IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE NAMENDA DIRECT PURCHASER ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO:** **All Direct Purchaser Actions**	**Case No. 1:15-cv-07488-CM-RWL**

DECLARATION OF PROFESSOR CHARLES SILVER IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES

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I, Charles Silver, state as follows:

I. SUMMARY OF OPINIONS

1. This is a landmark settlement. At $750 million, it is the largest-ever settlement of a private antitrust case against a single drug maker alleging suppression of generic competition. It is also in the top 1 percent of all class action settlements regardless of case type.

2. This litigation is also exceptional in that class certification was achieved over Forest's objection rather than with its acquiescence as part of a settlement. Settlement classes are more common than litigation classes, but the latter convey greater bargaining leverage in settlement negotiations. That the lawsuit settled on the eve of trial reflects the importance Forest attached to avoiding the risk of suffering a class-wide judgment at trial.

3. The failure of any governmental agency to pursue the generic delay arrangement shows that Class Counsel bore all the litigation risk associated with this claim alone. While it is true that the New York Attorney General ("NYAG") obtained an injunction against the product hop, only Class Counsel pursued damages on that claim. Class Counsel also pursued damages on the generic delay settlement, which the NYAG did not challenge and which accounts for the bulk of damages sought.

4. The time, effort, and expense devoted to this lawsuit—approximately 52,000 hours of professional time and approximately $5.8 million in out-of-pocket costs—reflect the difficulty and intensity of the litigation and, in view of the success Class Counsel achieved, justify an ample fee award.

5. In view of the preceding, I believe that a request by Class Counsel for 27.5 percent of the recovery—$206.25 million—as fees and reimbursement of approximately $5.8 million in

expenses is reasonable. I also believe that an award of this magnitude is supported by (1) rates prevailing in the private market for legal services, (2) awards granted in other generic delay cases, (3) awards granted in other cases with mega-fund recoveries (recoveries of $100 million or more), and (4) a lodestar cross-check.

II. CREDENTIALS

6. I hold the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law. I joined the Texas faculty in 1987, after receiving an M.A. in political science at the University of Chicago and a J.D. at the Yale Law School. I received tenure in 1991. Since then, I have been a Visiting Professor at University of Michigan School of Law (twice), the Vanderbilt University Law School, and the Harvard Law School.

7. I have taught, researched, written, consulted with lawyers, and testified about class actions, other large lawsuits, attorneys' fees, professional responsibility, and related subjects for 30 years. I have published over 100 major writings, many of which appeared in peer-reviewed publications and many of which focus on subjects relevant to this Declaration. My writings are cited and discussed in leading treatises and other authorities, including the MANUAL FOR COMPLEX LITIGATION, THIRD (1996), the MANUAL FOR COMPLEX LITIGATION, FOURTH (2004), the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, and the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT.

8. My first publication after joining the Texas Law faculty, an analysis of the restitutionary basis for fee awards in class actions, appeared in 1991. Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991). My most recent publication in the field, an empirical study of fee awards in securities fraud class actions, appeared in the Columbia Law Review nearly twenty-five years later. Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in*

Securities Class Actions, 115 COLUM. L. REV. 1371 (2015) (*Is the Price Right?*). The CORPORATE PRACTICE COMMENTATOR chose this article as one of the ten best in the field of corporate and securities law in 2016. The study of attorneys' fees has been a principal focus of my academic career.

9. From 2003 through 2010, I served as an Associate Reporter on the American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). Many courts have cited the PRINCIPLES with approval, including the U.S. Supreme Court.

10. I have testified as an expert on attorneys' fees many times. Courts have cited or relied upon my opinions when awarding fees in many class actions, including *In re Enron Corp. Securities, Derivative & "ERISA" Litig*., 586 F. Supp. 2d 732 (S.D. Tex. 2008), *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 2019 WL 6888488 (E.D.N.Y. 2019); and *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006), all of which settled for amounts exceeding $1 billion.

11. Finally, because awards of attorneys' fees may be thought to raise issues relating to the professional responsibilities of attorneys, I note that I have an extensive background, publication record, and experience as an expert witness testifying on matters relating to this field. I also served as the Invited Academic Member of the Task Force on the Contingent Fee created by the Tort Trial and Insurance Practice Section of the American Bar Association. In 2009, the Tort Trial and Insurance Practice Section of the American Bar Association gave me the Robert B. McKay Award in recognition of my scholarship in the areas of tort and insurance law.

12. I have attached a copy of my resume as Exhibit 1 to this declaration.

III. PRIOR TRIAL AND DEPOSITION TESTIMONY

13. In the past four years, I have testified in the following matters:

Case	Proceeding	Jurisdiction	Topic of Testimony	Year
William "Max" Duncan, Jr. and Duncan Litigation Investments, LLC v. Robert C. Hilliard and HMG, LLP	Arbitration	N/A	Legal Ethics-Fee Splitting with Non-Lawyer	2019

IV. DOCUMENTS REVIEWED

14. In preparing this report, I reviewed the items listed below. I also reviewed other items including, without limitation, cases, studies, and published scholarly works.

Documents Generated in Connection with This Case

- Order on Certain Evidentiary Matters Raised in the Parties' October 23, 2019 and October 24, 2019 Letter Briefs, *In re Namenda Direct Purchaser Antitrust Litigation*, 15-cv-07488 (S.D.N.Y. Oct. 24, 2019) (ECF No. 907)
- Transcript of Final Pretrial Conference, *In re Namenda Direct Purchaser Antitrust Litigation*, 15-cv-07488 (S.D.N.Y. Oct. 10, 2019) (ECF No. 889)
- Transcript of Settlement Conference, *In re Namenda Direct Purchaser Antitrust Litigation*, 15-cv-07488 (S.D.N.Y. Oct. 38, 2019) (ECF No. 913)
- Revised Joint Pretrial Order, *In re Namenda Direct Purchaser Antitrust Litigation*, 15-cv-07488 (S.D.N.Y. Apr. 30, 2019) (ECF No. 699)
- Memorandum of Law in Support of Class Counsel's Motion for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for the Named Plaintiffs
- Declaration of Bruce E. Gerstein in Support of Class Counsel's Motion for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for the Named Plaintiffs
- Memorandum Decision and Order Denying Defendants' Motion for Summary Judgment; Granting in Substantial Part and Denying in Part Defendants' *Daubert* Motions to Exclude Opinions and Testimony of Plaintiffs' Experts; and Granting Plaintiffs' Motion for Class Certification *In re Namenda Direct Purchaser Antitrust Litigation*, 15-cv-07488 (S.D.N.Y. Aug. 16, 2018) (ECF No. 570)
- Settlement Agreement, *In re Namenda Direct Purchaser Antitrust Litigation*, 15-cv-07488 (S.D.N.Y. Dec. 24, 2019) (ECF No. 919)
- Order Granting Direct Purchaser Class Plaintiffs' Motion for Preliminary Approval of the Form and Manner of Notice to the Class and Proposed Schedule for a Fairness Hearing, *In re Namenda Direct Purchaser Antitrust Litigation*, 15-cv-07488 (S.D.N.Y. Jan. 6, 2020) (ECF No. 920)
- Settlement Notice

Other Documents

- Settlement Agreement Between the Attorney General for the State of New York and Allergan, *People of the State of New York v. Actavis Plc, et al*, 14-cv-07473 (S.D.N.Y. Nov. 30, 2015) (ECF No. 96-1)
- Transcript of Civil Cause for Settlement and Attorneys' Fees, *In re Buspirone*, 01-md-1410 (S.D.N.Y. Apr. 11, 2003)
- Letter from Steven Winick, *In re Asacol Antitrust Litigation*, 15-cv-12730 (D. Mass. Oct. 26, 2017) (ECF No. 581-1)
- Letter from Robert J. Tucker, *In re Asacol Antitrust Litigation*, 15-cv-12730 (D. Mass. Sept. 15, 2017) (ECF No. 582-2)
- Letter from David A. Schumacher, *In re Asacol Antitrust Litigation*, 15-cv-12730 (D. Mass. Sept. 11, 2017) (ECF No. 582-3)
- Letter from David A. Schumacher, *In re Celebrex (Celecoxib) Antitrust Litig.*, 2:14-cv-00361 (E.D. Va. Jan. 2, 2018) (ECF No. 619-4)
- Letter from Robert J. Tucker, *American Sales Company, LLC v. Pfizer, Inc., et al.*, 2:14-cv-00361 (E.D. Va. Dec. 26, 2017) (ECF No. 619-5)
- Letter from Steven Winick, *In re Celebrex (Celecoxib) Antitrust Litig.*, 2:14-cv-00361 (E.D. Va. Jan. 4, 2018) (ECF No. 619-6)
- Letter from Robert J. Tucker, *In re Flonase Antitrust Litigation, American Sales Co., Inc. v. SmithKlineBeecham*, 08-cv-03149 (E.D. Pa. Dec. 19, 2012) (ECF No. 488-4)
- Letter from Steven Winick, *In re Flonase Antitrust Litigation, American Sales Co., Inc. v. SmithKlineBeecham*, 08-cv-03149 (E.D. Pa. February 13, 2013) (ECF No. 488-5)
- Letter from Robert J. Tucker, *In re K-Dur Antitrust Litigation*, 2:01-cv-01652 (D.N.J. Aug. 9, 2017) (ECF No. 1050-7)
- Letter from David A. Schumacher, *In re K-Dur Antitrust Litigation*, 2:01-cv-01652 (D.N.J. Aug. 7, 2017) (ECF No. 1050-8)
- Letter from Steven Winick, *In re K-Dur Antitrust Litigation*, 2:01-cv-01652 (D.N.J. Aug. 21, 2017) (ECF No. 1050-9)
- Letter from Donald W. Myers, *In re Neurontin Antitrust Litigation*, MDL No. 1479 (D.N.J. June 19, 2014) (ECF No. 750-3)
- Letter from Robert J. Tucker, *In re Neurontin Antitrust Litigation*, MDL No. 1479 (D.N.J. June 18, 2014) (ECF No. 750-4)
- Letter from Steven Winick, *In re Neurontin Antitrust Litigation*, MDL No. 1479 (D.N.J. June 16, 2014) (ECF No. 750-5)
- Letter from Steven E. Bizar, *In re Nifedipine Antitrust Litigation*, 1:03-ms-223 (D.D.C. Jan. 19, 2011) (ECF No. 331)
- Letter from Thomas L. Long, *In re Nifedipine Antitrust Litigation*, 1:03-ms-223 (D.D.C. Jan. 19, 2011) (ECF No. 331)
- Letter from Richard A. Ardoin, *In re Nifedipine Antitrust Litigation*, 1:03-ms-223 (D.D.C. Jan. 14, 2011) (ECF No. 331)
- Letter from Thomas L. Long, *Meijer, Inc. et al. v. Abbott Laboratories*, No. C 07-5985 (N.D. Cal. May 5, 2011) (ECF No. 510-1)
- Letter from Richard Ardoin, *Meijer, Inc. et al. v. Abbott Laboratories*, No. C 07-5985 (N.D. Cal. May 4, 2011) (ECF No. 510-1)

- Letter from Donald J. Myers, *Meijer, Inc. et al. v. Abbott Laboratories*, No. C 07-5985 (N.D. Cal. May 9, 2011) (ECF No. 510-1)
- Letter from Steven E. Bizcar, *In re OxyContin Antitrust Litig.*, MDL No. 1603 (S.D.N.Y. Nov. 10, 2010) (ECF No. 359-4)
- Letter from Thomas L. Long, *In re OxyContin Antitrust Litig.*, MDL No. 1603 (S.D.N.Y. Nov. 10, 2010) (ECF No. 359-5)
- Letter from Richard Ardoin, *In re OxyContin Antitrust Litig.*, MDL No. 1603 (S.D.N.Y. Nov. 15, 2010) (ECF No. 359-6)
- Letter from Robert J. Tucker, *In re Prandin Direct Purchaser Antitrust Litigation*, 2:10-cv-12141 (E.D. Mich. Dec. 10, 2014) (ECF No. 67-3)
- Letter from David A. Schumacher, *In re Prandin Direct Purchaser Antitrust Litigation*, 2:10-cv-12141 (E.D. Mich. Dec. 11, 2014) (ECF No. 67-4)
- Letter from Steven H. Winick, *In re Prandin Direct Purchaser Antitrust Litigation*, 2:10-cv-12141 (E.D. Mich. Dec. 16, 2014) (ECF No. 67-5)
- Letter from David A. Schumacher, *In re Prograf Antitrust Litigation*, 11-md-02242 (D. Mass. Apr. 1, 2015) (ECF No. 669-2)
- Letter from Robert J. Tucker, *In re Prograf Antitrust Litigation*, 11-md-02242 (D. Mass. Apr. 2, 2015) (ECF No. 669-3)
- Letter from Steven H. Winick, *In re Prograf Antitrust Litigation*, 11-md-02242 (D. Mass. Apr. 2, 2015) (ECF No. 669-4)
- Letter from David A. Schumacher, *King Drug Co. of Florence v. Cephalon, Inc., et al.*, 2:06-cv-1797 (E.D. Pa. Sept. 11, 2015) (ECF No. 864-3)
- Letter from Robert J. Tucker, *King Drug Co. of Florence v. Cephalon, Inc., et al.*, 2:06-cv-1797 (E.D. Pa. Sept. 14, 2015) (ECF No. 864-4)
- Letter from Steven H. Winick, *King Drug Co. of Florence v. Cephalon, Inc., et al.*, 2:06-cv-1797 (E.D. Pa. Sept. 11, 2015) (ECF No. 864-5)
- Letter from Donald W. Myers, *In re Metoprolol Succinate Direct Purchaser Antitrust Litigation*, 06-cv-052 (D. Del. Sept. 27, 2011) (ECF No. 189-1)
- Letter from Thomas L. Long, *In re Metoprolol Succinate Direct Purchaser Antitrust Litigation*, 06-cv-052 (D. Del. Sept. 27, 2011) (ECF No. 189-1)
- Letter from Richard Ardoin, *In re Metoprolol Succinate Direct Purchaser Antitrust Litigation*, 06-cv-052 (D. Del. Oct. 3, 2011) (ECF No. 189-1)
- Letter from Richard Ardoin, *In re Wellbutrin SR Antitrust Litigation*, 2:04-cv-5525 (E.D. Pa. Oct. 3, 2011) (ECF No. 409-3)
- Letter from Donald W. Myers, *In re Wellbutrin SR Antitrust Litigation*, 2:04-cv-5525 (D. Del. Sept. 27, 2011) (ECF No. 409-4)
- Letter from Thomas L. Long, *In re Wellbutrin SR Antitrust Litigation*, 2:04-cv-5525 (E.D. Pa. Sept. 27, 2011) (ECF No. 409-5)
- Letter from Robert J. Tucker, *In re Wellbutrin XL Antitrust Litigation*, 2:08-cv-2431 (E.D. Pa. Oct. 22, 2012) (ECF No. 481-4)
- Letter from Steven Winick, *In re Wellbutrin XL Antitrust Litigation*, 2:08-cv-2431 (E.D. Pa. Oct. 17, 2012) (ECF No. 481-5)
- Letter from Donald W. Myers, *In re Wellbutrin XL Antitrust Litigation*, 2:08-cv-2431 (E.D. Pa. Oct. 10, 2012) (ECF No. 481-6)

V. FACTS

15. The litigation-related facts upon which my conclusions rest are set out in the documents listed above.

16. In brief, Class Counsel[1] have negotiated a proposed settlement that will make $750 million (less attorneys' fees and other expenses) available for the benefit of the Direct Purchaser Class, which includes drug wholesalers, some of which are extremely large.

17. Class Counsel have applied to the Court for a common fund fee award of 27.5 percent of the gross recovery ($206.25 million) plus cost reimbursements of approximately $5.8 million.

VI. BACKGROUND ANALYSIS

18. Throughout my academic career, I have urged courts to base fee awards from common funds on rates prevailing in the private market for legal services. Although the view was not widely shared when I first expressed it, it is now. It is not unusual for courts to want to know what those rates are and to give them weight when deciding how much lawyers to award lawyers whose efforts create common funds, even when they are not legally bound to do so. In this report, I will show that Class Counsel's request for a fee equal to 27.5 percent of the recovery falls on the low end of the range of percentages that prevails in the private market, which typically runs from 25 percent to 40 percent.

[1] Class Counsel are Garwin Gerstein & Fisher, LLP ("GGF"), Berger Montague PC ("Berger"), Faruqi & Faruqi LLP, Heim Payne & Chorush LLP, Odom & Des Roches LLC, and Smith Segura Raphael & Leger LLP.

A. Fee-Setting Is A Positive-Sum Interaction

19. Many people think that fee-setting is a zero-sum game in which more for the lawyer means less for the client. Because the object of class litigation is to help the victims, they infer that lower fees are always better than higher ones.

20. This belief is mistaken. Fee-setting is a positive-sum interaction in which higher fees can help claimants. To see this, imagine how class members would fare if courts set common fund fee awards at 0 percent. When the fee is zero, the expected recovery is zero too because lawyers will not agree to represent class members (or signed clients) on these terms. From class members' perspective, any fee percentage greater than zero is better than zero because any positive recovery is better than no recovery.

21. When regulating fees, then, the object should not be to set them as close to zero as possible. It should be to maximize class members' net expected recoveries—the amounts they expect to take home after paying their attorneys. Because a claimant who nets $1 million after paying a 40 percent fee is better off than one who nets $500,000 after paying a 20 percent fee, it is rational for clients to offer higher percentages when doing so is expected to leave them with more money after fees are paid.

22. Courts have known this for years. In 2002, a task force on fees commissioned by the Third Circuit stated that "The goal of appointment [of class counsel] should be to maximize the net recovery to the class and to provide fair compensation to the lawyer, *not to obtain the lowest attorney fee.* The lawyer who charges a higher fee may earn a proportionately higher recovery for the class than the lawyer who charges a lesser fee." *Third Circuit Task Force Report,* 208 F.R.D. 340, 373 (January 15, 2002) (emphasis added). The Seventh Circuit made a similar point in *In re Synthroid Marketing Litig.*, 264 F.3d 712 (7th Cir. 2001). It rejected the so-called "mega-fund rule," according to which fees must be capped at low percentages when recoveries are very large,

noting that "[p]rivate parties would never contract for such an arrangement" because it would encourage cheap settlements. *Id*. at 718. Private clients want lawyers to maximize the value of their claims, not to settle them cheaply.

B. Courts Should Mimic The Market When Awarding Fees

23. In the market for legal services, claimants negotiate fees when litigation starts, not when it ends. Upfront, they see the risks that lie ahead and the virtue of paying fees that encourage lawyers to bear them. As the Seventh Circuit observed,

> The best time to determine [a contingent fee lawyer's] rate is the beginning of the case, not the end (when hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets. Individual clients and their lawyers never wait until after recovery is secured to contract for fees. They strike their bargains before work begins.

In re Synthroid Marketing Litigation, 264 F.3d at 724.

24. Unfortunately, courts typically set fee terms when class actions end, not when they start. Consequently, the hindsight bias may cause them to set fees too low. To guard against this tendency, which can only harm class members in the long-run by weakening lawyers' incentives, I believe that courts should try to determine the percentage that class members would have agreed to pay had they bargained directly with their lawyers when litigation was about to commence.

25. The best evidence on which to base an answer is the market rate. A general insight from the economics of contracts is that parties tend to agree on terms that maximize the amount of wealth available for them to share. When markets are competitive, as the market for legal services plainly is, clients and lawyers should settle on the lowest percentages that maximize their joint expected return. This is the percentage that maximizes clients' net expected recoveries.

26. The information I have gathered over years of study shows that claimants typically agree to pay contingent fees of 25 percent to 40 percent, even when sophisticated clients hire

lawyers to handle complex commercial lawsuits with the potential to generate enormous recoveries. To encourage lawyers to maximize class members' net recoveries, I believe that courts should set fee awards from common funds in this range.

C. Quality of Plaintiffs' Counsel

27. When considering how much lawyers should be paid, it is also important to remember that the quality of counsel matters greatly. Lawyers' charges vary with experience, rank, and accomplishment. For example, it is well known that a select group of attorneys with outstanding reputations command exceedingly high rates, often more than $1,500 per hour.

28. In this case, the lawyers who represent the class are the best in the world at what they do. Lawyers comprising Class Counsel pioneered antitrust challenges to settlements that delay or impede the entry of generic drug manufacturers. The *Memorandum of Law in Support of Class Counsel's Motion for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for the Named Plaintiffs* ("*Fee Memorandum*") lists 27 prior cases of this type with gross recoveries exceeding $2.6 billion, "virtually of all which Class Counsel here prosecuted." The lawyers' experience is actually greater than this because there are several unlisted generic delay cases that turned out poorly. *See Fee Memorandum*, at pp. 5-7 (discussing cases that were lost). Lawyers have a learning curve, the antitrust caselaw needed time to develop, and even after it developed significant risks remained. The lawyers comprising Class Counsel know this minefield better than anyone else.

29. The antitrust world has taken note of Class Counsel's success. According to the *2018 Antitrust Annual Report*, Berger ranked 16th in aggregate antitrust settlements over the 2013 to 2018 period, with $975 million recovered, and GGF ranked 10th, with $1.18 billion recovered. University of San Francisco Law School and The Huntington National Bank, *2018 Antitrust Annual Report* (2019), p. 27. Because GGF and Berger are elite antitrust firms, the members of

the Direct Purchaser Class would rationally have agreed to pay them the prevailing rate for such firms when hiring them to handle this case.[2]

30. In fact, this is precisely what the class members did in past cases. As Class Counsel reports, in prior litigations members of the Direct Purchaser Class "provided letters and declarations attesting to the reasonableness of a 33⅓% fee." *Fee Memorandum*, pp. 2-3. Class members' willingness to pay 33⅓ percent of their recoveries as fees in prior antitrust cases of this type supports the inference that a percentage that high would be appropriate here, and a lower percentage like 27.5% moreso. There is no better evidence of market rates than the fees that sophisticated clients willingly pay.

VII. FEES PREVAILING IN THE PRIVATE MARKET FOR LEGAL SERVICES

31. As mentioned, over the course of my career I have consistently urged courts to take guidance from the market for legal services when sizing fee awards, and the number of courts that do so has grown. For example, in *Goldberger v. Integrated Resources, Inc*., 209 F.3d 43 (2d Cir. 2000), the Second Circuit wrote that "market rates, where available, are the ideal proxy for [class action lawyers'] compensation." *Id*., p. 52. It is hard to do better than "ideal."

32. In my experience, courts have found the "mimic the market" approach attractive for two reasons. They understand the importance of incentivizing lawyers properly and they want an objective basis on which to decide how much lawyers will be paid. The two considerations–incentives and objectivity–are linked. By taking guidance from the market, courts constrain their discretion and thereby make lawyers' incentives clearer and more reliable.

[2] The *2018 Antitrust Annual Report* also points out that Faruqi & Faruqi LLP, another firm working for the class, was co-lead counsel in the sixth-largest settlement approved in 2018. *Id*., p. 15.

A. In Contingent Fee Litigation, Percentage-Based Compensation Predominates

33. Having established that market rates are "ideal" proxies, it remains to consider how the market compensates plaintiffs' attorneys. In this section and the next, I explain what I know about this issue.

34. I start by noting that when clients hire lawyers to handle lawsuits on straight contingency, the market sets lawyers' compensation as percentages of claimants' recoveries. Even sophisticated business clients with complex, high-dollar legal matters use the percentage approach.

> [T]he contingency fee model covers all sorts of plaintiffs' litigation, including cases where sophisticated individual clients have high-stakes, complex claims worth hundreds of millions of dollars. . . . [I]t is essentially unheard of for sophisticated lawyers to take on a case of this magnitude and type on any basis other than a contingency fee, expressed as a percentage of the relief obtained.

In re Payment Card Interchange Fee & Merchant Discount Litig., 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014).[3] *See also Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (Easterbrook, J.) (noting the predominance of the percentage method in plaintiff representations and observing that "[w]hen the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate'" (emphasis in the original)).

35. Abundant evidence supports this contention. When two coauthors and I studied hundreds of settled securities fraud class actions specifically looking for terms included in fee agreements between lawyers and investors seeking to serve as lead plaintiffs, all the agreements we found provided for contingent percentage fees. *Is the Price Right*, *supra*. No lead plaintiff agreed to pay its lawyers by the hour; nor did any retain counsel on a lodestar basis.

36. The finding just described was expected. Over the course of my academic career, I have studied or participated in hundreds of class actions, many of which were led by sophisticated

[3] This opinion became a nullity when the decision approving the settlement was reversed on appeal, but the observation quoted is correct.

business clients. To the best of my recollection, I have encountered only one in which a lead plaintiff paid class counsel out of pocket, and that case is more than 100 years old. Even wealthy clients that, in theory, might have paid lawyers by the hour used contingent, percentage-based compensation arrangements instead. Because percentage-based compensation arrangements dominate the market, courts should also use them when awarding fees from common funds.

37. The market also appears to favor fee percentages that are flat or that rise as recoveries increase. Scales with percentages that decline at the margin are rarely employed. Professor John C. Coffee, Jr., the country's leading authority on class actions, made this point in a report filed in the antitrust litigation relating to high fructose corn syrup.

> I am aware that "declining" percentage of the recovery fee formulas are used by some public pension funds, serving as lead plaintiffs in the securities class action context. However, I have never seen such a fee contract used in the antitrust context; nor, in any context, have I seen a large corporation negotiate such a contract (they have instead typically used straight percentage of the recovery formulas).

Declaration of John C. Coffee, Jr., submitted in *In re High Fructose Corn Syrup Antitrust Litigation*, M.D.L. 1087 (C.D. Ill. Oct. 7, 2004), ECF No. 1421, ¶ 22. My experience is similar to Professor Coffee's. I know of no instance in which a large corporation used a scale of declining percentages when hiring a lawyer or firm to represent only itself.

38. In view of the rarity with which declining scales are used, the 'mimic the market' approach suggests that flat percentages and scales with percentages that rise at the margin create better incentives. This is so because flat percentages and rising scales better incentivize plaintiffs' attorneys to extract higher dollars that are harder to obtain. Flat percentages or percentages that increase with the recovery encourage plaintiffs' attorneys to turn down inadequate settlements.

B. Clients Normally Pay Contingent Fees In The Range Of 25 Percent To 40 Percent

39. Countless plaintiffs have hired lawyers on contingency to handle cases of diverse types. Consequently, the market for legal services is a rich source of information about lawyers' fees. In this section, I survey this evidence.

40. Before doing so, I wish to note that there is broad agreement that fees ranging from 25 percent to 40 percent prevail in most types of plaintiff representations. For example, courts have often noted that fees in personal injury cases normally equal or exceed 33⅓ percent of plaintiffs' recoveries. *See, e.g.*, *George v. Acad. Mortg. Corp. (UT)*, 369 F. Supp. 3d 1356, 1382 (N.D. Ga. 2019) ("Plaintiffs request for approval of Class Counsel's 33% fee falls within the range of the private marketplace, where contingency-fee arrangements are often between 30 and 40 percent of any recovery"); *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 201 (N.D. Ill. 2018) ("a typical contingency agreement in this circuit might range from 33% to 40% of recovery"); *Wolff v. Cash 4 Titles*, No. 03-22778-CIV, 2012 U.S. Dist. LEXIS 153786, 2012 WL 5290155, at *4 (S.D. Fla. Sept. 26, 2012) ("One-third of the recovery is considered standard in a contingency fee agreement."); *Burkholder v. City of Ft. Wayne*, 750 F. Supp. 2d 990, 997 (N.D. Ind. 2010) (observing that "a counsel fee of 33.3% of the common fund 'is comfortably within the range typically charged as a contingency fee by plaintiffs' lawyers' in an FLSA action").

41. Many courts have also observed that attorneys regularly contract for contingent fees between 30 percent and 40 percent in non-class, commercial cases. *See, e.g., Kapolka v. Anchor Drilling Fluids USA, LLC*, No. 2:18-CV-01007-NR, 2019 WL 5394751, at *10 (W.D. Pa. Oct. 22, 2019); *Lincoln Adventures LLC v. Those Certain Underwriters at Lloyd's, London Members*, No. CV 08-00235 (CCC), 2019 WL 4877563, at *8 (D.N.J. Oct. 3, 2019); *Cook v. Rockwell Int'l Corp.*, No. 90-CV-00181-JLK, 2017 WL 5076498, at *2 (D. Colo. Apr. 28, 2017); and *In re Schering-*

Plough Corp. Enhance Sec. Litig., No. CIV.A. 08-2177 DMC, 2013 WL 5505744, at *32 (D.N.J. Oct. 1, 2013).

42. The point of surveying the evidence, then, is not to establish something new. It is to show that what everyone already knows is correct. In cases of diverse types, the market rate for contingent fee lawyers ranges from 25 percent to 40 percent of clients' recoveries.

1. Personal Injury Cases

43. If courts chose to base fee awards in class actions on fees charged in personal injury cases, this Report could be quite short. The evidence clearly shows that contingent fees normally range from 25 percent to 40 percent in these cases,[4] are often higher in mass tort contexts,[5] and are

[4] On fees in personal injury cases, *see* Deborah R. Hensler *et al*., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 135-36 & Table 5.11 (RAND 1991), available at http://www.rand.org/pubs/reports/2006/R3999.pdf (reporting that randomly selected accident victims who hired attorneys on contingency paid median fees of 33 percent and mean fees of 29 percent); Herbert M. Kritzer, *Investing in Contingency Fee Cases*, WISCONSIN LAWYER 11, 12 (August 1997) (reporting that in a sample of 989 plaintiff representations in Wisconsin, slightly more than half of the claimants agreed to pay a one-third contingent fee); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 846 (2011) (reporting that "every one of the twelve [high volume plaintiffs' firms she] studied charge[d] a tiered contingency fee," with most charging "at least 33%--and perhaps as high as 40%").

[5] On fees in mass tort cases, *see* James S. Kakalik, *et al*., COSTS OF ASBESTOS LITIGATION Table S.2 (RAND 1983) (finding that asbestos claimants whose cases closed before August, 1982, paid legal fees and other litigation expenses equal to about 42 percent of their recoveries); James S. Kakalik *et al*., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xviii Figure S.1 (RAND 1984) (finding that asbestos claimants paid legal fees and expenses equal to 39 percent of their recoveries). For anecdotal reports of fees in mass tort cases, *see In re A.H. Robins Co., Inc*., 182 B.R. 128, 131 (E.D. Va. 1995) (reporting that thousands of women injured by the Dalkon Shield signed contingent fee arrangements providing for fees between one-quarter and one-half of the recovery, with most charging one-third); Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, NEW YORK TIMES, November 19, 2010, available at http://www.nytimes.com/2010/11/20/nyregion/20zero.html (reporting that thousands of rescue and clean-up workers who were harmed as a result of the terrorist attacks on September 11, 2001, hired lawyers on terms requiring them to pay one-third of their recoveries); Martha Neil, *Frustration Over Uncontained Gulf Oil Spill – and Tort Claim Contingency Fees of Up to 50 Percent*, ABA JOURNAL (May 24, 2010), available at http://www.abajournal.com/news/article/frustration_over_uncontained_gulf_oil_spill--and_tort_legal_fees_of_up_to_5/ (reporting that thousands of clients with claims against BP arising out of

higher still in medical malpractice cases, which are exceptionally risky and costly.[6] Lower rates prevail in commercial airplane crash cases, where liability is usually conceded.[7] Fees vary across contexts because cases of different types require lawyers to bear different risks.

2. Large Commercial Lawsuits

44. We do not know as much about fees paid in large commercial lawsuits as we might.[8] No publicly available database collects information about this sector of the market, and businesses that sue as plaintiffs rarely reveal their fee agreements. Consequently, most of what is known is drawn from anecdotal reports.[9] That said, the evidence available on the use of contingent fees by sophisticated clients shows that marginal percentages tend to be high.

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the Deepwater Horizon catastrophe promised to pay contingent fees in the range of 40 percent to 50 percent).

[6] On factors affecting the size of contingent fees charged in medical malpractice cases, *see* ABA/TIPS Task Force on Contingent Fees, Report on Contingent Fees In Medical Malpractice Litigation (September 20, 2004), available at http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf.

[7] *See id*., at 27. *See also* ABA Formal Opinion 94-389, n. 13 (1994) (reporting that "[i]n cases where airline insurers voluntarily . . . [made] an early settlement offer and concede[d] all legal liability, average contingent fee rates dropped to 17% and were often only charged on a portion of the recovery") (citing L. Kriendler, *The Letter: It Shouldn't be Sent*, 12 THE BRIEF 4, 38 (November 1982)).

[8] I have studied the costs insurance companies incur when *defending* liability suits. *See* Bernard Black, David A. Hyman, Charles Silver and William M. Sage, *Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004*, 10 AM. L, & ECON, REV. 185 (2008). Unfortunately, this information sheds no light on the amounts that businesses pay when acting as plaintiffs.

[9] Businesses sometimes use hybrid arrangements that combine guaranteed payments with contingent bonuses. In a recent case against Bank of America, for example, a group of bankruptcy creditors with about $58 million at stake agreed to pay a law firm $1 million upfront and 5 percent of the net recovery. Petra Pasternak, *It's BIG, You're in Charge! Firm Picked for Pending Case Against BofA, Citi*, CORP. COUNS. (Online) April 9, 2010. Hybrid arrangements hold few lessons for class actions, however, because lawyers representing plaintiff classes must work on straight contingency.

a) Patent Cases

45. Consider patent infringement representations. There are many anecdotal reports of high percentages in this area. The most famous one related to the dispute between NTP Inc. and Research In Motion Ltd., the company that manufactures the Blackberry. NTP, the plaintiff, promised its law firm, Wiley Rein & Fielding ("WRF"), a 33⅓ percent contingent fee. When the case settled for $612.5 million, WRF received more than $200 million in fees. Yuki Noguchi, *D.C. Law Firm's Big BlackBerry Payday: Case Fees of More Than $200 Million Are Said to Exceed Its 2004 Revenue*, WASHINGTON POST, March 18, 2006, D03.

46. The fee percentage that WRF received is typical, as Professor David L. Schwartz found when he interviewed 44 experienced patent lawyers and reviewed 42 contingent fee agreements.

> There are two main ways of setting the fees for the contingent fee lawyer [in patent cases]: a graduated rate and a flat rate. Of the agreements using a flat fee reviewed for this Article, the mean rate was 38.6% of the recovery. The graduated rates typically set milestones such as "through close of fact discovery," "through trial," and "through appeal," and tied rates to recovery dates. As the case continued, the lawyer's percentage increased. Of the agreements reviewed for this Article that used graduated rates, the average percentage upon filing was 28% and the average through appeal was 40.2%.

David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation,* 64 ALA. L. REV. 335, 360 (2012). In a case like this one that required the lawyers to bear significant litigation expenses with no guarantee of reimbursement a high fixed percentage would apply.[10]

[10] Professor Schwartz's findings are consistent with reports found in patent blogs, one of which stated as follows.

> *Contingent Fee Arrangements*: In a contingent fee arrangement, the client does not pay any legal fees for the representation. Instead, the law firm only gets paid from damages obtained in a verdict or settlement. Typically, the law firm will receive between 33-50% of the recovered damages, depending on several factors – a strictly results-based system.

47. Clearly, in the segment of the market where sophisticated business clients hire lawyers to litigate patent cases on contingency, successful lawyers earn enormous premiums over their normal hourly rates. The reason is obvious. When waging patent cases on contingency, lawyers must incur large risks and high costs, so clients must promise them hefty returns. Clients still prefer this arrangement to bearing the risks and costs of litigation themselves, so they willingly do.

b) Other Large Commercial Cases

48. Turning from patent lawsuits to business representations more generally, many examples show that compensation tends to be a significant percentage of the recovery. A famous case from the 1980's involved the Texas law firm of Vinson & Elkins ("V&E"). ETSI Pipeline Project ("EPP") hired V&E to sue Burlington Northern Railroad and other defendants, alleging a conspiracy on their part to prevent EPP from constructing a $3 billion coal slurry pipeline. Harry Reasoner, then V&E's managing partner, described the financial relationship between EPP and V&E.

> The terms of our retention were that our client would pay all out-of-pocket expenses as they were incurred, but all legal fees were contingent upon a successful outcome. We were paid 1/3 of all amounts received by way of settlement or judgment. We litigated the matter for 5 years. At the conclusion, we had settled with all defendants for a total of $634,900,000.00. As a result, a total of $211,633,333.00 was paid as contingent legal fees.

Declaration of Harry Reasoner, filed in *In re Washington Public Power Supply System Securities Litigation,* MDL No. 551 (D. Ariz., Nov. 30, 1990).

49. Several things about this example are noteworthy. First, the contingency fraction was one-third of the recovery in a massive case. Second, V&E bore no liability for out-of-pocket

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Matt Cutler, *Contingent Fee Patent Litigation, and Other Options*, PATENT LITIGATION, http://intellectualproperty-rights.com/?page_id=30 (reviewed March 13, 2012).

expenses. Third, the ETSI Pipeline case was enormous, ultimately generating a recovery greater than $600 million and a fee north of $200 million. Fourth, the client was a sophisticated business with access to the best lawyers in the country. No claim of pressure or undue influence by V&E could possibly be made.

50. The National Credit Union Administration's ("NCUA") experience in litigation against securities underwriters provides a more recent example of contingent-fee terms that were used successfully in large, related litigations. After placing 5 corporate credit unions into liquidation in 2010, the NCUA filed 26 complaints in federal courts in New York, Kansas, and California against 32 Wall Street securities firms and banks. To prosecute the complaints, which centered on sales of investments in faulty residential mortgage-backed securities, the NCUA retained two outside law firms, Korein Tillery LLP and Kellogg, Hansen, Todd, Figel, & Frederick PLLC, on a straight contingency basis. The original contract entitled the firms to 25 percent of the recovery, net of expenses. As of June 30, 2017, the lawsuits had generated more than $5.1 billion in recoveries on which the NCUA had paid $1,214,634,208 in fees.[11]

51. When it retained outside counsel on contingency, NCUA knew that billions of dollars were at stake. The failed corporate credit unions had sustained $16 billion in losses, and the NCUA's objective was to recover as much of that amount as possible. It also knew that dozens of defendants would be sued and that multiple settlements were possible. Even so, the NCUA

[11]The following documents provide information about NCUA's fee arrangement and the recoveries obtained in the litigations: Legal Services Agreement dated Sept. 1, 2009, https://www.ncua.gov/services/Pages/freedom-of-information-act/legal-services-agreement.pdf; National Credit Union Administration, Legal Recoveries from the Corporate Crisis, https://www.ncua.gov/regulation-supervision/Pages/corporate-system-resolution/legal-recoveries.aspx; Letter from the Office of the Inspector General, National Credit Union Administration to the Hon. Darrell E. Issa, Feb. 6, 2013, https://www.ncua.gov/About/leadership/CO/OIG/Documents/OIG20130206IssaResponse.pdf.

agreed to pay a straight contingent percentage fee in the standard market range on all the recoveries. It neither reduced the fees that were payable in later settlements in light of fees earned in earlier ones, nor bargained for a percentage that declined as additional dollars flowed in, nor tied the lawyers' compensation to the number of hours they expended.

52. In *In re Merry-Go-Round Enterprises, Inc*., 244 B.R. 327 (D. Md. 2000), the bankruptcy trustee wanted to assert claims against Ernst & Young. He looked for counsel willing to accept a declining scale of fee percentages, found no takers, and ultimately agreed to pay a law firm a straight 40 percent of the recovery. Ernst & Young subsequently settled for $185 million, at which point the law firm applied for $71.2 million in fees, 21 times its lodestar. The bankruptcy judge granted the request, writing: "[v]iewed at the outset of this representation, with special counsel advancing expenses on a contingency basis and facing the uncertainties and risks posed by this representation, the 40% contingent fee was reasonable, necessary, and within a market range." *Id*. at 335.

53. Based on what lawyers who write about fee arrangements in business cases have said, contingent percentages of 33⅓ percent or more remain common. In 2011, THE ADVOCATE, a journal produced by the Litigation Section of the State Bar of Texas, published a symposium entitled "Commercial Law Developments and Doctrine." It included an article on alternative fee arrangements, which reported typical contingent fee rates of 33 percent to 40 percent.

> A pure contingency fee arrangement is the most traditional alternative fee arrangement. In this scenario, a firm receives a fixed or scaled percentage of any recoveries in a lawsuit brought on behalf of the client as a plaintiff. Typically, the contingency is approximately 33%, with the client covering litigation expenses; however, firms can also share part or all of the expense risk with clients. Pure contingency fees, which are usually negotiated at approximately 40%, can be useful structures in cases where the plaintiff is seeking monetary or monetizable damages. They are also often appropriate when the client is an individual, start up, or corporation with limited resources to finance its litigation. Even large clients,

> however, appreciate the budget certainty and risk-sharing inherent in a contingent fee arrangement.

Trey Cox, *Alternative Fee Arrangements: Partnering with Clients through Legal Risk Sharing*, 66 THE ADVOCATE (TEXAS) 20 (2011).

c) Sophisticated Named Plaintiffs in Class Actions

54. I mentioned above that the members of the Direct Purchaser Class supported fee awards in the range of one-third of the recovery in many prior cases. By doing so, they joined many other sophisticated businesses that supported similarly sized fees when serving as lead plaintiffs in class actions. Here are a few examples.

- In *Payment Card,* 2019 WL 6888488, a multi-billion-dollar litigation, twelve business clients signed retainer agreements when litigation commenced which generally provided that class counsel would receive one-third of the class-wide recovery.[12]

[12] Typical language read as follows:

> (a) Fees As Class Counsel
>
> (1) Fees for the Firm's professional services in the Action as Class Counsel will be on a contingent basis and dependent upon the results obtained. In the event of a settlement or a favorable outcome at or after a trial, the Firm shall seek to recover legal fees equal to one-third of the Value of the Recovery attributable to our representation of the Class from one or more of the defendants. Any amount which is not recovered from the defendant(s) shall be payable on a contingent fee basis as described in paragraph (2) below. The Company agrees to support any request for attorney's fees, costs and disbursements to the court that is in an amount of one-third of the Value of the Recovery or less.
>
> (2) In the event that the court does not approve the fee requested by the Firm, the Company and the other named plaintiffs agree to pay the difference between the fee awarded by the court and an amount equal to one-third of the Value of the Recovery made on behalf of the named plaintiffs.
>
> (b) Fees Owed If Recovery Is Made Outside Of Class Action.
>
> In the event that The Company makes a recovery outside of the class action (as, for example, if a class is not certified or the Company withdraws as a class representative) the Company agrees to pay a contingent fee equal to one-third of the Value of the Recovery to the Company.

- In *In re International Textile Group Merger Litigation*, C.A. No. 2009-CP-23-3346 (Court of Common Pleas, Greenville County, South Carolina), which settled in 2013 for relief valued at about $81 million, five sophisticated investors serving as named plaintiffs agreed to pay 35 percent of the gross class-wide recovery as fees, with expenses to be separately reimbursed. (The 35 percent fee was bargained down after initially being set at over 40 percent.)
- In *San Allen, Inc. v. Buehrer*, Case No. CV-07-644950 (Ohio – Court of Common Pleas), which settled for $420 million, seven businesses serving as named plaintiffs signed retainer contracts in which they agreed to pay 33.3 percent of the gross recovery obtained by settlement as fees, with a bump to 35 percent in the event of an appeal. Expenses were to be reimbursed separately.
- In *In re U.S. Foodservice, Inc. Pricing Litigation*, Case No. 3:07-md-1894 (AWT) (D. Ct.), a RICO class action that produced a $297 million settlement, both of the businesses that served as named plaintiffs were represented by counsel in their fee negotiations and both agreed that the fee award might be as high as 40 percent.

C. Direct Purchasers' Support For A One-Third Fee In Prior Generic Delay Antitrust Class Actions

55. Having shown that sophisticated business clients regularly pay contingent fees in the range requested here and that they do so when serving as lead plaintiffs in class actions too, I will now discuss the support that the three largest members of the Direct Purchaser Class—AmerisourceBergen, Cardinal Health, and McKesson—offered for the fees requested in prior cases. They did so by submitting letters when the lawsuits settled.

56. AmerisourceBergen, Cardinal Health, and McKesson are enormous companies. In 2018, their revenues were $170 billion, $137 billion, and $208 billion, respectively. They plainly qualify as highly sophisticated clients with ready access to the market for legal services and great ability to bargain with lawyers over prices. Their attitudes and actions in prior cases where Class Counsel represented them therefore merit study.

57. Table 1, below, identifies a group of settled antitrust class action for which I have information showing that AmerisourceBergen, Cardinal Health, and McKesson submitted letters expressing their affirmative support for proposed settlements and fee awards. In all but one of the listed cases, all three companies did so. There are also many cases not listed in the table in which,

although these businesses did not submit supporting letters, they did not object. Given their sophistication, it seems reasonable to infer that silence equals approval.

Table 1: Settlements With Letters Of Support From The Three Largest Direct Purchasers					
Litigation	**Settlement (Millions)**	**Fee**	**Amerisource Bergen**	**Cardinal Health**	**McKesson**
In re Asacol Antitrust Litig., No. 15-12730 (D. Mass. Dec. 7, 2017)	$15.00	33⅓%	Y	Y	Y
In re K-Dur Antitrust Litig., No. 01-1652 (D.N.J. Oct. 5, 2017)	$60.00	33⅓%	Y	Y	Y
In re Prograf Antitrust Litig., No. 11-md-2242 (D. Mass. May 20, 2015)	$98.00	33⅓%	Y	Y	Y
In re Prandin Direct Purchaser Antitrust Litig., No. 10-12141 (E.D. Mich. Jan. 20, 2015)	$19.00	33⅓%	Y	Y	Y
In re Neurontin Antitrust Litig., No. 02-1830 (D.N.J. Aug. 6, 2014)	$191.00	33⅓%	Y	Y	Y
In re Flonase Antitrust Litig., No. 08-cv-3149 (E.D. Pa. June 14, 2013)	$150.00	33⅓%	N	Y	Y
In re Wellbutrin XL Antitrust Litig., No. 08-cv-2431 (E.D. Pa. Nov. 7, 2012)	$37.50	33⅓%	Y	Y	Y
In re Metoprolol Succinate Antitrust Litig., No. 06-52 (D. Del. Jan. 11, 2012)	$20.00	33⅓%	Y	Y	Y
In re Wellbutrin SR Antitrust Litig., No. 04-5525 (E.D. Pa. Nov. 21, 2011)	$49.00	33⅓%	Y	Y	Y

Table 1: Settlements With Letters Of Support From The Three Largest Direct Purchasers					
Litigation	**Settlement (Millions)**	**Fee**	**Amerisource Bergen**	**Cardinal Health**	**McKesson**
In re Nifedipine Antitrust Litig., No. 03-mc-223-RJL (D.D.C. Jan. 31, 2011)	$35.00	33⅓%	Y	Y	Y
In re Oxycontin Antitrust Litig., No. 04-md-1603-SHS (S.D.N.Y. Jan. 25, 2011)	$16.00	33⅓%	Y	Y	Y
In re Celebrex (Celecoxib) Antitrust Litig., No. 2:14-CV-00361, 2018 WL 2382091 (E.D. Va. Apr. 18, 2018)	$94.00	33⅓%	Y	Y	Y
Meijer, Inc. v. Abbot Labs., No. 07-5985 (N.D. Cal.) (August 11, 2011)	$52.00	33⅓%	Y	Y	Y
King Drug Company of Florence, Inc. v. Cephalon, Inc., No. 2:06-cv-1797-MSG (E.D. Pa. Oct. 8, 2015)	$512.00	27.5%	Y	Y	Y

VIII. THE DIFFICULTY OF WINNING ANTITRUST CLASS ACTIONS

58. The successes that Class Counsel has accomplished when attacking generic delay settlements on antitrust grounds may create the impression that the cases are "slam-dunks." They are not. Many hurdles must be overcome.

59. Class Counsel describe many of the risks they faced in the *Fee Memorandum* and the *Declaration of Bruce E. Gerstein in Support of Class Counsel's Motion for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for the Named Plaintiffs*. Because they know this terrain far better than I do, I can add little to their account. However, I can say, first, that had this lawsuit been a "slam dunk," it would have been financially advantageous for Forest to have

settled far sooner than it did. Why waste tens of millions of dollars defending a lawsuit until the eve of trial when it is obvious that one will lose? Why file a 71-page motion to dismiss or resist class certification if it is obvious that both maneuvers will fail? Why spend millions more on expert witnesses too? Forest's willingness to mount an aggressive defense makes sense only if the company thought it had a decent chance of winning the case.

60. I can also point out that antitrust class actions with mega-fund recoveries are fairly uncommon. From 2013 to 2018, the median settlement amount (half above/half below) for antitrust class actions varied from a high of $11 million (in 2013) to a low of $5 million (in 2016 and 2017). Of the 730 settlements that occurred over this period, 92 percent fell below $100 million, the traditional mega-fund threshold. *2018 Annual Antitrust Report*, supra, p. 14.

61. The lack of a prior governmental investigation of the Forest/Mylan generic delay settlement is also worth mentioning because it a sign of high risk.[13] A government agency's involvement in a lawsuit may reduce the burden on class action lawyers, lend credence to the plaintiffs' allegations, and be a source of valuable information or other assistance. Many antitrust cases produced mega-fund recoveries were assisted substantially by criminal prosecutions and guilty pleas. *See, e.g., In re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL 34312839 (D.D.C. July 16, 2001) ($365 million class recovery and 34.6% fee award in case supported by criminal prosecutions and guilty pleas); *In re TFT-LCD (Flat Panel) [Indirect Purchaser] Antitrust Litig.*, MDL No. 1827, 2013 WL 1365900 (N.D. Cal. Apr. 3, 2013) ($1.08 billion class recovery and

[13] In late 2014, the New York Attorney General sued to enjoin the withdrawal of Namenda IR from the market. It did not challenge the generic delay settlement that is at the heart of this case. It also wound down its lawsuit after an injunction was secured, without seeking damages. *Gerstein Dec*., ¶¶ 3 & 7.

approximately 30% fee to class counsel and state attorneys general in case supported by sweeping criminal prosecutions and guilty pleas).

62. If prior or parallel government proceedings make class actions less risky, then (other things being equal) fee awards should be higher in cases like this one, where Class Counsel undertook the litigation challenging a patent litigation settlement without help from a regulator. In fact, in this context the lack of a governmental investigation of the Forest/Mylan generic delay settlement may have increased the risk, because the settlement was submitted to the Federal Trade Commission and the Justice Department, both of which chose not to act. Had this fact been made know to a jury—and Forest intended to introduce evidence of it at trial—its members may have inferred that the settlement was fine.

63. By saying that Class Counsel undertook the litigation without help from a regulator, I do not mean to deny that the New York Attorney General sued Forest and secured an injunction against the company's attempt to "product hop" by withdrawing Namenda IR from the market. I mean that only Class Counsel attacked the anticompetitive settlement agreement between Forest and Mylan and that only Class Counsel sought damages for the attempted product hop. The New York Attorney General seemed to think that the injunction it secured protected purchasers sufficiently. Nor did the New York Attorney General assist the private action by obtaining guilty pleas or other concessions, such as an agreement to cooperate, that might have made the damages action less risky. Only Class Counsel quantified the damages and bore the risk associated with the generic delay settlement.

64. Finally, it bears emphasis that Class Counsel secured class certification for trial before negotiating the proposed settlement. Although settlement classes are common in antitrust

cases and cases of other types, litigation classes are not, as other commentators have noted. The following paragraph appears in a study published in 2017.

> Many class actions are resolved as settlement classes—meaning that the parties settle the class certification issue at the same time as they settle the merits, and present both agreements to the judge for approval at the fairness hearing. Settlement classes were common in our data, constituting approximately three-quarters of the cases: Of the 422 cases for which data were available, 318 were settlement classes and 104 were litigation classes.

Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 961 (2017). Eleven of the 16 antitrust cases in the authors' dataset were settlement classes. *Id*., Table 10.

65. Both the risk and the value of certifying a class for litigation are important. Winning a contested certification motion in an antitrust case is hard. During the era of the Roberts Court, federal courts have been increasingly hard on antitrust plaintiffs. *See, e.g.,* Mark S. Popofsky and Douglas H. Hallward-Driemeier, *Antitrust and the Roberts Court*, 28-SUM ANTITRUST 26, 26 (2014) (observing that "the Roberts Court has consistently raised the threshold for plaintiffs seeking to pursue class actions"). Plaintiffs who win in the trial courts also face a serious prospect of losing on appeal, as I pointed out almost two decades ago.

> Rule 23(f) is a one-way ratchet for defendants. Although early evidence was ambiguous, … a clear pattern of antiplaintiff decisions has emerged. See Jennifer K. Fardy, Disciplining the Class: Interlocutory Review of Class Action Certification Decisions Under Rule 23(f), 13 Class Actions & Derivative Suits 3, 9 (2003) (reporting that federal circuit courts have granted thirty-two petitions for interlocutory review, that "the vast majority of the decisions ... have resulted in elimination of class status," and that no federal circuit has used [a] 23(f) appeal to reverse [a] denial of class certification), available at http://www.seyfarth.com/db30/cgi-bin/pubs/fardy.PDF.

Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1430 (2003).

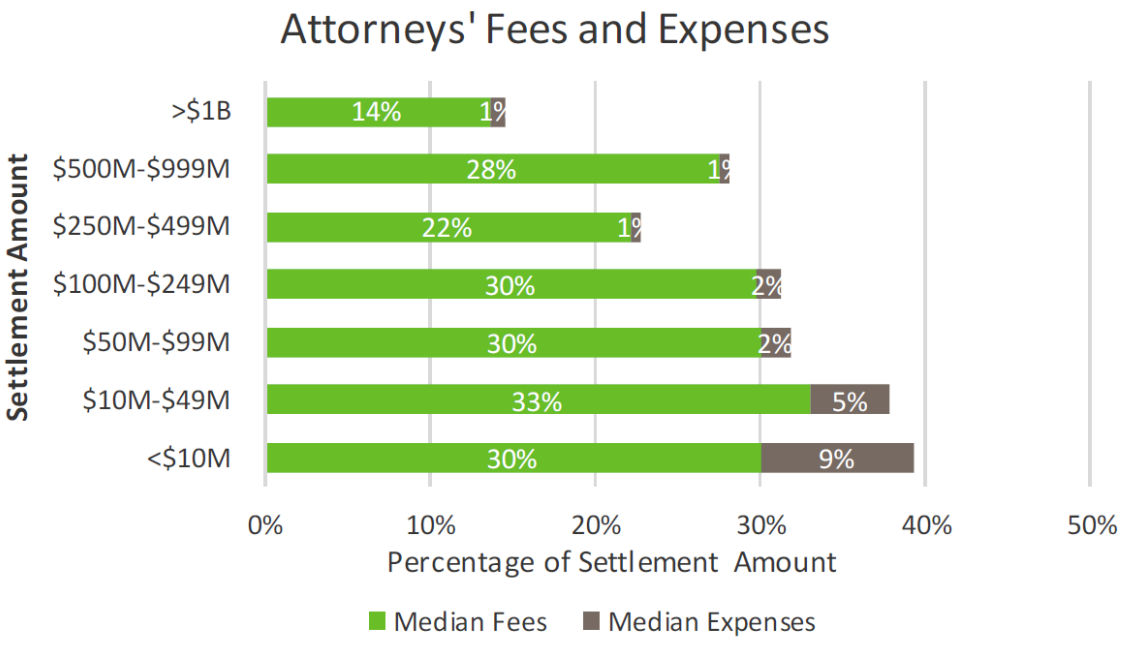
66. Although the odds of losing are great, the value of having a class certified for litigation is enormous. Certification cements counsel's control of the lawsuit and forces the defendant to confront the possibility of suffering a class-wide judgment at trial. The combination greatly enhances plaintiffs' leverage in settlement negotiations.

IX. FEE AWARDS IN COMPARABLE CASES

67. In my experience, courts want to know how other courts have handled fees in similar cases. Being familiar with both empirical studies of fee awards and awards made in cases with recoveries exceeding $100 million, I can confidently report that Class Counsel's request for a fee of 27.5 percent of the recovery falls at the low end of the range that courts typically award.

68. The *2018 Antitrust Annual Report, supra*, at p. 23, contains the most comprehensive information I have been able to find on fee awards in antitrust class actions. It reports that fees and expenses are most often calculated as a percentage of the overall settlement fund, and that lodestar cross checks are common too. The report then breaks out median fee awards and expenses in antitrust class action by size of recovery. As is visually apparent, at most recovery levels, the median award falls between 28 percent and 33 percent. Only when recoveries exceed $1 billion does the median fee award percentage substantially decline.

Figure 12: **Attorneys' Fees and Expenses**
2013 - 2018



Source: University of San Francisco Law School and The Huntington Bank, 2018 Antitrust Annual Report, Fig. 12 (2019).

69. In this case, Class Counsel may request a fee award equal to 27.5 percent of the $750 million recovery. The request falls slightly below the median award—28 percent—for cases in the relevant size band. In view of this, Class Counsel's request seems modest, not exceptional.

70. An examination of fee awards in mega-fund cases with recoveries of $100 million or more strengthens this impression. There are many mega-fund cases with awards in the relevant range, as shown in Table 2, below. The table is exemplary, not exhaustive. There may be more cases than it reports. The entries have not been adjusted for inflation, either. By increasing settlement values to current dollars, an inflation adjustment would increase the number of qualifying cases and make the older cases in the table seem larger. For example, the $359 million paid in the *Vitamins* antitrust case in 2001 equals $523 million in 2020.

Table 2: Mega-Fund Settlements With Fee Awards Of 30 Percent Or More				
	Case	**Settlement Amount (in Millions)**	**Fee**	**Type**
1	In re Vitamins Antitrust Litig., No. MDL 1285, 2001 WL 34312839 (D.D.C. July 16, 2001)	359.00	34%	Antitrust
2	In re Urethane Antitrust Litig., 2016 WL 4060156, at *8 (D. Kan. July 29, 2016)	835.00	33%	Antitrust
3	In re Initial Pub. Offering Sec. Litig., 671 F. Supp. 2d 467 (S.D.N.Y. 2009)	586.00	33%	Securities
4	In re Tricor Direct Purchaser Antitrust Litig., No. 05-340-SLR, ECF No. 543 (D. Del. 2009)	250.00	33%	Antitrust
5	In re Buspirone Antitrust Litig., MDL No. 1413 (JGK), 2003 U.S. Dist. LEXIS 26538, at *11 (S.D.N.Y. Apr. 11, 2003)	220.00	33%	Antitrust
6	*In re Neurontin Antitrust Litig.,* No. 02-1830 (D.N.J. Aug. 6, 2014)	$191.00	33⅓%	Antitrust
7	In re Titanium Dioxide Antitrust Litig., No. 10-CV-00318 RDB, 2013 WL 6577029 (D. Md. Dec. 13, 2013)	163.50	33%	Antitrust
8	In re Se. Milk Antitrust Litig., No. 2:07-CV 208, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013)	158.60	33%	Antitrust
9	In re Flonase Antitrust Litig., 951 F. Supp. 2d 739 (E.D. Pa. 2013)	150.00	33%	Antitrust
10	In re Apollo Grp. Inc. Sec. Litig., No. CV 04-2147-PHX-JAT, 2012 WL 1378677 (D. Ariz. Apr. 20, 2012)	145.00	33%	Securities
11	In re Plasma-Derivative Protein Therapies Antitrust Litig., No. 09-cv-07666, ECF Nos. 693, 697, 697-1 and 701 (N.D. Ill. 2014)	128.00	33%	Antitrust
12	Erica P. John Fund, Inc. v. Halliburton Co., No. 02-xc-01152, ECF No. 844 (N.D. Tex. Apr. 25, 2018)	100.00	33%	Securities
13	Dahl v. Bain Capital Partners, LLC, No. 07-CV-12388, ECF No. 1095 (D. Mass. Feb 2, 2015).	590.50	33%	Antitrust

Table 2: Mega-Fund Settlements With Fee Awards Of 30 Percent Or More				
	Case	**Settlement Amount (in Millions)**	**Fee**	**Type**
14	In re Relafen Antitrust Litig., No. 01-12239, ECF No. 297 (D. Mass. Apr. 9, 2004)	175.00	33%	Antitrust
15	Standard Iron Works v. Arcelormittal, et al., No. 08-cv-5214, ECF. No. 539 (N.D. Ill. 2014)	163.90	33%	Antitrust
16	In re Auto. Refinishing Paint Antitrust Litig., No. MDL NO 1426, 2008 WL 63269 (E.D. Pa. Jan. 3, 2008)	105.75	33%	Antitrust
17	Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1241 (S.D. Fla. 2006)	1075.00	31%	Securities
18	In re Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011)	410.00	30%	Antitrust
19	Schuh v. HCA Holdings Inc., No. 3:11-cv-01033, ECF No. 563 at 1 (M.D. Tenn. Apr. 14, 2016)	215.00	30%	Securities
20	In re Linerboard Antitrust Litig., No. CIV.A. 98-5055, 2004 WL 1221350, at *19 (E.D. Pa. June 2, 2004), amended, No. CIV.A.98-5055, 2004 WL 1240775 (E.D. Pa. June 4, 2004)	203.00	30%	Antitrust
21	City of Pontiac General Employees' Retirement System v. Wal-Mart Stores, Inc. et al., No. 12-cv-05162, ECF No. 458 (W.D. Ark. 2019)	160.00	30%	Securities
22	In re Polyurethane Foam Antitrust Litig., No. 1:10 MD 2196, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015), appeal dismissed (Dec. 4, 2015)	147.80	30%	Antitrust
23	In re: Informix Corp. Sec. Litig. No 97-CV-1289-CRB, ECF No. 471 (N.D. Cal., Nov 23, 1999)	142.00	30%	Securities
24	Anwar et al v. Fairfield Greenwich Limited et al, No. 09-cv-0118, ECF No. 1457 (S.D.N.Y. Nov. 20, 2015)	125.00	30%	Securities
25	Kurzweil v. Philip Morris Cos., 1999 U.S. Dist. LEXIS 18378, (S.D.N.Y. Nov 24, 1999)	123.80	30%	Securities
26	In re Ikon Office Sols., Inc., Sec. Litig., 194 F.R.D. 166 (E.D. Pa. 2000)	111.00	30%	Securities and Derivative

Table 2: Mega-Fund Settlements With Fee Awards Of 30 Percent Or More				
	Case	**Settlement Amount (in Millions)**	**Fee**	**Type**
27	In re Morgan Keegan Open-End Mutual Fund Litigation, No. 07-cv-02784, ECF No. 435 (W.D. Tenn. Aug 2, 2016)	110.00	30%	Securities
28	In re Prison Realty Sec. Litig., No. 3:99–0458, 2001 U.S. Dist. LEXIS 21942 (M.D. Tenn. Feb. 9, 2001).	104.00	30%	Securities

71. The cases in Table 2 show that courts try to award fees that are appropriate in the circumstances. They apply percentages in the normal range, even when settlements are unusually large, when they determine that the facts warrant.

X. LODESTAR CROSS-CHECK

72. When awarding fees, courts often gauge their reasonableness by performing lodestar cross-checks. These cross-checks employ two components: the lodestar basis, which combines hourly rates and time expended; and a multiplier, which is a factor that brings the basis into line with the fee request. I discuss both quantities here.

73. Before doing so, I wish to note that I oppose the use of cross-checks and have argued against them in print. By assigning weight to cross-checks, courts encourage lawyers to expend time rather than to conserve it. In other words, courts unintentionally penalize efficiency and reward inefficiency. To the best of my knowledge, claimants never use the lodestar method when hiring lawyers directly. I therefore see no reason for courts to rely on it when assessing the reasonableness of class counsel's fees.

74. Turning to the comparison itself, Class Counsel requests compensation for approximately 52,000 hours of work at a blended rate of approximately $667 per hour for all timekeepers ($34.7 million in fees divided by 52,000 hours of work). There are many sources of information that may help assess the reasonableness of the requested blended rate. For example,

one can study the fee applications that lawyers submit in bankruptcy proceedings. Using this approach, one learns that many lawyers are compensated at rates far higher than those requested here. For example, in the Sears bankruptcy proceeding, the fee application submitted in 2019 by Weil, Gotshal & Manges LLP, the debtors' attorneys, includes dozens of lawyers whose hourly charges exceed $1,000, with nine lawyers charging $1,500 per hour or more. Unlike Class Counsel, these lawyers did not work on contingency. Even so, the bankruptcy judge approved the fee request in full.

75. Even higher hourly rates were sought in the Toys R' Us bankruptcy, where Kirkland & Ellis LLP serves as debtors' counsel. There, the highest hourly rate was $1,795, the blended rate for all partners, of which there were dozens, was $1,227, and the blended rate for all timekeepers, including paralegals and support staff, was $901.

76. Looking at bankruptcy cases more broadly, a survey of almost 3,000 fee requests found that, "[i]n major markets, bankruptcy partners make $1,000 an hour or more." Katelyn Polantz, *In Bankruptcy, Flat is Fine; Median Rates at Large Firms Ran $595 Per Hour,* The National Law Journal, May 16, 2016.

77. One can also examine opinions containing lodestar cross-checks to learn what hourly rates courts find reasonable. For example, when presiding over *Pantelyat v. Bank of Am., N.A.*, No. 16-CV-8964 (AJN), 2019 WL 402854 (S.D.N.Y. Jan. 31, 2019), which settled for $22 million, Judge Alison J. Nathan of the Southern District of New York approved a 25 percent fee based on a blended hourly rate of $695,[14] higher than the blended rate Class Counsel requests here.

[14] I calculated the blended hourly rate in *Pantelyat* by dividing the lodestar basis ($1,125,294.50) by the number of hours worked (1,618.8).

78. Finally, one can consult surveys of law firms' billing rates, such as those taken by the NATIONAL LAW JOURNAL (NLJ). The number of firms participating in the NLJ surveys varies from year to year, but always exceeds 100. The NLJ surveys are often cited to courts as evidence supporting hourly rates in fee applications. *See, e.g*., *Parkinson v. Hyundai Motor Am*., 796 F. Supp. 2d 1160, 1172-73 (C.D. Cal. 2010) (admitting into evidence and relying upon expert report by Professor William Rubenstein which was based in part on NLJ surveys).

79. The NLJ surveys report that senior partners at large law firms often charge $1000 per hour or more. *See* Karen Sloan, *NLJ Billing Survey: $1,000 Per Hour Isn't Rare Anymore,* The National Law Journal (January 13, 2014). Reading the text of the article, one learns that "[n]early 20 percent of the firms included in The National Law Journal's annual survey of large law firm billing rates [in 2014] had at least one partner charging more than $1,000 an hour." Lawyers who practice in the Supreme Court routinely charge more than $1,000 per hour too. *Billing Rates*, The National Law Journal Supreme Court Brief (Online), Sept. 6, 2019.

80. The 2014 NLJ survey, which contained information for 159 of the largest law firms in the U.S., found a median rate (half above/half below) for the highest partner billing rate category of $775 and a median high hourly rate for associates of $510. Since then, rates at major law firms have risen, but even so the blended rate that Class Counsel requests falls with the identified range.

81. As explained, Class Counsel are the best in the world at litigation of this type. Consequently, they should be paid at rates comparable to those charged by other outstanding attorneys. Having considered a variety of sources, it is my opinion that the requested blended rate of $667 per hour for all timekeepers is reasonable.

82. I turn now to the multiplier portion of the lodestar, which will equal 5.9 if the Court awards 27.5 percent of the recovery as fees. The best-known feature of multipliers is that they

increase sharply as settlements become larger. For example, a study published in 2017 reported a mean multiplier of 1.82 for all federal class actions, but also noted that "higher multipliers are associated with higher recoveries." Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 966 (2017). It is difficult to say more than this, however, because the number of enormous settlements is small. For example, in the study just cited the largest decile of cases, which has a mean multiplier of 2.72, includes all settlements greater than $67.5 million. *Id*., Table 13. Because multipliers increase greatly as recoveries grow, a category that would lump a $67.6 million settlement together with a $750 million settlement is likely to hide more than it reveals.

83. Although a 5.9 multiplier is certainly above average, I believe that a federal district court judge has discretion to approve it in appropriate circumstances. One reason for holding this opinion is that multipliers in the same range, including some higher ones, have been awarded in other mega-fund cases. Table 3, below, lists settlements I found with multipliers of 6 or more. The table is meant to be illustrative, not complete. There may be cases I have not found.

Table 3. Mega-Fund Cases with Lodestar Multipliers of 6 or More			
	Case	**Settlement (Millions)**	**Multiplier**
1	In re Doral Financial Corp. Secs. Litig., No. MDL 1706, ECF No. 107 (S.D.N.Y. July 17, 2007)	$129.00	10.26
2	Cosgrove v. Sullivan, 759 F.Supp. 166, 167 n. 1 (S.D.N.Y.1991)	$100.00	8.74
3	In re Buspirone, 01-md-1410 (S.D.N.Y. Apr. 11, 2003)	$220.00	8.46
4	New England Carpenters Health Benefits Fund v. First Databank, Inc., No. 05 Civ. 11148, 2009 WL 2408560 (D. Mass. Aug. 3, 2009)	$350.00	8.30
5	In re Healthsouth Corporation Securities Litig. (UBS Defendants), No. 05-cv-01500. ECF No. 1721 (N.D.Ala. Jul 26, 2010)	$117.00	7.01
6	In re Rite Aid Corp. Sec. Litig., MDL No. 1360, 2005 WL 697461 at *2-3 (E.D. Pa. Mar. 24, 2005)	$126.64	6.96
7	In re UnitedHealth Grp. Inc. PSLRA Litig., 643 F. Supp. 2d 1094 (D. Minn. 2009)	$925.50	6.50
8	In re Credit Default Swaps Antitrust Litig., No. 13MD2476 DLC, ECF No. 554 (S.D.N.Y. April 18, 2016)	$1,864.65	6.36
9	Spartanburg Regional Health Servs. District, Inc. v. Hillenbrand Indus., Inc., No. 03-DV-2141, ECF No. 377 (D.S.C. Aug. 15, 2006)	$489.80	6.00
10	In re Cardinal Health Inc. Sec. Litig., 528 F. Supp. 2d 752 (S.D. Ohio 2007)	$600.00	6.00

84. Another reason for awarding large multipliers in mega-fund cases is that, without them, lawyers' incentives will be dulled. The multiplier is the lodestar component that ties the fee award to the recovery. Unless it increases sharply as settlements grow larger, lawyers will find it advantageous to settle cheaply because, by doing so, they will not put their fees at risk—which they do whenever settlement offers are declined. In other words, the upside potential of refusing to settle must exceed the downside risk of losing fees, which it will only if lodestar multipliers reward lawyers adequate for taking large risks.

85. I therefore conclude that a lodestar cross-check confirms the reasonableness of Class Counsel's fee request.

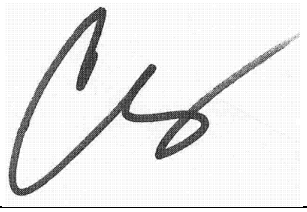
XI. COMPENSATION

86. I received a flat fee of $50,000 for preparing this report.

XII. CONCLUSION

87. For the reasons set out above, I believe that Class Counsel's request for a fee award of 27.5 percent of the gross recovery is reasonable and should be approved.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 11th day of March, 2020, at Austin, Texas.



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School of Law, University of Texas at Austin, 1987-2015
- Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure
- W. James Kronzer Chair in Trial & Appellate Advocacy
- Cecil D. Redford Professor
- Robert W. Calvert Faculty Fellow
- Graves, Dougherty, Hearon & Moody Centennial Faculty Fellow
- Assistant Professor

University of Michigan Law School, Fall 2018
- Visiting Professor

Harvard Law School, Fall 2011
- Visiting Professor

Vanderbilt University Law School, Fall 2003
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Yale Law School, JD (1987)
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PUBLICATIONS

Special Projects

PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (with Samuel Issacharoff, Reporter, and Robert Klonoff and Richard Nagareda, Associate Reporters) (American Law Institute 2010).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Class Action Litigation," 25 Rev. Litig. 459 (2006).

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PRACTICAL GUIDE FOR INSURANCE DEFENSE LAWYERS (2002) (with Ellen S. Pryor and Kent D. Syverud, Co-Reporters); published on the IADC website (2003); revised and distributed to all IADC members as a supplement to the Defense Counsel J. (2004).

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LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION, (coedited with Richard Nagareda, Robert Bone, Elizabeth Burch and Patrick Woolley) (Foundation Press, 2nd Ed. 2012) (updated annually through 2018).

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2. "Regulating Pharmaceutical Companies' Financial Largesse," 7:25 Israeli J. Health Policy Res. (2018), https://doi.org/10.1186/s13584-018-0220-5 (with Ronen Avraham).*

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4. "It Was on Fire When I Lay Down on It: Defensive Medicine, Tort Reform, and Healthcare Spending," (with David A. Hyman) OXFORD HANDBOOK OF AMERICAN HEALTH LAW, I. Glenn Cohen, Allison Hoffman, and William M. Sage, eds. (2017).*

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8. "Health Care Quality, Patient Safety and the Culture of Medicine: 'Denial Ain't Just A River in Egypt,'" (with David A. Hyman), 46 New England L. Rev. 101 (2012) (invited symposium).

9. "Medical Malpractice and Compensation in Global Perspective: How Does the U.S. Do It?" (coauthored with David A. Hyman) MEDICAL MALPRACTICE AND COMPENSATION IN GLOBAL PERSPECTIVE (Ken Oliphant & Richard W. Wright, eds. 2013)*; originally published in 87 Chicago-Kent L. Rev. 163 (2012).

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13. "Speak Not of Error, Regulation (Spring 2005) (with David A. Hyman).

14. "The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?" 90 Cornell L. Rev. 893 (2005) (with David A. Hyman).

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16. "You Get What You Pay For: Result-Based Compensation for Health Care," 58 Wash. & Lee L. Rev. 1427 (2001) (with David A. Hyman).

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18. "Fictions and Facts: Medical Malpractice Litigation, Physician Supply, and Health Care Spending in Texas Before and After HB 4," 51 Tex. Tech L. Rev. 627 (2019). (with David A. Hyman and Bernard Black) (invited symposium on the 15th anniversary of the enactment of HB4).

19. "Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980-2010," 13 J. Empirical Legal Stud. 183 (2016) (with Bernard S. Black, David A. Hyman, and Mohammad H. Rahmati).

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28. "Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003," 3 Geneva Papers on Risk and Insurance: Issues and Practice 177-192 (2008) (with Bernard S. Black, David A. Hyman, William M. Sage and Kathryn Zeiler).*

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31. "Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002," 2 J. Empirical Legal Stud. 207–259 (July 2005) (with Bernard S. Black, David A. Hyman, and William S. Sage).*

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40. "Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment," 66 Vanderbilt L. Rev. 1677 (2013) (with Lynn A. Baker and Michael A. Perino).

41. "The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal," 63 Vanderbilt L. Rev. 107 (2010) (with Geoffrey P. Miller).

42. "Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions," 57 DePaul L. Rev. 471 (2008) (with Sam Dinkin) (invited symposium), reprinted in L. Padmavathi, Ed., SECURITIES FRAUD: REGULATORY DIMENSIONS (2009).

43. "Reasonable Attorneys' Fees in Securities Class Actions: A Reply to Mr. Schneider," 20 The NAPPA Report 7 (Aug. 2006).

44. "Dissent from Recommendation to Set Fees Ex Post," 25 Rev. of Litig. 497 (2006).

45. "Due Process and the Lodestar Method: You Can't Get There From Here," 74 Tul. L. Rev. 1809 (2000) (invited symposium).

46. "Incoherence and Irrationality in the Law of Attorneys' Fees," 12 Tex. Rev. of Litig. 301 (1993).

47. "Unloading the Lodestar: Toward a New Fee Award Procedure," 70 Tex. L. Rev. 865 (1992).

48. "A Restitutionary Theory of Attorneys' Fees in Class Actions," 76 Cornell L. Rev. 656 (1991).

Liability Insurance and Insurance Defense Ethics

49. "Liability Insurance and Patient Safety," 68 DePaul L. Rev. 209 (2019) (with Tom Baker) (symposium issue).

50. "The Treatment of Insurers' Defense-Related Responsibilities in the Principles of the Law of Liability Insurance: A Critique," 68 Rutgers U.L. Rev. 83 (2015) (with William T. Barker) (symposium issue).

51. "The Basic Economics of the Duty to Defend," in D. Schwarcz and P. Siegelman, eds., RESEARCH HANDBOOK IN THE LAW & ECONOMICS OF INSURANCE 438-460 (2015).*****

52. "Insurer Rights to Limit Costs of Independent Counsel," ABA/TIPS Insurance Coverage Litigation Section Newsletter 1 (Aug. 2014) (with William T. Barker).

53. "Litigation Funding Versus Liability Insurance: What's the Difference?," 63 DePaul L. Rev. 617 (2014) (invited symposium).

54. "Ethical Obligations of Independent Defense Counsel," 22:4 Insurance Coverage (July-August 2012) (with William T. Barker), available at http://apps.americanbar.org/litigation/committees/insurance/articles/julyaug2012-ethical-obligations-defense-counsel2.html.

55. "Settlement at Policy Limits and The Duty to Settle: Evidence from Texas," 8 J. Empirical Leg. Stud. 48-84 (2011) (with Bernard S. Black and David A. Hyman).*

56. "When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs," 44 Ariz. L. Rev. 787 (2002) (invited symposium).

57. "Defense Lawyers' Professional Responsibilities: Part II – Contested Coverage Cases," 15 G'town J. Legal Ethics 29 (2001) (with Ellen S. Pryor).

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59. "Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law Governing Insurance Defense Lawyers," 4 Conn. Ins. L. J. 205 (1998) (invited symposium).

60. "The Lost World: Of Politics and Getting the Law Right," 26 Hofstra L. Rev. 773 (1998) (invited symposium).

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62. "All Clients are Equal, But Some are More Equal than Others: A Reply to Morgan and Wolfram," 6 Coverage 47 (1996) (with Michael Sean Quinn).

63. "Are Liability Carriers Second-Class Clients? No, But They May Be Soon-A Call to Arms against the Restatement of the Law Governing Lawyers," 6 Coverage 21 (1996) (with Michael Sean Quinn).

64. "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L. J. 255 (1995) (with Kent D. Syverud); reprinted in IX INS. L. ANTHOL. (1996) and 64 Def. L. J. 1 (Spring 1997).

65. "Wrong Turns on the Three Way Street: Dispelling Nonsense about Insurance Defense Lawyers," 5-6 Coverage 1 (Nov./Dec.1995) (with Michael Sean Quinn).

66. "Introduction to the Symposium on Bad Faith in the Law of Contract and Insurance," 72 Tex. L. Rev. 1203 (1994) (with Ellen Smith Pryor).

67. "Does Insurance Defense Counsel Represent the Company or the Insured?" 72 Tex. L. Rev. 1583 (1994); reprinted in Practicing Law Institute, INSURANCE LAW: WHAT EVERY LAWYER AND BUSINESSPERSON NEEDS TO KNOW (1998).

68. "A Missed Misalignment of Interests: A Comment on *Syverud, The Duty to Settle*," 77 Va. L. Rev. 1585 (1991); reprinted in VI INS. L. ANTHOL. 857 (1992).

Class Actions, Mass Actions, and Multi-District Litigations

69. "What Can We Learn by Studying Lawyers' Involvement in Multidistrict Litigation? A Comment on *Williams, Lee, and Borden, Repeat Players in Federal Multidistrict Litigation*," 5 J. of Tort L. 181 (2014), DOI: 10.1515/jtl-2014-0010 (invited symposium).

70. "The Responsibilities of Lead Lawyers and Judges in Multi-District Litigations," 79 Fordham L. Rev. 1985 (2011) (invited symposium).

71. "The Allocation Problem in Multiple-Claimant Representations," 14 S. Ct. Econ. Rev. 95 (2006) (with Paul Edelman and Richard Nagareda).*

72. "A Rejoinder to *Lester Brickman, On the Theory Class's Theories of Asbestos Litigation,"* 32 Pepperdine L. Rev. 765 (2005).

73. "Merging Roles: Mass Tort Lawyers as Agents and Trustees," 31 Pepp. L. Rev. 301 (2004) (invited symposium).

74. "We're Scared To Death: Class Certification and Blackmail," 78 N.Y.U. L. Rev. 1357 (2003).

75. "The Aggregate Settlement Rule and Ideals of Client Service," 41 S. Tex. L. Rev. 227 (1999) (with Lynn A. Baker) (invited symposium).

76. "Representative Lawsuits & Class Actions," in B. Bouckaert & G. De Geest, eds., INT'L ENCY. OF L. & ECON. (1999).*

77. "I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds," 84 Va. L. Rev. 1465 (1998) (with Lynn A. Baker) (invited symposium).

78. "Mass Lawsuits and the Aggregate Settlement Rule," 32 Wake Forest L. Rev. 733 (1997) (with Lynn A. Baker) (invited symposium).

79. "Comparing Class Actions and Consolidations," 10 Tex. Rev. of Litig. 496 (1991).

80. "Justice in Settlements," 4 Soc. Phil. & Pol. 102 (1986) (with Jules L. Coleman).*

General Legal Ethics and Civil Litigation

81. "A Private Law Defense of Zealous Representation" (in progress), available at http://ssrn.com/abstract=2728326.

82. "The DOMA Sideshow" (in progress), available at http://ssrn.com/abstract=2584709.

83. "Fiduciaries and Fees," 79 Fordham L. Rev. 1833 (2011) (with Lynn A. Baker) (invited symposium).

84. "Ethics and Innovation," 79 George Washington L. Rev. 754 (2011) (invited symposium).

85. "In Texas, Life is Cheap," 59 Vanderbilt L. Rev. 1875 (2006) (with Frank Cross) (invited symposium).

86. "Introduction: Civil Justice Fact and Fiction," 80 Tex. L. Rev. 1537 (2002) (with Lynn A. Baker).

87. "Does Civil Justice Cost Too Much?" 80 Tex. L. Rev. 2073 (2002).

88. "A Critique of *Burrow v. Arce*," 26 Wm. & Mary Envir. L. & Policy Rev. 323 (2001) (invited symposium).

89. "What's Not To Like About Being A Lawyer?" 109 Yale L. J. 1443 (2000) (with Frank B. Cross) (review essay).

90. "Preliminary Thoughts on the Economics of Witness Preparation," 30 Tex. Tech L. Rev. 1383 (1999) (invited symposium).

91. "And Such Small Portions: Limited Performance Agreements and the Cost-Quality/Access Trade-Off," 11 G'town J. Legal Ethics 959 (1998) (with David A. Hyman) (invited symposium).

92. "Bargaining Impediments and Settlement Behavior," in D.A. Anderson, ed., DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP (1996) (with Samuel Issacharoff and Kent D. Syverud).

93. "The Legal Establishment Meets the Republican Revolution," 37 S. Tex. L. Rev. 1247 (1996) (invited symposium).

94. "Do We Know Enough about Legal Norms?" in D. Braybrooke, ed., SOCIAL RULES: ORIGIN; CHARACTER; LOGIC: CHANGE (1996) (invited contribution).

95. "Integrating Theory and Practice into the Professional Responsibility Curriculum at the University of Texas," 58 Law and Contemporary Problems 213 (1995) (with Amon Burton, John S. Dzienkowski, and Sanford Levinson,).

96. "Thoughts on Procedural Issues in Insurance Litigation," VII INS. L. ANTHOL. (1994).

Legal and Moral Philosophy

97. "Elmer's Case: A Legal Positivist Replies to Dworkin," 6 L. & Phil. 381 (1987).*

98. "Negative Positivism and the Hard Facts of Life," 68 The Monist 347 (1985).*

99. "Utilitarian Participation," 23 Soc. Sci. Info. 701 (1984).*

Practice-Oriented Publications

100. "Your Role in a Law Firm: Responsibilities of Senior, Junior, and Supervisory Attorneys," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (3D) (Texas Center for Legal Ethics and Professionalism 1996).

101. "Getting and Keeping Clients," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (3D) (Texas Center for Legal Ethics and Professionalism 1996) (with James M. McCormack and Mitchel L. Winick).

102. "Advertising and Marketing Legal Services," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).

103. "Responsibilities of Senior and Junior Attorneys," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).

104. "A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney's Fees Provisions," 28 Clearinghouse Rev. 114 (June 1994) (with Stephen Yelenosky).

Miscellaneous

105. "Public Opinion and the Federal Judiciary: Crime, Punishment, and Demographic Constraints," 3 Pop. Res. & Pol. Rev. 255 (1984) (with Robert Y. Shapiro).*

PERSONAL

Married to Cynthia Eppolito, PA; Daughter, Katherine; Step-son, Mabon.

Consults with attorneys and serves as an expert witness on subjects in his areas of expertise.

First generation of family to attend college.