Class Action Watch

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In the last two issues of Class Action Watch, we dedicated the Analysis Section to a presentation of data we collected in surveying a sampling of major American companies on their class action litigation over the past ten years. In this issue, we present the remaining data, which covers a fairly diverse range of subjects. Before discussing this data, though, a brief review of the survey project, methodology employed, and earlier findings is in order. To read about the survey and these earlier reported findings in their entirety, we invite you to visit the Federalist Society's web page at www.fed-soc.org.

ABOUT THE CLASS ACTION SURVEY

In December 1998 the Federalist Society mailed a survey to 100 Fortune 500 companies with nationwide commercial interests. The companies represented every conceivable industry.

The Federalist Society survey asked about putative class actions that were pending in 1988, 1993, and 1998. The hope was that these chronological "snapshots" would provide some sense of the development of class action activity over the most recent ten-year period. The respondents were asked to provide information about federal actions as well as cases in all state courts.

For each of the three years, the survey asked companies to consider a wide variety of subjects, including but not limited to the number of class actions, the type of predominant issue, the size of the class, the incidence and magnitude of settlement demands, and the ultimate disposition.

We had no idea whether or not class action litigation was perceived as a "problem" by the companies we surveyed (indeed, a number of the respondent companies had no class actions to report). Moreover, the surveys were submitted anonymously, and we therefore do not know which companies responded.

Thirty-two companies responded by submitting surveys. Given the size of these companies and the logistical difficulties associated with responding to such a survey (it was 15 pages), we were quite satisfied to have secured such business participation in this kind of a project.

The pool of respondents reflects a diverse collection of class action experiences. It is clear, for example, that the companies that responded were not simply those especially concerned with or affected by class action litigation. A number of the respondents had no or very little litigation pending during the years in question, while others posted more significant numbers. The median and mean numbers of class actions reflect that distribution.

It is crucial to note that this survey effort was not intended to be a complete scientific sample or analysis of class action activity. The data was intended to increase our understanding in this area, but it by no means complete our understanding.

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SOME EARLIER REPORTED RESULTS: A SUMMARY

For the respondents, class action litigation is on the rise. The number of pending putative class actions in state courts increased by 1,315 percent between 1988 and 1998, but by only 340 percent in federal courts for the same period.

Respondents reported that certified state class actions settled much more often than non-certified actions. And, with each passing year, the length of time between certification and settlement has narrowed substantially. The settlement rate was between 41 and 65 percent in state courts nationwide. The two previous issues of Class Action Watch set forth these findings as well as others in much greater detail.

ADDITIONAL FINDINGS

Among the respondents, a substantial proportion of class actions were filed in just a few states. In 1993, for example, 54 percent of the reported state court class actions appeared in just five jurisdictions: Alabama, California, Louisiana, Ohio, and Texas. That number jumped to 69 percent in 1998. As Figure One demonstrates, Texas, Louisiana, California, and Alabama were especially popular filing states. Indeed, filings went up in Alabama, California and Texas between 1993 and 1998. In 199_ , the Louisiana legislation enacted state class action reform. Filings did go down in Louisiana between 1993 and 1998, which raises the question whether intervening state reform had some impact.

The size of putative classes in state court increased among respondents between 1988 and 1993, as Figure Two suggests. In 1988, 86 percent of the reported class actions involved classes of fewer than 10,000 individuals and only seven percent of the classes involved 100,000 or more members. Those figures were quite different in 1998, with only 53 percent of the classes consisting of fewer than 10,000 members but 31 percent of the classes con-

Figure 1

Percentage of State Court Class Actions by Jurisdiction

	AL	CA	LA	OH	TX	All Other States
1993	5	8	21	5	14	46
1998	14	14	17	4	20	31

Analysis

Putative Class Size (%)			
No. Class Members	1988	1993	1998
Less than 10,000	86	62	53
Greater than 10,000 but less than 100,000	7	18	16
100,000 to 1,000,000	7	0	16
Greater than 1,000,000	0	18	15

Figure 2

taining 100,000 or more members. Of special note, there were no 1-million members classes reported in 1988, but 18 percent of the classes involved 1 million or more members in 1993 and 15 percent involved 1 million or more members in 1998. These larger state class actions are a proxy (albeit, an admittedly inexact one) for nationwide class actions. Accordingly, these findings are consistent with the anecdotal evidence of a growing tendency for the filing of putative nationwide class actions in state courts.

Many have suggested that the litigation system is witnessing some changes in the kind of class actions being filed. In particular, the Rand Institute and others have reported that class actions involving consumer- or service-oriented claims are replacing traditional toxic tort or product defect claims. Data collected from respondents seems to corroborate this trend. Most notably, respondents reported an increase in class actions alleging fraudulent or wrongful sales practices and fraudulent or wrongful calculation of payments such as royalties or franchise fees. Increases here were significantly more pronounced than in any other area. There were only six such cases reported in 1988 and eight in 1993. But the number of cases jumped to 56 in 1998, and that spike was not attributable to a few outliers; the increases were fairly evenly distributed among all respondents.

We asked respondents to provide data about whether any class actions had been filed during the pendency of an agency proceeding that involved substantially similar claims or requests for relief. Seven respondents reported that such class actions were filed, as demonstrated in Figure 3, with the exception of one of these respondents, each reported a significant increase. While no dual proceedings were reported for 1988, two were identified in 1993, and notably, 44 in 1998. For these respondents combined, about 20 percent of their total class action caseload involved such dual proceedings. While the reader can judge for himself whether this is a considerable

proportion of the respondents' caseload, one thing is certain—the frequency of dual proceedings is greater than in past years for the respondents at issue. Although the number of companies responding to this question is too small to support any firm conclusions, the anecdotal evidence from the survey suggests a growing number of dual proceedings

We sought to gauge the magnitude of class action claims in financial terms by seeking information about initial settlement demands by plaintiff classes in state courts. Responses to questions in this area were somewhat sparse, but those respondents who did report presented some interesting data. In 1988, eight respondents reported that they had cases involving initial settlement demands. All of those demands were less than $1 million. For those respondents, the landscape changed substantially by 1993. In 1993, the same eight respondents reported they had initial settlement demands. This time, though, only a quarter were under $1 million. Half of all the demands were greater than $10 million, and a quarter were between $1 million and $10 million. Finally, the respondents reported less drastic changes between 1993 and 1998. Eleven respondents reported in 1998, three of whom had not reported any data on initial settlement demands for previous years. For 1998, 37 percent of the demands were for more than $10 million, and 26 percent of the cases involved demands between $1 million and $10 million.

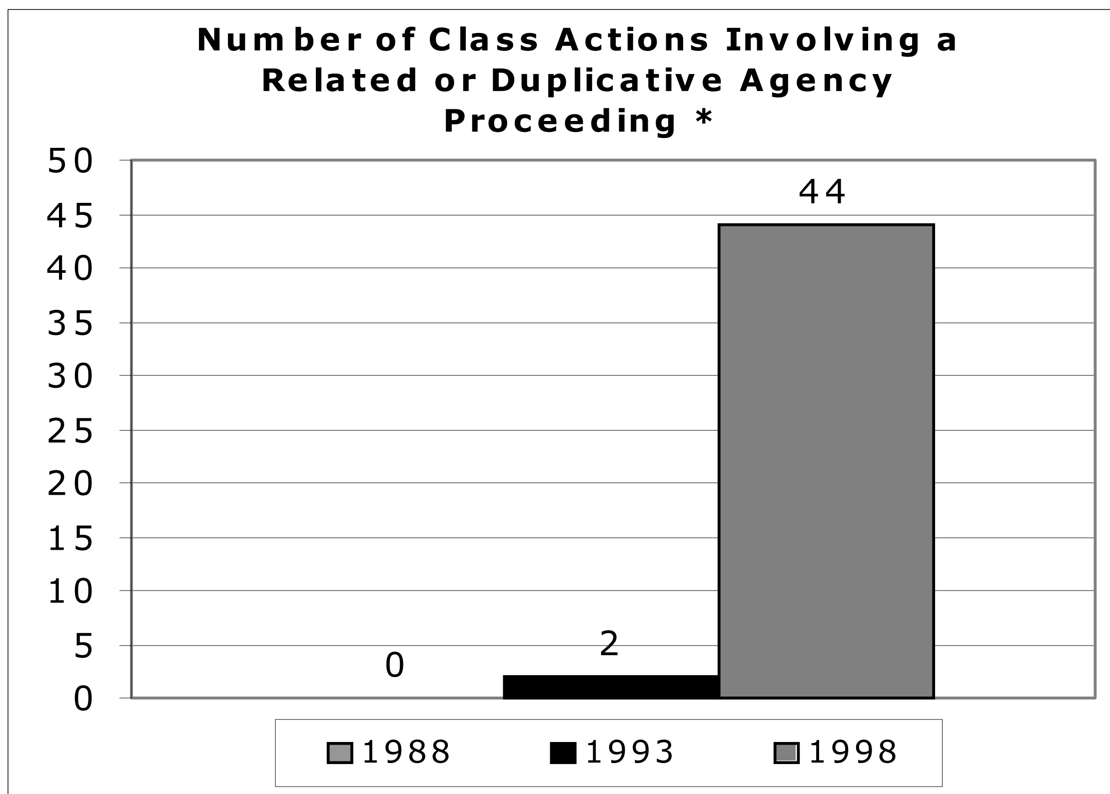

Figure 3

* The graph merely reflects anecdotal data as only seven companies responded to this question.

FEDERALIST SOCIETY SURVEYS CLASS ACTION LAWYERS

This fall marks the first anniversary of the Federalist Society's Class Action Watch Project. Since its inception, we have had the opportunity to hear the opinions of many lawyers, corporate counsel, judges, and scholars respecting the state of class action litigation. Perhaps most notably, we have noticed that opinions in this area vary widely and that many people have strongly held views about the class action device. It is against this backdrop that the Federalist Society decided to undertake a "Class Actions Opinion Survey."

The survey, which is reprinted on page 7, asks the respondents to express their level of agreement or disagreement with a series of twelve statements. These statements deal with issues such as attorney fees, the impact of class certification, the incidence of state court class action filings, Rule 23 standards for certification, and the appropriate scope of settlement class actions.

The greatest challenge was to find an objective method of assembling a survey pool. Fortunately, the Martindale-Hubbell directory was enormously helpful in this regard. Among the various practice designations, lawyers may choose from "class actions" and "class action defense." We mailed a copy of the survey to anyone who used these designations to identify their practice areas. The survey reached 1,884 class action lawyers and 300 class action defense counsel.

Both categories of counsel received the same survey except in one respect. Lawyers who identified their practice as "class actions" received a survey reproduced on color paper, enabling us to differentiate defense counsel and thereby contrast their responses from a more general pool containing mostly plaintiff counsel.

The surveys were mailed less than a month ago, and we already have achieved a ten percent response rate in both categories. While it is premature to analyze the data fully, we have decided to disclose some preliminary results relating to state court class action litigation. This data is especially timely because of the debates currently taking place on Capitol Hill respecting legislation aimed at loosening the standards for removing state class actions to federal court.

Statement # 2 reads as follows: "As the federal courts of appeals have tightened the requirements for class certification, there is a greater incentive to file class actions in state court." For the most part, respondents are in agreement here, with 79 percent of defense counsel expressing agreement or strong agreement. About 61 percent of the broader category of class action lawyers expressed agreement or strong agreement.

Statement # 3 suggests that "State courts are appropriate forums for nationwide class actions." Here we begin to see some divergence between the two pools of respondents. While 74 percent of the defense counsel disagreed or strongly disagreed, about 52 percent of the class action lawyers agreed or strongly agreed with the statement.

Statement # 4 deals directly with the legislation pending in Congress: "It should be easier to remove nationwide class actions to federal court." About 63 percent of the class action defense counsel who responded thus far either agreed or strongly agreed with this statement. In fact, 46 percent of them strongly agreed. But among the more general category of class action lawyers, only 17 percent strongly agreed with the statement, and 45 percent either disagreed or strongly disagreed.

With the Supreme Court's recent decision on settlement classes, we also decided to provide a glimpse of the preliminary results relating to Statement # 12, which reads: "A settlement class action should be permitted even if the putative class could not be certified for litigation purposes under Rule 23." Here, reviews were quite mixed amongst defense counsel. An almost even amount agreed (44 percent) as disagreed (48 percent) with the statement. But among the general category of class action lawyers, the non-certifiable settlement class was much more favored, with 60 percent agreeing with the statement and only 28 percent disagreeing with it.

The figures discussed above are only the very early returns. Trends could shift as we receive more responses. A comprehensive analysis will appear in the next issue.

CLASS ACTIONS OPINION SURVEY

Please respond to the statements below by using the following scale:

1 – strongly disagree
2 – disagree
3 – no opinion
4 – agree
5 – strongly agree

1. Class actions result in a net savings of judicial resources.

2. As the federal courts of appeals have tightened the requirements for class certification, there is a greater incentive to file class actions in state court.

3. State courts are appropriate forums for nationwide class actions.

4. It should be easier to remove nationwide class actions to federal court.

5. It should be easier to appeal orders granting or denying class certification.

6. The incidence and magnitude of excessive class action attorney fee awards is exaggerated.

7. Certification of a nationwide class action all but guarantees that the case will settle.

8. A regulatory agency's ongoing examination of a defendant's conduct should counsel against certification of a class action.

9. The existing Rule 23 factors provide a sufficient basis for screening out cases that are not appropriate for class treatment.

10. Cases seeking medical monitoring are particularly strong candidates for class action treatment.

11. It is appropriate for state courts or legislatures to modify the elements of a cause of action to make it easier to seek class action treatment.

12. A settlement class action should be permitted even if the putative class could not be certified for litigation purposes under Rule 23.