IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	))))))))))))	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

REPORT OF PROFESSOR CHARLES SILVER ON ATTORNEYS' FEES

I, Charles Silver, declare as follows:

I. INTRODUCTION AND SUMMARY OF OPINIONS

The Court is in the unusual position of having to set the fee in a class action before the final outcome of litigation is known. Due to the efforts of Class Counsel, the law firm of Robbins Geller Rudman & Dowd, LLP, who tried the case for six weeks, the Class obtained a verdict for almost $2.5 billion. The risk of non-recovery is still palpable, however, because the Defendants have appealed the verdict. If they prevail, the parties could conceivably return to the District Court for a new trial and the risk of non-recovery reemerges. The history of tried class actions shows that, even at this advanced point in litigation, the risk of non-recovery is real.

Insofar as fee-setting is concerned, the posture of the case is advantageous. The core purpose of the contingent fee is to compensate lawyers for incurring risks. As Judge Frank Easterbrook recently observed when affirming a 27.5 percent fee award in a securities class action that settled for $200 million: "Contingent fees compensate lawyers for the risk of

nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Solutions, Inc*., 2013 WL 4082893 *2 (7th Cir. 2013). The importance of assessing risks accurately also led Judge Easterbrook to encourage district court judges to set fee terms at the start of litigation, when the risk of losing can be seen clearly. "[T]he best time to determine the rate is in the beginning of the case, not the end when hindsight alters the perception of the suits' riskiness, and sunk costs make it impossible for lawyers to walk away if the fee is too low." *Synthroid I*, 264 F.3d at 718. Although this case began more than a decade ago, the Court can still see the risks Class Counsel overcame by winning a verdict at trial and the risks they continue to face, there being no settlement to obscure this most important consideration.

Class Counsel has asked the Court to fix 24.37 percent of the eventual recovery, should there be one, as the fee percentage. This fraction is based on an agreement negotiated with one of the Named Plaintiffs near the outset of the case. This is a reasonable number, both because the Named Plaintiff agreed to pay it and because it falls within the range of percentages clients usually agree to pay lawyers in actual representations. Real transactions provide indispensable information about the compensation needed to encourage lawyers to accept non-payment risks.

Again, the Seventh Circuit agrees. It has repeatedly held that lawyers representing plaintiff classes are to be compensated at market rates, meaning rates that "willing buyers and willing sellers of legal services" would have agreed to at the start of litigation. *Silverman v. Motorola Solutions, Inc*., 2013 WL 4082893 *1 (7th Cir. 2013).[1] Fees paid by real clients whose own money is on the line provide the best evidence of market rates.

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[1] See also *In re Trans Union Corp. Privacy Litigation*, 629 F.3d 741, 744 (7th Cir. 2011) (stating, with approval, that "[t]he special master recognized that his task was to estimate the contingent fee that the class would have negotiated with the class counsel at the outset had negotiations with

In this opinion, I survey the available evidence concerning the fees plaintiffs pay lawyers in diverse contexts. I discuss personal injury cases, mass tort representations, patent cases, and other business litigations. I find that fees in the range of 33 percent or higher are common in all areas. I also survey the fees lead plaintiffs promise to pay when hiring lawyers to handle securities fraud class actions. Fees tend to be somewhat lower in this context, but fees in the range requested by Class Counsel are common, even so.

Finally, I also discuss fee awards in other class actions. Although I review several empirical studies, including a forthcoming study of which I am a co-author, I believe the award in *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006), is more relevant and informative. *Allapattah Services* was tried to a jury, produced a verdict exceeding $1 billion, and lasted longer than 11 years. It is the only case I know of with these features, besides this one. Consequently, the 31.3 percent fee award it yielded is the only indicator we have about judges' views of appropriate compensation in exceptionally long-lived class actions that are tried to exceptionally large verdicts. I am familiar with *Allapattah Services* because I served as an expert witness in the case. When setting the fee, District Court Judge Alan S. Gold relied on my report.

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clients having a real stake been feasible."); *In re Synthroid Mktg Litig.*, 325 F.3d 974, 975 (7th Cir. 2003) ("*Synthroid II*") ("A court must give counsel the market rate for legal services. . . ."); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*") ("courts must do their best to award counsel the market price for legal services, in light of the risk on non-payment and the normal rate of compensation in the market at the time"); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992). (the "market rate" is "as we have been at pains to stress, [what] the lawyer . . . would have gotten in the way of a fee in an arms' length negotiation, had one been feasible"); *In re AT&T Mobility Wireless Data Services Sales Tax Litig.*, 792 F.Supp.2d 1028, 1033 (N.D. Illinois, 2011) ("The Seventh Circuit has directed district courts to estimate the market price for legal services in calculating an appropriate attorneys' fee.").

II. CREDENTIALS

I hold the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law, where I also serve as Co-Director of the Center on Lawyers, Civil Justice, and the Media. 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, the Vanderbilt University Law School, and the Harvard Law School. A copy of my resume is attached.

From 2003 through 2010, I served as an Associate Reporter on the American Law Institute's Project on the Principles of Aggregate Litigation. The ALI's membership approved the final report in 2009 and the published version appeared in 2010. See ALI, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). Many courts have cited THE PRINCIPLES with approval, including the U.S. Supreme Court.

I have taught, researched, written, consulted with lawyers, and testified about class actions, other large lawsuits, attorneys' fees, professional responsibility, and related subjects for over 15 years. I have published over 80 major writings, many of which appeared in peer-reviewed publications and many of which focus on subjects relevant to this Report.

Many federal and state court judges have relied upon my testimony when reviewing class action settlements and awarding fees. Judge Amy St. Eve recently did so in *Silverman v. Motorola, Inc.*, 2012 WL 1597388 *4 (N.D. Ill.), where she awarded a fee of 27.5 percent on a recovery of $200 million. Her decision was affirmed on appeal. *Silverman v. Motorola Solutions, Inc.*, 2013 WL 4082893 *1 (7th Cir. 2013).

Leading treatises and other authorities, including the MANUAL FOR COMPLEX LITIGATION, THIRD (1996) and the MANUAL FOR COMPLEX LITIGATION, FOURTH (2004), have cited my work

many times. 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.

Finally, because the award of attorneys' fees 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 in 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.

III. DOCUMENTS REVIEWED

When preparing this Report, I reviewed the documents listed below, all of which were prepared in the course of this lawsuit or relate to it in other ways, unless otherwise noted. I also rely on my knowledge of secondary sources, including articles published in law reviews and other journals, treatises, and other authorities.

- *Plaintiffs' Memorandum in Support of Motion for Attorneys' Fees and Expenses and Reimbursement of Reasonable Costs and Expenses for Lead Plaintiffs*
- *Corrected Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws*
- Home Page, Household International Securities Class Action, http://householdfraud.com/
- Verdict Form
- Notice of Verdict in Favor of Plaintiff Class and Against Household International, Inc., William Aldinger, David Schoenholz, and Gary Gilmer
- Final Judgment Pursuant to Federal Rules of Civil Procedure 54(b)
- Proof of Claim

- Memorandum Opinion and Order (November 22, 2010)
- Order Approving the Form and Manner of Notice
- Notice of Hearing Regarding: (A) Lead Counsel's Application for an Award of Attorneys' Fees and Expenses; and (B) Lead Plaintiffs' Application for an Award of Expenses

IV. ANALYSIS

A. Background

The history of this case is known to the Court, summarized on the website Class Counsel created to communicate with class members (Household International Securities Class Action, http://householdfraud.com/), and described in detail in *Plaintiffs' Memorandum in Support of Motion for Attorneys' Fees and Expenses and Reimbursement of Reasonable Costs and Expenses for Lead Plaintiffs*. In brief, Class Counsel filed the case in mid-2002, defeated motions to dismiss in 2004 and 2005, negotiated a settlement with Arthur Andersen in 2005, tried the case to a verdict in 2009, and secured a judgment for $2.46 billion in 2013. The verdict is now on appeal and post-judgment interest is accruing.

In the course of this hard-fought lawsuit's 11-year life, Class Counsel have so far expended more than 116,000 hours of lawyer and paraprofessional time and have borne more than $14.6 million in expenses, without being paid and while bearing an enormous risk of loss. As the case proceeds through appeals, Class Counsel will devote thousands of hours more to the litigation, shoulder more expenses, and bear the risk of non-payment for additional years. In return, Class Counsel asks the Court to award 24.37 percent of the eventual recovery, should there be one, as fees and for an award of expenses.

B. Initial Comparison to Other Class Actions—*Allapattah Services* is the Closest Case

In the history of class action litigation in the United States, this case has no equal. That is so, first, because few class actions are tried; second, because trials often go badly for plaintiffs; and, third, because billion-dollar verdicts are unheard of. As Kevin LaCroix, a prominent commentator, observed when writing about this case for *D&O Diary*:

> Of the slightly more than two dozen cases that have gone to trial since the enactment of the PSLRA [in 1995], about half have resulted in defense verdicts. Of the trials that have resulted in plaintiffs' verdicts, none have resulted in damages awards anywhere remotely approaching the size of this judgment…. The only verdict anywhere near this one (and still not all that near) was the $280 million plaintiffs' verdict in the Apollo Group case; after the defendants appealed the verdict all the way to the U.S. Supreme Court, the parties settled the case for $145 million.[2]

Trials of securities fraud class actions are rare; plaintiff wins are rarer still; and jury verdicts exceeding $280 million don't exist. Yet, this case was tried to a plaintiff verdict for $2.46 billion, including prejudgment interest. The set of comparable securities fraud class actions is empty.

Mr. LaCroix based his observations on a table of tried cases prepared by Adam Savett, a securities fraud litigator and analyst.[3] I attempted to verify Mr. Savett's entries by tracking down

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[2] Kevin LaCroix, Record $2.46 Billion Post-Verdict Judgment Entered in Long-Running Household International Securities Suit, D&O Diary (October 18, 2013), http://www.dandodiary.com/2013/10/articles/securities-litigation/record-246-billion-postverdict-judgment-entered-in-longrunning-household-international-securities-suit/.

[3] Adam Savett, Securities Class Action Trials in the Post-PSLRA Era, txtcapital (October 18, 2013), https://app.box.com/shared/xxav75dzpf.

the cases he listed. I then enriched the table by trying to determine the final case dispositions. Finally, I examined other sources and found one more tried case that Savett missed.

The table below summarizes the results of my efforts. Not only did none of the cases yield a verdict anywhere close to this one; of the cases with plaintiff verdicts that have been finally resolved, all ended on terms that were far less favorable than the trial results. In two cases—*BankAtlantic Bancorp* and *In re Homestore.com Inc. Securities Litigation*—the classes collected *nothing*. In four others—*Real Estate Associates Limited Partnerships*, *Clarent Corp.*, *Apollo Group*, and *Claghorn*—the settlements fell far short of the verdicts.

Table 1: Post-PSLRA Securities Fraud Class Actions with Pro-Plaintiff Jury Verdicts		
Case	**Verdict Amount**	**Ultimate Resolution**
In Re Real Estate Associates Limited Partnerships (C.D. Cal.)[4]	$185 million	• Verdict reduced by the trial court to $120 million; • Settled for $83 million
In re Clarent Corp. (N.D. Cal.)[5]	Unknown; verdict appears to have been on liability only	• Settled for $6.9 million
In re Apollo Group Inc. Sec. Litig. (D. Ariz.)[6]	$280 million	• Verdict overturned by trial judge post-trial; • Verdict reinstated by Ninth Circuit; • Cert denied by US Supreme Court; • Settled for $145 million
In re Vivendi Universal S.A. Sec. Litig. (S.D.N.Y.)[7]	Verdict did not determine total damages	• Post-trial motions greatly narrowed the class; • Case still pending
BankAtlantic Bancorp (S.D. Fla.)[8]	$2.41 per share	• Verdict set aside on post-trial motion and judgment entered for the defendants
In re Homestore.com Inc. Sec. Litig. (C.D. Cal.).	Per share damage award, with damages varying across fraud period;[9] described by named plaintiff as "multi-million" dollar award[10]	• No recovery; • Judgment entered for the trial defendant dismissing all claims because verdict was offset by prior settlements
Claghorn v. Edsaco Ltd. (N.D. Cal.)	$170.7 million	• Settled for $10 million

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[4] http://www.labaton.com/en/cases/Copy-of-In-re-Real-Estate-Associates-Limited-Partnership-Litigation.cfm

[5] http://securities.stanford.edu/1019/CLRN01/.

[6] http://securities.stanford.edu/1032/APOL04_01/.

[7] http://securities.stanford.edu/1024/V02-01/.

[8] http://www.dandodiary.com/stats/pepper/orderedlist/downloads/download.php?file=http%3A//www.dandodiary.com/uploads/file/bankatlpost.pdf

[9] http://www.dandodiary.com/stats/pepper/orderedlist/downloads/download.php?file=http%3A//www.dandodiary.com/uploads/file/homestorejuryverdictform.pdf.

[10] http://www.businesswire.com/news/home/20110225006092/en/CalSTRS-Receives-Judgment-Homestore-Class-Action-Suit.

The existence of settlement discounts is predictable: they are a fixture of civil litigation. Studying medical malpractice cases, my empirical research group found that 75 percent of plaintiffs who won at trial received payments less than their verdicts (adjusted for pre- and post-judgment interest). Across all years and cases, the aggregate verdict reduction was 56 percent, meaning that plaintiffs recovered only 44 percent of their jury awards. "Haircuts" increased in frequency and size with verdict amounts, meaning that the malpractice plaintiffs who won the largest verdicts discounted their verdicts the most when settling after trial.[11]

This case also has no equal for a fourth reason: It has already lasted 11 years. As class actions go, that is an incredibly long time. A study of cases resolved in 2006 and 2007 found that the average securities fraud class action lasted 1,438 days, slightly less than 4 years. Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 820, Table 2 (2010).[12] At 4000-plus days already, this case has outlived the longest securities class action in Professor Fitzpatrick's dataset—and the end is not yet in sight. With appeals, this case could last another two years.

Case duration is a proxy for risk. The longer a case lasts, the greater the risks and costs class counsel must bear. Considering duration alone, it is obvious that this case is exceptionally risky. When one adds that the Defendants will rationally spend millions of dollars to have the $2.46 billion judgment overturned and that appellate courts often reverse large verdicts, the risk is more than palpable; it is immense.

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[11] David A. Hyman, Bernard Black, Kathryn Zeiler, Charles Silver, and William M. Sage, Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988–2003, 4 JOURNAL OF EMPIRICAL LEGAL STUDIES 3 (2007).

[12] See also Michael Klausner and Jason Hegland, When are Securities Class Actions Dismissed, When Do They Settle, and For How Much?—Part II, XXIII PLUS JOURNAL 1, 4 (2010) (study of securities class actions filed from 2000 to 2003 reporting that cases that survived a motion to dismiss settled on average 24 months after the motion was decided).

The class action that, in my judgment, best compares to this one is *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006). *Allapattah Services* was a contract class action that was tried to a jury (twice), produced a $1.3 billion verdict (including pre-judgment interest), and lasted 14 years before being resolved in a $1.2 billion settlement. Lisa Orkin Emmanuel, Exxon Must Pay $1.3B to Gas Station Owners, Associated Press (May 20, 2005). As part of the settlement, the trial judge awarded 31.3 percent of the recovery as fees. I provided a report on attorneys' fees in *Allapattah Services* on which the trial judge relied.

District Court Judge Gold, who presided over *Allapattah Services*, based the 31.3 percent fee on the exceptional risk class counsel bore in the litigation and on evidence of how the market for legal services compensates lawyers who handle cases on contingency. Writing in 2006, he observed that

> Class Counsel, having worked on this case since 1992, faced a potential catastrophic risk in the event the case was lost at trial or, thereafter, at each level of review. Given the length of this case, and the significant risks inherent in the litigation, I conclude that the most appropriate way to establish a benchmark is by reference to the market rate for a contingent fee in private commercial cases tried to judgment and reviewed on appeal. *See … In re Synthroid Marketing Litig.,* 264 F.3d 712, 718 (7th Cir.2001) (requiring that "common fund" percentage awards be determined by market rate for contingency fee agreements on a prospective basis at the outset of the representation).

Allapattah Services, 454 F. Supp. 2d at 1203. This was hardly the only time Judge Gold mentioned the risk inherent in the case. He did so repeatedly. For example, he quoted from an expert report by "Professor John Coffee of Columbia University (the foremost academic scholar

on class action attorneys' fees awards[)]," who stated: "'No other action that I have seen approaches this one in the degree of success obtained for the class, the effort expended by class counsel, or the risk assumed.'" *Id.*, at 1205 (quoting Coffee Declaration, ¶ 2).

The *Allapattah Services* fee award is also a good comparator for this case because Judge Gold wholeheartedly embraced the logic of the Seventh Circuit's decisions when setting it. In the passage quoted above, he relied on Judge Easterbrook's opinion in *Synthroid I*. Later on, when rejecting the so-called mega-fund rule according to which the fee percentage must decline as the recovery increases, he quoted *Synthroid I* again:

> We have held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time…. Private parties would never contract for [the mega-fund rule], because it would eliminate counsel's incentive to press for [larger recoveries].

Allapattah Services, 454 F. Supp. 2d at 1211-1212 (quoting *In re Synthroid Marketing Litig.,* 284 F.3d at 718). The *Allapattah Services* fee award is one that a federal district court judge in the Seventh Circuit might have issued.

When considering how the market compensates lawyers for incurring risks, Judge Gold took note of the fees customarily paid in commercial representations and of the amounts class members actually agreed to pay in signed retainer agreements with class counsel. See *Allapattah Services,* 454 F. Supp. 2d at 1209. Both equaled or exceeded 31.3 percent.

Taking *Allapattah Services* as a guide, one could easily conclude that a similar fee is justified here. Yet, Class Counsel has applied for only 24.37 percent, a much smaller fee percentage. Obviously, the smaller percentage will yield an enormous fee award *if* the trial verdict is held and collected in full. Even then, however, it will be reasonable, for many reasons.

- The requested fee compares favorably to fees prevailing in the market for legal services.
- The Named Plaintiff agreed to pay the requested fee to Class Counsel.
- The requested fee falls within the range judges have historically awarded in class actions.
- The requested fee is justified on the basis of the risks incurred, the effort expended, and the results obtained.

I discuss the evidence supporting these opinions in the sections that follow.

C. Market Rates

Starting with the first article I published as a law professor, I have urged judges to base class action fee awards on market rates. I did so because the practice of awarding fees in class actions is grounded in the law of restitution, which normally uses market rates as the standard for compensation. See Charles Silver, A Restitutionary Theory of Attorneys' Fees in Class Actions, 76 CORNELL L. REVIEW 656, 700 (1991) ("Quasi-contractual damages usually equal the reasonable or market value of the service provided. In the words of one commentator, "[q]uasi-contract proceeds on the fiction of an implied promise to pay.... If there were a real promise, it would probably be to pay the market value, and the implied promise is analogized to that.") (quoting Douglas Laycock, MODERN AMERICAN REMEDIES 488 (1985)).

1. <u>In the Market for Legal Services, Percentage Compensation Predominates in Plaintiff Representations Taken on Contingency</u>

When considering how the market for legal services compensates attorneys, the first thing to notice is that plaintiffs normally pay percentage fees to lawyers hired on contingency. This is true in all contexts, insofar as I am aware. Paying clients rarely pay lawyers by the hour and they almost never use the lodestar method.

In 1998, Professor Herbert Kritzer, now of the University of Minnesota Law School, published the results of a survey of Wisconsin lawyers that produced 511 usable responses containing information on 989 cases, including 332 that were unfiled, 390 that were filed but not tried, and 267 that went to trial. Only 3 percent of the cases "involved a fee with a contingency element that did not conform to the standard percentage fee arrangement." None of the variations Professor Kritzer described resembled the lodestar method; that is, none combined a contingent hourly rate with a multiplier. Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL LAW REVIEW 267, 284-288 (1998).

The lawyers Professor Kritzer surveyed represented mainly individuals in personal injury cases. Business clients normally pay contingent percentage fees too. For example, when Professor David Schwartz studied fee arrangements in patent cases, he discovered that contingent percentage compensation dominates the market. David L. Schwartz, The Rise of Contingent Fee Representation in Patent Litigation, 64 ALABAMA LAW REVIEW 335 (2012). The fee agreement between Class Counsel and the Named Plaintiff is typical in this regard. It entitles Class Counsel to contingent percentage compensation, not a guaranteed hourly rate or other form of payment. In this respect, it resembles every other fee agreement I have ever seen employed in a securities fraud class action.

The Seventh Circuit has recognized repeatedly that contingent percentage compensation dominates the market for plaintiff representations. See *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) ("When the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee ***is*** the market rate.") (emphasis in original); *In re Continental Illinois Securities Litigation*, 962 F.2d 566, 572-573 (7th Cir. 1992) ("We know that in personal-injury suits the usual range for contingent fees is between 33 and 50 percent but we

also know that in large commercial litigation with prospects of multimillion dollar recoveries the percentage frequently is tapered-it might be 33 percent of the first million, 25 percent of the next million, and so on down."). This is why the Seventh Circuit used the percentage-of-the-fund approach when setting fees itself in *Synthroid II*, 325 F.3d at 980. The panel led by Judge Easterbrook awarded consumer class counsel 30 percent of the first $10 million, 25 percent of the next $10 million, 22 percent of the next $26 million, and 15 percent of all amounts over that. The panel did not even consider using the lodestar approach.

The PSLRA also supports the use of the contingent percentage method. The text of the statute reflects Congress' expectation that the reasonableness of fee awards would be determined on a percentage basis. The statute provides that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount" recovered for the class. 15 U.S.C. §78u-4(a)(6). The statute does not mention the lodestar, and courts awarding fees in PSLRA cases have rarely applied it.[13]

2. Contingent Fees Normally Exceed 25 Percent of the Recovery

a. Personal Injury Cases

If fees paid by personal injury clients were dispositive of the amounts judges presiding over class actions should award, this Report would be brief. There is broad agreement among researchers and judges that, in these cases, contingent fees normally range from 25 percent to 40 percent and average one-third of the recovery. This belief is so widespread that explaining the stability of high contingent percentage fees has become a major project for academics. See, e.g., Eyal Zamir, Barak Medina, and Uzi Segal, The Puzzling Uniformity of Lawyers' Contingent Fee

[13] Courts presiding over securities class action settlements have used the lodestar methods as a cross-check on percentage-based fees. They have rarely used the lodestar method as the sole or primary basis for fee calculations.

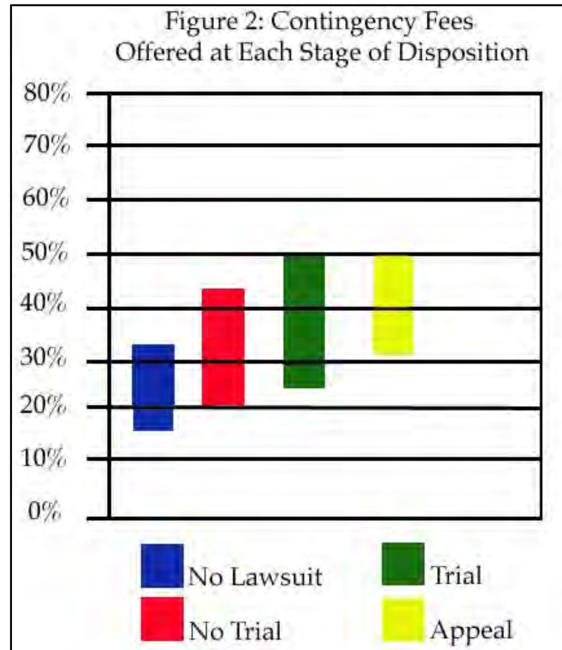
Rates: An Assortative Matching Solution (draft of January 16, 2012), available at http://ssrn.com/abstract=1986491.

Empirical studies show that although one-third fees are common, the conventional wisdom overstates their frequency. Contingent percentage fees vary in size, both within practice areas and across them. Generally speaking, they range from a low of 20 percent in automobile accident cases that settle even before complaints are filed to a high of 50 percent in medical malpractice cases. The variation reflects, among other things, the differing risks and costs that different lawsuits entail.

Both the prevailing rates in personal injury lawsuits and the variation in charges were documented by a RAND report published in 1991. The authors of this study interviewed a structured random sample of approximately 2770 persons who suffered accident-related injuries, 387 of whom had hired attorneys. Looking solely at the members of this group who agreed to pay contingent fees, they found that "[t]he median fee ratio for those who agreed to a fixed amount was 33 percent (mean = 29 percent)." Deborah R. Hensler et al., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 135-36 & tbl.5.11 (RAND 1991), available at http://www.rand.org/pubs/reports/2006/R3999.pdf.

Herbert Kritzer is the country's leading empirical researcher of attorneys' fees in plaintiff representations. In an article based on a sample of 989 representations in Wisconsin, he reports that in slightly more than half the cases the client agreed to pay a one-third contingent fee. Herbert M. Kritzer, Investing in Contingency Fee Cases, WISCONSIN LAWYER 11, 12 (August 1997). Many other clients agreed to pay contingent percentages that varied in size according to the stage litigation reached before ending. The figure reproduced below, taken from the same

article, shows the range of percentages agreed to for each stage of litigation. As is visually apparent, fees below 25 percent are exceptional.



Source: Herbert M. Kritzer, Investing in Contingency Fee Cases, WISCONSIN LAWYER 11, 12 (August 1997).

A RAND study of federal lawsuits found that, of the cases in which contingent fees were paid, the percentage was 33 percent over half the time, less than 33 percent about a quarter of the time, and more than 33 percent in the remainder. See Herbert M. Kritzer, Seven Dogged Myths Concerning Contingency Fees, 80 WASHINGTON UNIVERSITY LAW QUARTERLY 739, 760 (2002) (summarizing data reported in James S. Kakalik et al., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996)).

Most recently, Nora Engstrom published two articles studying law firms she describes as "settlement mills." These firms advertise heavily and handle large volumes of small claims. According to Professor Engstrom, "every one of the twelve settlement mills [she] studied charges a tiered contingency fee," and most charge "at least 33%—and perhaps as high as 40%."

Nora Freeman Engstrom, Sunlight and Settlement Mills, 86 NEW YORK UNIVERSITY LAW REVIEW 805, 846 (2011).

Judges know that market rates normally equal or exceed 33.3 percent of recoveries in personal injury cases. In *Gaskill v. Gordon*, 160 F.3d 361, 362-63 (7th Cir.1998), where he affirmed a 38 percent fee, Judge Posner stated that the market range for contingent fee cases is 33 percent to 40 percent. He put the range at 33 percent to 50 percent in *In re Continental Illinois Securities Litigation.*, 962 F.2d 566, 572-573 (7th Cir. 1992), quoted above. Many cases contain similar observations. *See, e.g., Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) ("A customary contingency fee would range from 33% to 40% of the amount recovered."); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("[I]n private contingency fee cases . . . plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."); *In re M.D.C. Holdings Sec. Litig.,* No. CV 89-0090 E (M), 1990 U.S. Dist LEXIS 15488 at *22 (S.D. Cal. Aug. 30, 1990) (noting fees typically in the range of 30 percent to 40 percent in private contingent fee agreements).

Plainly, if personal injury representations provide any guidance, fee awards in class actions must exceed 25 percent.

b. Mass Actions

Mass actions are litigations in which lawyers represent large numbers of clients, with each client having a signed retainer agreement. Examples include asbestos lawsuits, defective products litigation, pollution cases, certain cases involving investments, and mass accidents and disasters, such as hotel fires and airplane crashes.

Mass actions arguably provide the best evidence of the fees claimants would voluntarily offer and lawyers would voluntarily accept at the outset of class litigation, because they resemble

class actions in important respects. First, mass actions bring together multitudes of clients whose claims are factually and legally related. When an explosion occurs, for example, issues relating to the blast—why it happened, when it happened, how large it was, etc.—are common to all persons claiming injuries. Legal issues, such as whether the defendant owed the claimants a duty of care, may be common as well. This means that plaintiffs can gain economies of scale by aggregating their cases. Scale economies exist in class actions too.

Second, mass tort cases and class actions both usually involve corporations and insurers on the defense side, for the simple reason that the liabilities are too great to be satisfied by individuals. Often, the parties on the defense side possess tremendous resources and significant experience in litigation. This means that, in both contexts, plaintiffs' lawyers must be incentivized to bear large risks and make sizeable litigation investments.

Mass actions also provide valuable information about fees because lawyers compete for the opportunity to represent clients when news of a mass tort breaks. Although lawyers were once prohibited from advertising, they now make their willingness to represent mass tort victims widely known. A person injured by an oil spill, exposure to a toxic drug, or any other mass tort can find lots of lawyers just by doing a "Google" search. Because advertising is widespread and the pool of lawyers willing to handle mass actions is deep, one expects the market to price lawyers' services efficiently.

Having reviewed the literature on mass actions and participated as a consultant in many group lawsuits, I can confidently report that contingent fees of 33 percent-40 percent are common in mass actions and that higher fees often prevail. I start with my anecdotal knowledge, which rests on reports of fees in cases I read about or participated in personally. Here are a few examples.

- Approximately 1,700 plaintiffs alleging asbestos-related personal injuries each agreed to pay fees in the range of 33 to 40 percent, with expenses separately reimbursed.
- Six hundred plaintiffs who suffered property damage as a result of an explosion at a natural gas storage facility agreed to pay fees of 33 percent of the recovery, plus expenses.
- Approximately 60,000 plaintiffs who suffered property damage as a result of defective polybutylene plumbing agreed to pay fee of 40 percent of the recovery, plus expenses.
- In litigation alleging person injuries stemming from the use of prescription drugs, such as Fen-Phen, Vioxx, or Paxil, fees range from 33 percent to 40 percent, with expenses separately reimbursed.
- In a follow up to a class action lawsuit against TransUnion, more than 60,000 clients who accused TransUnion of using their credit information unlawfully agreed to pay fees and expenses exceeding 40 percent.

These examples are neither isolated nor idiosyncratic. Their typicality is reinforced by large numbers of anecdotal reports covering decades. In the Dalkon Shield litigation conducted in the early 1990s, thousands of claimants signed contingent fee arrangements providing for fees between one-quarter and one-half of the recovery, with most charging one-third. *In re A.H. Robins Co., Inc.*, 182 B.R. 128, 131 (E.D.Va. 1995). In the aftermath of the terrorist attacks on September 11, 2001, thousands of rescue and clean-up workers hired lawyers on terms requiring them to pay one-third of their recoveries. 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. In 2010, thousands of clients with

claims against BP arising out of the Deepwater Horizon catastrophe promised to pay contingent fees in the range of 40 percent to 50 percent. 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/. Except for airplane crash litigation, which I discuss below, I cannot recall hearing of a mass tort case in which the fees fell below 25 percent. In most such cases, the percentages are considerably higher.

Studies of litigation costs in mass tort cases reach conclusions consistent with my observations. A study of asbestos litigation by the Institute for Civil Justice at RAND examined over 3,000 claims that closed before August, 1982. It found that plaintiffs' legal fees and other litigation expenses consumed an average of about 42 percent of plaintiffs' gross recoveries. James S. Kaklik, et al., COSTS OF ASBESTOS LITIGATION Table S.2 (RAND 1983). A second RAND study of asbestos cases reported legal fees and expenses consumed 39 percent of plaintiffs' gross recoveries. James S. Kakalik et al., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xviii Figure S.1 (RAND 1984).[14]

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[14] In the authors' words:

> We have concluded that legal fees in tried [asbestos] cases were typically 33 to 45 percent of total compensation, and averaged about 39 percent. Other expenses in tried cases ranged from 1 to 12 percent of recovery, but were generally about 6 percent.
>
> Plaintiffs' legal fees as a percentage of compensation were lower for settled cases; they typically ran from 28 percent to 40 percent with an average of 34 percent. Other expenses on settled claims averaged approximately 5 percent of the recovery, though on occasion they were much higher or lower.
>
> In summary, the average plaintiff litigation expenses (including both legal fees and other expenses) were 39 percent of total compensation for all 1980-1982 closed claims combined.

Id., at 83-84.

Researchers familiar with mass tort lawsuits involving other products report similar rates. Consider the following statement by Professor Lester Brickman, who otherwise disagrees with me on just about everything:

> "In these nonclass aggregate litigations, lawyers solicit or otherwise obtain hundreds and even thousands of clients who have similar claims against a single defendant, and typically charge contingency fees ranging from one-third to forty percent. Indeed, forty percent appears to have become the standard contingency fee in nonclass mass tort litigation.

Lester Brickman, Anatomy of an Aggregate Settlement: The Triumph of Temptation over Ethics, 79 GEORGE WASHINGTON LAW REVIEW 700, 706 (2011).

The only mass tort area in which lower charges prevail, to my knowledge, is litigation arising out of commercial airplane disasters. A footnote to ABA Formal Opinion 94-389 reports that "[i]n cases where airline insurers voluntarily sent out the 'Alpert letter' which makes an early settlement offer and concedes all legal liability, average contingent fee rates dropped to 17% and were often only charged on a portion of the recovery." ABA Formal Opinion 94-389, n. 13 (1994) (citing L. Kriendler, The Letter: It Shouldn't be Sent, 12 THE BRIEF 4, 38 (November 1982)). Market forces explain these lower percentages, as, in the same footnote, the ABA opinion observes. When a defendant concedes liability and puts a settlement offer on the table from the get-go, risks fall and the market pays contingent fee lawyers less for handling cases.

In this case, of course, the Defendants denied liability and insisted on trying the case. The fee award should therefore vastly exceed the percentages lawyers receive in commercial

aircraft disasters where liability is conceded. Taking contested mass actions as a guide, the fee award should again exceed 25 percent.

c. Contingent Fees Paid By Sophisticated Business Clients

Commentators often criticize the size of contingent fees paid in personal injury cases. When thinking about the fees judges should award in class actions, one might therefore prefer to know what business clients agree to pay when they hire lawyers on contingency. Business clients can shop for lawyers and compare rates. They are often experienced negotiators who use lawyers repeatedly. They also possess good information about market rates. The fees they pay should reflect the value of the services lawyers provide.

Unfortunately, we know less about the fees business clients pay than we might. There are few empirical studies of contingent fees in commercial cases.[15] No databases collect this information, and businesses that sue as plaintiffs rarely make their fee agreements public. Consequently, most of what we know about the contingent fees sophisticated clients pay is drawn from anecdotal reports. Businesses also frequently use hybrid arrangements that combine guaranteed payments with contingent bonuses.[16] These arrangements hold few lessons for class actions because lawyers representing plaintiff classes must work on straight contingency. That said, the limited evidence available on the use of pure contingent fees by sophisticated clients shows that marginal percentages tend to be high.

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[15] I have studied the costs insurance companies incur defending liability suits empirically using a large database of closed claims in Texas. 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 AMERICAN LAW AND ECONOMICS REVIEW 185 (2008).

[16] In a recent case against Bank of American, 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, CORPORATE COUNSEL (Online) April 9, 2010.

Academic researchers have recently begun to study contingent fees used in intellectual property cases, especially cases involving patent infringement. Reports of high percentages in this area abound. The most famous such instance involved NTP Inc. and Research In Motion Ltd., the company that manufactures the popular Blackberry. NTP promised its law firm, Wiley Rein & Fielding ("WRF"), a one-third contingent fee. When the case settled for $612.5 million, WRF received more than $200 million in fees, a 33 percent contingency. 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. Another famous case involved the law firm of Dickstein Shapiro, which was reported to be entitled to a fee of $90 million under a *partial* contingent fee agreement,[17] if a $501 million jury award against Boston Scientific Corp. stood up on appeal. Martha Neil, Dickstein Contingent-Fee Payout Could Be $600K Per Partner, ABA JOURNAL (May 20, 2008). In another instance, the Texas law firm of McKool Smith won a $200 million jury verdict against Microsoft for Toronto-based i4i Inc. Penalties and interest added $90 million to the total. The firm's share, under another *partial* contingent fee agreement,[18] was reported to be $60 million, again assuming the verdict held up. Cheryl Hall, Patents and patience pay off for Dallas law firm McKool Smith, THE DALLAS MORNING NEWS, March 27, 2010.

In a recent article, Professor David L. Schwartz reports findings based on interviews with 44 experienced lawyers who represent plaintiffs in patent cases and his review of 42 contingent

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[17] In a partial contingent fee agreement, the contingent bonus, usually but not necessarily a percentage of the recovery, applies on top of other guaranteed compensation, such as a fixed payment upfront or a discounted hourly rate. Because guaranteed compensation is unavailable in class actions, partial contingent fee agreements provide no guidance for fee percentages in securities class actions.

[18] See preceding footnote.

fee agreements. David L. Schwartz, The Rise of Contingent Fee Representation in Patent Litigation, 64 ALABAMA LAW REVIEW 335 (2012). His conclusion: The percentages are high.

> On the whole, the contingent rates are similar to the "one-third" that a stereotypical contingent personal injury lawyer charges. There are two main ways of setting the fees for the contingent fee lawyer: 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%.

Id., at 360.

Schwartz's findings are consistent with anecdotal reports from other sources. For example, the author of a blog on patent litigation writes of contingent fee arrangements 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.

Mark Cutler, Contingent Fee Patent Litigation, and Other Options, PATENT LITIGATION, http://intellectualproperty-rights.com/?page_id=30 (reviewed March 13, 2012).[19]

[19] This item can now be found at http://patentlitigationstrategy.com/?page_id=30.

An example of the use of scaled contingent percentages in patent litigation appears in *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, LLP, et al.*, 105 S.W.3d 244 (Tex. Appls.—Houston, 2003), which involved a sophisticated client with an enormous intellectual property claim. The decision reports that the plaintiff agreed to pay his attorneys a scale of contingent percentages. "Under the fee agreement, Tanox agreed to pay the Lawyers a contingency fee pursuant to a sliding scale: 25% of the first $32 million recovered by Tanox, 33 1/3% of recovery from $32 million to $60 million, 40% of recovery from $60 million to $200 million, and 25% of recovery over $200 million." *Id.* at 248-249. The agreement also contained other provisions favorable to the lawyers, including a promise of "$100 million if they obtained a permanent injunction." "The total fees Tanox agreed to pay the Lawyers were capped at $500 million and the total fees derived from royalties were capped at $300 million." *Id.* at 249. Like NTP in the *Blackberry* litigation, Tanox agreed to pay both a high percentage and a potentially enormous amount.

The payment of high contingent fees in patent cases is not a new phenomenon. In 1993, THE AMERICAN LAWYER ran a cover story featuring patent contingency litigator Gerald Hosier, who reportedly made over $150 million in a single year, "more than the draws of all the equity partners at New York's Cravath, Swaine & Moore and Chicago's Winston & Strawn combined." Stewart Yerton, The Sky's the Limit, THE AMERICAN LAWYER (May 1993). An article published in 1997 reported that attorney Alfred Engelberg began handling patent cases on contingency in 1985. In an interview, Engelberg stated that he "ha[d] been involved in seven contingent patent challenges over the last 10 years … and ha[d] received remuneration in excess of $100 million. On an hourly basis, even if the cases had been fully staffed, the cases would have produced a total of no more than ten to fifteen million dollars in billing." P.L. Skip Singleton, Jr., Justice For

All: Innovative Techniques for Intellectual Property Litigation, 37 IDEA 605, 610 (1997). Clearly, in the segment of the market where sophisticated businesspeople hire lawyers to handle 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.

Turning from patent lawsuits to business representations more generally, many examples show that high percentage compensation is common. In *ETSI Pipeline Project v. Burlington N., Inc.*, No. B-84-979-CA, 1989 U.S. Dist. LEXIS 18796 (E.D. Tex. June 5, 1989), a famous case from the 1980s, ETSI Pipeline Project (EPP) hired Vinson & Elkins (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. In a sworn affidavit, Harry Reasoner, 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. Arizona, Nov. 30, 1990).

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 expenses. The percentage was high even though, by comparison to securities fraud class actions,

where lawyers advance costs and bear the risk associated with them under the end of litigation, the deal was favorable to the law firm. Third, the case was enormous, ultimately generating a huge recovery. 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.

If lawyers who write about fee arrangements in business cases can be believed, high contingent percentages remain common today. 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, according to which:

> 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).

A recent case shows, in monetary terms, that lawyers who handle business disputes on contingency can earn enormous premiums over their hourly rates. In 2012, the U.S. Court of Appeals for the Tenth Circuit issued an opinion in a case involving a dispute over the fee a business client owed to the law firm of Susman & Godfrey (Susman). Susman had handled an oil and gas matter for the client on the following terms. "Under the Fee Agreement, [the client] agreed to pay Susman 30% 'of the sum recovered by settlement or judgment,'" subject to caps based on when the lawsuit was resolved. *"[T]he Fee Agreement capped fees at $50 million if the case settled within one year after the action was filed.*" *Grynberg Production Corp. v. Susman Godfrey, L.L.P.*, No. 10-1248, (10th Cir. February 16, 2012), available at http://law.justia.com/cases/federal/appellate-courts/ca10/10-1248/10-1248-2012-02-16.html. The fee agreement thus entitled Susman to be paid $50 million for a year or so of work—and that is what an arbitrator decided Susman should receive (subject to an offset of less than $2 million that, for present purposes, is irrelevant).

Moving closer to the securities litigation context, examples of high contingent fees can be found in reported cases involving business clients who retained lawyers to participate on their behalf in class actions. One such instance is described in *Synthroid II*. There, financial intermediaries with tens of millions of dollars at stake agreed to pay outside law firms fees averaging 22 percent of the recovery *even though a settlement was already on the table when the lawyers were hired*. The lawyers' job was merely to garner as much as possible of the settlement fund for the clients, not to litigate the case. Given the lack of risk of non-payment, the size of the percentage reflects well on the 24.37 percent fee requested by the lawyers in this case, who bore an enormous risk of non-payment and incurred sizeable expenses on behalf of the class.

More information can be found in an expert report Professor John C. Coffee, Jr. filed in *In re: High Fructose Corn Syrup Antitrust Litigation*. According to Professor Coffee, the two named plaintiffs, Zarda Enterprises and Publix Supermarkets Inc., agreed to pay fees of 30 percent and "more than 25%," respectively. In the same case, an opt-out claimant, Gray & Co, agreed to pay its attorney 33 percent-40 percent of the recovery, depending on the time of settlement. Three other corporate class members, Honickman Group, The Coca-Cola Company, and Admiral Beverage Corporation, submitted affidavits stating that they would have paid at least a 25 percent fee. *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), pp. 1-2. In the same lawsuit, class counsel submitted a list showing the contingent percentage fees agreed to by 6 named plaintiffs, all of which were businesses that purchased corn syrup. The percentages ranged from 20 percent to 33 percent, often varying with the duration of the lawsuit. *Plaintiffs' Supplemental Memorandum on Attorneys' Fees in Common-Fund Cases*, Exhibit E, submitted in *In re: High Fructose Corn Syrup Antitrust Litigation,* M.D.L. 1087 (C.D. Ill. Oct. 7, 2004).

Although the information presented in this section is admittedly anecdotal, its cumulative weight is impressive and it supports a straightforward conclusion. Sophisticated business clients usually agree to pay contingent fees exceeding 25 percent of their recoveries. Class Counsel's request for 24.37 percent is reasonable by comparison.

D. Fee Agreed to by the Named Plaintiff

In early 2005, Lead Plaintiff IUOE and its fund counsel negotiated a fee agreement with Class Counsel. Although the case commenced in 2002, the outcome was then still unknown, as it is today. No settlement offer was on the table. There was a real prospect of losing the case. The terms of the fee agreement should therefore reflect the risk Class Counsel incurred.

The fee agreement that emerged from the negotiations entitles Class Counsel to a varying percentage of the recovery, shown in the table below. As the Court can see, the percentages are lower than those personal injury clients, mass tort clients, and business clients normally pay.

Table 2: Scale of Percentages Agreed to by Lead Plaintiff IUOE	
Recovery Increment	**Fee**
$1-$50 Million	19%
$50 Million-$150 Million	22%
> $150 Million	25%

The percentages in the table are also comparable to the fees that institutional lead plaintiffs agreed to pay in other securities fraud cases. The following table displays the sliding scales used in a selection of other cases.

Table 3: Scales of Percentages Used in Other Securities Class Actions		
Case	**Recovery Increment**	**Fee**
In re Dollar General Corporation Securities Litigation	$0-$15 Million	15%
	$15-$30 Million	17.50%
	$30-$60 Million	20%
	Greater than $60 Million	22.50%
Schwartz v. TXU Corp.	$0-$20 Million	18%
	$20-$40 Million	20%
	$40-$75 Million	22%
	Greater than $75 Million	24%
Pirelli v. Hanover Compressor Company, et al	$0-$10 Million	14%
	$10-$25 Million	18%
	Greater than $25 Million	24%
In re NorthWestern Corporation Securities Litigation	$0-$6 Million	17%
	$6-$12 Million	19%
	$12-$18 Million	23%
	Greater than $18 Million	27%
In re Cardinal Health, Inc. Securities Litigation	$0-$50 million	19%
	$50-$150 million	23%
	Greater than $150 million	25%

Obviously, Table 3 does not present an exhaustive list. There are many other cases in which scales were used, some of which involved lower fee percentages. In the *Enron* litigation, for example, the named plaintiff agreed to a sliding scale that topped out at 10 percent. If named plaintiffs and lawyers are bargaining, variation must be expected as fees are tailored to the facts of cases. My point is only that the fees shown in Table 2 are reasonable because institutional named plaintiffs agreed to similar fee percentages in other securities fraud cases.

As mentioned above, in *Silverman v. Motorola, Inc.*, 2012 WL 1597388 *4 (N.D. Ill.), Judge St. Eve awarded a 27.5 percent fee on a recovery of $200 million. When doing so, she relied on a report in which I surveyed the evidence on contingent fees paid by sophisticated clients. Judge Easterbrook affirmed her award because he agreed with her and me that the case

was exceptionally risky. *Silverman v. Motorola Solutions, Inc*., 2013 WL 4082893 (7th Cir. 2013).

Even so, Judge Easterbrook raised doubts about the propriety of awarding a flat percentage fee in an enormous case. Even though he rejected the mega-fund rule in *Synthroid I*, when reviewing the *Silverman* fee award he argued that the marginal fee percentage should decline as the recovery rises. Judge Easterbrook reached this conclusion partly because he thought my expert report contained no examples in which real clients agree to pay flat or rising percentages in large cases. In his words: "Professor Silver's report does not identify suits seeking more than $100 million in which solvent clients agree *ex ante* to pay their lawyers a flat portion of all recoveries, as opposed to a rate that declines as the recovery increases." *Silverman v. Motorola Solutions, Inc*., 2013 WL 4082893 *3 (7th Cir. 2013).

It should now be clear that Judge Easterbrook overlooked some of the evidence in my *Silverman* report. First, like this Report, the one I submitted in *Silverman* contained *several* examples of the type he said were missing. Table 4, below, summarizes four of them. Second, and also like this Report, my *Silverman* report examined other evidence, including more complicated examples involving high fee percentages; Professor Schwartz's study of fee contracts used in patent cases, which found that flat percentage fees in the 33.3 percent-40 percent range predominate; and an article by a prominent business lawyer who reported that fees in this range were common. Finally, in case any doubt should remain, Tables 2 and 3, which were not in my *Silverman* report, contain entries showing that sophisticated business clients serving as lead plaintiffs in securities fraud class actions have used rising scales of percentages in cases with possible recoveries exceeding $100 million. By using a rising scale of percentages in this case, the Lead Plaintiffs acted reasonably.

Table 4: Cases With Actual or Anticipated Recoveries of $100 Million or More and Flat or Rising Scales of Marginal Fee Percentages		
Case	**Fee Structure**	**Recovery**
NTP v. Research In Motion Ltd.	• 33.3% of the recovery.	$612.5 million
Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, LLP, et al.	• 25% of the first $32 million; • 33.3% of the recovery from $32 million to $60 million; • 40% of recovery from $60 million to $200 million; • 25% of recovery over $200 million.	N/A
ETSI Pipeline Antitrust Litigation	• 33.3% of the recovery, with the client bearing expenses.	$634.9 million
Allapattah Services, Inc. v. Exxon Corp.	• 33.3% of the recovery	$1.2 billion

E. Fees Historically Awarded in Settled Class Actions

The history of fee awards in class actions does *not* provide evidence of market rates. It shows how judges have regulated fees, and judges have often departed markedly from market-based rates and practices. They have done so, for example, by applying the lodestar method and lodestar cross-checks, neither of which are used by real plaintiffs with any frequency. They have also applied a mega-fund rule that real clients would never adopt, for reasons Judge Easterbrook explained in *Synthroid I*, 264 F.3d at 718.

With this caveat in mind, I start the discussion of the history of fee awards by observing that judges have often awarded high percentage fees in class actions with enormous recoveries. Table 5 lists 66 class actions with recoveries of at least $100 million and fees awards of 20 percent or more. In many of these cases, the awards equal or exceed 24 percent. The Court can award the fee Class Counsel requests in this case without leaving the beaten path.

Table 5: Mega-Fund Class Actions with Fee Awards of 20% or More			
	Case	**Recovery (millions)**	**Fee Award**
1	*Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006)	$1,060	31.33%
2	*In re AT & T Mobility Wireless Data Services Sales Tax Litig.*, 792 F. Supp. 2d 1028 (N.D. Ill. 2011)	$956	20.00%
3	*In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 2000 WL 204112 (N.D. Ill. Feb. 10, 2000)	$697	25.00%
4	*In re Fructose Antitrust Litig.*, MDL No. 1087, Master File No. 94-1577 (C.D. Ill. Oct. 4, 2004)	$531	25.00%
5	*In re Initial Pub. Offering Sec. Litig.*, 671 F.Supp.2d 467 (S.D.N.Y. 2009)	$510	33.30%
6	*Spartanburg Regional Health Services Dist., Inc., et al. v. Hillenbrand Industries, Inc. et al.*, No. 7:03-2141-HFF (D. S.C. Aug. 15, 2006)	$468	25.00%
7	*In re Adelphia Communs. Corp. Sec. and Derivative Litig.*, No. 03 MDL 1529(LMM), 2006 WL 3378705 (S.D.N.Y. Nov. 16, 2006)	$455	21.40%
8	*In re Air Cargo Shipping Servs. Antitrust Litig. ("Air Cargo I")*, No. 06–MD–1775, 2009 WL 3077396 (E.D.N.Y. Sept. 25, 2009) ($85 million); *In re Air Cargo Shipping Services Antitrust Litig. (Air Cargo II)*, No. 06–MD–1775, MDL 1775, 2011 WL 2909162 (E.D.N.Y. July 15, 2011) ($153.8 million); & *In re Air Cargo Shipping Services Antitrust Litig. (Air Cargo III)*, No. 06–MD–1775, MDL 1775, 2012 WL 3138596 (E.D.N.Y. Aug. 2, 2012) ($183.4 million)	$422.2	25.00%
9	*In Re (Bank of America) Checking Account Overdraft Litigation*, 830 F.Supp.2d 1330 (S.D. Fla. 2011)	$410	30.00%
10	*In re Freddie Mac Sec. Litig.*, No. 03-CV-4261 (JES), (S.D.N.Y. Oct. 27, 2006)	$410	20.00%
11	*In re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL 34312839 (D.D.C. July 16, 2001)	$365	34.60%
12	*In Re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, No. M:02-cv-01486-PJH, MDL-02-1486 (N.D. Cal. Nov. 1, 2006)	$326	25.00%
13	*In re Rite Aid Corp. Sec. Litig. (Rite Aid I)*, 146 F.Supp.2d 706 (E.D.Pa.2001)($193 million) & *In re Rite Aid Corp. Sec. Litig. (Rite Aid II)*, 362 F.Supp.2d 587 (E.D.Pa.2005) ($126 million)	$319	25.00%
14	*Cooper v. IBM Personal Pension Plan*, 2005 WL 1981501 (S.D. Ill. 2005)[1]	$314	28.30%
15	*In re Williams Sec. Litig.*, No. 02-cv-072-SPF-FHM (N.D. Okla. Feb. 12, 2007)	$311	25.00%
16	*In re Oxford Health Plans, Inc. Sec. Litig.*, MDL 1222 (S.D.N.Y. June 2003)	$300	28.00%
17	*In re DaimlerChrysler AG Sec. Litig.*, No. 00-0993 (KAJ) (D. Del. Feb. 5, 2004)	$300	22.50%
18	*In re Enron Corp. Sec. and ERISA Litig.*, MDL 1446, Case 4:01-cv-03913 (S.D. Tex. July 24, 2006)	$264	20.00%

	Case	Recovery (millions)	Fee Award
19	*In re Am. Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, MDL No. 834 (D. Ariz. July 24, 1990)[2]	$250	26.60%
20	*In re Comverse Technology, Inc. Securities Litig.*, 2010 WL 2653354, 6 (E.D.N.Y., 2010)	$225	25.00%
21	*In re Buspirone Antitrust Litig.*, No. 01-MD-1410 (S.D.N.Y. Apr. 11, 2003)[3]	$220	33.30%
22	*In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995)	$220	30.00%
23	*In re Waste Mgmt., Inc. Sec. Litig.*, No. 97-7709, 21 Class Action Rep. 263 (N.D. Ill. filed Sept. 17, 1999)	$220	20.80%
24	*In re Washington Mutual, Inc. Sec. Litg.*, No. 2:08-md-01919 MJP (W.D. Wash. Nov. 4, 2011)	$208.5	21.00%
25	*In re Linerboard Antitrust Litig.*, 2004 WL 1221350 (E.D. Pa. 2004)	$203	30.00%
26	*Silverman v. Motorola, Inc.*, No. 07 C 4507, 2012 WL 1597388 (N.D. Ill. May 7, 2012)	$200	27.50%
27	*Weatherford Roofing Co., et al. v. Employers National Ins. Co.*, No. 91-05637 (116th Dist. Ct, Dallas, TX) (Dec. 1, 1995)	$190	31.60%
28	*In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D.Tex.1999)[4]	$190	25.00%
29	*In re Home-Stake Prod. Co. Sec. Litig.*, MDL No. 153 (N.D.Okla. Jan. 2, 1990)	$185	30.00%
30	*In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327 (Bankr. D. Md. 2000)[5]	$185	40.00%
31	*In re Relafen Antitrust Litig., No. 01-12239,* 2004 U.S. Dist. LEXIS 28801 (D. Mass. Apr. 9, 2004)	$175	33.30%
32	*Alaska Elec. Pension Fund v. Pharmacia Corp.*, No. 03-1519 (D.N.J. Jan. 30, 2013)	$164	27.50%
33	*In re: (Chase Bank) Checking Account Overdraft Litig.*, No. 1:09-MD-02036 (S.D. Fla. Dec., 19, 2012)	$162	30.00%
34	*In re Dollar Gen. Corp. Sec. Litig.*, No. 01-388 Order (M.D. Tenn. May 24, 2002)	$162	21.60%
35	*MBA Surety Agency, Inc. v. AT&T Mobility LLC*, No.1222-CC09746 (Mo. Cir. Ct. Mar. 7, 2013)	$152.6	25.00%
36	*In re: Managed Care Litig.*, No. 00-MD-1334, MDL1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003	$150	29.00%
37	*Schwartz v. TXU Corp.*, No. 3:02–CV–2243–K, 2005 WL 3148350 (N.D.Tex. Nov.5, 2005)	$150	22.2%
38	*In re Coordinated Pretrial Proceedings In Petroleum Prods. Antitrust Litig.*, No. MDL 150, 1994 WL 675265 (C.D. Cal. Aug. 11, 1994)	$140	21.00%
39	*Carpenters Health v. Coco-Cola Co.*, 587 F.Supp.2d 1266 (N.S. Ga. 2008)	$138	21.00%
40	*In re: (Citizens Bank) Checking Account Overdraft Litig.*, No. 1:09-MD-02036 (S.D. Fla. Mar. 12, 2013)	$137.5	30.00%
41	*In re Computers assocs. Class Action Sec. Litig.*, CV-98-4839 (TCP) (E.D. NY 2003)[6]	$136	25.00%
42	*In re Informix Corp. Sec. Litig.*, Master File No. C-97-1289 CRB (N.D.Cal. Nov. 2, 1999)	$132	30.00%

	Case	Recovery (millions)	Fee Award
43	*In re Combustion, Inc.*, 968 F.Supp. 1116 (W.D.La.1997)	$127	36.00%
44	*In re Infant Formula Antitrut.*, MDL No. 878, (N.D. Fla. Sept. 7, 1993)	$125	25.00%
45	*PaineWebber Ltd. P'ships Litig. v. Geodyne Res., Inc.*, 999 F. Supp. 719 (S.D.N.Y. 1998)	$125	20.80%
46	*Kurzweil v. Philip Morris Co., Inc.*, Nos. 94 Civ. 2373(MBM), 94 Civ. 2546(BMB), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999)	$123	30.00%
47	*In re Deutsche Telekom AG Sec. Litig.*, No. 00-CV-9475-NRB (S.D.N.Y.2005)	$120	28.00%
48	*Hershey, et al, v. Pac. Inv. Mgmt. Co. LLC*, No. 1:05-cv-04681 (N.D. Ill. May 2, 2011)[7]	$120	28.00%
49	*In re: Bank One Sec. Litig. First Chicago S'holder Claims*, No. 00-CV-0767 (N.D. Ill. Aug. 26, 2005)	$120	22.50%
50	*In re Sumitomo Copper Litig.*, 74 F.Supp.2d 393 (S.D.N.Y.1999)	$116	27.50%
51	*In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166 (E.D.Pa.2000)	$111	30.00%
52	*Klein v. O'Neal, Inc.*, 705 F.Supp.2d 632 (N.D.Tex. Apr. 9, 2010)	$110	30.00%
53	*In re Cardizem CD Antitrust Litig.*, No. 99-MD-1278, at 18-20 (E.D.Mich. Nov. 26, 2002)	$110	30.00%
54	*In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 912 F.Supp. 97 (S.D.N.Y.1996)	$110	27.00%
55	*In re Sunbeam Sec. Litig.*, 176 F.Supp.2d 1323 (S.D.Fla.2001)	$110	25.00%
56	*In re DPL Inc. Sec. Litig.*, 307 F.Supp.2d 947 (S.D. Ohio 2004)	$110	20.00%
57	*In re Methionine Antitrust Litig.*, No. C 99-3491, MDL No. 00-1311 (N.D. Cal. Oct. 3, 2002)	$107	23.30%
58	*In re Automotive Refinishing Paint Antitrust* Litigation, MDL No. 1426 (E.D. Pa. Jan. 3, 2008)	$106	32.70%
59	*City of Greenville v. Syngenta Crop Protection*, No. 3:10-cv-00188 (S.D. Ill. Oct. 23, 2012)	$105	33.33%
60	*Haynes v. Shoney's*, No. 89-30093-RV, 1993 WL 19915 (N.D. Fla. Jan. 25, 1993)[8]	$105	23.20%
61	*In re Prison Realty Sec. Litig.*, Civil Action No. 3:99-0458, 2001 U.S. Dist. LEXIS 21942 (M.D.Tenn. Feb. 9, 2001)	$104	30.00%
62	*Ingram v. Coca-Cola, Corp.*, 200 F.R.D. 685 (N.D. Ga. 2001)[9]	$104	20.00%
63	*In Re: Chase Bank USA, N.A. "Check Loan" Contract Litigation*, 3:09-md-02032-MMC (D. N.J. 2012)	$100	25.00%
64	*Baird v. Thomson Consumer Elecs.*, No. 00-761 (Ill. Cir. Court. Madison Co. June 15, 2001)	$100	22.00%

	Case	Recovery (millions)	Fee Award
65	*In re AT&T Corp. Sec. Litig*., 455 F.3d 160 (3d Cir. 2006)	$100	21.25%
66	*Stop N Shop Supermarket Company, et. al. v. SmithKline Beecham Corp*., Civil Action No. 03-CV-4578 (E.D. Pa. 2005)	$100	20.00%

[1] The Court awarded a graduated amount ranging from 17–29% of the recovery. After an appeal reversed a portion of the award, this table reflects the actual settlement and fee realized.
[2] The Court awarded an increasing graduated amount (25% of the first $150 million and 29% of any larger amount). This table reflects the values realized.
[3] The global settlement exceeded $500 million, of which $220 million was reserved for the Direct Purchaser Class. The trial court approved a fee equal to 33 1/3% of the Direct Purchaser fund.
[4] The Court awarded 25% in five settlements and a 15% fee award in two others. This table lists $190 million, the total recovery from all settlements.
[5] While technically not a class action, this case is equivalent to a class-action in which the fee was negotiated *ex ante* .
[6] The settlement fund was paid in shares of stock. Class counsel received a percentage of the stock as fees.
[7] The attorneys' fee award was not part of the final judgment. The settlement notice stated that class counsel would request 20% of the recovery as fees and the final judgment
[8] This amount reflects only the cash relief. Additional non-cash relief was valued at $30 million.
[9] The fund amount excludes $10 million in a "Promotional Achievement Fund" and $43.5 million in "future pay equity adjustments."

By starting this section with mega-fund cases, I may have distracted the Court's attention from a key fact: ***This is not a mega-fund case***. It is a case with an enormous jury award and judgment, not a penny of which has been collected or may ever be collected. The point of Table 5 is that the Court can plan now for the possibility of a settlement north of $100 million by setting a 24.37 percent fee and remain well within the range of fees judges have customarily applied. In fact, the Court could go higher. Knowing the enormous risk Class Counsel has borne, the Court could comfortably set the fee at one-third of the recovery.

The fact that no money is on the table must also be kept in mind when evaluating the bearing of academic studies of fee awards. All such studies use settled cases as their data. As Judge Easterbrook observed in *Synthroid I*, the hindsight bias skews the perception of risk downward in settled cases, causing judges to set fees too low. Here, by contrast, the risk of non-

recovery still exists. The fee award should reflect the risk that existed when this lawsuit started, a hint of which can be gained by the risk it still carries today.

That being understood, I now turn to empirical studies of fee awards in class actions, of which there are many.[20] I begin with two that examine class actions of diverse types: Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 811 (2010) ("*Fitzpatrick Study*"); and Theodore Eisenberg and Geoffrey P. Miller, Attorney Fees and Expenses in Class Action Settlements: 1993–2008, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 248 (2010) ("*E&M Study*"). Both studies were peer-reviewed.

Before discussing studies, it will be helpful to explain a statistics concept: the standard deviation. The standard deviation is a measure of the extent to which data points are spread about a reported estimate. A larger standard deviation means that the data points are spread farther from the point estimate than a smaller standard deviation, which indicates closer clustering.

The standard deviation also provides an easy way of identifying the core of a distribution. Assuming a normal distribution, about 68 percent of the data points will fall within one standard deviation above or below the reported point estimate. For example, suppose the average height of a U.S. adult male is 70" with a standard deviation of 3". It follows that the range running

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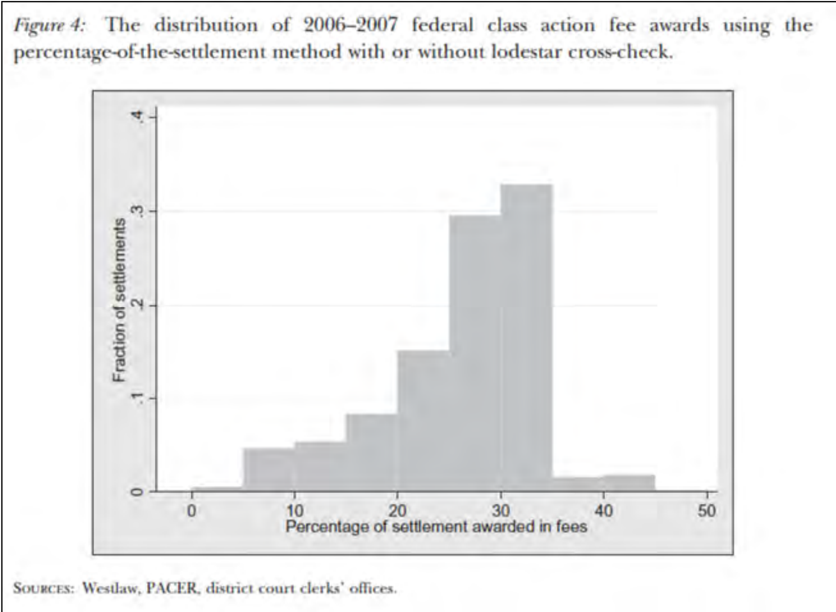
[20] See, e.g., Denise N. Martin, Vinita M. Juneja, Todd S. Foster, and Frederick C. Dunbar, RECENT TRENDS IV: WHAT EXPLAINS FILINGS AND SETTLEMENTS IN SHAREHOLDER CLASS ACTIONS?, Table 9 (1996); Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 151 (1996); Mukesh Bajaj, et al., SECURITIES CLASS ACTION SETTLEMENTS: AN EMPIRICAL ANALYSIS (Nov. 16, 2000); Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., Attorney Fee Awards in Common Fund Class Actions, 24 CLASS ACTION REPORTS 167 (2003); and Theodore Eisenberg and Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 27, 75 (2004).

from 67" to 73" will capture about 68 percent of all adult U.S. males. If the standard deviation were 4", a wider spread running from 66" to 74" would be required to achieve the same result.

Turning now to the studies, Professor Fitzpatrick collected all class action settlements approved by federal judges in 2006 and 2007, a total of 668 reported and unreported decisions. The following figure describes the range of fee awards in cases where federal judges applied the percentage method with or without a lodestar cross-check. As is apparent, awards ranging from 30 percent to 35 percent of the recovery constitute the most common category. Over 30 percent of the cases in Fitzpatrick's dataset had fee awards this large.

Figure 4: The distribution of 2006–2007 federal class action fee awards using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

Source: Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 811, 834 (2010)

Breaking down settlements by size, Professor Fitzpatrick reported mean fee percentages for settlements by size. If one assumes for the sake of argument that this case will eventually settle for more than $100 million, the relevant size decile would be the largest one in Professor Fitzpatrick's study. It contained 45 cases and spanned an incredible range from $72.5 million to $6.6 billion. The mean fee was 18.4 percent with a standard deviation of 7.9 percent, meaning

that about two-thirds of the cases fell in a range extending from 10.5 percent to 26.3 percent. See *Fitzpatrick Study*, at p. 839, Table 10. The fee requested by Class Counsel falls within this core of the distribution.

The *E&M Study* examined common fund class actions that closed from 1993 to 2008, a total of 689 cases. The authors drew their sample from Westlaw, Lexis and other reporters. For the entire dataset, the average fee-to-recovery ratio was 23 percent. *E&M Study*, *supra*, at pp. 258-259. Focusing on securities cases, of which the dataset contained 268, the authors found a mean fee award of 23 percent on an average gross recovery of $141.96 million. *Id.*, at p. 262, Table 5.

Professors Eisenberg and Miller also found a strong inverse correlation between the percentage awarded and the size of the common fund. Fee percentages tended to be larger in cases with smaller recoveries and smaller in the cases that produced the largest common funds. The table below, reproduced from their article, makes this relationship clear.

Table 7: Mean, Median, and Standard Deviation of Fee Percent, Controlling for Class Recovery Amount, 1993–2008

Range of Class Recovery (Millions) Decile	*Mean*	*Median*	SD	N
Recovery <= 1.1	37.9	32.3	19.6	69
Recovery > 1.1 <= 2.8	27.1	26.4	9.1	69
Recovery > 2.8 <= 5.3	26.4	25.0	9.8	69
Recovery > 5.3 <= 8.7	22.8	22.1	8.4	69
Recovery > 8.7 <= 14.3	23.8	25.0	8.1	69
Recovery > 14.3 <= 22.8	22.7	23.5	7.5	69
Recovery > 22.8 <= 38.3	22.1	24.9	8.7	68
Recovery > 38.3 <= 69.6	20.5	21.9	10.0	70
Recovery > 69.6 <= 175.5	19.4	19.9	8.4	69
Recovery > 175.5	12.0	10.2	7.9	68

SOURCES: Westlaw, LexisNexis, PACER.

Source: Theodore Eisenberg and Geoffrey P. Miller, Attorney Fees and Expenses in Class Action Settlements: 1993–2008, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 248, 265 (2010).

Because there is a jury verdict in this case, not a recovery, one cannot say which size category this case belongs in. However, given the standard deviations reported, one can observe that in the two categories with mega-fund settlements, the fee awards cover a broad range. In the smaller size group, which extends from $69.6 million to $175.5 million, about 68 percent of the cases have awards between 11 percent and 27.8 percent. In the larger size group, which extends from $175.5 million upward, the range extends from 4.1 percent to 19.9 percent.

The *E&M Study* also found a positive correlation between fee awards and risk. In most of the case categories studied, "mean fee percentages were higher in high-risk cases than in other cases." *E&M Study*, *supra*, at 265. The measure of risk was exceedingly noisy, however. The researchers could not assess the riskiness of any case directly, so they coded cases on the basis of the comments about risk that appeared in judges' opinions. Consequently, although the finding makes sense, it would be a mistake to place much weight on the numbers. Having said that, the average fee in cases coded as high-risk was 26.1 percent, with no standard deviation reported. *E&M Study*, *supra*, at p. 265. Because this case was exceptionally risky, the requested fee of 24.37 percent can easily be justified on that basis.

I will now briefly discuss three recent studies of fee awards in securities class actions, which can also be large, high-risk cases. Choi *et al*. found that fees averaged 30 percent of the recovery in cases led by individual investors and private institutions, and 25 percent in cases led by public institutions. Stephen J. Choi, Jill E. Fisch, and A.C. Pritchard, Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act, 83 WASHINGTON UNIVERSITY LAW QUARTERLY 869, 897, Table 6A (2005). More recently, Professor Michael Perino, who also studied securities class actions, reported average fees of 26.6 percent, which dropped to 19.3 percent in cases where public pension funds served as lead

plaintiffs. Michael Perino, Institutional Activism Through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions, 9 JOURNAL OF EMPIRICAL LEGAL STUDIES 368, 380, Table 1 (2012). Finally, a study coauthored by Professors Perino, Lynn Baker, and me of securities cases that settled in the three busiest federal districts reported average fee awards of 22.5 percent for, with a 25th percentile of 18 percent and a 75th percentile of 27 percent. Lynn A. Baker, Michael A. Perino, and Charles Silver, Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment, 66 VANDERBILT LAW REVIEW 1677, 1692 Table 1 (2013). Given these findings and the fact that no money has yet been recovered, the requested fee of 24.37 percent can be justified easily.

F. Risk Incurred, Effort Expended, and Results Obtained

a. Risk Incurred

Seventh Circuit case law requires a court setting attorneys' fees to evaluate the risk class counsel faced *ex ante*, that is, at the time a lawsuit was filed. In this section, I attempt to profile this risk. As will be clear, when viewed from an *ex ante* perspective, securities class actions are risky propositions, and this case was riskier than many. When this case started in 2002, neither Class Counsel nor anyone else had reason to expect an enormous trial judgment or a mega-fund recovery, the latter of which, as I repeatedly emphasize, has not yet been achieved.

To help the Court appreciate the risk Class Counsel faced at the start of litigation, I will refer to studies that contain information that informed observers of securities class actions would likely have known about at the relevant time. I will also refer to more recent studies when they contain information that is helpful. Finally, when assessing the recovery that might reasonably have been predicted back in 2002, I will use Class Counsel's representation that, when litigation began, actual damages stemming from the fraud were thought to be in the $3.5 billion range,

meaning that $3.5 billion is the most the Class could have recovered by means of a complete victory against a solvent defendant.

When thinking about the expected recovery, it is helpful to start by addressing the popular misconception that securities class actions routinely generate enormous recoveries. They do not. Most securities class actions settle for modest amounts. According to NERA, a private economics consulting firm that produces widely read reports on securities class actions, the median settlement amount for a securities class action was $7.0 million in 2005 and 2006 and $9.4 million in 2007. Stephanie Plancich and Svetlana Starykh, 2008 Trends in Securities Class Actions, p. 9 (NERA, Dec. 2008) ("*Trends 2008*").

The average securities settlement typically exceeds the median, reflecting the impact of the small number of extremely large mega-settlements. Because some years close without any mega-settlements, however, the average recovery varies greatly. As NERA explains, "[t]he average settlement over the years from 2003 to 2008—the post-Sarbanes-Oxley-Act period—has been $45 million…. The annual average has ranged from $21 million to $82 million over this six-year period." *Trends 2008*, p. 10. When the average reflects the influence of a small number of outlier cases, academics often recalculate the average with the outliers removed. Recognizing this, NERA recalculated the average recovery without the mega-settlements. "Removing all settlements of over $1 billion, the 2003-2008 average settlement drops to $26 million, and the range of settlement averages across years becomes much tighter." *Trends 2008*, p. 11.

It is not obvious that the median settlement—$7 million to $9.4 million— or the trimmed average—$26 million—provides the better starting point for analysis. The more conservative approach is to pick the larger number, so I will use $26 million as my initial estimate.

The $26 million estimate must be further refined, for two reasons. First, $26 million was the average recovery *in cases where recoveries were obtained*, excluding mega-fund settlements. *Cases that are dismissed or that generate $0 recoveries for other reasons were excluded from the calculation, and there are many of them.* An accurate prediction of the expected result would therefore discount the $26 million figure by the probability of losing outright. Second, recoveries in securities fraud class actions vary with investors' losses. Bigger losses generate larger settlements. An accurate prediction would therefore also take account of the amount investors in Household International are thought to have lost.

Starting with investors' losses, the evidence shows that recoveries increase with losses, but not nearly as fast. "[A] case with investor losses of $100 million is expected to have a settlement that is around $5.1 million, or 5.1% of investor losses. A case with $1 billion in investor losses is expected to settle for $12 million, only 1.2% of losses." *Trends 2008*, p. 13. According to a more recent NERA study, "the median settlement for cases with investor losses over $1 billion has been 0.7% of investor losses." Renzo Comolli et al., Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review 32 (NERA 2013) (*Trends 2012*).

As stated above, I will use $3.5 billion as the estimate of class members' losses due to the fraud. Given this estimate, Class Counsel would reasonably have expected to recover roughly $42 million when litigation commenced in 2002.

It remains to adjust for the probability of losing outright. NERA's reports track the percentage of class actions dismissed by filing year. Of cases filed in 2000, 36 percent were dismissed. *Trends 2012*, Figure 22. The dismissal rate for cases filed in 2001 was similar: 32 percent. Taking the average of 2000 and 2001 as the base rate for dismissals, one would initially infer that Class Counsel faced a 34 percent chance of losing outright when this case was filed.

Because this case is still ongoing and could be dismissed on the law on appeal, I note that the risk of losing has risen substantially in recent years. From 2003 to 2009, more than 40 percent of filed securities fraud class actions were dismissed. Of cases filed in 2009, 49 percent—almost half—have already been dismissed, a remarkable fact given that as of the end of 2012 one-third of the cases were still unresolved. *Trends 2012*, Figure 22. This case was risky when it began in 2002, and it grew riskier over time as the law became more hostile to securities fraud cases.

A 34 percent likelihood of outright failure implies a 66 percent probability of success. Multiplying the predicted recovery of $42 million by the 66 percent chance of winning yields an expected recovery of $27.7 million. It bears emphasis that Class Counsel has not yet beaten this prediction. Although an enormous jury verdict has been secured, the verdict may be lost on appeal, in which event the class may recover nothing.

In cases with recoveries around $27.7 million, judges routinely award fees above 25 percent. In cases filed from 1996 to 2009 with recoveries from $10 million to $25 million, the median fee award was 30 percent; for recoveries in the $25 million to $100 million range, it was 28.8 percent. *Trends 2012*, Figure 31. Given the risks Class Counsel faced *ex ante* and continues to face at this time, a 30 percent contingent fee would be justifiable. Class Counsel's actual request for 24.37 percent is reasonable by comparison.

b. Results Obtained

It is wholly premature to speak of Class Counsel having obtained results at this point in the litigation. Class Counsel has secured a judgment. Large jury verdicts are often lost on appeal and are rarely collected in full.

If Class Counsel holds onto the judgment and collects the entire $2.46 billion (plus post-judgment interest) for the Class, this case will attain landmark status by becoming one of the top

ten securities fraud recoveries of all time. Currently, the cases shown in the table below, all of which settled before trial, make up the top ten. Depending upon the amount of post-judgment interest that accumulates, a full recovery would rank this case 5th or 7th. The caliber of such an accomplishment would be self-evident and would justify a fee at the top of any reasonable scale.

Table 6. Largest Securities Fraud Settlements

Rank	Case Name	Total Settlement Amount ($Millions)
1	ENRON Corp.	$7,242
2	WorldCom, Inc.	$6,196
3	Cendant Corp.	$3,692
4	Tyco International, Ltd.	$3,200
5	AOL Time Warner, Inc.	$2,650
6	Bank of America Corp.	$2,650
7	Nortel Networks I	$1,143
8	Royal Ahold, NV	$1,100
9	Nortel Networks II	$1,074
10	McKesson HBOC, Inc.	$1,043

Source: Renzo Comolli et al., Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review 32 (NERA 2013).

Insofar as results obtained are concerned, I feel comfortable saying this: To this point in the litigation, Class Counsel has done as well as humanly possible. They have survived repeated dismissal motions, secured evidence sufficient to persuade a jury, and secured an unprecedented jury verdict and judgment for the Class. If one counts these accomplishments as results for fee-setting purposes, the results obtained are spectacular.

c. Quality of Effort Expended

This factor requires no discussion. Class Counsel weathered a six-week trial and obtained what is far and away the largest jury verdict in the history of securities fraud class action litigation. The accomplishment plainly required top-flight lawyering.

Only a law firm like Robbins Geller Rudman & Dowd LLP (RGRD) could have accomplished this feat. RGRD is one of the premier securities class action law firms in the United States. It has a track record of success and a reputational interest in performing at the highest level. RGRD handles more securities class actions than other law firms, year after year. According to Cornerstone Research, a private consulting group that maintains an enormous database of securities class actions, RGRD represented the most securities fraud plaintiffs in both 2009 and 2010. Cornerstone Research, Securities Class Action Filings: 2011 Year in Review 2 (2012) (*Cornerstone 2011*).

Securities Class Action Services (SCAS), a litigation consulting group, consistently gives RGRD top marks on many criteria, as shown below.

SCAS Ranking of Robbins Geller Rudman & Dowd LLP among Law Firms Handling Securities Class Actions

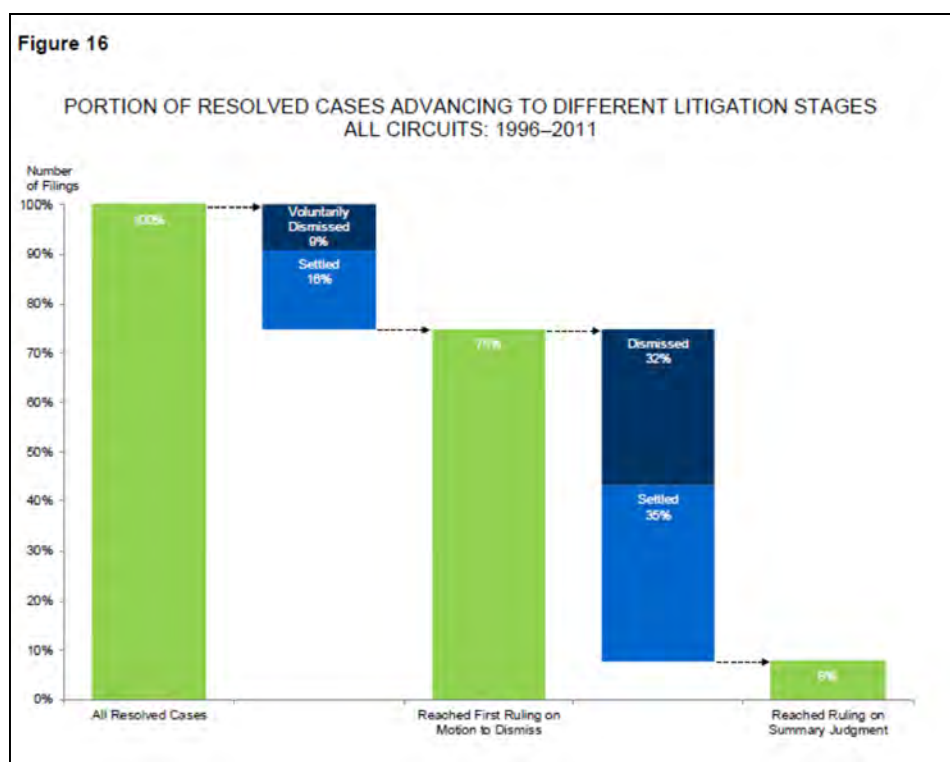
Years	Number of Recoveries	Aggregate Recoveries
2003 - 2007	#1	#1
2008	#1	#3
2009	#1	#1
2010	#1	#2

RGRD also cemented its reputation forever by settling claims arising out of the failure of Enron for a record $7.2 billion, the largest recovery in any class action.

Given RGRD's track record and reputation, one expects the firm to do excellent work. And that is just what it did in this case. First, RGRD bore and continues to bear an unusually heavy workload. The case has already required over 116,000 hours of work by attorneys and paraprofessionals. It has also forced the firm to bear over $14.6 million in expenses relating to investigations, discovery, motion practice, trial and the claims process. Second, because of

RGRD's efforts, the case survived three motions to dismiss in 2003 plus two more in 2005, achieved class certification in 2005, and prevailed at trial.

To appreciate the significance of these accomplishments, it helps to know how class actions usually fare in the course of litigation. Cornerstone Research provides a breakdown of cases showing the stage at which the litigation resolved and other procedural developments. *Cornerstone 2011*, p. 18. For the Court's convenience, a figure from the report is reproduced below. The sample on which the figure and findings are based includes 2,415 class actions, and excludes all IPO Allocation, Analyst, and Mutual Fund filings in Cornerstone's database.



Source: Cornerstone Research, Securities Class Action Filings: 2011 Year in Review Figure 16 (2012).

As is visually apparent, 25 percent of the cases were either voluntarily dismissed or resolved before the first ruling on a motion to dismiss. Merely by taking the case through the ruling on the first dismissal motion, RGRD expended more effort than a non-trivial fraction of class actions require.

Of the cases that received a first ruling on a dismissal motion, the vast majority (67 percent) were resolved by dismissal (32 percent) or settlement (35 percent) before a summary judgment motion was ruled upon. In other words, *92 percent of the cases were resolved before they reached the summary judgment stage*. RGRD took this lawsuit to the "Elite Eight"—and beyond.

The numbers in the Seventh Circuit are slightly different but still show that this case has required RGRD to make an unusual commitment. Of the 125 Seventh Circuit cases in Cornerstone's dataset, 11 percent reached the summary judgment stage. *Cornerstone 2011*, p. 30. To my mind, the difference between 8 percent and 11 percent is unimportant. Taking all securities class actions or Seventh Circuit cases as the baseline, this case required exceptional effort.

Cornerstone 2011 report does not state the percentage of securities class actions that are tried. The reason is obvious: Tried cases are so rare as to be statistically irrelevant. In terms of effort required, this case ranks in the top one-tenth of 1 percent.

V. CONCLUSION

In academic writings, lectures, expert reports, and testimonial appearances, I have encouraged judges and policymakers to set fees in class actions at market rates. I have also mined the literature on attorneys' fees for evidence showing what market rates tend to be. The evidence I have seen leads me to conclude that class members would agree to pay their lawyers 25 percent or more of their recoveries, if they could hire them directly. I conclude, for all the reasons discussed above, that Class Counsel's request for 24.37 percent of the eventual recovery, should there be one, is reasonable.

VI. COMPENSATION

I received a flat fee of $35,000 for preparing this Report.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on:

December 20, 2013	
Date	Charles Silver

RESUME OF CHARLES SILVER

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Charles Silver holds the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the School of Law at the University of Texas at Austin. He has published widely in law reviews and peer-reviewed journals. His articles use economic theory, philosophical and doctrinal reasoning, and empirical methodologies to shed light on issues arising in the areas of civil procedure, liability insurance, and the professional regulation of attorneys. He has written about group lawsuits (including class actions and other mass proceedings), attorneys' fees (including contractual compensation arrangements, common fund fee awards, and statutory fee awards), and professional responsibility (focusing on lawyers involved in civil litigation on behalf of plaintiffs and defendants). In recent years, as Co-Director of the Center on Lawyers, Civil Justice and the Media at the University of Texas, he has worked with a group of empirical researchers on a series of studies of medical malpractice litigation in Texas. The research group's findings are to appear in a book with the working title "To Sue is Human" on Yale University Press.

Professor Silver served as Associate Reporter on the Principles of the Law of Aggregate Litigation, published by the American Law Institute in 2010. He taught as a Visiting Professor at the Harvard Law School, the University of Michigan Law School, and the Vanderbilt University Law School.

Professor Silver has given many presentations at academic conferences, including programs sponsored by the American Law and Economics Association, the Conference on Empirical Legal Studies, the Law & Society Association, RAND, and the Searle Center on Law, Regulation and Economic Growth. He has also spoken at faculty colloquia at law schools across the U.S.

Professor Silver often consults with attorneys and serves as an expert witness. He has strong ties with all segments of the litigating bar. On the plaintiffs' side, he submitted an expert report on attorneys' fees in the massive Enron settlement and served as professional responsibility advisor to the private attorneys who handled the State of Texas' lawsuit against the tobacco industry. On the defense side, he advises on the responsibilities of lawyers retained by insurance carriers to defend liability suits against policyholders. Professor Silver has also testified to legislative committees and submitted amicus curiae briefs to courts on topics ranging from class certification to lawyers' fiduciary duties to medical malpractice litigation.

In 2009, the Tort Trial & Insurance Practice Section (TIPS) of the ABA awarded Professor Silver the Robert B. McKay Law Professor Award for outstanding scholarship on tort and insurance law.

ACADEMIC EMPLOYMENTS

UNIVERSITY OF TEXAS SCHOOL OF LAW

Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure	2004-present
Co-Director, Center on Lawyers, Civil Justice, and the Media	2001-present
Robert W. Calvert Faculty Fellow	2000-2004
Cecil D. Redford Professor	1994-2004
W. James Kronzer Chair in Trial & Appellate Advocacy	Summer 1994
Graves, Dougherty, Hearon & Moody Centennial Faculty Fellow	1991-1992
Assistant Professor	1987-1991

HARVARD LAW SCHOOL

Visiting Professor	Fall 2011

VANDERBILT UNIVERSITY LAW SCHOOL

Visiting Professor	2003

UNIVERSITY OF MICHIGAN LAW SCHOOL

Visiting Professor	1994

UNIVERSITY OF CHICAGO

Managing Editor, Ethics: A Journal of Social, Political and Legal Philosophy	1983-1984

EDUCATION

JD 1987, Yale Law School
MA 1981, University of Chicago (Political Science)
BA 1979, University of Florida (Political Science)

SPECIAL PROJECTS

Associate Reporter, Principles of the Law of Aggregate Litigation, American Law Institute (2010) (with Samuel Issacharoff (Reporter), Robert Klonoff and Richard Nagareda (Associate Reporters)).

Co-Reporter, Practical Guide for Insurance Defense Lawyers, International Association of Defense Counsel (2002) (with Ellen S. Pryor and Kent D. Syverud) (published on the IADC website in 2003 and revised and distributed to all IADC members as a supplement to the Defense Counsel J. in January 2004).

BOOKS UNDER CONTRACT

To Sue is Human: Medical Malpractice Litigation in Texas 1988-2005, Yale University Press (coauthored with Bernard Black, David Hyman, and William Sage).

Health Law and Economics, Edward Elgar (coedited with Ronen Avraham and David Hyman).

BOOKS

Law of Class Actions and Other Aggregate Litigation, 2nd Edition, Foundation Press (2013) (with Richard Nagareda, Robert Bone, Elizabeth Burch and Patrick Woolley).

Professional Responsibilities of Insurance Defense Counsel, LexisNexis Mathew Bender (2012) (with William T. Barker); Updated 2013.

G. PUBLICATIONS AND RECENTLY PRESENTED WORKS IN PROGRESS

1. "Philosophers and Fiduciaries" (in progress) (presented at several law schools and conferences).

2. "Does Tort Reform Affect Physician Supply? Evidence from Texas," International Review of Law & Economics (forthcoming 2014) (with David A. Hyman, Bernard S. Black and Myungho Paik).

3. "Insurer Rights To Limit Costs of Independent Counsel," ABA/TIPS Insurance Coverage Litigation Section Newsletter (forthcoming 2014) (with William T. Barker).

4. "Double, Double, Toil and Trouble: Justice-Talk and the Future of Medical Malpractice Litigation," DePaul Law Review (forthcoming 2013) (invited symposium) (with David A. Hyman).

5. "Litigation Funding Versus Liability Insurance: What's the Difference?," DePaul Law Review (forthcoming 2013) (invited symposium).

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

7. "Five Myths of Medical Malpractice," 143:1 Chest 222-227 (January 2013) (with David A. Hyman) (peer-reviewed).

8. "How do the Elderly Fare in Medical Malpractice Litigation, Before and After Tort Reform? Evidence From Texas" (with Bernard Black, David A. Hyman, Myungho Paik, and William Sage), Amer. L. & Econ. Rev. (2012), doi: 10.1093/aler/ahs017 (peer-reviewed).

9. "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.

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

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

12. "Justice Has (Almost) Nothing to Do With It: Medical Malpractice and Tort Reform," in Rosamond Rhodes, Margaret P. Battin, and Anita Silvers, eds., MEDICINE AND SOCIAL JUSTICE, Oxford University Press 531-542 (2012) (with David A. Hyman) (peer reviewed).

13. "Will Tort Reform Bend the Cost Curve? Evidence from Texas" (with Bernard Black, David A. Hyman, Myungho Paik), 9 J. Empirical Legal Stud. 173-216 (2012) (peer-reviewed).

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

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

16. "The Impact of the Duty to Settle on Settlement: Evidence From Texas," 8 J. Empirical Leg. Stud. 48-84 (2011) (with Bernard Black and David A. Hyman) (peer reviewed).

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

18. "O'Connell Early Settlement Offers: Toward Realistic Numbers and Two-Sided Offers," 7 J. Empirical Legal Stud. 379 (2010) (with Bernard Black and David A. Hyman) (peer reviewed).

19. "Access to Justice in a World without Lawyers: Evidence from Texas Bodily Injury Claims," 37 Fordham Urb. L. J. 357 (2010) (with David A. Hyman) (invited symposium).

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

21. "The Effects of 'Early Offers' on Settlement: Evidence From Texas Medical Malpractice Cases, 6 J. Empirical Legal Stud. 723 (2009) (with David A. Hyman and Bernard S. Black) (peer-reviewed).

22. "Estimating the Effect of Damage Caps in Medical Malpractice Cases: Evidence from Texas," 1 J. Legal Analysis 355 (2009) (with David A. Hyman, Bernard S. Black, and William M. Sage) (inaugural issue) (peer-reviewed).

23. "The Impact of the 2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric," 44 The Advocate 25 (2008) (with David A. Hyman and Bernard Black) (invited symposium).

24. "Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004," 10 Amer. Law & Econ. Rev. 185 (2008) (with Bernard Black, David A. Hyman, and William M. Sage) (peer-reviewed).

25. "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).

26. "Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003," 33 Geneva Papers on Risk and Insurance: Issues and Practice 177-192 (2008) (with David A. Hyman, Bernard S. Black, William M. Sage and Kathryn Zeiler) (peer-reviewed).

27. "Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims 1990-2003," 36 J. Legal Stud. S9 (2007) (with Bernard Black, David A. Hyman, William Sage, and Kathryn Zeiler) (peer-reviewed).

28. "Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988-2003," J. Empirical Legal Stud. 3-68 (2007) (with Bernard Black, David A. Hyman, William M. Sage, and Kathryn Zeiler) (peer-reviewed).

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

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

31. "Dissent from Recommendation to Set Fees Ex Post," 25 Rev. of Litig. 497 (2006) (accompanied Task Force on Contingent Fees, Tort Trial and Insurance Practice Section of the American Bar Association, "Report on Contingent Fees in Class Action Litigation," 25 Rev. of Litig. 459 (2006)).

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

33. "Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid," 59 Vanderbilt L. Rev. 1085 (2006) (with David A. Hyman) (invited symposium).

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

35. “Medical Malpractice Reform Redux: Déjà Vu All Over Again?” XII Widener L. J. 121 (2005) (with David A. Hyman) (invited symposium).

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

37. “Speak Not of Error, Regulation (Spring 2005) (with David A. Hyman).

38. “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).

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

40. “Believing Six Improbable Things: Medical Malpractice and ‘Legal Fear,’” 28 Harv. J. L. and Pub. Pol. 107 (2004) (with David A. Hyman) (invited symposium).

41. “We’re Scared To Death: Class Certification and Blackmail,” 78 N.Y.U. L. Rev. 1357 (2003).

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

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

44. “Does Civil Justice Cost Too Much?” 80 Tex. L. Rev. 2073 (2002).

45. “Defense Lawyers’ Professional Responsibilities: Part II—Contested Coverage Cases,” 15 G’town J. Legal Ethics 29 (2001) (with Ellen S. Pryor).

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

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

48. “The Case for Result-Based Compensation in Health Care,” 29 J. L. Med. & Ethics 170 (2001) (with David A. Hyman).

49. “Defense Lawyers’ Professional Responsibilities: Part I—Excess Exposure Cases,” 78 Tex. L. Rev. 599 (2000) (with Ellen S. Pryor).

50. “What’s Not To Like About Being A Lawyer?,” 109 Yale L. J. 1443 (2000) (with Frank B. Cross) (review essay).

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

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

53. "Representative Lawsuits & Class Actions," in Int'l Ency. Of L. & Econ., B. Bouckaert & G. De Geest, eds., (1999) (peer-reviewed).

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

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

56. "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).

57. "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).

58. "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).

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

60. "Professional Liability Insurance as Insurance and as Lawyer Regulation: A Comment on Davis, Institutional Choices in the Regulation of Lawyers," 65 Fordham L. Rev. 233 (1996) (invited symposium).

61. "All Clients are Equal, But Some are More Equal than Others: A Reply to Morgan and Wolfram," 6-3 Coverage 47 (May/June 1996) (with Michael Sean Quinn).

62. "Are Liability Carriers Second-Class Clients? No, But They May Be Soon-A Call to Arms against the Restatement of the Law Governing Lawyers," 6-2 Coverage 21 (Jan./Feb. 1996) (with Michael Sean Quinn).

63. "Bargaining Impediments and Settlement Behavior," in Dispute Resolution: Bridging the Settlement Gap, D.A. Anderson, ed. (1996) (with Samuel Issacharoff and Kent D. Syverud).

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

65. "Do We Know Enough About Legal Norms?" in Social Rules: Origin; Character; Logic: Change, D. Braybrooke, ed. (1996).

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

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

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

69. "Does Insurance Defense Counsel Represent the Company or the Insured?" 72 Tex. L. Rev. 1583 (1994), reprinted in Practising Law Institute, Insurance Law: What Every Lawyer and Businessperson Needs To Know, Litigation and Administrative Practice Course Handbook Series, PLI Order No. H0-000S (1998).

70. "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).

71. "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).

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

73. "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).

74. "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).

75. "Thoughts on Procedural Issues in Insurance Litigation," VII Ins. L. Anthol. (1994).

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

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

78. "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. 857-870 (1992).

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

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

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

82. "Elmer's Case: A Legal Positivist Replies to Dworkin," 6 L. & Phil. 381 (1987) (peer-reviewed).

83. "Justice In Settlements," 4 Soc. Phil. & Pol. 102 (1986) (with Jules L. Coleman) (peer-reviewed).

84. "Negative Positivism and the Hard Facts of Life," 68 The Monist 347 (1985) (peer-reviewed).

85. "Utilitarian Participation," 23 Soc. Sci. Info. 701 (1984) (peer-reviewed).

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

H. NOTABLE SERVICE ACTIVITIES

Associate Reporter, American Law Institute Project on the Principles of Aggregate Litigation

Interested Party, Statistical Information Task Force, National Association of Insurance Commissioners, Model Medical Malpractice Closed Claim Reporting Law

Invited Academic Member, American Bar Association/Tort & Insurance Practice Section Task Force on the Contingent Fee

Chair, Dean Search Committee, School of Law, University of Texas at Austin

Chair, Budget Committee, School of Law, University of Texas at Austin

Coordinator, General Faculty Colloquium Series, School of Law, University of Texas at Austin

Sole Drafter, Assessment Report for the Juris Doctor Program at the School of Law, University of Texas at Austin, for the Commission on Colleges of the Southern Association of Colleges and Schools

RECENT AWARDS

Robert B. McKay Law Professor Award, Tort Trial & Insurance Practice Section, American Bar Association (2009)

Faculty Research Grants, University of Texas at Austin (various years)

MEMBERSHIPS

American Bar Foundation

Texas Bar Foundation (Life Fellow)

State Bar of Texas (admitted 1988)

Tort Trial and Insurance Practice Section, American Bar Association

Society for Empirical Legal Studies

American Law and Economics Association

American Association for Justice

DECLARATION OF SERVICE BY ELECTRONIC MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, State of California, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 W. Broadway, Suite 1900, San Diego, California 92101.

2. That on December 31, 2013, declarant caused to be served by electronic mail to the parties the following document:

REPORT OF PROFESSOR CHARLES SILVER ON ATTORNEYS' FEES

The parties' e-mail addresses are as follows:

Tkavaler@cahill.com Pfarren@cahill.com Dowen@cahill.com Jhall@cahill.com Pclement@bancroftpllc.com	Zhudson@bancroftpllc.com Mrakoczy@skadden.com Rstoll@skadden.com Mmiller@MillerLawLLC.com Lfanning@MillerLawLLC.com

I declare under penalty of perjury that the foregoing is true and correct. Executed this 31st day of December, 2013, at San Diego, California.

s/ TERESA HOLINDRAKE

TERESA HOLINDRAKE