



J. MADISON

Class Action Watch

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Analysis: Class Action Litigation—A Federalist Society Survey, Part II

In our inaugural issue of *Class Action Watch*, we unveiled the results of a business survey we conducted on class action litigation. Our first report compiled and analyzed a substantial amount of general data on the nature of federal and state court class action litigation, with a particular emphasis on the Texas state courts. At the time, Texas was about to convene its biennial legislative session and class action reform proposals were scheduled for consideration. This issue of *Class Action Watch* reports on other aspects of the Federalist Society's survey effort. In this latest issue, we specifically highlight data that may prove useful as Congress prepares to assess proposals for class action reform that would, among other things, expand parties' rights to remove litigation from state to federal courts.

A Review of the Project

When the *Class Action Watch* bulletin was first being planned, we were struck by the absence of any generally available data on business exposure to class action litigation. We frequently heard the argument that the business community had been facing more class action litigation with each passing year. Indeed, the preliminary findings of a Rand Institute study published in 1997 say as much, with lawyers and corporate counsel who were interviewed reporting that they have witnessed a

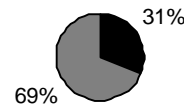
doubling or tripling of class action suits in the past few years. But we knew of no effort to survey companies in considerable depth regarding their own specific experiences. We decided, therefore, to undertake that task in December 1998.

The first portion of this endeavor, of course, was to devise a reasonably thorough survey that companies could readily and easily answer. We chose to ask about putative class action cases that were pending in 1988, 1993, and 1998. The hope was that these

Figure 1

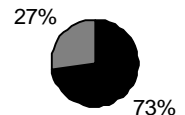
1998 Plaintiff Class Composition in State Courts

Focus Group 1



■ Multistate Classes
■ State or Local Classes

Focus Group 2

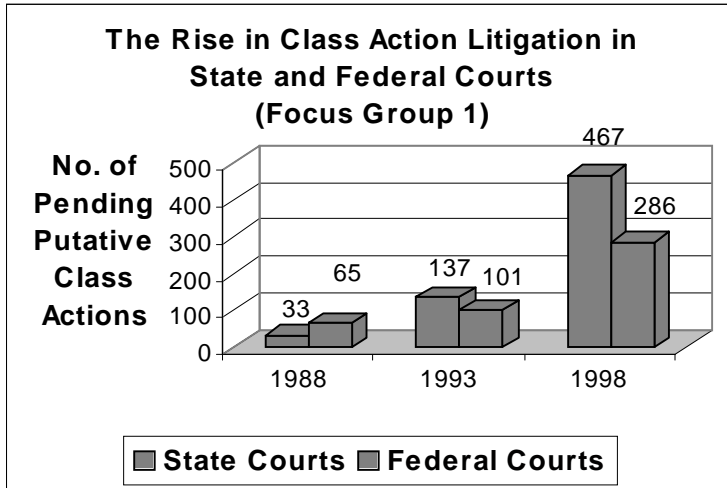


■ Multistate Classes
■ State or Local Classes

◆ Taking account of both focus groups, the vast majority of survey respondents reported that between a third and three quarters of their state class actions involved nationwide or multistate classes.

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Figure 2



◆ Respondents reported that between 1988 and 1998, the number of pending class actions in state courts increased by 1315%, and the number in all federal courts increased by 340 percent.

◆ Among respondents, class action litigation rose at a faster rate in state courts than in federal courts. Class action activity more than doubled in federal courts between 1993 and 1998, and more than tripled in state courts for the same years.

three chronological “snapshots” would provide some sense of the development of class action activity over the most recent ten-year period. The respondents were asked to provide information about federal actions, cases in all state courts, and cases just in Texas state courts. We asked for a breakout of Texas class actions because it was our understanding that Texas is shaping up to be the next major battleground for legislative consideration of class action reform and we had already planned to devote a major portion of our inaugural issue to reporting on the activity in this state.

For each of the three years, the survey asked companies to consider a wide variety of issues, including, but not limited to:

- The number of putative class actions pending in federal, state, and Texas state courts.
- The predominant issue in each case (e.g., securities, toxic tort, consumer fraud, etc.).
- The size of the putative class in each case, and whether the class was local, state-wide, or nationwide in its composition.
- The number of state and federal cases in which classes were certified.
- The incidence and magnitude of both initial and post-certification settlement demands.

- The number of federal, state, and Texas state court cases that were resolved by settlement, dispositive motion, and verdict.

- The length of time between class certification and settlement.

- The size of the plaintiff counsel fee award.

With respect to these and other issues that we raised, bear in mind that the survey asked about cases that were *pending* in a given year. In other words, when the 1993 portion of the survey asked about class certification and settlement, for example, the respondents were instructed to “count” cases that were certified or settled before, during, or after 1993. The same can be said for the 1988 and 1998 portions of the survey. We chose this approach because it was most consistent with what we know about the manner in which company databases track litigation.

After having completed the survey, we set out to obtain some data. We mailed the survey to 100 companies consisting of: (1) most of the principal large employers in Texas, including both Texas-based companies and non-Texas-based companies with a significant number of employees and with annual

revenues at or about \$1 billion; and (2) Fortune 500 companies that have a demonstrated interest in the litigation process generally as expressed by corporate or general counsel membership in more than one trade organization that monitors litigation reform, including the American Corporate Counsel Association, the American Bar Association's Corporate General Counsel Committee, the Civil Justice Reform Group, and the American Tort Reform Association. The companies represented every conceivable industry—transportation, energy and utilities, pharmaceuticals, food service, banking, insurance, heavy and light manufacturing, telecommunications, and a wide range of durable and nondurable consumer goods production. We had no idea whether or not class action litigation was perceived as a “problem” by the companies we surveyed, and the fact that a company has an interest in litigation reform does not necessarily mean that it has concerns about class action activity (indeed, a number of the respondent companies had no class actions to report). Moreover, the responses were submitted anonymously, and we therefore do not know which companies ultimately responded.

The survey effort began on December 4, 1998 with a mailing to the general coun-

sels of the 100 companies we identified. As of April 20, 32 companies from this survey pool had responded by returning surveys (a 32 percent response rate). We call this respondent pool “Focus Group 1.” Given the size of these companies and the logistical difficulties associated with responding to such a survey (it was 15 pages), we were quite satisfied to have secured such business participation in this kind of a project. Indeed, we know of no similarly successful survey effort (though Rand and others have been quite successful in collecting data through other very valuable means).

Another mailing was conducted just a few weeks later in order to create a second focus group (“Focus Group 2”). The purpose of the second focus group was to collect additional data and to see whether results from the first focus group would be corroborated. On December 23, we mailed a virtually identical set of surveys to any company that had representation either on the board of American Corporate Counsel Association or on the Association's Litigation Committee. Any company which participated in the first focus group and which would have also qualified for the second was eliminated from the second mailing list. In total, 215 were included in the second focus group, and,

as of April 20, over 31 companies have returned the survey (a 14 percent response rate).

For a number of reasons, we believe the two pools of respondents reflect a rather diverse collection of experiences respecting class action litigation. It is clear, for example, that the companies that responded are not simply those that are especially concerned with or affected by class action litigation. A number of the respondents had no pending litigation at all during the years in question (or very little), and others posted more significant numbers. The median and mean numbers of pending putative class actions reflect this distribution. At the very least, therefore, one can see the nature and extent of class action activity among a few dozen major American companies with a diverse array of business interests.

It is crucial to note that this survey effort is not intended to be a complete scientific sample or analysis of class action activity. The data were intended to increase our understanding in this area, but by no means completes our understanding. Moreover, as we continue to receive responses, we will adjust our analysis.

What follows is a summary of some of the information we were able to compile from the surveys that were submitted. Our choices on

what data to include in this article are simply a reflection of what is readily available. We did not believe it was appropriate to report on issues or questions unless all or virtually all of the respondents provided data. Thus, for example, we are not able at this time to discuss data respecting plaintiff fee awards—too many of the respondents left answers to this question incomplete. It is our hope that some of these other issues can be tackled in future survey efforts.

In addition, given that the response rate to the second focus group is not yet as high as our first survey effort, we are not able at this time to report on all issues. We hope to provide our readers in a future issue with a complete report of our findings as more responses are received. Where a large number of respondents reported data on a particular question, we have reported on the findings in this issue. And, at times, we discovered that data from the second focus group corroborates findings from the first focus group.

It should be noted that *Class Action Watch* does not seek to render any subjective judgments on our findings, and, therefore, we purposely have avoided reaching any normative conclusions respecting the data. We leave it to the readers to decide for themselves what the trends reflect,

what has caused them, and whether a problem has been revealed here that should be addressed.

Class Composition: Are Nationwide Plaintiff Classes Litigating in State Courts?

The centerpiece of federal class action reform currently under consideration on Capitol Hill is the proposal to allow class actions that are filed in state court to be removed to federal court even in the absence of complete diversity. One aspect of our survey provides some information that may be useful in examining this issue.

Our survey asked respondents to indicate the number of cases in which the plaintiff class was either local, statewide, regional/multistate, or nationwide for all of the putative class actions pending in each of the three time periods surveyed. As depicted in Figure 1, multi-state plaintiff classes were present in 73 percent of the state court class actions pending in 1998 among respondents for Focus Group 2. For Focus Group 1, multistate plaintiff classes were present in 27 percent of the pending state court class actions for the same period.

It is impossible to know with certainty what accounts for the difference in the statistics for these two focus groups (i.e., why nationwide

class composition is less pronounced in Focus Group 1 than in Focus Group 2). However, respondents for Focus Group 1 reported considerably more toxic tort and property damage cases than Focus Group 2, while those in Focus Group 2 reported considerably more consumer fee and fraud cases than Focus Group 1. Toxic tort and property damage cases often do involve localized injury, while consumer class actions involving large companies often involve nationwide commercial activity. Thus, it is conceivable that, because of the localized nature of the numerous toxic tort and property damage cases reported by Focus Group 1, the plaintiff class composition data for that focus group is less multistate in orientation than Focus Group 2. Regardless, one thing is certain—among our respondents, nearly a third (and possibly a greater percentage) of state cases could well be removed to federal court if complete diversity requirements were relaxed.

The Incidence of Class Action Activity: Is Class Action Litigation Increasing?

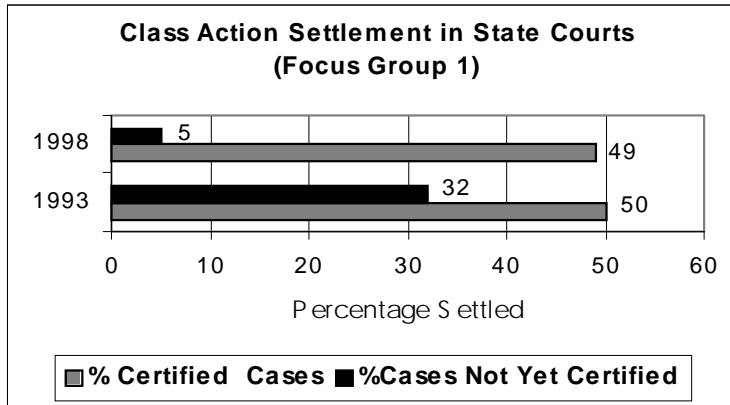
We began our survey by asking: “How many putative class actions were pending in 1988 [and 1993 and 1998]? In answering this question,

please include all suits in which the plaintiff purported to sue on behalf of a class, without regard to whether class certification was ultimately granted or denied.” Respondents were asked to identify the number of such cases in state and federal

In order to ensure that the increases in class action litigation we are seeing were not simply the result of a small number of outliers who experienced very significant spikes, we performed the following analysis:

ported increases and about 4 percent reported declines. Therefore, most companies—not merely a small cluster of especially hard-hit companies—saw increases.

Figure 3



◆ Settlement occurred more often with certified cases than with cases that were not yet certified.

courts, and then to break down the state cases by jurisdiction (Alabama, California, Florida, Louisiana, Ohio, Texas, and “Other”). Figure Two sets forth the data from this question.

Among the respondents for Focus Group 1, the number of pending putative class actions in state courts increased by 1,315 percent between 1988 and 1998, and by 340 percent in federal courts for the same two years. Our preliminary findings for Focus Group 2 also show a rising trend for state court class actions. Among respondents for Focus Group 2, the number of state court class actions increased by 550 percent between 1988 to 1998.

• We counted the number of respondents who showed increases in class action litigation between 1988 and 1998, 1988 and 1993, and 1993 and 1998. In the 1988-1998 time period, about 84 percent reported increases and none reported declines. In the 1988-1993 period, about 48 percent reported increases and about 16 percent reported declines. In the 1993-1998 time period, about 82 percent re-

• We also looked at the figures for individual respondents which reported increases. For each relevant time period (1988 vs. 1998, 1988 vs. 1993, and 1993 vs. 1998) and court system (federal, state, Texas state), we calculated the median and mean increases in the number of cases for our respondents. The median figure and the mean figure for a given court system and time period were consistently about the same, with very little deviation. Moreover, we noticed that, for each year in each court, it was virtually always the case that respondent increases were quite similar. For example, in comparing 1993 and 1998 data for cases in state courts—a period during which we recorded an increase of 230 cases—about two-thirds of the respondents witnessed an increase of

Figure 4

Period of Time between Certification & Settlement			
	Less than 1 Year	1–3 Years	Greater than 3 Years
1988	0%	50%	50%
1993	57%	14%	29%
1998	36%	64%	0%

seven cases or less and about one-third witnessed an increase of 14-28 cases. In other words, no one company or small group of companies was responsible for the increases we observed.

- We also sought to control for company growth in an effort to account for the fact that increases in class actions sometimes can be the result of increases in company growth and productivity or merger and acquisition activity. We found that revenues for the companies doubled on the average between 1988 and January 1, 1998. This is considerably lower than the percentage increases in class action litigation.

Is There A Relationship between Class Certification and Settlement?

When we began this project one observation we frequently heard from practicing attorneys was that certification increases the pressure for defendants to settle. In order to provide some information to spark further debate about this observation, our survey asked for data respecting both the incidence of class certification and the incidence of settlement. In addition, we asked

for information regarding the length of time between class certification and settlement.

Figure Three compares the settlement rates for putative state class actions pending in 1993 and 1998 for Focus Group 1 (there were too many incomplete responses to develop any findings for 1988). Among the respondents, certified state class actions seem to settle more than non-certified state class actions. For example, 50 percent of the certified class actions pending in 1993 resulted in settlement, as compared with 32 percent of the cases that had not yet been certified. We see a wider disparity with state cases pending in 1998. Already, 49 percent of the certified cases pending in 1998 have settled, but only 5 percent of the cases that have not yet been certified have been settled.

Figure Four tracks the length of time between state court class certification and settlement for Focus Group 1. It appears that, among respondents, settlement is now following class certification more quickly than in the past. In 1988, for example, 50 percent of the state cases were settled more than three years after certification; no cases settled in less than one year after certification. In 1993, only 29 percent of the cases were settled after more than three years after certification, 14 percent of the case

settled between one and three years of certification, and 57 percent settled within one year of certification. Finally, in 1998, all of the certified state cases that were reported by our respondents settled within three years of certification, and of those, 36 percent settled with one year of certification.

* * *

As we mentioned at the outset, the responses we have received provide a glimpse of the scope and nature of their class action activity. While it may not be representative of all or even most businesses in America, we believe the data helps to increase understanding of the area. Whenever possible, the Federalist Society's Litigation Practice Group will continue to generate data in order to shed further light on trends relating to class action litigation.