

10-2004

## The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues

Theodore Eisenberg

Geoffrey Miller

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Torts Commons](#)

---

### Recommended Citation

Theodore Eisenberg and Geoffrey Miller, The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues, 57 *Vanderbilt Law Review* 1527 (2019)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol57/iss5/2>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues

*Theodore Eisenberg\**

*Geoffrey Miller\*\**

I.	THE IMPORTANCE OF OPT-OUT RIGHTS .....	1534
A.	<i>Opt-out Rights' Central Role in Class Action Adjudication</i> .....	1534
1.	Opt-out Rights, Objectors, and Due Process .....	1534
2.	Opt-out Rights as a Check on Class Counsel and Class Representative Performance.....	1536
3.	Opt-out Rights Shape the Practice of Class Action Law .....	1537
B.	<i>Commentators' Views on Opt-out Rights</i> .....	1538
II.	PRIOR RESEARCH ON DISSENT AND THE INSTANT STUDY ...	1540
A.	<i>Prior Studies of Opt-Outs</i> .....	1541
B.	<i>The Instant Study</i> .....	1542
III.	RESULTS .....	1545
A.	<i>Statistical Description of Aggregate Opt-out Behavior</i> .....	1546
B.	<i>Opt-outs and Objectors by Case Type</i> .....	1548
C.	<i>Opt-out and Objector Behavior Over Time</i> .....	1550
D.	<i>Explaining the Pattern of Dissenting Behavior</i> .....	1551
E.	<i>Exploring the Pattern of Class Approval</i> .....	1557
IV.	IMPLICATIONS.....	1559
A.	<i>Notice</i> .....	1560

---

\* Henry Allen Mark Professor of Law, Cornell Law School.

\*\* William T. and Stuyvesant P. Comfort Professor of Law, NYU Law School. We thank Cathy A. Weist for valuable research assistance.

B.	<i>Personal Jurisdiction</i> .....	1561
C.	<i>Adequacy of Counsel and Class Representatives</i> ....	1562
D.	<i>Settlements</i> .....	1562
E.	<i>Mandatory vs. Opt-Out Actions</i> .....	1565
V.	CONCLUSION.....	1566

Class actions are a useful means for achieving economies of scale in litigation, facilitating the prosecution of claims that would be uneconomic to litigate individually, and strengthening enforcement of the laws. These advantages can be obtained only because the class action brings before the court the claims of absent parties – people who may not even know that their rights are being determined *in absentia*. Because class action judgments are entitled to *res judicata* effect, the procedure can foreclose significant rights of parties who do not wish to release their claims or who may not even wish for the litigation to occur at all. The problem is particularly acute in the case of damages class actions under Rule 23(b)(3), a procedure that allows for forced consolidation of individual claims that, aside from practical considerations, could theoretically be litigated individually without impacting the interests of other claimants. This tension between the advantages and disadvantages of adjudicating the rights of absent parties is a pervasive theme in class action law.

The framers of the current Rule 23, adopted in 1966 and revised from time to time thereafter, understood this tension and included measures designed to ameliorate it. The commonality, typicality, and adequacy-of-representation requirements of Rule 23(a) work to ensure both that the interests of absent class members are effectively served by competent and loyal counsel and that the representative plaintiff is not disabled from properly performing his or her role. Settlements of class actions must be reviewed by the court and found to be fair, adequate, and reasonable to the class.<sup>1</sup> Notice of any settlement must be distributed to the class under court supervision.<sup>2</sup> As to (b)(3) class actions, in which the problem of absent parties is most acute, the rules also require that the class members receive the best notice of class certification practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.<sup>3</sup>

---

1. FED. R. CIV. P. 23(e).

2. *Id.*

3. FED. R. CIV. P. 23(c)(2).

Perhaps the most innovative requirement under the current Rule 23 – one not present under the pre-1966 iteration of the rules – is a provision allowing class members to exclude themselves from the class in a (b)(3) case.<sup>4</sup> Over time, this procedure, commonly known as an “opt-out,” has developed into a fundamental part of class action practice.<sup>5</sup> Indeed, the right to opt-out provides a key premise for many of the basic principles that shape the (b)(3) action—jurisdiction over absent parties, due process considerations, judicial review of settlements, awards of attorneys’ fees, and more.

In addition to the right to opt-out of a (b)(3) action, members of any class action—even “mandatory” actions under Rule 23(b)(1) or 23(b)(2)—have the option to exercise their collective “voice” by objecting to a proposed settlement.<sup>6</sup> In theory, the right to object to a settlement provides a check on reasonableness: the court can look to the views of class members as a counterweight to the views of counsel and the representative parties, who may be biased in favor of approval.

But how important *are* opt-outs and objections in the real world of class action litigation? How frequently do class members opt-out of class actions, and in what types of cases? How prevalent are objections? Knowledge of average opt-out and objection rates provides background information for a court evaluating how the class has reacted to a proposed settlement. Otherwise, a court has no basis for evaluating how the observed opt-out or objection rates in a case at bar compare with rates of opt-outs and objections in other cases.

Opt-out or objection rates provide even more fundamental information about class actions. If class members only rarely object or opt-out, we might infer that in many cases the right to opt-out or object is not very meaningful for class members. This fact would seem to somewhat undermine the value of these rights, as well as the functions allocated to them under existing law. For example, the difference between an opt-out class action and a mandatory class

---

4. FED. R. CIV. P. 23(c)(2)(A).

5. See George Rutherglen, *Future Claims in Mass Tort Cases: Deterrence, Compensation, and Necessity*, 88 VA. L. REV. 1989, 1995 (2002) (“The right to notice and to opt out has remained at the center of class action litigation for the last three decades.”)

6. On the analogy between settlement objections and the exercise of voice in political contexts, see John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 377 (2000) (“[O]ne could rely more on voice by giving class members greater authority to hire or fire the class’s attorney (or to approve the settlement)”). For an evaluation of “whether objectors to class action settlements add to the efficiency and fairness problems that plague modern class actions,” see, for example, Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 403 (2003).

action—while so prominent in theoretical discussions—might prove to be of only marginal practical importance. Similarly, the case for assuming personal jurisdiction over absent class members in a (b)(3) class could be significantly weakened if class members hardly ever opt-out of such lawsuits.

The present study is the first systematic attempt to measure the importance of opt-out rights and objections, as well as to assess the determinants of when class members are likely to utilize them.<sup>7</sup> We examined several thousand class action decisions for the eleven-year period between 1993 and 2003 to collect data on the frequency of opt-outs and objections. The study generated 236 cases in which we could ascertain quantitative information about the number of objectors, 159 cases with quantitative information about the number of opt-outs, 205 cases with both the size of the class and the number of objectors, and 143 cases with both the size of the class and the number of opt-outs.<sup>8</sup> The cases with information about objectors and opt-outs are not mutually exclusive. Many cases contained useful information about both. Based on these samples, and subject to their limitations—especially the limitation generated by relying exclusively on published opinions—we find the following:

1. Opt-outs from class participation and objections to class action resolutions are rare: on average, less than 1 percent of class members opt-out and about 1 percent of class members object to class-wide settlements.

2. Opt-out rates vary by case type. Even in case categories in which the opt-out rates are highest, however, the percentage of class members who exclude themselves is quite low. The highest mean opt-out rate is 4.6 percent for the four mass tort cases for which data were available. Employment discrimination cases rank second with an opt-out rate of 2.2 percent for the three cases in our sample with the necessary data. The opt-out rate for thirty-nine consumer class action cases is less than 0.2 percent.

3. Like the rate of opt-outs, the rate of objections varies depending on the type of case. Civil rights and employment discrimination cases have (relatively speaking) high objector rates,

---

7. We will sometimes refer to opting out and objecting collectively as “dissenting activity.”

8. In general, the published opinions provide opt-out statistics in settlement classes, when class members have the choice between the benefits of a negotiated settlement or exclusion and seeking an alternative remedy. Simply because courts do not report it, we do not have much information on opt-outs in the setting contemplated by the framers of Rule 23: cases where notice is distributed early in the litigation and class members then opt-out prior to any negotiated settlement. We are confident, however, that if such cases were included in our data set, the results would be even more pronounced: class members overwhelmingly do nothing when provided the option to opt out of class actions.

though their average rates are both less than 5 percent. Securities and antitrust cases have lower objection rates. Consumer cases tend to have the lowest objection rates of any case type with more than ten cases in our sample.

4. Opt-out-rates and objector rates can be partly explained by observable factors in a particular case. But the uniformly low rate of opting-out makes it difficult to model the opt-out decision. Aside from variation across case types, the most significant factor explaining opt-out and objector rates is the recovery per class member: as would be expected by theory, opt-out and objector rates increase as per capita recovery increases. This finding suggests that the economics of obtaining individual counsel help drive the dissent rates.

5. We do not find robust evidence that the rate of opt-out or objection is statistically associated with the level of attorney fee or the fee's proportion of the client's recovery. Class dissent does not appear to increase when the fee is high, nor does dissent appear to exert a notable moderating effect on fees. The class's recovery is the overwhelmingly dominant feature in shaping the fee level.

6. As predicted by theory, rates of dissent decline as the number of class members increases.

7. As also predicted by theory, the rate of objection to a settlement is negatively correlated with the likelihood that the settlement will be approved. However, we find no evidence that the opt-out rate has any effect on settlement approval.

8. Interestingly, overall levels of dissent to class action settlements declined during the period of this study. Although dissent rates have never been high, they exhibit a noticeable decline between 1993 and 2003.

The overall impression across the range of cases in the study is that opt-outs and objections are extremely uncommon. This evidence supports the claim, often found in the literature, that class counsel controls the litigation.<sup>9</sup> This conclusion is not necessarily an

---

9. The dominating role of class counsel is stressed in John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 896-900 (1987); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677-78 (1986); Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 659-63 (1994); Alon Klement, *Who Should Guard The Guardians? A New Approach For Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 27-28 (2002); Jonathan R. Macey and Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 41-44 (1991). Securities fraud litigation under the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in sections of 15 U.S.C. §§ 77, 78) ("PSLRA") may present a somewhat different

indictment of current class action practice. But our findings do have implications for courts assessing class action settlement proposals in light of a seemingly low absolute number or percentage of class members opting-out or objecting. Nominally low opt-out or objection rates should be evaluated in light of the rates in the mass of cases. Since this Article shows those rates to be trivially small in most cases, courts should be marginally less inclined to credit low rates of class dissent as evidence that the settlement receives the affirmative endorsement of a class. Both courts and theoreticians may also need to rethink the substantial role that opt-out rights play in the theory of modern class action litigation. Too much weight may be currently placed on a procedural option that only rarely serves its intended functions.

Part I of this Article discusses the importance of opt-out rights to the theory and practice of class action litigation; Part II describes our empirical study; Part III reports the key results; and Part IV discusses the implications of the results.

## I. THE IMPORTANCE OF OPT-OUT RIGHTS

Opt-out rights play a central role both in the theoretical foundations of class action law and in day-to-day judicial application of class action principles. Courts and commentators regularly rely on opt-out rights to support the functioning of the current class action system.

### *A. Opt-out Rights' Central Role in Class Action Adjudication*

Courts recognize that class actions bind parties who are not central participants in their own litigation and thus raise due process concerns. Opt-out rights are a central component of the argument for why (b)(3) class actions satisfy procedural due process requirements, even though absent class members are represented by attorneys they did not select and may have never met.

#### 1. Opt-out Rights, Objectors, and Due Process

The right to opt-out provides part of the justification for bringing into a state court parties with damages claims over whom the court would otherwise have no personal jurisdiction. The idea—suggested by the Supreme Court in the *Shutts* case—is that

---

situation in light of the more active role for representative plaintiffs contemplated in that statute.

when a class member receives notice of the action and fails to opt-out, he or she can be said to have submitted themselves, at least implicitly, to the jurisdiction of the tribunal.<sup>10</sup>

Opt-out rights are also intertwined with the due process concerns associated with binding absent class members (for example, members of the class who have not personally appeared in the action) by any final judgment or approved settlement of the litigation.<sup>11</sup> When opt-out rights are conferred, the courts will bind class members to the judgment if they fail to exercise their privilege to exclude themselves from the class.<sup>12</sup> Conversely, if opt-out rights are not provided in a suit in which a substantial element is a claim for money damages, the court may conclude that the proposed litigation would violate class members' due process rights.<sup>13</sup> In the case of settlement classes, where class members have the ability to observe the terms of a proposed settlement before deciding whether to exclude themselves, opt-out rights may alleviate due process concerns about expansive releases in a settlement agreement,<sup>14</sup> whereas the absence of opt-out rights may exacerbate such concerns.

In some cases, concerns for fairness to absent class members spark the creation of "super" opt-out rights transcending the rights explicitly conferred by Rule 23(b)(3). For example, some settlements of (b)(3) class actions allow class members to exclude themselves from the action even after the settlement is approved.<sup>15</sup> Super opt-out rights are explicitly authorized under the recent amendments to Rule

---

10. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-14 (1985). The jurisdictional basis for *Shutts* may not be present when the class action may result in the imposition of liability on the absent plaintiff (for example, an obligation to pay counsel fees) as opposed to the potential loss of a chose in action. See *State v. Homeside Lending, Inc.*, 826 A.2d 997, 1006-08 (Vt. 2003).

11. The opt-out in a case brought in state court is significant in light of the ruling of the United States Supreme Court in *Matsushita Electrical Industrial Company v. Epstein*, 516 U.S. 367, 380 (1996), which held that a state court class action settlement can release claims within the exclusive jurisdiction of the federal courts.

12. See, e.g., *Demint v. NationsBank Corp.*, 208 F.R.D. 639, 643-44 (M.D. Fla. 2002).

13. See, e.g., *Molski v. Gleich*, 307 F.3d 1155, 1165 (9th Cir. 2002); *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 241 (C.D. Cal. 2003); *In re Nat. Life Ins. Co.*, 247 F. Supp. 2d 486 (D. Vt. 2002); *Brown v. Tigor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), cert. granted in part by *Tigor Title Ins. Co. v. Brown*, 510 U.S. 810 (1993), and cert. dismissed as improvidently granted by *Tigor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994); *In re Teletronics Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. 2000).

14. See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982); *O'Brien v. Nat'l. Prop. Analysts Partners*, 739 F. Supp. 896, 901 (S.D.N.Y. 1990); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 482 (S.D.N.Y. 1998) ("The fact that the scope of the release has been fully disclosed in the Class Notice with opportunity for opting out strongly supports the scope of the releases.")

15. The Fen-Phen settlement in involving American Home Products is an example. See *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.*, 2003 WL 22657123, at \*1 (E.D. Pa. Oct. 30, 2003) (referring to the exercise of "back-end" opt-out).



23, which allow the trial judge to refuse to approve a settlement of a (b)(3) class action unless it affords a second opt-out right to class members who did not request exclusion in the first go-round.<sup>16</sup>

Some courts have approved a different form of super opt-out rights by ordering that class members be allowed to exclude themselves from (b)(1) or (b)(2) actions, notwithstanding the ostensibly mandatory nature of these procedures,<sup>17</sup> even when the opt-out right is sought by an absent class member rather than by the class representative or lead class counsel.<sup>18</sup> Similarly, some courts have viewed the absence of opt-out rights in mandatory classes as a reason for imposing a nonstatutory requirement of “coherence” that emulates the predominance and superiority requirements explicitly set forth in Rule 23(b)(3).<sup>19</sup>

Due process-based concerns also appear to underlie the right of class members to object to proposed settlements.<sup>20</sup> Such concerns are especially pronounced in the case of “mandatory” class actions under Rules 23(b)(1) and 23(b)(2), which do not explicitly confer opt-out rights. Lacking the ability to opt-out, members of these classes are allowed to protect their interests, at least to some extent, by being allowed to articulate objections to any proposed resolution of the controversy.

## 2. Opt-out Rights as a Check on Class Counsel and Class Representative Performance

The rights of class members to opt-out and object may be seen as a market check on the propensity of counsel to serve their own interests over those of the class. If bad representation triggers opt-outs and objections, counsel will make an effort to provide good representation *ex ante* in order to prevent their deficiencies from being brought to the attention of the court *ex post*. Similarly, courts may conclude that the presence of opt-out rights reduces the need for intensive scrutiny of the adequacy of either the class counsel<sup>21</sup> or the

---

16. FED. R. CIV. P. 23(e)(3).

17. See, e.g., *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898 (7th Cir. 1999); *Brown v. Tigor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992); *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983); *Fisher v. Virginia Elec. & Power Co.*, 217 F.R.D. 201, 214 (E.D. Va. 2003); *Palmer v. Combined Ins. Co. of Am.*, 217 F.R.D. 430, 439-40 (N.D. Ill. 2003).

18. See, e.g., *Doe v. Karadzic*, 182 F.R.D. 424, 428 (S.D.N.Y. 1998) (denying request to opt-out).

19. See, e.g., *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999).

20. See, e.g., *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 507-08 (5th Cir. 1981).

21. See, e.g., *Abby v. City of Detroit*, 218 F.R.D. 544, 548 (E.D. Mich. 2003).

class representative,<sup>22</sup> on the theory that if class members are dissatisfied with their representation, they can exclude themselves.<sup>23</sup> Conversely, if class members are not afforded the right to opt-out, this may result in a more stringent application of the adequacy of representation requirement.<sup>24</sup>

Courts frequently look to the number of opt-outs or objections as bearing on both the fairness of the settlement and the appropriate fee to be awarded to counsel. Thus, statistics on opt-outs and objections have become important data for courts in determining whether the settlement is fair, adequate, and reasonable. The idea is that if few class members exclude themselves after reviewing the terms of a proposed settlement, this tends to be a vote of confidence in the settlement by the parties most affected. Similarly, courts may view a small number of exclusions as indicative of excellent results warranting higher-than-usual compensation for class counsel.<sup>25</sup> Even the presence of opt-out rights, without regard to actual usage, may influence a court to resolve doubts in favor of the reasonableness of a proposed settlement.<sup>26</sup> On the other hand, when opt-out rights are not provided, their absence is sometimes viewed as a serious drawback to a settlement.<sup>27</sup>

### 3. Opt-out Rights Shape the Practice of Class Action Law

The presence or absence of opt-out rights affects the practice of class action law in numerous ways. The possibility of mass opt-outs orchestrated by dissident class counsel can pose a threat to a negotiated class action settlement. Competing class counsel

---

22. See, e.g., *Jones v. Risk Mgmt. Alternatives, Inc.*, No. 02 C 9392, 2003 WL 21654365, at \*4 (N.D. Ill. July 11, 2003).

23. See, e.g., *Carder Buick-Olds Co. v. Reynolds & Reynolds, Inc.*, 775 N.E.2d 531, 535 (Ohio Ct. App. 2002).

24. See, e.g., *ARC of Washington State, Inc. v. Quasim*, No. C99-5577FDB, 2001 WL 1448523, at \*4 (W.D. Wash. Oct. 26, 2001) (noting that “[t]he importance of adequate representation is only heightened when, as here, the members of the proposed class have no right to opt-out”).

25. See, e.g., *Deloach v. Philip Morris Co.*, No. 1:00CV01235, 2003 WL 23094907, at \*10 (M.D. N.C. Dec. 19, 2003) (“[T]he fact that [sic] there were not objections to the settlement and only 161 timely opt-outs testifies to the value of the settlement in the eyes of the class.”).

26. See, e.g., *Petruzzi's, Inc. v. Darling-Delaware Co.*, 983 F. Supp. 595, 610 (M.D. Pa. 1996) (viewing the settlement opt-out right as making presence of coupon relief less troublesome).

27. The “mandatory” nature of the settlement was one of the rationales underlying the Supreme Court’s rejection of a global asbestos settlement in *Ortiz* litigation. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842-43 (1999) (adopting a limiting construction of the Rule 23(b)(1)(B) mandatory class in order to avoid “serious constitutional concerns raised by the mandatory class resolution of individual legal claims”).

sometimes even attempt to exclude entire subclasses.<sup>28</sup> To deter secession by a segment of the class, some settlements are conditioned on fewer than some critical mass of class members opting out.<sup>29</sup> Other settlements contain provisions that appear designed to make opting out appear less attractive.<sup>30</sup> Courts also police against opt-out campaigns by competing counsel.<sup>31</sup>

Opt-out rights provide the most important rationale for requiring notice of the action at the time of certification in (b)(3) cases.<sup>32</sup> Notice, in turn, exercises an important strategic influence over the conduct of class litigation because the cost of notice can be substantial, especially in consumer cases with low damages per capita and large numbers of plaintiffs.

Opt-out rights can also affect subject matter jurisdiction: some courts have refused to consider the claims of absent class members in determining whether the amount-in-controversy requirement for federal diversity jurisdiction was present, on the theory that they could opt-out of the litigation.<sup>33</sup>

### *B. Commentators' Views on Opt-out Rights*

Commentators tend to view opt-out rights favorably, though many express reservations about particular aspects of opt-out rights. Such rights are seen as a means for protecting class members' autonomy of action,<sup>34</sup> protecting them from abuse in a distant forum,<sup>35</sup>

---

28. See, e.g., *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 196 (3d Cir. 1993).

29. See, e.g., *Laughman v. Wells Fargo Leasing Corp.*, No. 96 C 925, 1997 U.S. Dist. LEXIS 13614, at \*3 n.1 (N.D. Ill. Sept. 2, 1997).

30. See, e.g., *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 359, 381 (N.D. Ohio 2001) (providing that "[i]f the defendants settle a case with an opt-out claimant on terms more favorable than are received under the Settlement Agreement by participating claimants, then the defendants agree to pay all participating claimants the increment"); see generally Richard A. Nagareda, *Closure in Damage Class Settlements: The Godfather Guide to Opt-Out Rights*, 2003 U. CHI. LEGAL F. 141 (2003).

31. For example, an attorney who counsels a client in how to conduct an *ex parte* campaign to solicit absent class members to opt out of a class action may face disqualification and other sanctions for conduct detrimental to the orderly administration of justice. See *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1200 (11th Cir. 1985).

32. See, e.g., *Eisen v. Carlyle & Jacquelin*, 417 U.S. 156, 176 (1974). If, in a settlement class, the notice does not provide information sufficient to allow a class member to make an informed decision about whether to opt out, the court may reject the proposal *in toto*. See *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 283-84 (7th Cir. 2002) (rejecting a class action settlement, in part, because certain class members had not received notice adequate to provide them with information needed to make informed opt-out decision).

33. See, e.g., *Gibson v. Chrysler Corp.*, 261 F.3d 927, 941 (9th Cir. 2001); *Klempner v. Northwestern Mut. Life Ins. Co.*, 196 F. Supp. 2d 1233, 1238 (S.D. Fla. 2001).

34. See, e.g., John E. Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3, 79 (1983) (recognizing the right to control one's own litigation).

and reinforcing their right to adequate representation.<sup>36</sup> Professor Coffee views the opt-out right as so significant that he recommends an additional, delayed opt-out right that begins after the approval of some class action settlements.<sup>37</sup> Professor Molot also endorses enhanced opt-out rights as a useful reform that would bring class actions more in line with an administrative law paradigm.<sup>38</sup> Professor Nagareda sees the distinction between opt-out and non-opt-out classes as fundamental to the nature of class actions and as essential to structuring a class remedy that comports with notions of corrective justice.<sup>39</sup> Professors Coffee and Issacharoff analogize the right to opt-out to the important power of exit enjoyed by members of corporate governance structures.<sup>40</sup> Professors Koniak and Cohen suggest that class action attorneys should be subject to civil or criminal liability for disguising the value of opt-out rights in the notice distributed to the class.<sup>41</sup> Professor Epstein, writing from a libertarian perspective, applauds the right to opt-out of class actions on autonomy-based grounds.<sup>42</sup> Another commentator argues that opt-out rights are required as a matter of due process, not only for (b)(3) class actions, but also for class actions in general.<sup>43</sup>

Not all commentators are as favorably disposed towards opt-out rights. Professor Perino critiques exclusion rights in mass tort cases on the ground that they can disrupt settlements that are valuable to the majority of claimants.<sup>44</sup> Professor Bone questions the

---

35. See Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 16 (1986) (stating that the reasoning in *Shutts* "was based upon the inference of consent from class members' failure to opt out").

36. See John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1441 (2003) (stating that the individual who opts out might be signaling his unhappiness with the suit and is essentially protecting his own interests).

37. Coffee, *supra* note 6, at 420.

38. Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 110-12 (2003).

39. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 153-54 (2003).

40. Coffee, *supra* note 6, at 376-77; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 366. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

41. Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1056 (1996).

42. Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 510 (2003) ("All options have some positive value, and the control of one's own litigation cannot be regarded as a small detail within the overall scheme of civil procedure.").

43. Steven T.O. Cottreau, Note, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. REV. 480, 528 (1998).

44. Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85, 143-44 (1997).

ideal of a “day in court” that opt-out rights help enforce.<sup>45</sup> Professor Redish attacks opt-out rights as facilitating the transformation of substantive law, within the context of the class action, into a regime protective of the rights of entities rather than individuals.<sup>46</sup> Professor Rosenberg argues that opt-out rights can be antithetical to the purposes of class action litigation, which he sees as achieving a socially desirable level of deterrence over misconduct by defendants.<sup>47</sup> One commentator claims that class members should be required to establish good cause before being allowed to opt out.<sup>48</sup>

Even those commentators who criticize opt-out rights or their details, however, generally agree about the importance of the procedure – otherwise they would not be so critical. Professor Koniak’s concern about the mandatory nature of the asbestos settlement, for example, appears animated by a belief that opt-out rights would have significantly improved the position of absent class members.<sup>49</sup> Professor Epstein’s endorsement of the autonomy value of opt-out rights is likewise premised on the notion that these rights have significant value to class members.<sup>50</sup> Even Professor Rosenberg, although no fan of opt-out rights, assumes their importance when he criticizes their effect.<sup>51</sup>

## II. PRIOR RESEARCH ON DISSENT AND THE INSTANT STUDY

This Part first reviews prior empirical work on opt-outs and objectors and then describes the instant study.

---

45. Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 195-99 (1992).

46. Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 94-102 (2003).

47. David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 23 (2003) (arguing that “allowing members to exit the class undermines the “basic deterrence objective of collective adjudication.”); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1911-16 (2002) (questioning individual autonomy rationale for opt-out rights); David Rosenberg, *Mandatory-Litigation Class Actions: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 840-43, 896-97 (2002) (advocating mass-tort class actions with no opt-out rights).

48. Mark W. Friedman, Note, *Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 YALE L. J. 745, 745 (1990).

49. See generally Koniak & Cohen, *supra* note 41.

50. See generally Epstein, *supra* note 42.

51. See generally Rosenberg, *supra* note 47.

*A. Prior Studies of Opt-Outs*

Little prior empirical work exists on class action opt-outs and objectors. Thomas E. Willging, Laurel E. Hooper, and Robert J. Niemic of the Federal Judicial Center included statistics on opt-out rates in a study of class actions.<sup>52</sup> Their study covered four federal district courts in major urban areas (Philadelphia, Miami, Chicago, and San Francisco) and included all class action cases (not just published opinions) terminated from July 1, 1992 through June 30, 1994.<sup>53</sup> They found a low rate of opt-outs. “Across all four districts, the median percentage of members who opted out of a settlement was either 0.1% or 0.2% of the total membership of the class; 75% of the opt-out cases had 1.2% or fewer of class members opt-out.”<sup>54</sup> In Rule 23(b)(3) class actions, the percentage of cases with one or more opt-outs ranged from 9 percent in the Northern District of California to 21 percent in the Eastern District of Pennsylvania. The vast majority of cases, therefore, had zero opt-outs. Objector participation was somewhat higher. “Overall, about half of the settlements that were the subject of a hearing generated at least one objection. The percentage of cases in which there was no objection ranged from 42% to 64% in the four districts . . .”<sup>55</sup> Willging et al. found their results to be consistent with an empirical study of Rule 23(b)(3) class actions conducted twenty years earlier.<sup>56</sup>

Other important empirical work on class actions exists but with less emphasis on quantifying opt-outs.<sup>57</sup> Deborah Hensler et al., in a study by the RAND Institute for Civil Justice, provide quantitative opt-out information for four class action cases studied in detail. They also find that the rate of opt-outs is quite low as a

---

52. THOMAS E. WILLGING, LAUREL E. HOOPER, & ROBERT J. NIEMIC, FEDERAL JUDICIAL CENTER, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 45-54 (1996), available at [http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url\\_r=pages/556&url\\_l=index](http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url_r=pages/556&url_l=index).

53. *Id.* at 4.

54. *Id.* at 10.

55. *Id.* at 57.

56. *Id.* at 53-54 (citing Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123 (1974)).

57. See, e.g., DEBORAH R. HENSLER, NICHOLAS M. PACE, BONITA DOMBEY-MOORE, BETH GIDDENS, JENNIFER GROSS, & ERIK K. MOLLER, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 39 n. 38 (2000) (citing early empirical work on class actions), available at <http://www.rand.org/publications/MR/MR969/>; BOB NIEMIC & TOM WILLGING, FEDERAL JUDICIAL CENTER, EFFECTS OF *AMCHEM/ORTIZ* ON THE FILING OF FEDERAL CLASS ACTIONS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (2002), available at [http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url\\_r=pages/556&url\\_l=index](http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url_r=pages/556&url_l=index).

percentage of the class, although there was considerable variation among the cases studied.<sup>58</sup>

The four-district Federal Judicial Center study and the RAND data tell a consistent story: opt-outs tend to be less than 1 percent of class members. But generalizing from them may be premature because, as the authors of the studies note, they are limited either by a small number of districts or by a small number of cases. Our study, with its own limitation to published opinions,<sup>59</sup> nevertheless can add substantially to what other class action studies find.

### B. *The Instant Study*

Our study was conducted as follows. We first assembled a comprehensive database of published class action cases.<sup>60</sup> We searched in the Westlaw™ “ALLCASES” database using the search: “CLASS ACTION” & (OPT-OUT OR “OPT-OUT” OR “OPTED OUT” OR “EXCLUDE THEMSELVES” OR “EXCLUDE HIMSELF” OR “EXCLUDE HERSELF” OR OBJECTOR) & SETTLEMENT & DATE(=[1993-2003]).<sup>61</sup> This search’s results were checked against a

58. *Atkins v. Harcross* is reported to have had approximately 25 opt-outs out of 3800 class members. HENSLER ET AL., *supra* note 57, at 325-26, 333. *In re Louisiana-Pacific Inner-Seal Siding* is reported to have had 1497 valid exclusions out of a potential class of 700,000 to 900,000 homes. *Id.* at 389. *Cox v. Shell Oil* had 32,000 opt-outs out of several million mailings. *Id.* at 356-57. *Roberts v. Bausch & Lomb, Inc.* is said to have had 103 opt-outs out of “hundreds of thousands” of class members. *Id.* at 162-65.

59. Our dataset looks only to opinions that, for whatever reason, were published in some readily available form and thereby omits opinions that were not published. Obviously, therefore, we have not included the full universe of cases in our dataset. Although published opinions are not necessarily representative of the universe of all cases, however, they can lead to important insights. Our quantitative statements are of course estimates, but they represent substantially more informed estimates than those made without comprehensive knowledge of the opinions. And opinions are in one important respect representative. For judges seeking to inform their fee decisions with knowledge of other cases, published opinions are the prime source of data. *Cf.* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1195 (1991).

60. A similar, but not identical, database was employed in an earlier study on attorneys’ fees in class action settlements. See Theodore Eisenberg & Geoffrey Miller, *Attorneys’ Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEG. STUD. 27, 28 (2004).

61. We included the search term “settlement” to make the results tractable. Although this search term tends to restrict the data set to settled class actions, its use can be justified by the fact that postcertification, most certified class actions likely settle, and when class actions go to a judgment on the merits, class member objections to the judgment are not likely allowed, and opt-out rates are unlikely to be reported in a written opinion. It should be noted that the low rate of judgments on the merits – and especially the low rate of trials – in class action cases may not materially differ from rates in other federal litigation. WILLGING ET AL., *supra* note 52, at 66. “The trial rate in class actions in each of the four districts was not notably different from the 3% to 6% trial rate for nonprisoner nonclass civil actions . . .” *Id.* In addition, “[p]laintiff classes and individual plaintiffs did not fare well at trial. Except for one default judgment that led to a class settlement, no trial resulted in a final judgment for a plaintiff class.” *Id.* (footnote omitted).

search of the Lexis™ “Mega” database using the same search terms. We also compiled lists of citations in the cases found by these search requests and included any additional cases in the dataset. The searches yielded many more cases than are included in the study because a case satisfying the search terms’ criteria need not contain quantitative data on opt-outs or objectors. Thus, the class action cases in the study represent only a fraction of all class action activity. One would, however, expect that judges in cases with substantial proportions of opt-outs or objectors would tend to comment on opt-outs or objections more than in cases with little or no opt-out or objection activity. If that is so, then the generally low level of opt-out or objector activity we find in published opinions may in fact overstate dissent in class action cases.

In interpreting the data, we had to address the fact that opt-outs and objections (in theory at least) serve different functions and are available in different situations. Opt-outs represent the exercise of an option to “exit” the case, whereas objections represent the exercise of a “voice.”<sup>62</sup> In theory, a given class member cannot exercise both rights in a single case: if both are available, the class member must decide whether to (1) opt-out and pursue relief (if at all) outside the class case; or (2) remain in the case, accept relief under the settlement, and agree to be bound by the preclusive effect of the release, while attempting to influence the court’s fairness review by lodging an objection to the settlement.

Four logical situations exist with respect to opt-out and objection rights:

First, class members can object but not opt out. This situation occurs in settled mandatory class actions under Rule 23(b)(1) or (b)(2), in which class members have no right to opt-out but may object to the proposed settlement.

Second, class members can opt out but not object. This situation occurs in Rule 23(b)(3) class actions that are litigated to judgment on the merits rather than settled. Our data include no such cases, both because litigated class actions do not generate opinions that report such data and because, for purposes of tractability, we limited our search to cases that included the term “settlement.”

Third, class members can neither opt out nor object. This situation occurs in mandatory class actions under Rule 23(b)(1) or (b)(2) that are litigated to a judgment on the merits rather than

---

62. See Coffee, *supra* note 6, at 376, 376 n.17 (employing vocabulary adopted from ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (discussing alternative strategies for involvement in political communities)).



settled. Again, our data include no such cases for reasons stated in the previous paragraph.

Fourth, class members can either opt out or object, but not both.<sup>63</sup> This situation occurs in Rule 23(b)(3) class actions that result in a settlement. As to these, two sub-categories are important:

In the case of litigation classes in which the action is certified prior to a settlement, class members must elect to opt out or remain in the case at the time of certification. Once the case is settled, class members who have not opted out may object to the settlement but ordinarily may not opt out.<sup>64</sup> In general, opt-out information is not available for such cases because the court has no reason to report the opt-outs when issuing an opinion on the fairness of the settlement. We do, however, find two instances of opinions in litigation classes that disclose the number of opt-outs.

In the case of settlement classes in which final approval of certification and settlement occurs at the same time, class members ordinarily have a choice of either opting out of the settlement and pursuing their individual remedies if they desire or remaining in the case and enjoying the right to object to the settlement terms. Here, courts frequently report opt-out rates, on the theory that these data provide a measure of the class's reaction to the settlement.

These differences are important because they affect both the data reported in the decisions as well as our analysis of the data. For example, if the action is a mandatory class action without opt-out rights, it would hardly be sensible to conclude from the absence of opt-outs that class members did not care about the right to exclude themselves. Similarly, if the action reaches a litigated judgment, we should hardly conclude that a member's failure to object indicates that the right to object is not valued – objections are not heard in such cases. We resolved this issue by both separately counting objections and opt-outs and only including cases in which it was clear that the class member enjoyed such rights.

We used the following conventions, or protocols, in gathering data.

1. For relief, we included the full relief for the class (including the value of attorneys' fees) plus costs of notice or settlement

---

63. In general, the right to opt out and the right to object are considered to be mutually exclusive: the class member has to elect one or the other. See, e.g., *Mortimer v. River Oaks Toyota*, 663 N.E.2d 113, 116 (Ill. App. 1996) (plaintiffs who objected but did not opt out were subject to the preclusive effect of the judgment in a settled class action).

64. This is not true in the unusual situation where, post settlement, the court allows a second round of opt-out rights to class members who previously did not exercise their right to exclude themselves.

administration paid by the defendant, if these were quantified in the opinion. If the court gave a reasonable range for the value of the class recovery, we used the midpoint. If the recovery could reasonably be calculated from other data in the opinion, we calculated it even if the class recovery was not explicitly stated.

2. For the type of action, we used judgment as to the principal nature of the case, even if several causes of action were pleaded.

3. We used the absolute number of persons or entities who objected. Even if multiple parties filed identical objections, we counted all parties. Where the court gave an estimate of objectors as “more than” a certain number or “less than” a certain number, we used the court’s baseline number.

4. We used the number of class members if the court provided this, or the court’s estimate of the number if no precise number was provided. Otherwise, we used the number of notices distributed as a proxy for the class size. We recognize that this can be only a reasonable approximation of class size because (a) it was often the case that the defendant’s files did not contain a complete list of class member names and addresses (this is particularly a problem in securities class actions since many shares of stock are held in street name, with the beneficial owners known only to brokers); and (b) not all mailed notices were correctly addressed, resulting in a percentage of returns for all class actions of any significant size. Even if the court indicated the percentage or absolute number of notices that were returned as undeliverable, we included the total number of notice forms sent out in order to preserve consistency with other cases. In shareholders’ derivative actions, we used the number of shareholders if this was available.

5. The “approved” variable codes whether the settlement ultimately received approval by the courts, including any appeals. If the court of appeals approved the settlement in part but rejected it in part, we coded the outcome as not approved.

6. As to the number of objectors, we included objections of any sort, including objections to the settlement or objections to the proposed attorney fee. If a single objection was brought on behalf of multiple class members, we included the total number of class members involved, if this number was available.

### III. RESULTS

This Part first reports basic descriptive results of key features of class action litigation relating to opt-outs and objections. It then

explores regression models of opt-out patterns and the relation between class approval and opt-outs.

### A. Statistical Description of Aggregate Opt-out Behavior

Table 1 reports statistics pertaining to key variables. It shows that the number of opt-outs varies widely, with a median of twenty class members opting out and a mean of 1,706 opt-outs. Similarly, the number of objectors varies, with a median of only three objectors per case.

These absolute levels of dissent are incomplete without knowledge of the size of the class. Table 1 shows a median class size of 22,496 members. The most telling statistics are the percentages. The median percentage of class members opting out, in the 143 cases in which the opinion reveals both the number of opt-outs and the number of class members, is a mere 0.1 percent. The median percentage of class members objecting is zero in the 205 cases with the necessary data. Opt-out and objector percentages are thus trivial.

Table 1. Characteristics of Class Action Litigation

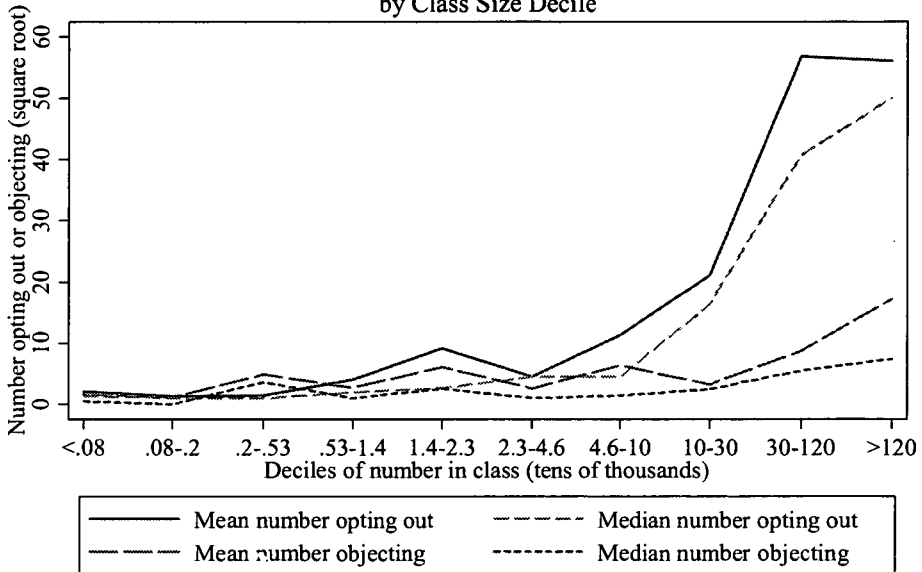
Variable	Mean	Median	Std. dev.	Number of cases
Number of opt-outs	1706.3	20.0	6228.8	159
Number of objectors	137.9	3.0	673.4	236
Percent opt-outs	0.6	0.1	1.8	143
Percent objectors	1.1	0.0	5.9	205
Number in class	603,692.6	22,496.0	1,900,000.0	215
Percent class approved	91.4	100.0	28.1	245
Class recovery (millions \$2003)	173.8	10.8	611.2	187
Attorneys' fees (millions \$2003)	14.0	2.5	42.9	198
Fee as percent of recovery	26.4	25.0	22.3	159
Recovery per class member	3662.0	553.6	10,434.8	161
Percent of sample consisting of mandatory class actions	7.3	-	-	246
Percent of sample consisting of litigation classes	2.8	-	-	246
Percent federal cases	90.0	-	-	251
Percent appellate	13.5	-	-	251

Source: Class action settlement opinions 1993 to 2003.

Figure 1 explores the relationship between class size and the number of opt-outs and objectors. The figure's y-axis shows the number of opt-outs or objectors. The figure's x-axis divides the sample

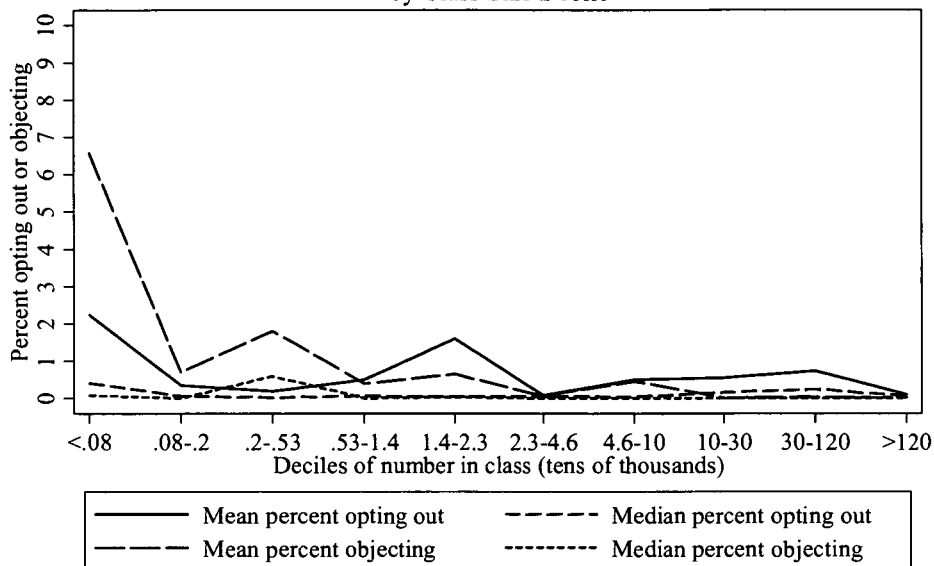
into deciles based on class size. For example, the smallest 10 percent of classes have fewer than 800 members and largest 10 percent of classes have more than 1.2 million members. The figure indicates that the sixth or seventh deciles in number of class action members, corresponding to 23,000 to 100,000 class members, are the deciles in which one begins to see nontrivial numbers of class members opting out. The number of opt-outs and objectors does not begin to approach 100 per case until class membership is well into five figures (note that Figure 1's y-axis shows the square root of the number of dissenters). The median number objecting never reaches 100, even in the largest class-member decile, for which the mean number of class members exceeds one million.

Figure 1. Number of Class Action Opt Outs & Objectors  
by Class Size Decile



Note. The y-axis shows the number of opt-outs or objectors for each decile of class membership size, using a square root transformation to help represent graphically the nonlinear pattern. The x-axis divides the sample into deciles based on class size. Source: Class action settlement opinions 1993 to 2003.

Figure 2. Percent of Class Opting Out or Objecting  
by Class Size Decile



Note. The y-axis shows the percent of the class opting out or objecting for each decile of class membership size. The x-axis divides the sample into deciles based on class size. Source: Class action settlement opinions 1993 to 2003.

### B. Opt-outs and Objectors by Case Type

One expects dissent rates to vary by case type. Table 2 explores the relation between case type and opt-out and objector behavior. For example, the table's first numerical column shows that the mean number of opt-outs ranges from a mere two in Fair Debt Collection Practices Act cases to over 18,000 in mass tort cases. Although the table's first three columns show that the number of opt-outs varies substantially, the second three-column group—which reports the percent of a class opting out—shows that opt-out rates are low for all case types. The median opt-out rate is about 1 percent or less for all case types other than mass tort. For that case type, the median opt-out rate is 4.2 percent and the mean 4.6 percent. Thus, for all case categories the inclusion rate (100 percent minus the opt-out percent) is over 95 percent. This constancy persists despite the vast range of class sizes shown in the third cluster of numerical columns—from a median of about 1,000 for employment discrimination cases to

a median of 2,000,000 for product liability cases (though only four product liability cases have available data).

Table 2. Opt-outs by Case Type & Recovery per Class Member

	Number of Opt-outs			Percent Opt-outs			Number of Class Members			Recovery per Class Member		
	Mean	Median	N	Mean	Median	N	Mean	Median	N	Mean	Median	N
Antitrust	898.4	121.0	19	0.6	0.2	15	1,200,000.0	51,578.5	20	3555.6	1159.3	19
Civil rights	19.5	7.5	6	0.7	0.2	6	8306.0	1500.5	8	25,557.0	1299.1	5
Commercial	67.8	36.0	4	1.4	1.2	4	3566.0	2341.0	6	9472.3	9472.3	2
Consumer	2935.3	513.0	39	0.2	0.1	39	1,800,000.0	510,000.0	45	481.5	99.7	30
Corporate	30.0	30.0	1	0.2	0.2	1	276,946.2	41,586.0	5	165.7	165.7	1
ERISA	425.0	425.0	2	0.0	0.0	2	140,689.3	7400.0	11	5998.2	1092.6	9
Employment	99.5	4.5	6	1.4	0.3	5	43,790.0	8703.0	6	1869.9	1907.5	6
Employment discrim.	27.0	24.0	3	2.2	1.1	3	3765.9	1013.0	8	20,080.6	16299.2	5
FDCPA	2.0	1.0	9	0.0	0.0	9	9017.8	1917.0	9	44.3	24.3	9
Mass tort	18,499.3	7257.0	6	4.6	4.2	4	162,106.1	29,530.0	9	5611.3	3739.4	81
Product liability	2045	1311.0	4	0.1	0.1	4	2,500,000.0	2,000,000.0	4	90.8	90.8	2
Securities	353.2	2.0	51	0.7	0.0	43	55,324.8	17,750.0	59	1728.3	668.4	53
Other	74.6	42.0	8	0.1	0.1	8	587,495.9	27,883.0	9	1188.4	498.1	3
Total	1717.1	20.0	158	0.6	0.1	143	645,476.2	25,829.0	199	3520.7	476.1	152

Note. FDCPA cases are Fair Debt Collection Practices Act cases. Source: Class action settlement opinions 1993 to 2003.

Table 3 reports on objector behavior by case type. The table's fourth through sixth numerical columns show the objection rate to be similarly low. Across all case types, as reported in the "Total" row, the median objection rate is zero and the mean is 1.1 percent of class members. Only in commercial cases does the objection rate rise to nontrivial levels, but this case type has only four cases in the sample. No other case type displays a mean objection rate of even 5 percent of class members. Like opt-outs, objectors are rare and this result varies little across the vast majority of case types.

Table 3. Objectors by Case Type

	Number of Objectors			Percent Objectors			Objectors Per Million Dollars Recovered		
	Mean	Median	N	Mean	Median	N	Mean	Median	N
Antitrust	170.3	2.0	28	0.5	0.0	20	0.6	0.1	25
Civil rights	43.6	19.0	17	4.3	0.5	14	22.2	0.6	10
Commercial	169.0	133.0	5	24.2	14.3	4	6.9	6.9	2
Consumer	233.1	19.5	44	0.1	0.0	43	4.7	0.2	28
Corporate	219.5	6.5	8	0.0	0.0	5	40.6	4.5	3
ERISA	82.0	8.0	13	0.9	0.3	12	7.5	0.6	11
Employment	17.5	5.5	6	0.3	0.1	6	1.2	0.3	6
Employment discrim.	48.4	3.0	9	3.4	0.4	9	1.5	0.2	6
FDCPA	0.4	0.0	9	0.0	0.0	9	5.3	0.0	9
Mass tort	214.5	30.0	13	1.0	0.1	12	0.8	0.2	11
Product liability	1691.8	128.5	4	0.1	0.0	4	7.7	7.7	2
Securities	41.6	0.0	70	0.1	0.0	57	4.3	0.0	63
Other	9.2	3.5	10	0.0	0.0	10	0.1	0.0	3
Total	137.9	3.0	236	1.1	0.0	205	5.3	0.1	179

Note. FDCPA cases are Fair Debt Collection Practices Act cases. Source: Class action settlement opinions 1993 to 2003.

### C. Opt-out and Objector Behavior Over Time

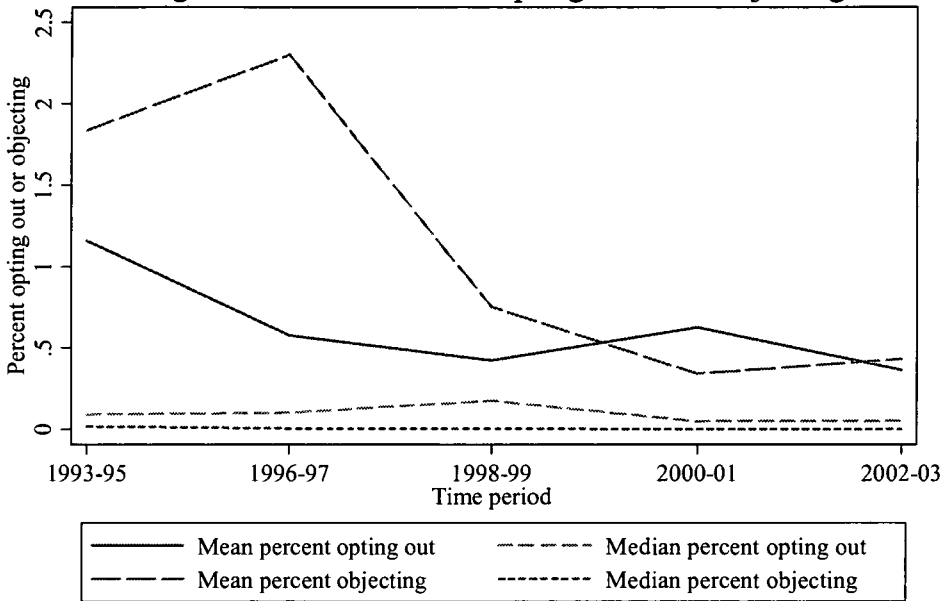
Previous research suggests no significant time trend from 1993 through 2002 in the size of class action recoveries or in the amount of attorney fees to class action counsel.<sup>65</sup> To explore the relationship between class action dissent and time, we first summarize, by year, the mean and median rates of opting out and objection. These results are reported in the Appendix and form the basis for Figure 3. To ensure a reasonable number of cases in each time period, we aggregate time periods as shown on the x-axis in Figure 3.

Over time, the most definite trend is the downward movement of the mean percentage of objectors to class action settlements. The rate dropped from 2.0 to 2.5 percent in the 1993 through 1997 period to less than 0.5 percent in the periods 2000-2003. The median percentage of objectors does not show a similar trend. It is consistently so low that there is little room for it to decrease. The mean opt-out rate also shows descent, although the slope of the descent is not as steep as in the case of objectors: opt-outs started at

65. Eisenberg & Miller, *supra* note 60, at 28.

slightly over 1 percent in 1993 to 1995 and declined to about 0.5 percent in 2002-2003. Furthermore, any noticeable declining trend in the mean opt-out rate occurred from 1993 through 1997. Like the median objector rate, the median opt-out rate is consistently so low that it cannot be expected meaningfully to decrease.

Figure 3. Time Trends in Opting Out and Objecting



Note. The y-axis shows the percent of the class opting out or objecting for each time period. The x-axis divides the sample into time periods. Source: Class action settlement opinions 1993 to 2003.

#### D. Explaining the Pattern of Dissenting Behavior

Tables 1 to 3 show the aggregate patterns of opt-out and objector behavior and the patterns by case type. Figure 3 shows the pattern over time. We now study simultaneously these and other possible influences on opt-out and objector behavior. We do so through regression models seeking to explain the pattern of opt-out and objector behavior and to determine whether opt-out or objector behavior affect attorney fee award levels. Although Willging et al. report that class members or other interested parties did not object to fees very often, they do report nontrivial rates of concern about fees.<sup>66</sup>

66. WILLGING ET AL., *supra* note 52, at 76.



If class-member concerns about fees help explain dissent patterns, then one can plausibly model class dissent as a function of the percentage awarded as attorney fees as well as a function of case type and time.

Using a measure of the fee as an explanatory variable for the rate of opt-outs or dissenters raises an issue about the direction of causation. It may well be that dissent—especially the objection rate—is a function of fee awards; objectors may tend to emerge in part when fees are thought to take too large a fraction of the recovery. But it may also be true that fee awards are a function of dissent. For example, a court may regard a high rate of opting out or objection as evidence that reflects on counsel's performance and therefore warrants a reduced fee. Whatever the relation between dissent and fee, the fee percentage recovered by counsel is not merely or primarily a function of dissent rates. A scaling effect exists in which a primary determinant of the fee percentage is the size of the class recovery.<sup>67</sup> Fee percentage declines as class recovery increases,<sup>68</sup> so exploring the relationship between dissent and fee requires also accounting for the size of recovery.

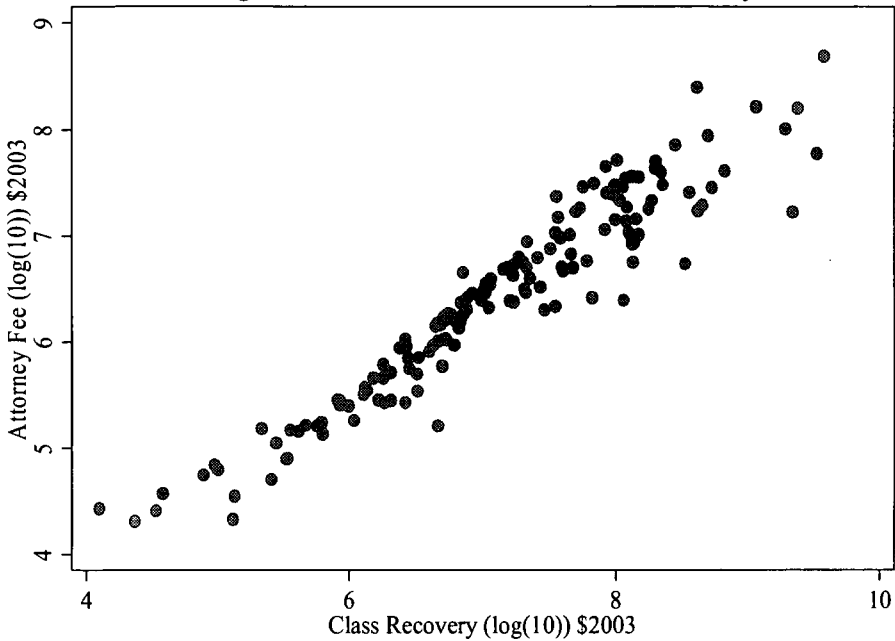
Figure 4 explores this relation in this new dataset. It confirms that the recovery is the overwhelming determinant of the fee in this dataset. The correlation between the fee and recovery is  $r = 0.95$ . The massive explanatory power of the recovery of course makes it difficult for other factors in a modest-sized sample to detectably influence the fee. Thus, we are skeptical that opt-out or objector behavior will be seen to affect the fee. In any event, one cannot simply examine the fee as a function of dissent; one must at least include the size of the class recovery in modeling the fee.

---

67. Eisenberg & Miller, *supra* note 60, at 28.

68. *Id.*

Figure 4. Fee As A Function of Recovery



Note. The y-axis shows the attorney fee in inflation-adjusted year 2003 dollars. The x-axis shows the class recovery in inflation-adjusted year 2003 dollars. Log transformations are used due to the log-normal distribution of the data. Source: Class action settlement opinions 1993 to 2003.

These considerations suggest that a single regression model equation cannot capture much of what is going on in explaining class action dissent. Any single-equation model likely will suffer from endogeneity.<sup>69</sup> Fee percentage used to explain dissenting behavior is not exogenous because the fee, as a percentage of recovery, may well depend on dissenting behavior. Fee percentage thus may be a function of dissenting behavior as well as of gross class recovery. To address these issues, we use three-stage least squares<sup>70</sup> to estimate a system of three equations, as follows:

- (1) fee level as a function of class recovery, dissent rate (opt-out or objector), and time;

69. Theodore Eisenberg, Stephen P. Garvey, & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1637 (1998) (citation omitted).

70. See generally WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* chs. 14-15 (5th ed. 2002). Results do not materially differ across the key variables of interest in two stage least squares models. For a discussion of strengths and weaknesses of various simultaneous equations models, see *id.*

(2) Dissent rate (opt-out or objector) as a function of case type, fee percent, recovery per class member, and time;

(3) Fee percentage (proportion) as a function of class recovery, case type, and time.

Table 4 reports the results for these simultaneously estimated equations.

Model (1) is the system of three equations relating to opt-outs, with fee level and fee percentage simultaneously modeled. Model (2) is the same system of equations as model (1) except that objectors replace the opt-outs. The models include the variable "Year" to track any linear time trend that might exist. A series of case-type dummy variables, included in the fee proportion and opt-out equations, represent each of the major case categories, with smaller case categories combined into the reference category. Because of their similarity, we combine Consumer and Fair Debt Collection Practices Act cases into a single category type. In the attorney fee level and fee proportion equations, the principal explanatory variable is the client recovery. Dissent rates are included as explanatory variables in these equations to try and detect any marginal effect they might have given the powerful influence of the class recovery.

One may expect that opt-out and objection rates are associated with levels of client recovery, but the causal relation is not necessarily unidirectional. For types of cases with large awards, one might expect clients to be more able to attract individual counsel. As noted by Willging et al.:

For very large awards, say in a products liability case involving serious personal injuries, one would expect the opt-out rate to increase as the size of the expected award increases because individuals with more serious than average injuries would be able to obtain representation and pursue a larger individual award.<sup>71</sup>

For cases comprising classes that have expected awards too low to support individual lawsuits on a contingent basis, "one might expect that class members would have more incentive in the larger cases to remain in the class and recover an award in the thousands of dollars."<sup>72</sup> These considerations suggest the need to include a measure of recovery in modeling dissent rates. We do so by including the recovery per class member (log) as an explanatory variable of opt-out and objection rates (the middle equation reported in Table 4 for both model (1) and model (2)). We have run, but do not report, models in which dummy variables for federal court cases and appellate court cases are included in all equations. Those models do not differ materially from those reported in Table 4.

---

71. WILLGING ET AL., *supra* note 52, at 53.

72. *Id.*

Turning to results, the opt-out rate (the middle column equation in model (1)) is significantly associated with the recovery per class member. As that recovery increases, so does the opt-out rate. This relationship logically cannot be a consequence of increasing dissatisfaction as the recovery per class member increases. Rather, it may be a function of the association of high per-class-member recoveries with opting out class members believing that they can do better on their own, or as part of a different class action law suit, than as members of the class from which they opt-out. These larger per-member stakes cases may well be the ones in which competing counsel may try to galvanize an opt-out movement or in which the economics of the case could support individual contingent fee counsel.

The objection rate (the middle column equation in model (2)) also shows a statistically significant positive association between recovery per class member and dissent. These large-recovery cases may spawn the belief that even more could be had, leading class members who do not opt out nevertheless to object to the settlement.

Some case type effects emerge. As suggested by Table 2's relatively high opt-out rate for mass tort cases, the opt-out percentage is significantly higher in mass tort cases than in the reference category. As suggested by Table 3, the mass tort effect does not persist when one models the objection rate in model (2) in contrast to model (1)'s opt-out rate.

Table 4. Regression Models of Opt-Out and Objector Rates

	(1) = Three-stage least squares estimates of three-equation system relating to opt- outs			(2) = Three-stage least squares estimates of three-equation system relating to objectors		
	Dependent variables =			Dependent variables =		
	Attorney fee level	Percent opt-outs	Fee proportion	Attorney fee level	Percent objectors	Fee proportion
Class Recovery (log(10)) \$2003	0.793** (31.85)		-0.733** (8.27)	0.802** (34.96)		-0.695** (8.09)
Percent opt-outs (square root)	0.020 (0.23)		0.528 (1.02)			
Percent objectors (square root)				-0.069 (0.96)		0.560 (0.90)
Year	0.022* (2.24)	-0.039 (1.56)	0.102* (2.73)	0.016 (1.84)	-0.033 (1.79)	0.086* (2.40)
Recovery per class member (log)		0.155* (2.20)			0.136* (2.34)	
Fee proportion (logit)		-0.049 (0.62)			-0.003 (0.05)	
Antitrust		-0.307 (1.22)	0.205 (0.63)		-0.336 (1.53)	0.396 (0.94)
Civil rights		0.087 (0.28)	-0.083 (0.26)		0.549* (2.26)	-0.508 (1.03)
Consumer/FDCPA		-0.194 (0.85)	0.291 (0.96)		-0.225 (1.07)	0.386 (0.93)
ERISA		-0.685 (1.10)	0.224 (0.30)		-0.027 (0.11)	-0.039 (0.10)
Mass tort		0.989* (2.53)	-0.541 (0.86)		-0.006 (0.02)	0.136 (0.32)
Securities		-0.380 (1.79)	0.179 (0.62)		-0.487** (2.61)	0.412 (0.97)
Constant	-43.064* (2.20)	78.931 (1.57)	-199.869** (2.68)	-31.105 (1.80)	66.747 (1.79)	-168.216* (2.35)
Observations	100	100	100	128	128	128

Note. "Attorney fee level" is in logs and in inflation-adjusted \$2003. "Percent opt-outs" and "Percent objectors" are square root transformations rather than other transformations that are sensitive to the presence of many zero values. "Fee proportion" is a logit transformation ( $\ln(y/(1-y))$ ) of the attorney fee as a proportion of the class recovery. Case categories with relatively few observations are combined into the reference category for the case category dummy variables. FDCPA cases are Fair Debt Collection Practices Act cases. Source: Class action settlement opinions 1993 to 2003.

Table 3 shows that civil rights cases have a relatively high objection rate, the highest mean and median rates of any sizeable case type. Table 4's model (2) confirms a significant positive relationship between civil rights cases and the rate of objections (although no such relationship existed for rates of opt-outs). Securities cases have a significantly lower objection rate than the reference category, a result consistent with Table 3's evidence that securities cases have (along with consumer cases) the lowest rate of objection of any sizeable case type. Mass tort cases show a significant and positive relation with opt-outs, but not objections.

In neither model do we find a significant association between the number of dissenters (opt-outs or objectors) and the level of the attorney fee or the fee percentage. The size of the class recovery overwhelmingly shapes both the fee level and the fee percentage.

The “Year” variable is negative and near-significant in the “Percent opt-outs” and “Percent objectors” equations, suggesting declining dissent from class action settlements over time as reflected in Figure 3. This is also consistent with Willging et al.’s suggestion that their four-district study’s findings “indicate that opting out may have declined [over time] significantly.”<sup>73</sup>

### *E. Exploring the Pattern of Class Approval*

Table 5 reports class action case characteristics, now divided by settlement approval status. Given the small number of unapproved settlement cases, the figures reported here should be treated with caution.

---

73. WILLGING ET AL., *supra* note 52, at 53-54. Although it is not the focus of this paper, it is worth noting that both “Fee proportion” equations and model (1)’s “Attorney fee level” equation show a positive, significant coefficient for the “Year” variable. In model (2), the “Year” variable in the “Attorney fee level” equation is positive and near-significant. This contrasts with earlier findings that fee awards had not increased in the decade from 1993 to 2002. Eisenberg & Miller, *supra* note 60, at 57. The significance of the “Year” coefficient is attributable not to a long-term increase but to high mean fee percents in 2002 and 2003. Simple median regression models reveal no significant increase over time. It is too early to tell if mean increase will become a long-term trend.

Direct comparison with the results in Eisenberg & Miller, *supra* note 60, is limited by the different size of the sample, by the fact that the current data are not coded for whether the case involved a fee-shifting statute, and by other coding differences. We have run models in which we include variables to account for fee-shifting statutes based on the type of case (for example, civil rights cases typically would involve a fee-shifting statute so we coded them all as fee-shifting) and the principal results reported here do not materially change.

Table 5. Characteristics of Class Action Litigation: by Settlement Approval Status

Variable	Settlement Approved			Settlement not approved		
	Mean	Median	N	Mean	Median	N
Number of opt-outs	1767.1	19.0	142	1269.8	600.0	16
Number of objectors	70.3	2.0	213	875.3	23.5	20
Percent opt-outs	0.7	0.1	128	0.3	0.2	15
Percent objectors	0.8	0.0	186	4.5	0.1	17
Number in class	569,165.5	20,000.0	195	983,035.5	174,000.0	18
Class recovery (millions \$2003)	180,000,000	11,000,000	176	110,000,000	5,000,000	11
Attorneys' fees (millions \$2003)	14,000,000	2,500,000	185	16,000,000	2,100,000	11
Fee as percent of recovery	26.5	25.0	152	25.4	20.0	7
Recovery per class member	3601.3	553.6	153	4822.9	577.5	8

Source: Class action settlement opinions 1993 to 2003.

Several variables behave as one might expect. For example, median and mean objection rates ("Percent objectors") are higher in unapproved settlements than in approved settlements. This result may indicate that the courts take a relatively high level of dissent into account when deciding whether to approve a settlement, or that both the court and the objecting class members independently conclude that the proposed settlement is not in the best interests of the class. Similarly, the median number of opt-outs in cases with approved settlements is 19.0 out of a median class size of 20,000; the median number of opt-outs in cases with unapproved settlement is 600 out of a median class of 174,000. The opt-out rate in this aggregate view is thus higher in cases in which settlement is not approved.

But not all variables conform to the expected pattern. Approved settlements have a median opt-out rate of 0.1 percent, compared to unapproved settlements' 0.2 percent. The approved settlements even have a higher mean opt-out rate. Mean and median recoveries per class member are higher in unapproved settlements. And mean and median attorneys' fees are lower in unapproved settlements. Whatever influences courts to reject class settlements, it does not appear to be the objectively measurable facts studied here, such as dissent rates, recoveries per class member, or attorney fee awards.

Table 6 reports the rate of settlement approval by case type. For each case type, the first row in the table shows the number of disapproved and approved settlements. The next row reports the percentages. Table 6 shows an overall settlement approval rate of over 90 percent. Superficial variation exists across case types. For

example, some case types with nontrivial numbers of cases, ERISA and mass tort, have 100 percent approval rates. But the overall pattern is one of overwhelming approval, with noticeable disapproval rates emerging only for case types with few cases in the sample. And one cannot reject the hypothesis that the overall variation in the approval pattern could occur by chance ( $p = 0.116$ ; Fisher's exact test). Regression models of the pattern of class approval do not aid materially in explaining the pattern of settlement approvals.

Table 6. Settlement Approval Rates by Case Type

	Class not approved	Class approved	Total
Antitrust	4	25	29
	13.8%	86.2%	
Civil Rights	1	15	16
	6.25%	93.75%	
Commercial	1	6	7
	14.3%	85.7%	
Consumer	6	41	47
	12.8%	87.2%	
Corporate	0	6	6
	0.0%	100%	
ERISA	0	13	19
	0.0%	100%	
Employment	2	6	8
	25.0%	75.0%	
Employment discrimination	1	8	9
	11.1%	88.9%	
FDCPA	0	9	9
	0.0%	100%	
Mass tort	0	14	14
	0.0%	100%	
Product liability	2	3	5
	40.0%	60.0%	
Securities	3	69	72
	4.2%	95.8%	
Other	1	9	10
	10.0%	90.0%	
Total	21	224	245
	8.6%	91.4%	

Note. The first row for each case type shows the number of disapproved and approved settlements. The next row reports the percents. FDCPA cases are Fair Debt Collection Practices Act cases. Source: Class action settlement opinions 1993 to 2003.

#### IV. IMPLICATIONS

We turn now to the implications of our study. Perhaps the most significant empirical finding is that opt-outs and objections, despite their fundamental place in the structure of class action



practice, are in fact very uncommon. In general, one may surmise that class members do not highly value these rights that courts and commentators have so widely praised as essential to the justification for group litigation involving absent parties.

Moreover, even the observed rates of opt-outs and objections may overstate the actual level of dissent. Available evidence suggests that when high numbers of dissenters emerge, it is often because an attorney or consortium of attorneys has solicited the class to encourage dissent.<sup>74</sup> Further, a person opting out of a case may not object to the litigation or the settlement. Sometimes people opt out because they have received the class notice in error and wish to bring to the court's attention the fact that they are not members of the class.<sup>75</sup> Some opt out because they are confused. Similarly, people may "object" to a settlement on grounds having little to do with the settlement itself—for example, general disagreement with class action litigation or a belief that the defendant has not done anything wrong.

If opt-outs and objections are relatively insignificant to most class members in most class actions, this result has consequences for a variety of class action doctrines and principles.

#### A. Notice

The study suggests reasons for doubting the wisdom of the Supreme Court's ruling in *Eisen v. Carlisle & Jacquelin*,<sup>76</sup> which required that even in large scale, small claim class actions, individual notice of class certification must be provided to all class members

---

74. An example is *In re Silicone Gel Breast Implant Litigation*, No. CV 92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at \*17 (N.D. Ala. Sept. 1, 1994). Similarly, in *In re Mexico Money Transfer Litigation*, 164 F. Supp. 2d 1002, 1020 (N.D. Ill. 2000), *aff'd*, 267 F.3d 743 (7th Cir. 2001), 90 percent of the opt-outs were obtained by a dissident attorney who objected to the settlement. (One of us (Miller) acted as an expert witness for the defendant in the fairness hearing in this case.) See also *Pederson v. Avrida/JMB Partners LLP*, No. 92 C 7148, 1994 U.S. Dist. LEXIS 2109, at \*42 (N.D. Ill. Feb. 3, 1994) (dissident attorney launched an opt-out campaign); *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 333 F.3d 763, 769 (7th Cir. 2003) (questioning whether counsel who organizes an opt-out campaign should be allowed to launch a competing class action). An example of a campaign by a dissident attorney to solicit objections is *In re Prudential Insurance Co. of America Sales Practices Litigation*, 177 F.R.D. 216 (D.N.J. 1997), *aff'd* 148 F.3d 283, 318 (3d Cir. 1998). See also *Maywalt v. Parker & Parsley Petroleum Co.*, 864 F. Supp. 1422, 1426 (S.D.N.Y. 1994), *aff'd*, 67 F.3d 1072 (2d Cir. 1995) (only 20 of 2,700 objections were independent of dissident counsel). Where opt-outs or objections are the result of attorney activism, there may be less reason to conclude that the reported numbers reflect genuine antagonism on the part of class members. See *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1139 n. 60 (7th Cir. 1979) ("Solicitations to opt-out tend to reduce the effectiveness of (b)(3) class actions for no legitimate reason.").

75. See, e.g., *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 n.6 (S.D.N.Y. 2000).

76. 417 U.S. 156, 173 (1974).

whose names and addresses could be identified with reasonable effort.<sup>77</sup> It would be an oversimplification to rely only on opt-out rates to determine which members of the class value the right to receive notice, because some members of the class will decide not to opt-out but still value the opportunity to make their own decision. The data suggest, however, that except in unusual cases, class members display by their behavior that they do not value the right to receive notice. The cost of individual notice, which can be significant,<sup>78</sup> represents both a loss to the class and a deadweight cost for society. In some cases, the per capita cost of notice to class members who opt-out greatly exceeds the per capita recovery for the class.<sup>79</sup> Our study suggests that publication and/or electronic notice may be a sufficient means of notifying the class of certification in the case of large-scale, small claims class actions.<sup>80</sup>

### B. Personal Jurisdiction

The results reported above also undermine the idea that absent class members may be taken to consent to the court's jurisdiction over their person by virtue of their failure to opt out of the action. The overwhelming inaction displayed by class members in the reported cases suggests that a class member's failure to opt out should not readily be equated to an affirmative consent to jurisdiction. Common sense indicates that apathy, not decision, is the basis for inaction. Even when a class member does opt out, his or her decision is probably not based on jurisdictional objections. The class member might opt out for many reasons—distrust in class counsel, unwillingness to sue, or (in settlement classes) disapproval of the relief obtained. The data thus suggest that the *Shutts* notion of consent to jurisdiction based on failure to opt out is fictional.<sup>81</sup> Rather

---

77. See generally *id.*

78. See, e.g., *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 310 n.12 (N.D. Ga. 1993) (notice cost was \$7,039,992).

79. An example is *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369 (D.D.C. 2002), a *parens patriae* antitrust case against pharmaceutical firms. *Id.* at 373. The court reported notice costs of \$8,250,000. *Id.* at 382. Of the 1,281,128 class members, 2,360 opted out or filed objections to a net class recovery of approximately \$67,000,000. Thus, it cost an average of \$3,495 to provide notice to each dissenting class member in a case where the average recovery was roughly \$52.

80. Individual notice would still be appropriate in the case of settlement classes where the notice also includes a mechanism, such as a claim form, for obtaining the relief.

81. We are not the first to highlight the weakness in the *Shutts* analysis of opt-outs. See, e.g., 3 HERBERT NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 13.37, at 13-105 (the "suggest[ion] that the failure of class members to opt-out of the suit equals consent to jurisdiction . . . does not withstand analysis"); Henry Paul Monaghan, *Antisuit Injunctions and*

than focusing on an imaginary form of consent, the courts might more appropriately examine whether class members without minimum contacts with the forum state are adequately represented by counsel.<sup>82</sup>

### C. Adequacy of Counsel and Class Representatives

The low level of opt-outs and objections also suggests that these procedures do not provide a reliable means for ensuring that class members receive adequate representation from competent and nonconflicted counsel and class representatives. Class members—especially those with small claims—appear to be rationally ignorant about the qualifications of their representatives and accordingly tend to do nothing when offered the opportunity to opt-out or object. As a result, our study suggests that courts should be especially vigilant to police the adequacy of counsel in class action cases and should not rely on the opt-out or objection processes as reliable indicators of quality.

### D. Settlements

Our study also provides information about the use of the opt-out experience in a particular case as an aid to the judicial evaluation of the fairness, adequacy, and reasonableness of the settlement.

The results show that percentages of opt-outs and objectors are almost always small. Does this suggest that, in general, class action settlements represent good value for the class? One possible interpretation of the data is that class action counsel and representative plaintiffs filter out bad class action settlements, either

---

*Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1170 n.95 (1998); Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 609-10 (1987).

82. In this recommendation we join a number of other commentators who have perceived the weakness of *Shutts'* consent theory of jurisdiction and accordingly have stressed the importance of adequate representation. Professor Monaghan, for example, argues that the jurisdiction conferred over absent class members by a class member's failure to opt out of the action is limited and conditional: it can be defeated at any time if the representation provided by the named plaintiff and class counsel falls short of the minimum constitutionally required for adequate representation. See Monaghan, *supra* note 81, at 1172-73 (noting that "*Hansberry v. Lee* and other decisions make clear that, to bind absent class members on the basis of representation, there must, at a minimum, have been adequate representation") (citation omitted). Professor Nagareda stresses the need for structural assurances of adequacy at the time jurisdiction is conferred, rather than on adequacy-in-fact throughout the case. Nagareda, *supra* note 39, at 184. These commentators differ in important respects – Professor Monaghan's theory, for example, would open up greater room for collateral attack on class action judgments on the ground that class representation became inadequate as the case progressed – but their essential message is the same: that adequacy of representation is an important and irreplaceable complement to opt-out rights as a prerequisite to a state court's jurisdiction over absent parties without minimum contacts with the state.

because they are serving as loyal and competent advocates for the class or because they want to avoid triggering dissent by class members. The truly unfair or weak settlements never see the light of day. The filtering out of weak resolutions leaves only the strong to survive, and class members understandably do not revolt against what should be reasonable settlements. Thus, the low levels of dissent could be consistent with the proposition that the vast majority of settlements represent good value for the class. We suspect that the important filtering mechanism plays some role in explaining the pattern of what we observe. But we also suspect that the courts have ascribed more of a role to opt-out and objection behavior than may be warranted in light of the uniformly low dissent rates we observe. Class members appear to be behaving out of apathy or rational ignorance rather than making a considered choice not to opt out or object.

Even if low levels of dissent do not reliably indicate that class action settlements are generally fair and reasonable, the rate of dissent in a particular case might provide some information about settlement quality. However, the signal is a weak one at best. First, because dissent levels tend to be so low, they may not provide information of statistical value in a given case. Moreover, we find that the percentage of opt-outs and objectors decreases as class size grows. Thus, in larger cases where the number of opt-outs and objectors might be large enough to provide valuable information to the court, the percentages of the class dissenting tend to be so small as to reduce the quality of the signal.

Cross-case comparisons of dissent rates provide interesting, but ultimately ambiguous, information. Opt-outs and objections are significantly associated with the size of recovery per class member. Dissent seems to grow larger as individual recoveries increase—a superficially counterintuitive result. Because we have not controlled for the strength and magnitude of cases, this relationship does not suggest that class members become more dissatisfied as outcomes improve. Rather, class members who dissent appear to be acting rationally by taking affirmative steps to protect their interests when their interests become sufficiently large to be worth protecting.

Opt-outs and objections provide little or no assistance to the court in determining fees for class counsel. Overwhelmingly, fees are determined by a single factor: the size of the recovery for the class as a whole. We found no significant association between the number of dissenters and either the gross fee or the fee as a percentage of class recovery. Our study thus suggests that courts should not ordinarily look to statistics on opt-outs and objectors when setting fees (although

objectors may provide valuable information that courts could consider when deliberating on this issue).

Statistics on judicial approval or disapproval of settlements provide only weak support for the proposition that dissent levels are an indicator of settlement quality. We found that the percentage of objectors was greater in cases where the settlement was rejected than in cases where the settlement was approved. This finding suggests that courts do take the percentage of objectors into account, at least to some extent, when ruling on the fairness of settlements. Assuming judicial decisions approving or disapproving settlements are generally accurate, this finding also suggests that levels of objection provide some evidence of a settlement's fairness, adequacy, and reasonableness. When it comes to opt-outs, however, the results are not as predicted: the mean percentage of opt-outs in approved settlements was in fact greater than the mean percentage of opt-outs in disapproved settlements (although the median percentage of opt-outs was higher in disapproved settlements than in approved ones).

Our study provides perspective on the inference, frequently found in the cases, that the reaction of the class provides valuable data about the fairness of the settlement. It suggests that courts should give little or no weight to opt-out rates, but that rates of objection can provide weak evidence of settlement quality, keeping in mind the possibility that mass objections may be manufactured by dissident counsel seeking to upset a settlement. Overall, notwithstanding frequent statements in judicial decisions to the contrary,<sup>83</sup> the level of dissent is at best weak evidence of the fairness, adequacy, and reasonableness of class action settlements.<sup>84</sup>

---

83. See, e.g., *Laskey v. Int'l Union*, 638 F.2d 954, 956 (6th Cir. 1980) (placing significance on the fact that "only seven out of 109 made any kind of objection"); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 180 (5th Cir. 1979), cert. denied, 452 U.S. 905 (1981) ("virtually no objections from members of the settlement class" seen as a "significant element" of settlement fairness); *Shlensky v. Dorsey*, 574 F.2d 131, 148 (3d Cir. 1978) (one of the factors used to determine the fairness of the settlement was that an "overwhelming majority" had not objected); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 520 (E.D. Mich. 2003) (small number of opt-outs indicates "overwhelming approval"); *In re Newbridge Networks Sec. Litig.*, No. CIV. A. 94-1678-LFO, 1998 WL 765724, at \* 2 (D.D.C. Oct. 27, 1998) (small number of opt-outs creates a "strong inference" of satisfaction with a settlement); *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 176 F.R.D. 158, 185 (E.D. Pa. 1997) (small number of opt-outs "militates strongly" in favor of approval); *In re Residential Doors Antitrust Litig.*, No. 94-CV-3744, 1996 WL 751550, at \*19-20 (E.D. Pa. Dec. 31, 1996) (small number of opt-outs was the "most significant factor" counseling in favor of approval); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003) (lack of objection interpreted as overwhelming endorsement of the settlement).

84. The Third Circuit has voiced skepticism about the value of statistics on the number of opt-outs or objectors as indicating class-wide approval of the settlement. *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995). However, courts

To the extent that dissent levels are relevant, our study provides a baseline for assessing when the “reaction of the class”—either opt-outs or objections—is positive or negative. Heretofore, courts have had virtually no basis for comparison and thus had to examine the rate of class reaction only in a particular case. Not surprisingly, it has been common for courts to conclude that the minimal number of opt-outs and objections counsels in favor of approval of the settlement. However, because virtually *all* cases display a minimal number of opt-outs and objections, the lack of substantial dissent in a given case does not necessarily suggest that the settlement is fair to the class. The law reports teem with opinions in which the court concluded that a low level of dissent counseled in favor of approval—even though the level of dissent was sometimes higher than the average for cases in our study.<sup>85</sup>

### *E. Mandatory vs. Opt-Out Actions*

Our data also suggest a novel perspective on the distinction between mandatory class actions under Rules 23(b)(1) and (b)(2) and opt-out class actions under Rule 23(b)(3). Counsel frequently attempt to shoe-horn claims for monetary relief into a mandatory class action procedure.<sup>86</sup> From counsel’s perspective, this approach has the virtue of conserving the costs of notice associated with the opt-out right and also avoiding the hurdles of the predominance and superiority requirements under Rule 23(b)(3). One of the major concerns about such a strategy is that class members lose the right to opt-out of the action. Some courts have suggested that the loss of opt-out rights for money damages claims would deprive absent class members of due process.<sup>87</sup> Our study finds, however, that across the range of cases, opt-out rights are not highly valued by class members. The data suggest that at least in large-scale, small-claim actions, the decision to structure a case as a mandatory rather than an opt-out class would not significantly harm class members. The concerns about mandatory

---

continue to treat data on dissent rates as significant, even when reciting this admonishment. *See, e.g., In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 490 (E.D. Pa. 2003).

85. An example is *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990), where the court viewed 29 objections out of 281 class members as a factor that “strongly favors [the] settlement.” *See also, e.g., Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 447 (S.D. Iowa 2001) (characterizing as a “low” number of opt-outs a rate of 5,406 out of 400,000); *In re Texas Prison Litig.*, 191 F.R.D. 164, 175 (W.D. Mo. 1999) (characterizing 8 percent rate of objection as “relatively low” and an indication of settlement’s fairness).

86. The leading case is *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998) (allowing some monetary claims to be brought under Rule 23(b)(2) but rejecting others).

87. *See supra* note 13.

class actions do have greater significance, however, in mass tort cases where class members tend to opt-out at a higher rate than in other types of class actions.

## V. CONCLUSION

Our study finds, consistent with prior research into more restricted data sets, that opt-out and objection rates in class actions generally are trivially small percentages of the class. Dissent rates decrease as the number of class members increases and increase as the per capita class recovery increases. Dissent is most common in mass tort and civil rights cases, with opt-outs being the principal means of dissent in mass tort cases and objections taking the lead in civil rights cases. Dissent is much less common in consumer and securities cases. Across the range of cases, dissent rates—both opt-outs and objections—have also been decreasing over time, for reasons that are not clear from our data.

Opt-outs and objections have no statistically significant relationship with attorney fees, either in absolute terms or as a percentage of the recovery. Turning to the pattern of class approval, we find that objection rates are higher for unapproved settlements than for approved ones—suggesting that courts may give weight to objections when evaluating class settlements or that the objections reflect weaknesses in the settlement that are also independently identified by the courts. Contrary to expectations, however, the mean percentage of opt-outs was more than twice as large in approved settlements as in disapproved ones.

Our data on dissent rates raise questions about several important features of contemporary class action doctrine and practice: personal jurisdiction, notice, adequacy of counsel, mandatory vs. opt-out classes, and judicial evaluation of the fairness, adequacy, and reasonableness of settlements. We provide baseline data that courts can use in evaluating whether the reaction of the class to a proposed settlement counsels in favor of approval. Overall, we have attempted to enhance the information available to courts and litigators with respect to an important aspect of class action practice.

## Appendix. Opt-out and Objection Rates by Year

<u>Year</u>	<u>Mean Opt-out %</u>	<u>Median Opt-out %</u>	<u>N</u>
1993	0.1	0.1	4
1994	1.9	0.1	11
1995	0.7	0.1	9
1996	0.7	0.1	8
1997	0.5	0.1	14
1998	0.5	0.2	9
1999	0.3	0.3	8
2000	0.4	0.0	20
2001	0.8	0.1	25
2002	0.3	0.1	22
2003	0.6	0.0	13
Total	0.6	0.1	143

<u>Year</u>	<u>Mean Objector %</u>	<u>Median Objector %</u>	<u>N</u>
1993	1.7	0.0	14
1994	0.5	0.1	15
1995	3.3	0.0	15
1996	1.4	0.0	16
1997	2.9	0.0	25
1998	0.0	0.0	11
1999	1.2	0.0	16
2000	0.7	0.0	23
2001	0.1	0.0	29
2002	0.7	0.0	27
2003	0.0	0.0	14
Total	1.1	0.0	205



\*\*\*