



memorandum

DATE: February 9, 1995
TO: Advisory Committee On Civil Rules
FROM: Thomas E. Willging, ^{TW} Laural L. Hooper, ^{JH} and Robert J. Niemic¹ *RM*
SUBJECT: Preliminary Report On Time Study Class Action Cases

I. Summary and Highlights

A random national sample of 8,320 civil cases filed between November 1987 and January 1990 in 86 federal district courts included 51 cases involving class action allegations in the complaint or judicial action in response to class action activity. The incidence of class actions was 61 class actions per 10,000 cases. The following data highlight the results of examining the documents and docket sheets in those 51 cases.

- Data reported to the Administrative Office of the U. S. Courts ("AO Data") included only 71% of those cases, indicating an undercount of class action activity. These data and data from other sources,² to be reported in detail to the Committee in April 1995, indicate that there are no reliable national data on class action activity in the federal courts.
- Securities cases represented the single largest type of case (24%; 12 cases) followed by three types of civil rights cases—(Prisoner (16%; eight cases), Other Civil Rights (14%; seven cases), and Employment (6%; three

¹ The authors received substantial assistance from George Cort, William Eldridge, David Ferro, Scott Gilbert, Jane Ganz-Heinrich, Julie Hong, Patricia Lombard, John Shapard, Charles Sutelan, Elizabeth Wiggins, Carol Witcher, and other members of the Research Division staff.

² Data from the Center's field study trips to the Eastern District of Pennsylvania show that only 38 (28%) of the 137 class actions that had been terminated in that district between July 1, 1992 and June 30, 1994 were included in the AO data. The field study research team identified the other 99 cases (72%) with the aid of various searches of the electronic docketing system by court personnel.

cases)—that accounted for more than one out of three class action filings (Figure 1, p.7).

- Almost all class action cases were based on federal question jurisdiction and were filed as original proceedings in federal court. Only two cases asserted diversity of citizenship as the basis for jurisdiction and three cases were removed from state courts (p. 7).
- The largest numbers of filings were in district courts in the 5th and 11th circuits, accounting for 35% of the total; there were no class action filings for the D.C., 1st, and 10th circuits in the sample (Figure 2, p. 8).
- Of the 51 cases, 25 had motions filed (23) or sua sponte orders issued (2) to certify a class (p. 8). Sixty-four percent of the motions/orders were filed within 100 days of the filing of the complaint (Figure 3, p. 9). Of the 25 motions/orders, 11 classes were certified, 8 were denied certification, 2 rulings explicitly deferred the certification decision, and 4 had no certification action indicated before case closing (Figure 5, p. 13).
- All motions sought certification of plaintiffs' classes. Plaintiffs most frequently sought and obtained certification of (b)(3) (opt-out) classes (7 obtained out of 13 sought: 54%) and (b)(2)(injunctive relief) classes (3 obtained out of 8 sought: 38%) (Table 1, p. 10). No (b)(1) class was certified. One class was certified after the parties had proposed a settlement (pp. 9-10).
- The majority (65%) of motions for class certification were opposed but the opposition rarely focused on the type of class to be certified (Table 2, p. 11). In two cases the judge's ruling involved extensive discussion of the type of class to be certified. Most of the arguments centered on typicality, commonality, and representativeness. Numerosity was infrequently contested (Figure 4, p. 12).
- The average amount of judicial time spent on certification rulings was about 5 hours (Table 3, p. 14). Most rulings consisted of a single page but some were as long as 25 to 35 pages. The average ruling was approximately 8 pages (p. 13).
- Motions to dismiss were frequently filed and ruled on before there was a ruling on class certification (Table 4, p. 15). In ten cases the rulings

dismissed the entire complaint (Table 5, p. 16). Motions for summary judgment were also filed and granted in six cases where there was no ruling on class certification (Tables 6, 7, pp. 16-17). The average amount of judge time spent ruling on these motions was approximately six to seven hours (Table 8, p. 17).

- Cases with a certified class had an average case life of approximately three years, compared to approximately two and a quarter years for a case denied certification, approximately one and a quarter years for a case in which there was no ruling on certification, and less than one year for a non-class action time study case (Table 9, p. 19). As measured by the number of docket entries, the amount of activity in certified class actions was almost three times that of cases that were not certified and about seven times that of cases with no certification ruling (Table 10, p. 20).

- In all certified cases—including two exclusively (b)(2) actions—notice was communicated to the class. In almost all of the (b)(3) actions, notice was given through individual mailings. In about half of those cases, notice was also communicated by publication in one or more newspapers (p. 20).

- Cases with certified classes settled more often (82%) than cases that were not certified (50%) (Table 11, p. 22). For all certified class actions that were settled, notice was sent of the proposed settlement, including the time and place of the hearing on settlement approval. Notices stated the estimated size of the class in two of five cases for which we had information.

Otherwise, notices generally included information about the total amount of the settlement, the procedures for opting into or out of the class, the plan of distribution, and any equitable relief (Table 12, p. 23).

- Hearings on class settlements were held in seven cases; settlement rulings with a average length of approximately fourteen pages were issued (p. 23). Judges spent an average of about four hours in ruling on settlements in certified class actions. All but one of the proposed settlements that had been acted on were approved without changes; the one exception was approved with changes (pp. 23).

- Information about settlements funds established and distributed to class members was available in seven cases (Figure 6, p. 24). In five of those

seven cases, proceeds were distributed to members who filed claims and in the other two cases proceeds went to all class members who did not opt- out (p. 25). Generally the shares of the settlement were determined by consensual methods, typically involving counsel's application of a legal formula to the claims (Table 13, p. 25).

- In five cases for which information was available, attorneys' fees ranged from 14% to 45% of the settlement amounts, with higher percentages for the smaller settlements and smaller percentages for the two largest settlements (Table 14, p. 25).
- In seven cases, information was available about a court's action on a fee request. In all seven, the court awarded the full amount of the request (Table 15, p. 26).
- Bench trials were held in two cases, neither of which had been certified as a class action. Each resulted in a judgment for the defendant (p. 27).
- Appeals were filed in seven cases, mostly by class plaintiffs. Of the four for which information was available, none was successful (p. 28).
- Overall, records of judge time spent on class actions indicate that, on average, class actions demand more time than any type of civil case except death penalty habeas corpus cases. Certified class actions require, on average, about 34 hours of judicial time while cases that are not certified require, on average, about 6 hours (Table 16, p. 29).

II. Overview and Statistical Profile

A National Sample. In the Federal Judicial Center's District Court Time Study, district and magistrate judges maintained records of the time they spent on a random sample of 8,320 civil cases filed in 86 United States District Courts between November 1987 and January 1990. Fifty-one of those cases (0.61%, an incidence of 61 class actions for every 10,000 cases filed) contained class action allegations (hereafter "class actions"). A case was defined as a class action either by reference to the case statistics maintained by the Administrative Office (AO) (36; 71%) or, where there was no class action indicator in the AO statistics, to

class action activity in a judge's time records (15; 29%).³ Those data lead us to conclude that information on class actions reported to the AO substantially undercounted class action activity during the time study period. Data from the field study accentuate this finding⁴ and lead us to conclude that there are no reliable national data on class action activity in the federal courts.

For all 51 cases, we reviewed docket sheets and pleadings, documents, briefs, and orders relating to the class issues. We generally examined rulings on motions to dismiss and summary judgment, all briefs and orders relating to class certification, filings relating to notice and approval of settlement, and applications for attorneys' fees. In this report we will describe the major characteristics of those cases and examine them in relation to issues raised by the Advisory Committee at the outset of the FJC's Class Action Project.

Before presenting the data, it is important to call attention to their limits. Though informative and national in scope, the time study class action data need to be used with caution. In many instances, information on important class action activity was available only for two or three cases, which should be viewed simply as examples not to be generalized to the universe of class action activity. The time study data should be read as descriptive of a small national random sample of class actions. The data are certainly more than anecdotal evidence. However, the data are certainly not generalizable to a universe of class action activity.⁵

Relationship to the Field Study. The presentation in this preliminary report parallels the analysis we plan to present for class actions in the current FJC field study. There are, however, several major differences in the data. First, the time study records represent the only national data that we will be able to present to the Committee.⁶ The preliminary field study report we will present to the

³ One case identified in the AO data as a class action had no indication on the docket sheet or in the documents in the file that any class action allegations were involved. That case was eliminated from the sample discussed in this report.

⁴ See note 2, *supra*.

⁵ The time study data as a whole, of course, are fully suitable to their intended purpose of assigning case weights to various types of cases that were observed with much greater frequency than class actions. There is no separate case weight for class actions.

⁶ Problems in gathering national data are described in the January 19, 1995 memorandum to the Advisory Committee from Thomas E. Willging.

Committee in April will focus on recent class action activity in N. D. Cal. and E. D. Pa. Later we expect to report on activity in N. D. Ill. and S. D. Fla.

Second, the number of cases in the time study is relatively small and will preclude discussion of some events in the class action process that occur infrequently. In the field study, we will examine a larger sample of cases within the four districts selected for the study and will be able to discuss some of these less frequent events.

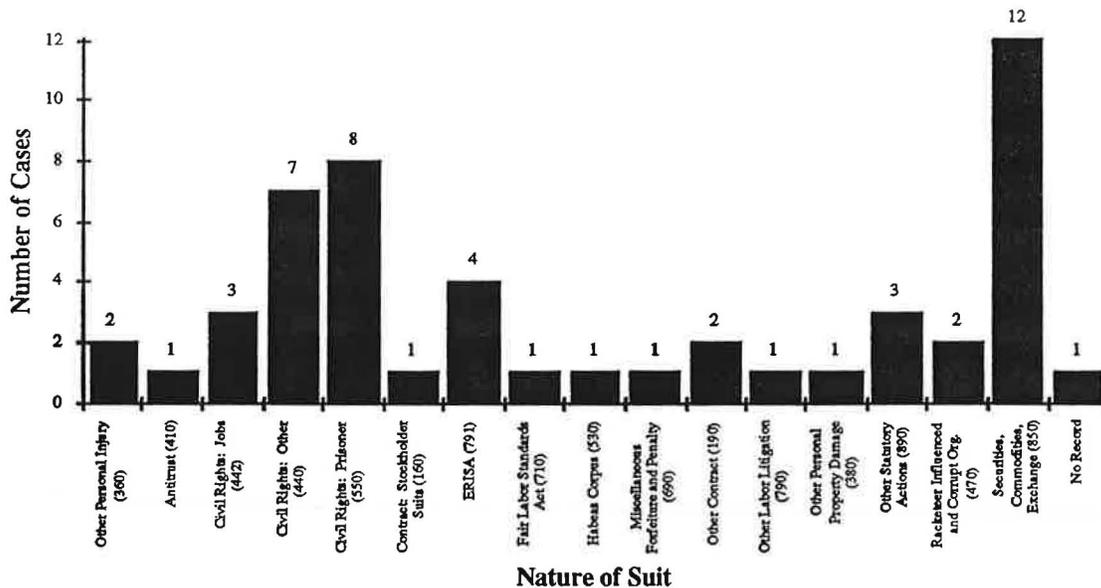
Third, the field study will include more complete records on the mechanics of the class action process (e.g., notices to the class and attorneys' fee requests) because, by visiting the district courts, we have full access to court records. In the time study, our review has been limited to documents that could be identified from the docket sheets and photocopied without imposing an excessive burden on the courts.

Finally, in the field study there are no judicial time records for the cases. Thus, the time study cases represent a unique opportunity to look at the judicial time required for various aspects of class actions.

Incidence of class action activity. The time study data suggest that the filing of a class action in federal court is a relatively rare event, occurring approximately 61 times per 10,000 cases. Certified class actions are even more rare, occurring 11 times in the sample, an incidence of 13 times per 10,000.

Types of cases. In the time study, as Figure 1 shows, securities cases represented the single largest type of case (24%; twelve cases). Civil rights cases of various types—Prisoner (16%; eight cases), Other Civil Rights (14%; seven cases), and Employment (6%; three cases)—accounted for more than one out of three class action filings. ERISA (8%; four cases) and Other Federal Statutory Actions (6%; three cases) were the only other types with more than two cases in the sample.

Figure 1
Nature of Suit for Time Study Class Actions, 1987 - 1990 (N=51)



Source: FJC Time Study

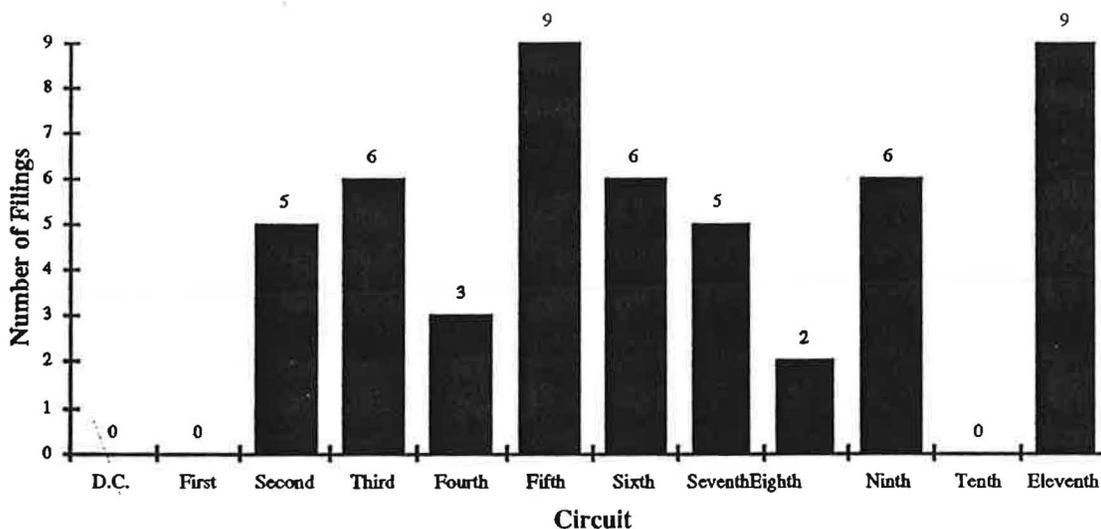
Bases of jurisdiction and origin of cases. Almost all of the cases (90%; 46 cases) invoked federal question jurisdiction. Only two cases invoked diversity of citizenship, reflecting, perhaps, the strict jurisdictional requirements for such cases. In addition, almost all of the cases (92%; 47 cases) were filed in the federal courts at the outset; only three cases were removed from state courts.

*Distribution among circuits.*⁷ District courts in the 5th and 11th circuits accounted for 35% of the class action filings (Figure 2). Three circuits had no class action filings during the sample period in the district courts within their jurisdiction and two other circuits had only 10% of the filings. This limited sample suggests that the distribution of class action activity across the circuits

⁷ The distribution of filing among the district courts cannot be addressed because the number of time study cases is too small to present a reliable picture of activity among the districts. Because there were more districts (86) than class action cases (51) in the time study, most districts did not have a single case filed during the two week sampling period for each court. Two weeks' filings represent approximately 4% of the total annual caseload for a district. For example, a district with 1,000 cases per year would be expected, on average, to have about 40 cases in the time study. At a national incidence rate of 61 class actions per 10,000 cases, the average district would have less than one class action in a given year.

may warrant further research to determine if there is any pattern and, if so, to identify factors that might account for any differences. Such factors might include the class action jurisprudence of the circuit, the local legal culture, or the specialization of the bar.

Figure 2
Filings of Class Actions by Circuits in Which the Districts Are Located,
Time Study Class Actions, 1987 - 1990 (N=51)



Source: FJC Time Study

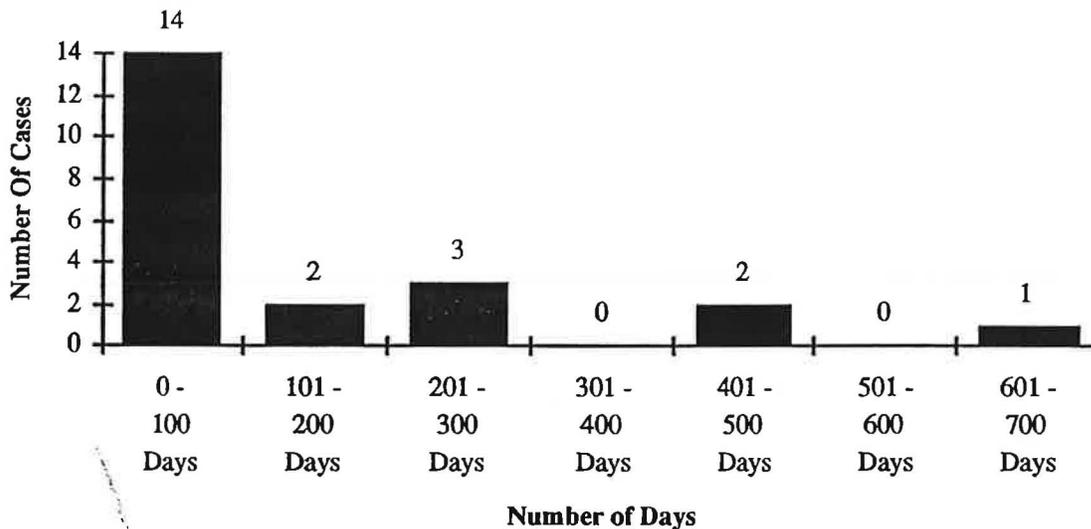
III. The Certification Process

Certification motions and sua sponte orders. In 23 (45%) of the 51 cases a motion to certify a class action was filed and in another two cases (4%) the judge issued a sua sponte order regarding class certification. The motions were filed an average of 139 days after the complaint was filed; the sua sponte orders were issued an average of 180 days after the complaint. All 23 motions were motions by plaintiffs to certify a plaintiffs' class. The data did not include any case with a motion filed—or a sua sponte order issued—to certify a defendants' class.

Timing of motions. F. R. Civ. P. 23 (c) (1) directs a district court to determine whether an action is to be maintained as a class action "as soon as practicable after the commencement" of the case. Some jurisdictions, for example, the Eastern District of Pennsylvania, have adopted a local rule requiring the filing of

such motions within 90 days after filing of the complaint. As Figure 3 shows, 14 of the 22 cases (64%) had certification motions filed within 100 days of the commencement of the action. The median number of days is 77.

Figure 3
Days from Filing of Complaint to Filing of Motion to Certify a Class, Time Study Class Actions, 1987 - 1990 (N=22)*



Source: Unless otherwise indicated all subsequent figures and tables are based on data collected for the FJC Class Action Project. * Missing data = 1

Type of class. As Table 1 shows, plaintiffs most frequently sought and obtained certification of (b)(3) (opt-out) classes (7 obtained out of 13 sought: 54%)⁸ and (b)(2)(injunctive relief) classes (3 obtained out of 8 sought: 38%). One case was certified under both (b)(2) and (b)(3). In three cases plaintiffs sought certification of a mandatory class under subsection (b)(1)(A) (one case) or (b)(1)(B) (two cases) but the courts certified none.

Settlement classes. In only one of the 25 cases involving certification motions or orders did the documents or docket entries indicate that a proposed

⁸ Presumably the seven cases in which the type of class was not specified were also (b)(3) actions because the proponent of a mandatory class generally is held to a stricter burden of proof than the proponent of an opt-out class and would have addressed the special criteria of (b)(1) and (b)(2) classes in a way that should have been clear to the person reviewing the file.

settlement was submitted to the court before or simultaneously with the first motion to certify a class.

Table 1
Type of Class Sought and Approved,
Time Study Class Actions, 1987 - 1990 (N=25)*

Type of Class	Discussed in Motion or Order	Certified by the Court
Rule 23(b)(1)(A)	1	0
Rule 23(b)(1)(B)	2	0
Rule 23(b)(2)	8	3
Rule 23(b)(3)	13	7
Type Not Specified	7	2

* Some cases included discussion of more than one type of class in the motion, order, or ruling.

Opposition to certification. There was opposition to 15 of 25 (65%)⁹ motions or orders regarding class certification. In the 12 cases for which data were available, the length of the opposition briefs averaged 45 pages, with a median length of 41 pages. For the 19 cases for which information was available, the briefs supporting certification averaged 25 pages, with a median length of 13 pages. Some of the briefs were in support of motions that were not opposed.

Arguments about class type. A central feature of the draft revision of Rule 23 circulated in January, 1993 is the amalgamation of the current subdivisions (b)(1), (2), and (3). A major consequence of the proposed change is that the judge would no longer have to decide which type of class fits the litigation. To learn more about this phenomenon, we examined the extent to which the parties and the courts address the issue of the type of class. As Table 2 indicates, in about half of the instances for which information was available did the parties' arguments address whether one type of class or another should be certified. In six of the seven cases where the parties argued about the type of class, the portion of the briefs devoted to such arguments was less than 25% of the size of the briefs.

⁹ Information on opposition to certification is not available for 2 of the 25 cases in which certification motions or orders were filed.

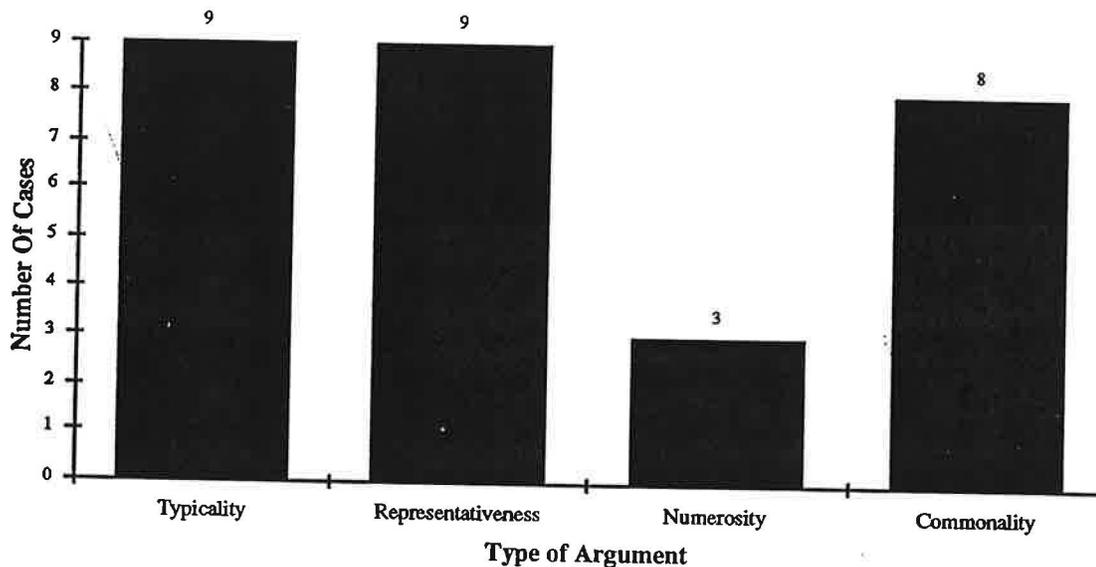
How did the courts respond to arguments about class type? Table 2 shows that of the 21 rulings for which information was available, 8 (38%) addressed the type of class to be certified. Of those 8 rulings, 2 devoted 50-74% of the opinion to the class-type issue; 6 devoted less than 25%.

Table 2
Extent of Arguments About Type of Class
Time Study Class Actions, 1987 - 1990

Extent of Argument or Discussion Directed at Class Type	In Briefs (N=15)	In Rulings (N=21)
100%	0	0
75 - 99%	0	0
50 - 74%	1	2
25 - 49%	0	0
1 - 24%	6	6
None	8	13

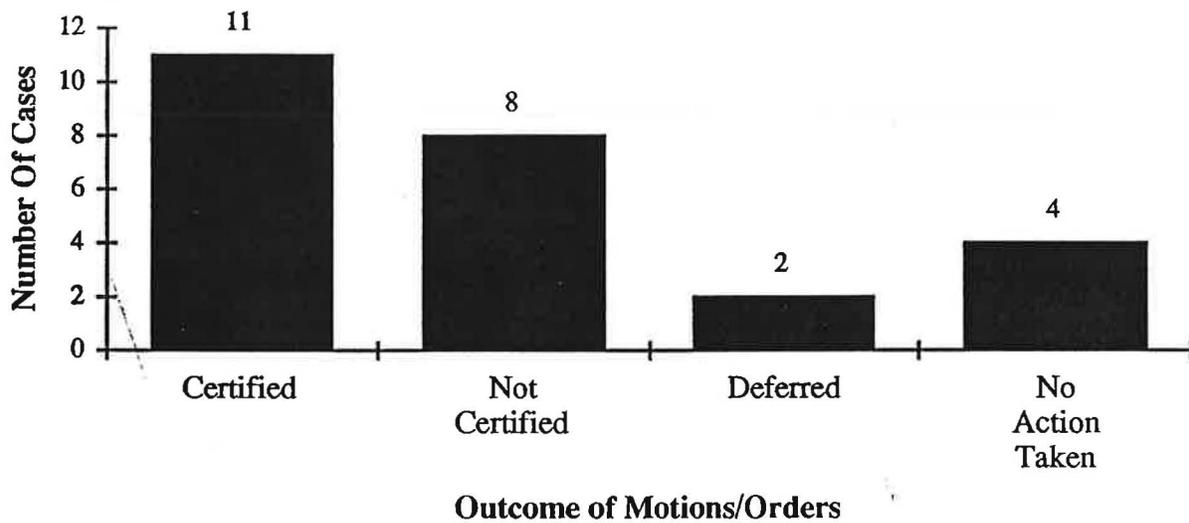
Other arguments. Most of the contested cases included arguments about three of the four traditional F. R. Civ. P. 23(a) issues: typicality, representativeness, and commonality, as shown by Figure 4. Arguments about the other traditional issue, the size of the class (numerosity), occurred in three (20%) of the fifteen contested motions. In many cases, there appeared to be little basis for arguing that the class was not large enough. The plaintiffs' most frequent estimate of the class size was that there were "thousands" of members. In the five cases in which the court referred to class size in its ruling, the most frequent references were in the thousands and the smallest size was 100.

Figure 4
Arguments Raised in Opposition to Class Certification Time Study
Class Actions, 1987 - 1990 (N=15)



Outcome. As Figure 5 shows, of the 25 cases in which certification motions or sua sponte orders were filed, eleven were ultimately certified as class actions, eight were denied certification, and two were expressly deferred. In five cases no action was taken with regard to certification. In three cases motions to reconsider were filed, and, in one instance, the court reversed its decision to certify a class.

Figure 5
Outcome of Motions/Orders
Re Class Certification
Time Study Class Actions, 1987 -1990 (N=25)



Judge time and length of rulings. In the 20 cases for which information on the length of the certification ruling was available, the length ranged from 1 page (ten cases) to 35 pages (one case). The length includes the order and any related memorandum opinion. The average length was 8 pages, but most rulings consisted of 1 page. In the 18 cases for which time records were available, judges spent about 5 hours, on average, per certification ruling (Table 3). The median was 2 hours in a range from 2 minutes to 28 hours. Recall from Table 2 that only two cases involved extensive ruling addressing the type of class to be certified. One of those cases consumed 4 hours and 45 minutes of the judge's time; the other consumed 20 minutes.

Table 3
Judicial Hours Spent on Certification Rulings
Time Study Class Actions, 1987 - 1990 (N=18)

	Class Certified (N=9)	Class Not Certified (N=9)	All Rulings (N=18)
Mean	9	2	5
Median	4	1	2
Minimum	less than 1	less than 1	less than 1
Maximum	28	5	28

Source: FJC Integrated Data Base and Class Action Project

IV. Relationships among Motions for Certification and Motions to Dismiss or for Summary Judgment

The proposed amendment to Rule 23 that the Advisory Committee on Civil Rules circulated in January, 1993 contained a new provision in § 23(d)(1)(B) authorizing a court to "decide a motion under Rule 12 or 56 before the certification determination if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay." At the outset of the class action research project, the Advisory Committee's Research Subcommittee indicated an interest in learning how courts treat Rule 12 and 56 motions under the current rule. The time study data shed light on this issue.

Motions to dismiss. Among the 51 class action cases in the time study, 10 included a ruling on a motion to dismiss as well as a ruling on a motion to certify a class. Five of the rulings on dismissal motions were issued before the ruling on class certification and five were issued after the certification ruling. In addition, judges ruled on nine motions to dismiss in cases where they had not ruled on class certification. Table 4 presents the outcomes of rulings on motions to dismiss, grouped according to their relationship to certification rulings.

Table 4
Timing and Outcome of Motions to Dismiss
In Relation to Timing of Class Certification Motions
Time Study Class Actions, 1987 - 1990 (N=19)

Outcome	Motion to Dismiss Ruling Before Certification Ruling (N=5)	Motion to Dismiss Ruling After Certification Ruling (N=5)	No Ruling on Certification (N=9)
Dismissed the entire complaint	0	3	7
Dismissed one or more claims for relief but not entire complaint	2	1	1
Denied the motion	3	1	1
Deferred action	0	0	0
Total	5	5	9

While the numbers are too small to permit any general inferences, it is clear that a few courts have not felt constrained to rule on class certification before addressing a motion to dismiss. In two cases the court dismissed part of the case, and in three cases the court denied a motion to dismiss, all before ruling on a motion to certify a class. At least those courts have not seen themselves as lacking authority to so rule. On the other hand, in three cases a court certified a class but later dismissed the entire complaint, bypassing what would appear in hindsight to have been a more economical way to address proposed class actions that are deficient on the merits.

Next, we look at the relationship between the outcome of motions for class certification and the outcomes of motions to dismiss. Table 5 shows that in none of the six cases where a court certified a class did that court dismiss the complaint in its entirety.

Table 5
Outcomes of Motions to Dismiss
In Relation to Class Certification Outcomes
Time Study Class Actions, 1987 - 1990 (N=19)

Outcome	Class action certified	Class action denied	No Ruling on Class status	Total
Dismissed the entire complaint	0	3	7	10
Dismissed one or more claims for relief but not entire complaint	3	0	1	4
Denied the motion	3	1	1	5
Deferred action	0	0	0	0

F. R. Civ. P. 12(b)(6) was the procedural rule most frequently cited in the motions to dismiss, occurring six times. For those cases, the outcomes were dismissal of the entire complaint in three cases, dismissal in part in two cases, and denial of the entire motion in one case.

Motions for summary judgment. Not surprisingly, a court rarely rules on a motion for summary judgment before ruling on a motion for class certification. In the time study, eight cases had rulings both on motions for summary judgment and on class certification. Seven of the summary judgment rulings came after a class certification ruling. In six additional cases, however, summary judgment was granted without any ruling on class certification. Table 6 shows the outcomes for all summary judgment motions.

Table 6
Outcomes of Motions for Summary Judgment
In Relation to Timing of Class Certification Motions
Time Study Class Actions, 1987 - 1990 (N=19)*

Outcome	Filed Before Certification Ruling	Filed After Certification Ruling	No Ruling on Class status
Granted	0	4	6
Denied	0	3	1
Granted in part, denied in part	1	0	0
No action	0	0	2

*Missing data = 2

Table 7 shows the outcomes of summary judgment motions in relation to the outcome of the class certification motion. Summary judgment was granted in six cases in which there was no ruling on class certification, in two cases in which classes had been certified, and in two in which certification had been denied.

Table 7
Outcomes of Motions for Summary Judgment
In Relation to Class Certification Outcomes
Time Study Class Actions, 1987 - 1990 (N=19)*

Outcome	Class certified	Certification denied	No Ruling on Class Status
Granted	2	2	6
Denied	3	0	1
Granted in part, denied in part	0	1	0
No action	0	0	2

*Missing data = 2

Judge time. Table 8 presents data on the amount of time the assigned judges spent in ruling on motions to dismiss and on motions for summary judgment. In ruling on motions to dismiss, in the cases for which data are available, judges spent an average of approximately seven hours. The median time was about four hours.

Again for cases for which data were available, judges spent an average of about six hours in ruling on motions for summary judgment. The median time was approximately four hours.

Table 8
Judicial Hours Spent Ruling on Motions to Dismiss
And Motions for Summary Judgment
Time Study Class Actions, 1987 - 1990 (N=22)

Time Spent on Ruling	Motions to Dismiss (N=10)	Motions for Summary Judgment (N=12)
Mean Hours	7	6
Median Hours	4	4
Minimum	less than 1	less than 1
Maximum	32	27

V. Relationship between Class Certification and the Life and Volume of the Litigation

Life of case. Certification of case as a class action would be expected to have a strong correlation with the duration of the litigation and the volume of activity in the case, and it does. Certified class actions have a longer life, by far, than cases that are filed as class actions but not certified. The data cannot tell us, however, whether certification causes the longevity or whether certification itself is a byproduct of or related to some other factors that extend the life of the litigation.

Table 9 shows the mean, median, minimum, and maximum times from filing to termination for all time study cases categorized according to the outcome of a motion to certify a class or the absence of such a motion or order. As expected, there is a noteworthy difference (259 days) between the lifetimes of certified cases and cases in which certification was denied in a written ruling. The largest difference in longevity (616 days), however, is between certified cases and cases in which there was no ruling on certification. Two cases in which the certification decision was deferred had the shortest life span, probably evidencing a decision by a judge to defer ruling on certification because an impending ruling on dismissal might moot the certification issue.

To put the data on class action longevity into perspective, we computed the average time from filing to termination for non-class action time study cases (Table 9, last row). The average for those cases was about a year, more than 100 days less than the average for cases filed as class actions that had no ruling on certification and more than two years less than a certified class action.

Table 9
Days from Filing to Termination By Action on Certification
Time Study Cases(N=7637) and Class Actions (N=50)*, 1987 - 1990

Certification Outcome	Mean (Days)	Median (Days)	Minimum Days from Filing to Termination	Maximum (Days)	Difference (Maximum-Minimum)
Class Certified (N=11)	1088	1247	341	2386	2045
Certification denied (N=8)	829	759	269	1728	1459
No Ruling on Class Status (N=31)	453	306	10	1420	1410
All Class Actions Cases (N=50)*	610	457	10	2386	2376
All Time Study Cases (N=7637)**	350	***	0	2156	2156

Source: FJC Integrated Data Base and Class Action Project * One case is pending' ** Except class action cases and cases for which either a filing or a termination date is missing. *** Not available

Volume of activity. Another way to look at the relationship between class certification and the length and complexity of a case is to look at the volume of activity in the litigation. We did so by measuring the number of docket entries in the case. Table 10 shows that the amount of activity in certified class actions is almost three times the amount of activity in cases that were not certified and approximately seven times the amount of activity in cases that had no ruling. This is not to say that class certification causes the added activity. Indeed, it may be that the additional activity represented a prelude to the class certification.

Table 10
Number of Docket Entries By Action on Certification
Time Study Class Actions, 1987 - 1990 (N=51)

Certification Outcome	Mean	Median	Minimum	Maximum
Class Certified (N=11)	196	86	41	988
Certification denied (N=8)	68	52	17	161
No Ruling on Class Status (N=32)	28	20	2	84
All Cases (N=51)	71	35	2	988

Source: FJC Integrated Data Base, Time Study, and Class Action Projects.

VI. Notice to the Class

General. In all 11 certified class actions, notice was communicated to the class at some stage of the proceedings, with notice sent after class certification and prior to settlement in 6 of the 11 cases.

In the two cases that were exclusively (b)(2) classes, notice was given to the class despite the fact that F. R. Civ. P. 23 (c) does not require such notice. In both cases the post-settlement notice was designed to call the class's attention to the terms of the injunction against a governmental agency. Noticing methods included distributing notices to legal services offices and other advocacy groups, posting notices at the affected governmental offices, and mailing notices to individuals, workers, and organizations likely to have contact with class members.

Method. In 8 of the 11 cases, notice was accomplished by individual mailings or personal delivery to class members. In 1 of the (b)(2) cases and 4 of the (b)(3) cases, notice was by publication in a newspaper. In 4 of the 11 cases notice was both by individual mailings and publication. Aside from the (b)(2) actions discussed in the previous paragraph, the data did not reveal use of any other form of notice (such as radio or TV or the Internet).

In the three cases for which information was available, notices were sent to 4,000; 5,653; and 5,900 class members. In those cases, 98% of the estimated class was notified in one case and 100% in the other two. In only three cases was an

aspect of notice contested; the nature of these disputes appeared to be relatively minor.¹⁰

Cost. In the documents examined in time study cases, no information was available as to the cost of administering the notice. Information about who paid for the notice was available in only a few cases. Records indicated that plaintiffs or their counsel paid the costs of notice in three cases and defendants paid in one case. Because all but two of the certified cases eventually settled (Table 11) and generally produced a common fund for the benefit of the class, it is likely that plaintiffs or their counsel were reimbursed for notice costs out of the proceeds of the settlement.

VII. Settlement and Approval

Certified v. Not Certified Cases. F. R. Civ. P. 23(e) calls for the court to review the dismissal or compromise of a class action and to direct notice to the class. We will examine in detail the settlement approval process for the 11 cases that were certified as class actions. Before doing so, however, it may be useful to compare the rate of settlement in cases that were certified and cases that were not certified. Table 11 shows the number of settlements for cases in those two categories, revealing that settlement occurred more often when a class has been certified than when a class had not been certified.

¹⁰ In one instance a non-party tried to expand the scope of the notice, but plaintiff noted that the proposed "expansion" was already in the notice plan. In another case the parties initially argued about a form for identifying subclass members and then resolved their differences.

Table 11
Proposed Settlements by Class Certification Status
Time Study Class Actions, 1987-1990 (N=51)

Outcome	Certified (N=11)	Not Certified (N=40)
Settlement (Proposed or actual)	9	20
No Settlement	2	20

Of the two certified cases that did not settle, one was transferred to another district and the other was resolved by summary judgment for the defendant. Seven of the nine proposed settlements were approved by the court, one proposed settlement was rejected, and one was still pending when we collected the court documents in the summer of 1994. In three of the nine cases the record showed that the court preliminarily approved the settlement as within an acceptable range of reasonableness and fairness before issuing notice of a hearing on settlement approval.

Notice. For the certified class actions that settled, notice of the proposed settlement was sent in all of the eight cases for which information was available. Table 12 presents the available information about the content of those notices.¹¹ The responses show that the notice often does not include an estimate of the size of the proposed class. Such an estimate would seem essential if a class member is to be able to estimate the value of that member's share of the settlement. In only one case did the notice fail to include the total amount of the settlement.¹² Note that in Table 12 there are no negative responses for stating a plan of distribution, establishing a claims procedure, and specifying a time and place for a hearing on the proposed settlement.

¹¹ For these items the time study data were not as complete as we expect the field study data to be. We present the available time study data here, but note that the not applicable ("N. A.") and unknown ("U") categories cover a large percentage of the cases.

¹² Data from the field study will include information about the net amount of the settlement and whether the notice included information about attorneys' fees, expenses, and the costs of administering the settlement.

Table 12
Content of Notice in Proposed Settlements of Certified
Time Study Class Actions, 1987 - 1990 (N=9)*

Content of Notice	Yes	No	N.A.	U
State the Approximate Class Size	2	3	0	3
Indicate the Total Settlement Amount	3	1	2	2
State a Plan of Distribution	4	0	2	2
Describe any Equitable Relief	2	1	2	3
Indicate a Right to Opt-Out	3	0	2	3
Establish a Claims or Opt-In Procedure	4	0	2	2
Specify a Time and Place for a Hearing	6	0	0	2

Missing Data = 1

Hearings. Hearings on a proposed settlement were held in seven cases. Participation at the hearing could be determined only in a small number of cases. In three cases the record indicated that class representatives attended the hearing; in one case a nonrepresentative class member attended; and in one case a person who opted-out attended. In four cases objections to the settlement were indicated, one of which claimed that the settlement was based on collusion between plaintiffs and defendants.¹³ In the only two cases for which information was available, the hearing lasted an hour in one case and less than an hour and a quarter in the other.

The rulings on proposed settlements ranged from 2 pages to 34 pages, with an average of 14 pages and a median of 10.¹⁴ All but one of the proposed settlements were approved without changes; the one exception was approved with changes.

Judge Time Spent Ruling on Settlements. District and magistrate judges expended an average of approximately three hours per certified class action in ruling on proposed settlements. In contrast, in non-certified cases the comparable mean was less than a quarter of an hour per case. This time included reviewing proposed settlements, presiding at settlement approval hearings, and ruling on settlements, but did not include judicial efforts to facilitate settlement.

¹³ Another objection related to confusion about when the cash settlement would be paid to class members and yet another objection related to the scope of relief in a (b)(2) settlement.

¹⁴ The length of the ruling may not be a good measure of the effort required of a judge in ruling on a settlement. In the field study we observed that it was a standard practice in securities class actions for plaintiffs' counsel to draft a proposed order which was generally signed by the judge if no objections were presented at the hearing.

Opt-outs and opt-ins. In two cases, counts were available of the number of opt-outs, 4 in one case and 139 in the other. In those 2 cases the estimated size of the class was 2,700 and 1,750 respectively. In 5 of the settlements an opt-in procedure was used. Information about the number of opt-in claimants was available in 2 cases; the numbers were 49 and 960 in classes the size of which had been estimated at 100 and 2700.

Settlement Funds. Of the 16 time study class action cases where the court approved a settlement, 7 cases produced a settlement fund to be distributed to members of a plaintiffs' class, as illustrated by Figure 6. The 7 cases represent 44% of settled cases and 14% of time study class actions. Eight cases were settled without the establishment of a settlement fund.

Figure 6
Percent of Settled Cases with Settlement Funds in
Time Study Class Actions, 1987 - 1990 (N=16)

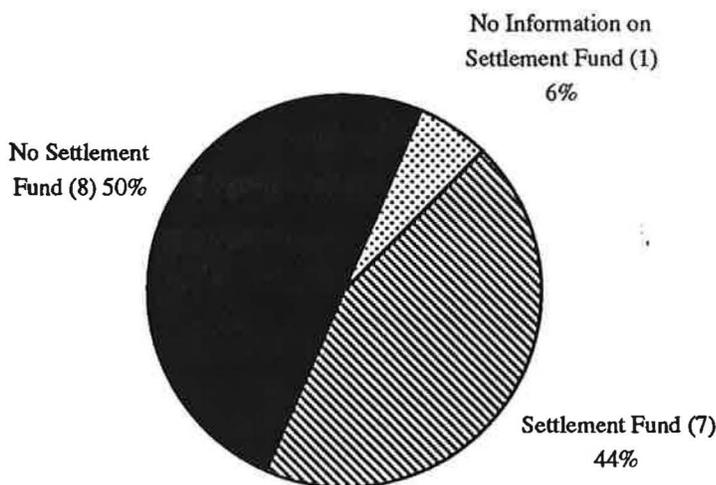


Table 13 lists the methods used to determine individual class member shares in settlement funds. In general, shares were determined by consensual methods, either by consent of the parties (2 cases) or by application of a formula by counsel pursuant to a settlement (4 cases).

Table 13
Methods for Determining Class Member Shares in Settlement Fund
Time Study Class Actions, 1987 - 1990 (N=7)

Method	Number of Cases	Percent of Total
Settlement Formula	4	57 %
Consent of the Parties	2	29 %
Individual Trials	1	14 %

Monies from two (29%) of the settlement funds were distributed to all class members who did not opt out. Monies from the other five (71%) funds were distributed only to class members who filed claims. The entire fund was distributed to class members in most cases (71%; five cases). In one case, however, the remaining funds were returned to the defendant. In another case, \$250,000 was reserved for settlement of appeals with any remainder reverting to the defendant. Data are not available on the amounts, if any, actually returned.¹⁵

Settlement amounts and attorneys' fees. Table 14 presents the percentage of settlement allocated to attorneys' fees for those cases where both settlement and fee award amounts are available.

Table 14
Settlement Amounts and Attorneys' Fee Awards in
Time Study Class Actions, 1987 - 1990 (N=5)

	Settlement Amount	Attorneys' Fees Awarded	Attorneys' Fees as Percentage of Settlement Amount
Case 1	\$175,000	\$78,000	45%
Case 2	240,000	90,716	38%
Case 3	1,750,000	667,872	38%
Case 4	6,955,828	975,554	14%
Case 5	17,500,000	4,000,000	23%

¹⁵ These data are generally not recorded in court records because fund distribution often occurs after a case is closed.

VIII. Attorneys' Fees

*Applications for Attorneys' Fees.*¹⁶ In 10 cases (20% of class actions) plaintiffs' attorneys requested court approval of their fees either by fee application or as part of a proposed settlement. In all 10 cases, a proposed settlement was brought to the court's attention. As shown in Table 15, the amount of fees requested in these 10 cases ranged from \$17,498 to \$4.0 million, with \$828,555 as the mean and \$466,783 as the median amount requested. Where class certification information is available, all cases with fee requests were certified as class actions (with only one of these certified for settlement purposes only). Defendants' counsel did not request court approval of their fees in any of the time study class action cases.

Table 15
Plaintiffs' Counsel Fees Requested/Awarded in
Time Study Class Actions, 1987 - 1990 (N=10)

	Fees Requested	Fees Awarded
Case 1	\$17,498	Missing
Case 2	45,000	45,000
Case 3	78,000	78,000
Case 4	90,716	90,716
Case 5	265,694	Missing
Case 6	667,872	667,872
Case 7	750,000	Missing
Case 8	975,554	975,554
Case 9	1,395,217	1,395,217
Case 10	4,000,000	4,000,000

Source: FJC Class Action Project

Awards of Attorneys' Fees. Fee award information is available for seven of the ten¹⁷ plaintiffs' counsel requests, as shown in Table 15. In all seven cases, the court awarded the full amount requested. Fee awards ranged from \$45,000 to \$4.0 million.

The time study collected information on the methods used for calculating counsel fee awards for only six cases. Four awards were stated in terms of a percentage of the gross settlement; two were determined by the lodestar method.

¹⁶ Attorneys' fees in this report do not include sanctions nor attorneys' out-of-pocket expenses.

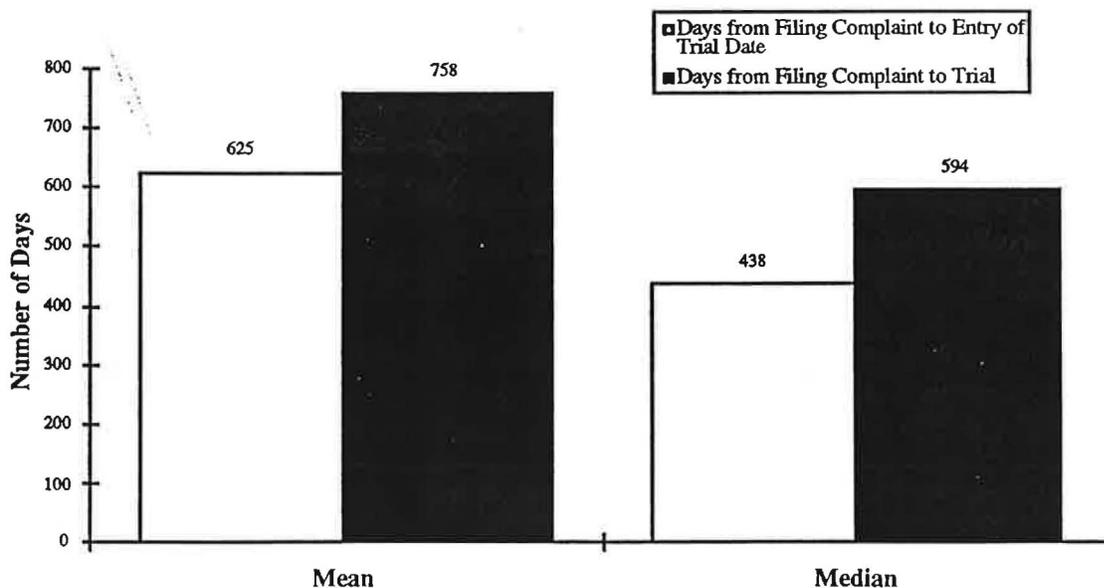
¹⁷ In the remaining 3 cases with fee requests, no information is available on fee awards. There are indications in case files that the parties settled these fee issues out of court.

Hearings on Fees. Our on-going field study indicates thus far that hearings on proposed settlements sometimes include hearings on fees. In the time study, however, we recorded data only on fee hearings that were separate from other hearings. Those data show that the court held separate fee hearings on only 2 of the 10 fee requests. District and magistrate judges spent a total of 25 hours ruling on attorneys' fee applications in the 10 cases--an average of 2.5 hours per case.

IX. Trials

A trial date was set in 10 (20%) of the 51 cases with class action allegations. As illustrated in Figure 7, a trial date was entered on the record an average of 625 days after the filing of the first complaint; the date set for trial was an average of 758 days after the complaint filing.

Figure 7
Time from Filing Complaint to Trial Date
Time Study Class Actions, 1987 - 1990 (N=10)



Trial was held in only two cases. Both were not certified as class actions. Each of these trials was a bench trial resulting in a judgment for the defendant.

The total amount of judge time spent on trial for one case was 9 hours and 45 minutes. Data are not available for the other trial.

X. Appeals

An appeal was filed in seven (14%) of the class action cases, with over half (4 cases) involving an appeal from a final order or judgment. Most (71%; five cases) were filed by a named class plaintiff, one was filed by an intervening class member, and the other by a party opposing the class.

The time study recorded information on the issues and outcomes on appeal for only four cases. In these cases, orders appealed from included denial of a motion to intervene, grant of a defendant's summary judgment motion, and denial of an emergency motion for injunctive relief. Outcomes on appeal included affirmance of summary judgment, dismissal for want of jurisdiction of the appeal of denial of intervention, and dismissal of another appeal for want of prosecution.

XI. Judge Time in Certified and Uncertified Cases

Judge time in certified and uncertified cases compared. Table 16 shows the distribution of judge time among various activities in the cases, comparing cases in which class certification was granted and those in which it was not granted (including in the latter category those cases in which no action was taken on certification). The table should be read with an awareness that time study data probably understate the amount of judge time spent on the various activities. The director of the time study estimated that roughly ten to twenty percent of the time expended on time study cases was not reported to the Center.¹⁸

¹⁸ Letter from John Shapard to Subcommittee on Judicial Statistics of the Committee on Judicial Resources, page 1, July 20, 1993.

Table 16
District Judge and Magistrate Judge Time Expended in
Time Study Class Actions Filed, 1987 - 1990 (N=51)

Type of Activity	Certified (N=11) Judge Time (Hours)	Not Certified (N=40) Judge Time (Hours)	Certified Average Hours Per Case	Not Certified Average Hours Per Case
Class Certification	79	16	7	less than 1
Motions to Dismiss	61	13	6	less than 1
Discovery	64	7	6	less than 1
Summary Judgment	30	48	3	1
Notice to Class	4	0	less than 1	0
Pretrial Conference	1	1	less than 1	0
All Other Pretrial Conferences	1	0	less than 1	0
Trial	0	10	0	less than 1
Facilitating Settlement	38	20	4	1
Review and Rule on Proposed Settlement	31	6	3	less than 1
Presiding at Settlement Approval Hearing	16	1	1	0
Ruling on Attorneys' Fees	25	0	2	0
Monitoring or Enforcing Final Order	11	0	1	0
Other	18	119	2	3
Total of All Activities	379	240	34	6

Source: FJC Time Study

Comparing the time demands of class action cases with the time demands of other case types gives a perspective of the relative burden that class actions impose on the courts. Case weights are scaled in relation to the weight of an average case, which is rated as a "1." If class actions were treated as a separate category for case weighting purposes (which they are not), the hours demanded for the class action cases in the district court time study would justify a case weight of 4.71, higher than any civil case type except death penalty habeas corpus (6.15). The next closest civil case is a RICO claim (3.02). To compare further, an average class action case would require about as much judge time as a criminal prosecution for extortion, racketeering, and threats (4.62) and would require less time than the average criminal prosecution for bankruptcy or

securities fraud (5.30).¹⁹ Based data from the entire time study (including non-class action cases), the case weights for the four types of cases that were most prevalent in the current study (See Figure 1) are:

<i>Securities, Commodities and Exchange</i> (850)	1.96
<i>Prisoner Civil Rights</i> (550) (not U.S. defendant)	0.43
<i>Other Civil Rights</i> (440) (filed originally in federal court)	1.61
<i>Civil Rights: Jobs</i> (442) (filed originally in federal court)	1.61

The calculation of the above hypothetical 4.71 case weight for class actions included both certified and uncertified cases. The average number of judge hours per case was approximately 11 for all class actions, but, as Table 16 shows, the amount of judge time for certified class actions was approximately three times that. The large number of cases that were not certified brings down the average for certified cases.

Most relevant to the Advisory Committee's concern with the certification process is the fact that certified class actions represented an investment, on average, of about seven hours of judge time on certification matters. Note, however, that the cases that were not certified required less than a half hour of judicial time, on average, for certification issues. Matters related to class notice required less than a half hour of a judge's time, on average.

For certified class actions, ruling on motions to dismiss demanded slightly less time, on the average, than did ruling on motions to certify a class. Ruling on discovery disputes also demanded less time than the certification process, as did the combined time devoted to facilitating and ruling on proposed settlements. At all stages except trial, certified class actions demanded more judge time, on the average, than cases that are not certified. For the average case not certified, the most demanding activity involved ruling on motions for summary judgment. Facilitating settlement was the next highest category of judicial activity.

¹⁹ *Id.* at 6-7. The 4.71 case weight for class actions was stated in a memorandum from John Shapard to Mark Shapiro, February 8, 1994 and included in the materials for the Advisory Committee's May, 1994 meeting.

XII. Conclusion (and Preview)

This preliminary report provides descriptive information on class action activity in 51 cases drawn from a national random sample of civil cases filed between November 1987 and January 1990. This information, though informative and national in scope, represents a limited introduction to the type of data that we will be collecting from the courts in the field study. For example, we have examined approximately 136 class actions in the Eastern District of Pennsylvania and expect to examine a similar number in the Northern District of California in time to report to the Committee at its April meeting in New York. We recognize that there is still a great deal that is not known about class action activity. As we continue to collect more data on these activities in our field study, we will be able to provide a more extensive and detailed view of the approaches various federal courts have taken to manage class action cases.

Please let us know if you see additional questions or analyses that we might explore using the time study data.