ATTORNEY CHOICE OF FORUM IN CLASS ACTION LITIGATION: WHAT DIFFERENCE DOES IT MAKE?

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INTRODUCTION[1]

Lawyers commonly perceive that choosing a forum in a class action is a critical element of litigating such a case. Customary legal strategy dictates that plaintiff attorneys consider filing and trying to keep a class action in state court because state judges are generally considered more willing to certify classes than federal judges. Using parallel reasoning, defendant attorneys have to consider removing a class action to federal court and trying to keep it there. Attorneys are likely to make exceptions to these general rules based on their specific perceptions of the favorability of state and federal courts that might have jurisdiction over their clients' claims.

Although generally accepted among attorneys, there is little empirical evidence supporting the belief that state and federal courts differ generally in their treatment of class actions. This study uses data from a case-based survey of attorneys to examine whether discrepancies exist between state and federal court treatment of class actions, both in general and specifically as to class certification decisions.

The importance of reexamining lawyers' perceptions about forums in class actions has increased in light of congressional enactment of the Class Action Fairness Act of 2005 (CAFA).[2] A major premise of the CAFA is that a federal forum is a superior venue for resolving class actions with multistate aspects. Limiting plaintiffs' attorneys' ability to choose a state forum for a class action appears to have been a major reason for enacting the CAFA into law.

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1 The authors, through the Federal Judicial Center, published an earlier, pre-CAFA, version of this article, THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION (2005) [hereinafter FJC REPORT], *available at* http://www.fjc.gov/public/pdf.nsf/lookup/ClAct05.pdf/$file/ClAct05.pdf. Differences are primarily in the Introduction, incorporating changes related to the CAFA, and in Part IV, adding information about the types of cases (nature of suit) and the state of filing for survey cases that were originally filed in state court and removed to federal court. In this Article, we cross-reference to the *FJC Report* and appendices for an extended discussion of research methods and for copies of the questionnaires. The data and methods used in the two articles are the same.

2 Pub. L. No. 109-2, 2005 U.S.C.C.A.N. (119 Stat.) 4.

In its report on the CAFA, the Senate concluded:

- "[S]ome state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions."[3]
- "[F]ederal courts generally scrutinize proposed settlements much more carefully [than state courts]."[4]
- "[F]ederal courts . . . pay closer attention to the procedural requirements for certifying a matter for class treatment."[5]
- "[A]buses are much more likely to occur when state court judges are unable to give class action cases and settlements the attention they need."[6]

Congress found specifically that "State and local courts are . . . keeping cases of national importance out of Federal court [and] sometimes acting in ways that demonstrate bias against out-of-State defendants."[7]

Congressional findings portray a system that, as discussed below, appears to be in dire need of correction. Although the findings are troubling, the fact that they are based primarily on untested anecdotes and assumptions raises questions about their accuracy. This Article tests those assumptions and provides empirical answers to some of those questions.

The arguments leading to the CAFA reflected plaintiff and defendant attorneys' perceptions and motivations for choosing a state or federal forum in which to litigate a class action—and about the effects they expected to flow from their choices. Many assumed that the driving forces in choice-of-forum decisions were the expected differences in class certifications and case outcomes based on how state and federal judges apply substantive laws and procedural rules. For example, one set of CAFA proponents asserted "'[f]ederal judges scrutinize class action allegations more strictly than state judges and deny certification in situations where a state judge might grant it improperly.'"[8]

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3 S. REP. NO. 109-14, at 14 (2005). Note that this report was ordered to be printed on February 28, 2005, after the CAFA was adopted and went into effect. The bill passed the Senate on February 10, 2005, and the House on February 17, 2005. The President signed it into law on February 18, 2005, and the legislation became effective on that date.

4 *Id.*

5 *Id.*

6 *Id.*

7 Class Action Fairness Act § 2(a)(4)(A), (B), 28 U.S.C.A. § 1711 note (West Supp. 2005) (Findings and Purposes).

8 John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case of It . . . In State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 154 (2001) (citing Memorandum to Advisory Comm. on Civil Rules from Judge Lee Rosenthal, Professor Edward H.

An academic commentator summarized the state of the debate this way:

> Plaintiffs view the federal courts as increasingly dominated by judges sympathetic to business interests and defendants. Defendants view state courts, particularly where judges are elected, as pro-plaintiff, and, in certain venues, as beholden to plaintiffs' attorneys. No matter that these stereotypes often fail to predict judicial behavior; they are given credence by attorneys on both sides, and they influence the agendas of interest groups and lobbyists concerning legislative and judicial initiatives.[9]

In passing the Class Action Fairness Act of 2003, the House of Representatives adopted a finding that "[t]hrough the use of artful pleading, plaintiffs are able to avoid litigating class actions in Federal court, forcing businesses and other organizations to defend interstate class action lawsuits in county and State courts where . . . less scrutiny may be given to the merits of the case."[10] As we have seen, the above arguments became findings in the Senate Report and in the CAFA.[11]

Based on those findings, Congress designed the CAFA to remedy the perceived problem. To shift class actions from state to federal courts, the CAFA creates a new category of federal jurisdiction for class actions in which the aggregate amount in controversy exceeds the sum or value of $5 million and the parties have minimal diversity of citizenship, that is a difference in state citizenship between any member of a class of plaintiffs and any defendant.[12] Class actions meeting those criteria may be removed from state to federal court by any defendant without regard to whether a defendant is a citizen of the state in which the action was brought and without regard to the one-year limit otherwise applicable to removal.[13]

We conducted the research presented here before the February 18, 2005, effective date of the CAFA. Under the laws in effect at the time of the research, an attorney for a plaintiff class could generally choose between a state or federal forum and sometimes from among a number of state or federal forums. Such an attorney could avoid federal diversity jurisdiction by pleading a valid claim against a local defendant or could establish federal diversity jurisdiction by pleading

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Cooper, and Professor Richard Marcus (Apr. 10, 2001) (quoting a 1999 version of a RAND study, DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS (2000))).

9 Edward F. Sherman, *Complex Litigation: Plagued by Concerns over Federalism, Jurisdiction and Fairness*, 37 AKRON L. REV. 589, 598 (2004).

10 H.R. 1115, 108th Cong. § 2 (a)(4)(A) (2003).

11 *See supra* text accompanying notes 3–7.

12 28 U.S.C.A. § 1332(d)(2).

13 28 U.S.C.A. § 1453(b).

valid claims solely against out-of-state defendants. Often a plaintiff attorney could establish federal question jurisdiction by pleading a federal statutory or constitutional claim.[14] In cases based on state law, federal jurisdiction would have been based on complete diversity of citizenship between named plaintiffs and out-of-state defendants. According to the pre-CAFA removal statute, if the plaintiff pleaded a valid claim against a local defendant, then complete diversity did not exist, and the case was not removable from state to federal court.[15] In practice, the defendant had the power to remove a case to federal court and to force the plaintiff to seek remand of the case by the federal court back to state court.[16]

Thus, before the CAFA, a defendant could have successfully removed a case from state to federal court only if there was federal jurisdiction based on complete diversity of citizenship[17] or based on a federal question pleaded in the complaint. As noted above, removal was not authorized if one of the defendants was a citizen of the state in which the action was brought.[18]

Proponents of changing federal jurisdictional statutes asserted that a major and undesirable consequence of allowing plaintiff attorneys the option of selecting a favorable forum had been the filing of a large number of class action cases in a small number of state courts that are, the proponents contended, predictably predisposed to favor

14 *See generally* 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3723 (3d ed. 1998 & Supp. 2005) (discussing the traditional pre-CAFA requirements for federal jurisdiction based on diversity of citizenship).

15 Before the CAFA, 28 U.S.C. § 1441(b) (2000) provided that any action not based on a federal question "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." The CAFA expressly permits removal "without regard to whether any defendant is a citizen of the State in which the action is brought." 28 U.S.C.A. § 1453(b) (West Supp. 2005).

16 28 U.S.C. § 1441(a) provides that "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court . . . may be removed by the defendant or defendants." *See also* 28 U.S.C. § 1446(d) (providing that filing a notice of removal with the clerk of the state court "shall effect the removal and the State court shall proceed no further unless or until the case is remanded"); 28 U.S.C. § 1447(c) (establishing procedures for filing a motion to remand and providing that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded"); 28 U.S.C. § 1447(d) ("An order remanding a case to the State Court from which it was removed is not reviewable on appeal.").

17 For a discussion of the pre-CAFA requirement of complete diversity of citizenship to establish federal jurisdiction, see generally 13B WRIGHT ET AL., *supra* note 14, § 3605.

18 28 U.S.C. § 1441(b).

plaintiffs' interests.[19] Proponents of change recommended expanding the circumstances under which a defendant may remove a class action from state to federal court.[20] The CAFA was the result.

The CAFA changed federal jurisdiction and removal law on the basis of assumptions rather than empirically derived fact. The source of those assumptions seems to be anecdotes of lawyers and lobbyists.[21] CAFA proponents presented extreme scenarios as typical of class action litigation. Such claims may have diverted policymakers' attention away from typical cases and interfered with a careful examination of the range of factors that might affect choice of forum, such as the original location of the alleged harms, the residence of class members, the applicable law, and the convenience of the parties and lawyers—factors that may become irrelevant under the CAFA. Prior to this study, we had little empirical information on how such factors affected choice of forum in class action litigation.

As to the assumptions that state courts favor plaintiffs and federal courts favor defendants, despite the force with which conclusions have been asserted, there had been no quantitative empirical examination of the differences in the treatment of class actions in state and federal courts. Nor had there been any quantitative empirical examination of the factors affecting attorneys' choices to litigate class actions in a state or federal forum before the study presented here.[22] The dearth of data left policymakers and proponents of change with little choice but to rely on anecdotes and assumptions or wait for more reliable data.[23] Many assumed that the outcomes of class action litigation mir-

19 *See, e.g.*, Beisner & Miller, *supra* note 8, at 160 (focusing on three county courts that had high volumes of class action filings relative to their populations).

20 *Id.* at 150–51. For a discussion of the pre-CAFA circumstances under which class actions filed in state court could be removed to federal court, see generally 14B WRIGHT ET AL., *supra* note 14, § 3723.

21 One quantitative study presented in support of the CAFA is Beisner & Miller, *supra* note 8. That study focuses on three courts the authors refer to as "outlier" courts, clearly atypical of state courts generally. *Id.* at 168. As such, the study amounts to a collection of anecdotes, not an attempt to sample the universe of state or federal class actions.

22 One very useful empirical study of attorney choice of forum examined civil litigation in general and did not focus on class action litigation. Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369 (1992).

23 RAND's in-depth analysis of ten cases litigated in federal and state courts represents a careful and systematic examination of choice-of-forum issues. *See* DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS 410–16, 481–83 (2000). That study, however, was not quantitative and, as the authors stress, was not designed to examine typical cases or to reach conclusions that might be applied generally to class action litigation. *Id.* at 138 ("[W]ith only enough resources to conduct ten case studies, we

rored the predictions of those who succeeded in choosing the forum; that is, plaintiffs who filed and retained a class action in state courts or defendants who successfully removed such an action to the federal courts.

Rather than rely on assumptions, we sought to answer some of the following empirical questions about the pre-CAFA class action litigation process:

- What factors influence plaintiff attorneys' choice of forum for filing a class action?
- What factors influence defendant attorneys' choice of forum for defending a class action?
- How different are judicial rulings on class certification and other procedural matters in state and federal forums?
- How different are the case outcomes—mostly in the form of dismissals or settlements—in state and federal forums?
- To the extent that both sides to the litigation base their forum-selection decisions on expectations of favorable legal rules or judicial predispositions, how accurate do their perceptions prove to be?

Even after the CAFA, our findings are likely to be relevant to some of the choice-of-forum decisions attorneys will continue to face. In a nation with fifty state court systems as well as ninety-four federal districts overseen by thirteen circuit courts of appeal, attorneys will have choices.[24] For example, plaintiffs will have a choice of whether to frame a class action that falls within the exceptions to the CAFA, e.g., by pleading for less than a $5 million amount in controversy.[25] Likewise, defendants will face a choice of whether or not to remove some consumer cases involving primarily state residents and based on state law. Plaintiffs may also have a choice of filing in one of several federal forums that might have jurisdiction;[26] in those instances, defendants will have a choice about whether or not to move to transfer the case to another federal forum. In contexts where plaintiffs have filed multiple class actions dealing with common factual questions in different federal courts, a party may apply to the Judicial Panel on

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could not select a statistically representative sample."). Beisner and Miller limited their study to three selected state courts, one of which the authors characterized as an "outlier among outliers." Beisner & Miller, *supra* note 8, at 168.

24 *See, e.g.*, Andrew J. McGuinness & Richard Gottleib, *Class Action Fairness Act 2005—Potential Pitfalls for Defendants*, 12 Andrews Class Action Litig. Rep. (West) No. 6, at 15, 15–16 (July 21, 2005) (discussing plaintiffs' choice of filing in selected federal forums or in selected, populous states or of seeking remedies valued at more or less than $5 million).

25 28 U.S.C.A. § 1332(d)(2) (West Supp. 2005).

26 McGuinness & Gottleib, *supra* note 24, at 15–16.

Multidistrict Litigation for consolidation of those cases in a single forum for pretrial proceedings,[27] including a decision on whether to certify a class action.[28] Our data might inform state-federal choices that remain after the CAFA. In the post-CAFA era, our research methods might be useful in examining the effects of attorneys' choices under the new jurisdictional rules.

Overview. This report presents empirical data and analysis relevant to the above questions. Overall, our data lend support to the conventional wisdom that attorney choice of forum is influenced by attorneys' perceptions of how the state and federal forums are likely to treat their cases, both as to class certification and settlement review. But, our data also show that attorneys considered more than the perceived attitudes of judges. Attorneys also factored in the underlying substantive and procedural law to be applied in state and federal court as well as local factors, such as the number of class members residing in the forum state and the local origin of the facts underlying the complaint.

Our data, however, lend little support to the view that state and federal courts differ greatly in how they resolve class actions. For example, state and federal courts were equally unlikely to certify cases filed as class actions. Both state and federal courts certified classes in fewer than one in four cases filed as class actions. Although state courts approved settlements awarding more money to the class than did federal courts, that difference was a product of the size of the class; individual class members on average were awarded more from settlements in federal courts than in state courts.

The balance of the Introduction to this report consists of a brief overview of the survey methods used to gather empirical data from attorneys who litigated the terminated class actions in the sample. Part I summarizes the findings as a whole. Part II describes and discusses the factors that plaintiff and defendant attorneys identified as having affected their choice of a state or federal forum. The data reveal that one of the strongest factors in an attorney's choice of forum is the attorney's perception of a judicial predisposition to rule in favor of interests like those of the attorney's client. Local residence of the class members, location of events underlying the claims, and local law proved to be major factors as well.

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27 28 U.S.C. § 1407(c)(ii) (2000).

28 *See, e.g.*, *In re* Express Scripts, Inc., Pharmacy Benefits Mgmt. Litig., 368 F. Supp. 2d 1356, 1357 (J.P.M.L. 2005) (centralizing cases to "prevent inconsistent pretrial rulings (especially with respect to questions of class certification)").

Part III examines factors associated with attorneys' perceptions of judicial predispositions. This Part explores the differences in such perceptions in relation to reports by the same attorneys on known or perceived differences between state and federal substantive law, procedural rules, and judicial receptivity to class actions.

Part IV compares judicial rulings and case outcomes in cases that were remanded to state courts with those retained in the federal courts. Data come from attorney reports of state and federal judicial rulings in a subset of removed class actions. Part IV also compares state and federal rulings on class certification, procedural rulings on dispositive motions, and settlement approval. It also analyzes data on monetary recoveries (generally in the form of class-wide settlements), attorney fees, class size, and recoveries per class member.

Part V examines attorney perceptions of judicial predispositions in relation to the specific cases in which plaintiff and defendant attorneys reported such perceptions. This approach allows us to compare and contrast those perceptions with the rulings that would be expected in those cases if such judicial predispositions were a significant factor.

Part VI reaches beyond the database of removed cases to include survey cases filed originally in federal court. This Part examines judicial rulings, settlement amounts, nonmonetary relief, and attorney fees for all cases in the sample, not just the removed cases. This Part also compares our findings regarding class certification rates, dismissals, recoveries, and attorney fees with available empirical data from prior studies.

Overview of Methods. In the course of conducting empirical research for another purpose relating to choice of forum in class action litigation,[29] we examined plaintiff and defendant choice-of-forum motivations and decisions by means of a survey of attorneys in a representative national sample of recently terminated cases that had been filed as class actions in state and federal courts. Our data from state court filings derive exclusively from attorney reports about cases plaintiffs filed in state courts and defendants subsequently removed to federal courts. About half of those cases were remanded to state courts for final resolution.

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29 At the request of the Judicial Conference of the United States Advisory Committee on Civil Rules, FJC researchers studied the effects of two recent Supreme Court decisions on attorneys' choice of a federal or state forum. *See* THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION (2004), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/AmOrt02.pdf/$file/AmOrt02.pdf.

The sample included cases that involved (1) personal injury and property damage claims based on a federal question or diversity of citizenship, filed as original actions in federal court or removed from state court; (2) contract claims based on a federal question or diversity of citizenship, filed as original actions in federal court or removed from state court; (3) claims based on "other statutes," filed as original actions in federal court or removed from state court; and (4) civil rights claims based on diversity of citizenship and removed from state court.[30]

We sent questionnaires[31] to 2132 attorneys in 1235 class action cases that had been either filed in federal court or removed to federal court between 1994 and 2001 and terminated between July 1, 1999, and December 31, 2002. Out of 1851 valid mailings we received responses from 728 attorneys, an overall response rate of 39%. The number of responses was sufficient to test the statistical significance of differences among the responses. In 107 of the 621 cases, we received responses from attorneys for both sides.[32] Of the responding attorneys, 312 (43%) represented plaintiffs and 416 (57%) represented defendants. We compared the cases underlying the responses with cases in the original sample and found the responses to be representative of the sample as a whole.[33] Attorneys were asked to report information about a specific case in which they had represented a party (the "named case"). We selected the named cases from the database used for an earlier FJC report on class action filing activity.[34]

30 FJC REPORT, *supra* note 1, at 59–60. We specifically excluded "(1) all labor cases; (2) all securities cases; (3) civil rights cases originally filed in federal court based on federal question jurisdiction; and (4) cases described as other (federal) statutes that had been originally filed in federal court." *Id.* at 60. The main reason for excluding such cases was that they would generally not demand difficult choice-of-forum decisions. *Id.*

31 For a copy of each of the four questionnaires we sent to attorneys, see FJC REPORT, *supra* note 1, app. at 79–121 (Questionnaire Appendix). Similar questionnaires were sent to plaintiff attorneys in cases filed originally in state court, plaintiff attorneys in cases filed originally in federal court, and defendant attorneys in cases filed in state or federal court. Each questionnaire was eight pages long.

32 All responses were used for analyses based on attorney reports (Introduction and Part II). For analyses done at the case level (Parts I, III, and IV), if two responses referred to the same case, each response was given a weight of .5.

33 The most important feature of a response rate is whether the respondents "are essentially a random sample of the initial sample and thus a somewhat smaller random sample of the total population." EARL BABBIE, SURVEY RESEARCH METHODS 182 (2d ed. 1990). For further discussion of the representativeness of the sample of cases and of the responses from attorneys, see FJC REPORT, *supra* note 1, at 62–63.

34 *See* BOB NIEMIC & TOM WILLGING, FED. JUDICIAL CTR., EFFECTS OF *AMCHEM/ORTIZ* ON THE FILING OF FEDERAL CLASS ACTIONS: REPORT TO THE ADVISORY COMMITTEE

The report identifies factors that attorneys reported—with the benefit of hindsight—as related to their decisions about where to file or whether to remove a class action, and it presents data concerning attorney perceptions of the relative importance of those factors in their filing and removal decisions. Questions called for numerous attorney judgments about whether individual factors might have influenced the attorney's total assessment of differences between state and federal courts in handling class action litigation.

Unless specified as not statistically significant, all differences discussed in this report were statistically significant at the .05 level or better, which means the probability that the differences occurred by chance is at most one in twenty.[35]

I. SUMMARY OF FINDINGS

A. Factors Affecting Plaintiff Attorneys' Choice of Forum

The questionnaire gave plaintiff attorneys a host of reasons why they might have filed the named case in state or federal court (the named case is the case about which the attorneys were surveyed). Multiple regression analysis revealed three factors that were strongly related to attorneys' decisions about where to file:

- attorney perceptions that state or federal judges were predisposed to rule on certain claims in line with the interests of the attorney's client;
- the source of law (state or federal) applicable to the claims; and
- "state connections," a composite measure we created, using the average of the percent of class members who resided in the state and the percent of claims-related transactions or events that attorneys reported having occurred within the state.

The substantive law and the discovery rules governing the case also had an impact on the attorneys' decisions. Those two factors were directly related to attorney perceptions of judicial predispositions. Attorney decisions to file a class action in state or federal court

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ON CIVIL RULES (2002), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/AmChem.pdf/$file/AmChem.pdf.

35 Further discussion of the quantitative methods used to conduct this study can be found in the FJC REPORT, *supra* note 1, app. at 57–78 (Methods Appendix). The Methods Appendix discusses the design and content of the questionnaire, the population from which the sample of cases and attorneys was drawn, the data collection, the representativeness of the data, and the mode of analysis. The Methods Appendix also presents a detailed discussion of the regression methods and results, including charts of the ten predictor models that emerged from the analysis.

were also related to the location of a competing or overlapping class action.

Personal and social characteristics of clients had little effect on the attorneys' decisions. A class representative's local residence was the client characteristic most strongly associated with a plaintiff's decision to file a class action in a state court—a factor captured as part of the "state connections" variable. The defendant's type of business was also associated with a plaintiff's choice of forum.

B. Defendant and Plaintiff Attorneys' Choice of a Federal Forum Compared

Defendant attorneys in removed cases and plaintiff attorneys in cases filed in federal courts each chose to litigate in a federal forum. Defendant attorneys in removed cases, however, more often reported their expectations that federal courts would apply class certification rules strictly and that substantive law, discovery rules, and expert evidence rules would favor their side. A defendant attorney was also far more likely than a plaintiff attorney to refer to the attorney's personal preferences or to client preferences as a basis for selecting a federal forum.

Responses from both plaintiff and defendant attorneys who sought a federal forum indicated that client characteristics, such as defendant's place of residence, gender, race, and ethnicity, were not related to choice of a federal or state forum. Attorneys infrequently perceived a litigation advantage or disadvantage arising out of any of those characteristics. Plaintiff attorneys, however, tended to see a proposed class representative's local residence as an advantage even when they filed the class action in federal court.

C. Attorneys' General Perceptions of Judicial Predispositions (in All Cases)

Attorneys on both sides of the litigation reported that they had expectations about judicial predispositions when they filed or removed the named case. About half of the plaintiff attorneys who filed cases in state courts said they thought that state judges were more likely than federal judges to rule in favor of interests like those of their clients. About 25% of plaintiff attorneys who filed in federal court reported that they expected federal judges to be more likely than state judges to rule in favor of interests like those of their clients, and about 40% of plaintiff attorneys filing in federal court reported that they perceived no difference between state and federal judges in that regard. About 75% of defendant attorneys who removed cases to federal court said that they had an impression at the time that federal

judges were more likely than state judges to rule in favor of interests like those of their clients. About 20% of defendant attorneys said they perceived no difference between the two sets of judges.

Often, attorneys' impressions of judicial predispositions were related to the attorneys' judgments about the relative favorability of the substantive law applicable to their clients' claims and defenses, to the relative favorability of a court's rules, and to the perceived judicial receptivity to the type of claims their clients presented. Plaintiff attorneys who filed in state court and perceived state judicial predispositions in favor of their clients' interests were more likely to report that state substantive law and state discovery, evidence, and class action certification rules favored their clients' interests. Plaintiff attorneys who perceived a state judicial predisposition were also more likely than other plaintiff attorneys to report that state court judges were more receptive than federal judges to motions to certify a class and more receptive to their clients' claims on the merits.

In reporting their impressions of judicial predispositions, defendant attorneys who removed cases to federal court presented almost, but not exactly, a mirror image of plaintiff attorneys. Defendant attorneys who reported perceiving federal court predispositions in favor of their clients' interests were more likely to report that federal discovery, expert evidence, and general evidentiary rules favored their clients' interests. Defendant attorneys who perceived a federal judicial predisposition were also more likely than other defendant attorneys to report that federal judges were less receptive than state judges to motions to certify a class and more receptive to their clients' positions on the merits. Defendant attorneys who perceived federal judicial predispositions, however, were no more likely than other defendant attorneys to report that federal substantive law was favorable to their clients' interests.

In the next three Parts (Parts I.D–F), we summarize findings about how those perceptions matched up with judicial rulings, procedural outcomes, and monetary recoveries and settlements in named cases removed from federal courts. In the two remaining Parts (Parts I.G–H), we summarize findings about judicial rulings, procedural outcomes, monetary recoveries and settlements, and attorney fees in all of the named cases, including a subset of cases that were filed originally in federal court.

D. Attorneys' General Perceptions and Judicial Rulings Compared (in Removed Cases)

Removed cases in our database consisted largely of contract and state statutory actions that were probably related to consumer law issues. For the most part, removal activity in the federal courts of a state was proportionate to the federal civil litigation activity in that state.

When we examined the removed cases, we found little relationship between the attorneys' perceptions of what the federal or state court was likely to do and the courts' actual rulings. Federal district judges remanded to state court almost half of the cases that defendants removed to federal court, providing an opportunity for us to compare rulings in the two types of courts.[36] Federal and state judges were about equally likely to certify cases as class actions (which occurred in 22% of the remanded cases and 20% of the cases retained in federal courts), but federal judges were more likely than state judges to issue rulings denying class certification. State judges, on the other hand, were more likely than federal judges to take no action regarding class certification. Federal and state judges were about equally likely to certify classes for trial and litigation or for settlement: half of the certifications in each set of courts were for trial and litigation and half were for settlement.

We found no statistically significant differences in rulings on dispositive procedural motions in cases remanded to state courts and in cases retained in the federal courts. Moreover, in certified class actions, state and federal courts were equally likely to approve a class-wide settlement. In one or two instances in federal or state court the settlement had been revised before court approval. No judge rejected a class settlement.

E. Attorneys' General Perceptions and Monetary Recoveries and Settlements Compared (in Removed Cases)

Despite the similarities in rulings, monetary recoveries differed in the two court systems. Such recoveries almost always took the form of settlements fashioned by the parties. In removed cases that had been remanded to state courts, the amount of class-wide monetary recoveries and settlements was substantially larger than monetary recoveries and settlements in cases retained in federal court. The typical (i.e.,

36 Note that our comparison of the two sets of cases proceeds on the assumption (untestable in the context of this survey) that district judges' decisions to remand were based on the presence or absence of federal subject matter jurisdiction and were not affected one way or the other by the certifiability of the case as a class action or by the underlying merits of the claims presented.

median) recovery was $850,000 in state court and $300,000 in federal court. Those differences, however, appeared to be a product of the larger size of class actions resolved in state courts (typically 5000 class members, compared to 1000 in federal courts). The typical recovery per class member turned out to be higher in federal court ($517) than in cases remanded to state court ($350).

F. Attorneys' Specific Case-Based Perceptions and Judicial Rulings Compared (in Removed Cases)

When we analyzed the removed cases according to plaintiff and defendant attorney perceptions of judicial predispositions, the results were similar to those regarding all removed cases as described in the previous paragraphs. Attorneys' perceptions of state or federal judicial predispositions toward their clients' interests showed little or no relationship to the state or federal judicial rulings in the surveyed cases. Judges certified or dismissed class actions with equal frequency when the attorney foresaw a state or federal predisposition. As we found in the examination of all removed cases, judges in federal courts tended to deny certification more frequently while state courts more frequently took no action on class certification. Regardless of the attorneys' expectations, judicial rulings on dispositive motions were just about equally likely to lead to a dismissal in the two sets of courts. In short, the predispositions anticipated by the attorneys failed to materialize in the form of judicial rulings.

G. Judicial Rulings and Settlements (in All Cases)

Looking at all closed cases in our sample (including cases filed originally in federal court), we found that in the majority of cases (57%) the court took no action on class certification. Courts certified 24% of the cases as class actions (an apparent decrease from previous years).[37] Of the certified cases, 58% were certified for settlement (an

37 *See* THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS (1996) [hereinafter FJC 1996 STUDY], *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf. A somewhat shorter version of that study can be found at Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74 (1996). The FJC's 1996 research, focusing on class actions terminated in 1992–1994 in four federal district courts, and based on examination of court files, not attorney recollections, reported a class certification rate of 37%. FJC 1996 STUDY, *supra*, at 9. The percentage of those cases certified for settlement was 39%. *Id.* While the study methods were different, comparing data from the current study and the 1992–1994 study suggests that the rate of class certification as a whole most likely has declined in the past decade.

apparent increase from previous years) and 42% were certified for trial or litigation.[38]

In both state and federal courts, all certified class actions settled on a class-wide basis. The typical (i.e., median) recovery in the class-wide settlements was $800,000. Twenty-five percent of the recoveries and settlements exceeded $5.2 million, and 25% were $50,000 or less. In contrast, most cases that were never certified were terminated by dismissal, summary judgment, voluntary dismissal, or settlement of class representatives' claims.

In the study, 29 of 315 cases (9%) with a recovery included some type of coupon in the recovery; three of those cases (1%) involved nontransferable coupons.

H. Attorney Fees

Attorney fees typically were 27% of the class recovery in remanded cases and 29% of the class recovery in cases retained in the federal courts, about the same percentage as in the prior FJC study of class actions.[39] Twenty-five percent of the cases involved fees of 36% or more.

II. Factors Affecting Choice of Forum

What factors influence attorneys' decisions to file class actions in state versus federal courts? A literature review reinforced our understanding that a host of factors are likely to influence such decisions. One researcher found, for example, that attorneys give "quite diverse" reasons for forum selection, citing "as many as fifteen or twenty different factors when responding to surveys asking about forum selection choices."[40] Attorneys cited "geographic convenience, fear of local bias, superior rules of procedure, case delay, judicial competence, litigation costs, favorable or unfavorable precedent, higher damages awards, higher likelihood of attorney fee award, jury pool differences, better rules of evidence, greater judicial pretrial involvement, and selection choice made by client or referring attorney."[41] In addition, in diversity cases, attorneys indicated that "[a]ttorney habit, conve-

38 FJC Report, *supra* note 1, at 11. The *FJC 1996 Study* and the current study suggest that the percentage of class actions certified for settlement has increased from the 39% rate found in 1996. FJC Report, *supra* note 1, at 11; FJC 1996 Study, *supra* note 37, at 9.

39 Median rates in the four federal districts studied in 1996 ranged from 27% to 30%. FJC 1996 Study, *supra* note 37, at 69.

40 Miller, *supra* note 22, at 382.

41 *Id.*

nience, and case delay" were the primary factors affecting their choice of forum.[42]

The questionnaires we sent to attorneys inquired about all of the above factors. In addition, we asked about matters peculiar to class actions, such as the rules governing certification of a class, class notification requirements, and the availability of interlocutory appeal. We also asked about judicial predisposition to rule in favor of client interests, about judicial receptivity to class actions, about judicial resources available to manage the litigation, and about the effect of federal multidistrict litigation procedures.[43] Finally, we asked about whether the decision of where to file or defend might have been influenced by various party characteristics, such as residence, gender, ethnicity, race, religion, nationality, reputation, type of business, corporate status, and the like.

We analyzed the attorneys' questionnaire responses regarding these and similar factors. If this report does not mention a specific factor from the above list, that means attorneys did not report any meaningful influence of that factor on their decisions.

A. Plaintiff Attorney Reports on Reasons for Filing the Named Cases in Federal or State Courts[44]

First, by conducting multivariate analyses of the wide range of variables described above, we analyzed why plaintiff attorneys file class actions in state or federal court. Multivariate analyses, as the name implies, allow us to look at the relationships between pairs of variables while controlling for the effects of other variables.[45]

We concentrated on factors we expected to be associated with attorneys' choice of forum and analyzed responses from plaintiff attor-

42 *Id.* at 383.

43 For copies of the four questionnaires used, see FJC REPORT, *supra* note 1, app. at 81–121.

44 The analyses in this subsection, but not in other parts of this report, excluded seventy-two cases that had been removed to federal court but remanded to state court or dismissed for lack of federal jurisdiction. The reason for excluding these cases was that the lack of federal jurisdiction suggested that the plaintiff attorney did not have a meaningful choice of forum.

45 See FJC REPORT, *supra* note 1, at 64–78, for a more complete description of these analyses. Note that we used a very restrictive approach on the data in the multivariate analyses, and, therefore, some of the reported frequencies in this section are different from those reported in sections using other analyses. In the multivariate analyses, we chose to limit our analyses to cases where there were no missing values for any of the variables in question. This reduced the total number of responses in the analyses.

neys who filed proposed class action lawsuits in state court and plaintiff attorneys who filed such suits in federal court.[46]

Various factors might play a role in an attorney's choice of forum. Factors include case characteristics (e.g., number of class members, amount in controversy, nature of suit), perceived advantages in a particular forum (e.g., applicable law, convenience, rules, judicial receptiveness, costs and fees, and strategy), and attorney experience (e.g., type of practice, type of clients, years of experience). Table 1 describes the factors our analyses found to be associated with attorneys' choice of forum, beginning with the three factors that turned out to be the most strongly associated.

46 We were unable to examine defendant attorneys' reasons for removing cases to federal court or for choosing to litigate such cases in state courts because we were unable to identify a source of information about cases in which defendants chose to remain in state court.

TABLE 1. FACTORS REPORTED TO HAVE INFLUENCED PLAINTIFF ATTORNEYS' CHOICE OF FORUM

Factor	Description of Factor in Questionnaire*
Judicial predisposition	Attorneys' impression of any predisposition of state or federal judges toward interests like those of their clients (Question 23)
Source of law	Attorneys' estimate of proportion of claims based on state or federal law (Question 1)
State connections	The average of the percentage of class members residing in the state (Question 4) and the percentage of claims-related events that occurred in the state where the class action was filed (Question 5)
Substantive law	Substantive law was more favorable to our case (Question 21)
Discovery rules	Discovery rules were more favorable to our case (Question 21)
Judicial receptiveness	Judges in state or federal court are generally more receptive to the claims on the merits (Question 21)
Location of court	The location of the court was more convenient for us, our clients, or witnesses (Question 21)
Cost of litigation	The cost of litigation would be lower (Question 21)
Jury award	A jury award would be higher (Question 21)
Other cases	Similar cases were filed in state or federal court (Question 19)
Attorney's federal civil litigation	Percentage of attorney's workload devoted to civil litigation in federal court during the past five years (Question 33)
Attorney's state class actions	Number of class actions attorney filed in state court in the past three years (Question 31)

* Question numbers refer to the questionnaires addressed to plaintiff attorneys, which can be found in the FJC REPORT, *supra* note 1, app. at 79 (Questionnaire Appendix). Note that Question 21 asked attorneys directly about their reasons for choosing a state or federal forum. *Id.* (Questionnaire 1, Question 21). Other questions asked attorneys to describe particular aspects of the named case.

1. Primary Factors Reportedly Influencing Plaintiff Attorneys' Choice of Forum

Three factors appear to have the greatest connection with where attorneys filed their class action cases: (1) attorneys' perception of judicial predispositions to rule for one side or the other; (2) the source (state or federal) of the law supporting the claims; and (3) the percentage of class members residing in, and claims-related events originating in, the state in which the case was filed (which we call "state connections"). How attorneys perceived these three factors proved to be closely related to their choice of forum.

Perception of Judicial Predispositions. The questionnaire asked attorneys to indicate whether they perceived, at the time of filing, that state or federal judges had any predisposition toward ruling in favor of interests like those of their clients.[47] Attorneys tended to file in the jurisdiction they thought would be predisposed to their clients' interests. Forty percent of attorneys filing in state court reported that they perceived a state judicial predisposition. Thirty-two percent of attorneys filing in federal court—as compared to 4% of attorneys filing in state court—reported that they perceived a federal judicial predisposition. A number of attorneys (28% of those filing in federal court and 56% of those filing in state court) reported that they perceived no differences between state and federal judges.

Source of Law. We asked attorneys to estimate the proportion of claims in the named case that were based on federal or state law. Most attorneys reported that their cases had a majority of state claims: 83% of attorneys filing in state court and 59% of attorneys filing in federal court reported a majority of state claims. Twenty-five percent of attorneys filing in federal court and 5% of attorneys filing in state court reported a majority of federal claims. Sixteen percent of attorneys filing in federal court and 13% of attorneys filing in state court reported an equal number of both state and federal claims. It is interesting to note that 13% of plaintiff attorneys who filed cases originally in federal court reported that the named case involved the laws of many states.[48] Comments from attorneys in a few instances indicated

47 In another analysis, reported in Part III.B, Tables 7 and 8, we report that such predispositions are related to attorneys' judgments or intuitions about factors such as the relative strictness of applicable class certification rules, judicial receptivity to motions to certify a class or to the merits of claims or defenses, and the impact of other system-wide court rules, such as those relating to discovery or evidence. Attorneys' judgments about the favorability of substantive law are also related, but to a lesser degree, to their impressions about judicial predispositions.

48 We did not use the same form of Question 21 for plaintiff attorneys who filed named cases originally in state court.

that they sometimes filed a case in federal court because they wanted to pursue at least one federal claim and knew that a single federal claim would allow a defendant to remove the case to federal court.

State Connections. We also asked attorneys to estimate the percentage of class members residing in, and the percentage of claims-related events that occurred in, the state where the class action was filed.[49] Attorneys filing in federal court reported a greater percentage of class members residing outside the state of filing than attorneys filing in state court (51% versus 28%) as well as a higher percentage of claims-related events occurring in multiple states (34% versus 26%). These data suggest that attorneys tend to file in federal courts when the case has factual and legal issues involving a larger number of states and tend to file in state courts when the case has factual and legal issues involving a smaller number of states.

Similarly, federal courts appear to have received more proposed class actions with multistate class membership than state courts. About 71% of attorneys filing in federal court reported class members resided in more than two states, compared with 41% of attorneys filing in state courts. Similarly, 34% of attorneys filing in federal court reported having class members from all 50 states, compared with 19% of attorneys filing in state court who so reported.

We computed a composite variable, called "state connections," by taking the average of the percentage of class members who resided in the state where the case was filed and the percentage of claims-related events that occurred in the state where the case was filed.[50] Attorneys who filed in state court had a higher average of state connections (73%) than attorneys who filed in federal court (57%).

Perception of Judicial Predispositions, Source of Law, and State Connections. We found that the probability of filing in state court is at its highest level when attorneys perceive a state judicial predisposition toward their clients' interests in a case with a majority of state claims

49 Questions 4 and 5 provide the underlying support for the "state connections" variable. *See* FJC REPORT, *supra* note 1, app. at 79 (Questionnaire 1, Questions 4–5). Question 4 asked for the percentage of claimants residing in the state where the class action was filed. Question 5 asked for "the percentage of claims-related transactions/events [that] occurred in the state where class action was filed." *Id.* That question depends on the ability of a responding attorney to distinguish between events (such as the purchase or use of a product allegedly causing injury) that may have occurred both within the state of filing and in a number of other states.

50 We examined the influence of the number of states represented by the class, the percentage of class members residing in the state, and the number of claims-related events that occurred in the state, but found that these factors individually were not associated with attorneys' choice of forum.

and with a high average[51] of class members residing in, and claims-related events originating in, the state where the class action was filed. Likewise, the probability of filing in state court was at its lowest level when the opposite was true. The multivariate model predicts that very few cases would be filed in state courts if attorneys perceive a federal judicial predisposition toward their clients' interests in a case with federal claims and with a low average[52] of claimants residing in, and claims-related events occurring in, the state where plaintiffs filed the class action.

2. Secondary Factors Reportedly Influencing Attorneys' Choice of Forum

Other Reasons for Filing in State or Federal Court. We found other factors were associated with attorneys' choice of forum. In the questionnaire,[53] attorneys reviewed a list of reasons that might have influenced their decisions about where to file the case. This list compared differences in state and federal practices, including applicable law, convenience, rules, judicial receptiveness, costs and fees, and strategy. Attorneys indicated which reason(s) influenced their decisions on where to file their case.

Attorneys who filed in state court were more likely than attorneys who filed in federal court to include the following as reasons for their decision: favorableness of substantive law and discovery rules; judicial receptiveness to such claims on the merits; lower costs of litigation; higher jury awards; and convenience of the court location.[54] We found that those reasons were associated with where the named case was filed. The probability of filing in state court increased if an attorney chose any of those reasons for selecting a particular court.

Table 2 shows the percentage of attorneys who chose any of these reasons.

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51 We examined the distribution for this variable and found that 25% of the respondents reported that all of the class members resided in, and all of the claims-related events occurred in, the state in which the plaintiff filed the class action (which we call "high state connections").

52 We examined the distribution for this variable and found that 25% of respondents reported state connections of 20% or less (which we call "low state connections").

53 *See* FJC REPORT, *supra* note 1, app. at 79 (Questionnaire 1, Question 21).

54 These factors were found to be independently predictive of attorneys' choice of forum. We controlled for the three factors in the basic model. There may be other factors that we did not measure that may have influenced the relationship.

TABLE 2. REASONS SELECTED BY PLAINTIFF ATTORNEYS FOR CHOICE OF FORUM

Reason	Filed in State Court	Filed in Federal Court
Source of claims (state or federal)	78%	28%
Favorableness of substantive law	33%	4%
Favorableness of discovery rules	28%	16%
Judicial receptiveness to claims on merits	38%	19%
Lower costs of litigation	31%	12%
Higher jury awards	18%	4%
Location of court	32%	18%

Note: Differences between state and federal courts in this table are all statistically significant at the .05 level.

Competing or Overlapping Cases. Attorneys were asked whether other lawsuits were filed in state or federal courts dealing with the same subject matter around the same time as the named case.[55] Attorneys filing in state court reported that, of the similar cases filed at the time of the named case, 61% were filed in a state court, 26% were filed in both state and federal court, and 13% were filed in federal court. Attorneys filing in federal court reported that 40% of similar cases were filed in state court, 12% were filed in both state and federal court, and 48% were filed in federal court.

We found that the locations of the other cases are associated with the location where the named case was filed. The probability of filing in state court increases when a similar case has been filed in state court and decreases when a similar case has been filed in federal court.

Attorney Experience. Attorneys were asked about the percentage of their civil cases that they filed in federal court in the past five years. Responses indicated that the probability of filing in state court generally varies in the same direction as the attorneys' recent filing activity. Attorneys filing class actions in state court reported filing 30% of all their civil litigation in federal court in the past five years. Attorneys filing class actions in federal court reported filing 46% of their civil litigation in federal court.

55 Note that we created the database for this study in a way that was designed to eliminate duplicate cases consolidated in the same federal court or in the same MDL proceeding. *See* FJC REPORT, *supra* note 1, at 58–60. Attorneys in the survey may, of course, have referred to cases that we treated as a single consolidated case.

Attorneys also were asked about the number of class actions they filed over the past three years and the percentage filed in state court. This factor had little influence on attorneys' choice of forum. The probability of filing in state court increases when the number of class actions filed in state court is high and decreases when the number of class actions filed in state court is low. Attorneys filing in state court reported filing 77% of all of their class actions in the past three years in state court. Attorneys filing in federal court reported filing 36% of all of their class actions in the past three years in state court.

3. Summary

The multivariate analysis indicates that plaintiff attorneys' choices between state and federal forums followed their expectations about where their clients' interests would best be served. Those attorneys' choices also followed their assessment of whether a state or federal forum had more of a nexus with the underlying litigation. When plaintiff attorneys perceived that state judges were receptive to, and predisposed to rule in favor of, claims like those of their clients; that state substantive law and discovery rules were more favorable to their clients; and that the facts, legal claims, and class members were linked to the state, then they were far more likely to file in state rather than federal court. The absence of any or all of those factors favorable to plaintiffs and to a state filing increased the likelihood of a federal filing.[56]

B. Comparison of Plaintiff and Defendant Attorney Reports of Reasons for Choosing To File the Named Case in, or Remove It to, Federal Court

We could not conduct a multivariate analysis of factors affecting defendant attorneys' removal of cases to federal court because we could not readily obtain a sample of defendant attorneys who chose to remain in state courts. We did examine defendant attorneys' responses, however, and in this section compare responses of plaintiff[57] and defendant attorneys who chose federal court.

The types of cases that were removed to federal court seemed to differ from those filed originally in federal court in regard to the pro-

56 For a detailed presentation of ten models that predict the probability of filing in state or federal court according to the most important factors identified in the regression analysis, see FJC REPORT, *supra* note 1, at 64–78.

57 The frequencies for plaintiff attorneys filing in federal court differ from the percentages presented in Table 2 because we did not need to eliminate any responses based on a failure to respond to other questions.

portion of claims based on state or federal law. Claims based on state law were considerably more frequent in cases originally filed in state courts. Defendant attorneys who removed named cases to federal court were more likely to report that all claims in their cases were based on state law than were plaintiff attorneys who filed named cases originally in federal court: 58% of defendant attorneys reported that all claims were based on state law, but 39% of plaintiff attorneys so reported. Eighty-eight percent of defendant attorneys, as opposed to 66% of plaintiff attorneys, reported that at least half of their claims were based on state law. On the other hand, 24% of plaintiff attorneys who filed cases originally in federal court reported that all claims were based on federal law; only 3% of defendant attorneys who removed cases reported this. About one-third of plaintiff attorneys who filed cases in federal court and 12% of defendant attorneys who removed cases to federal court reported that their case involved a majority of federal claims.

Cases that defendant attorneys removed to federal court had more state connections (i.e., percentage of in-state class membership and case-relevant factual links to the forum state) (71%) than cases plaintiff attorneys filed in federal court (55%). Defendant attorneys reported that, on average, 73% of class members resided in, and 73% of claims-related events occurred in, the state where the class action was filed. Plaintiff attorneys who filed in federal court reported that, on average, 47% of class members resided in, and 62% of claims-related events occurred in, the state of filing. Over 60% of attorneys removing to federal court reported that members of the proposed class resided in two states or a single state, whereas 16% reported class members from all fifty states. Twenty-nine percent of plaintiff attorneys who filed in federal court reported that the class members resided in two states or a single state, and 34% reported class members from all fifty states.

Attorneys appear to have considered any overlapping or competing cases before choosing federal court. Earlier we reported that plaintiff attorneys were more likely to file in state court if a similar case had been filed in state court. Plaintiff attorneys who filed in federal court reported that 50% of similar cases were filed in federal court, 22% were filed in both state and federal court, and 28% were filed in state court. On the other hand, defendant attorneys were likely to remove the named case to federal court even if a similar case had been filed in state court. Defendant attorneys reported 11% of other similar cases had been filed in federal court, 29% were filed in both state and federal court, and 60% were filed in state court.

Table 3 shows the percentage of attorneys who reported that they relied on specific reasons for filing in or removing a case to federal court.

TABLE 3. REASONS CITED BY ATTORNEYS FOR CHOICE OF FEDERAL COURT[58]

Reason	Defendant Removed to Federal Court	Plaintiff Filed in Federal Court
Client prefers federal court	65%	Not available*
Attorney prefers federal court†	57%	26%
Class certification†	47% (more stringent)	8% (less stringent)
Class notification†	9% (more stringent)	1% (less stringent)
Court more receptive to motions to approve class settlement†	2%	6%
Court likely to appoint firm as class counsel	Not available*	3%
Discovery rules favorable†	26%	10%
Expert evidence rules favorable†	22%	2%
Substantive law favorable†	18%	3%
Costs of litigation lower‡	14%	9%
Jury awards favorable†	21% (lower awards)	3% (higher awards)
Court has more resources†	30%	14%
Court is more expeditious†	27%	17%
Court location favorable‡	9%	17%

* These respondents were not presented with this factor as a potential reason for choosing a federal forum.
† Differences are statistically significant at the .05 level.
‡ Differences are statistically significant at the .10 level.

The reason most often cited by defendant attorneys for removing cases to federal court was the general preference of both the client and the attorney to litigate in federal court. Defendant attorneys were more than twice as likely as plaintiff attorneys to cite their preference to litigate in federal court as a reason for filing in that court.

Almost half of defendant attorneys cited the general stringency of class certification as a reason for removing a case to federal court. Many plaintiff attorneys choosing federal court agreed that a federal court would scrutinize a motion for class certification more closely

58 Table 3 differs from previous tables in that it includes responses from defendant attorneys who removed cases from state to federal courts.

than a state court; few indicated a belief that they would have an easier time with class certification in federal court. A small minority of plaintiff attorneys chose to file in federal court because the attorneys expected the court to appoint their firm as class counsel.

As was true regarding plaintiff attorneys' choice of a state forum,[59] defendant attorneys' choice of a federal forum included consideration of the perceived favorableness of substantive law and court rules, and the judicial receptiveness to their claims or defenses. Defendant attorneys were more likely than plaintiff attorneys to report choosing federal court because they expected the substantive law, and class certification, discovery, and expert evidence rules, to be more favorable.

A number of respondents reported that they chose to file in federal court after considering court resources and how fast their cases would move through the court. Defendant attorneys were more likely than plaintiff attorneys to report choosing federal court because they believed that federal court had more resources available to handle the class action, that the court would be able to resolve the class action more expeditiously, and that litigation costs would be lower. Plaintiff attorneys were more likely than defendant attorneys to report choosing federal court because the location of the court was convenient to them, their clients, and witnesses. A few plaintiff attorneys reported that they chose federal court because they believed they would receive a higher jury award, but defendant attorneys were seven times more likely to report choosing federal court because they envisioned a lower jury award.

1. Summary

Defendant attorneys' reported reasons for choosing a federal forum differed somewhat from plaintiff attorneys' reported reasons. Defendant attorneys were far more likely to view federal courts as preferable because of restrictive application of class certification rules. As one might expect, both sets of attorneys sought substantive law and procedural rules that would favor their clients.

C. Plaintiff and Defendant Attorney Reports About Any Relationship Between Client Characteristics and Filing and Removing Decisions

Attorneys might believe they would have an advantage, or a disadvantage, in state or federal court based on particular characteristics of

59 *See supra* Part II.A and Table 2.

the parties they represent. The questionnaire called for attorneys to review a list of party characteristics and report if the attorneys had, at the time of filing, expected any of those characteristics to yield an advantage or disadvantage. The party characteristics included residence, gender, race, ethnicity, religion, socioeconomic status, foreign national status, corporate status, type of business, and reputation of the class representatives and defendants.

Most respondents reported expecting no advantage or disadvantage arising from most of these party characteristics. When a majority of attorneys perceived effects, they tended to be modest, though statistically significant. None of the characteristics elicited responses indicating attorneys' widespread perceptions of a strong advantage or disadvantage.

Using multivariate analyses we found that party characteristics were not associated with plaintiff attorneys' choice of forum. We included those characteristics in the analysis of the many factors that might have affected attorney decisions about where to file a class action.[60] Here we discuss the differences regarding the importance of these party characteristics among plaintiff attorneys who filed in state or federal court, as well as between plaintiff and defendant attorneys.

1. Differences Between Plaintiff Attorneys Who Filed in State and Federal Court

We examined whether there were differences between ratings of party characteristics for plaintiff attorneys who filed proposed class actions in state court and plaintiff attorneys who filed such suits in federal court. Attorneys who filed in state and federal court differed in their reports of any perceived advantage or disadvantage of the defendant's type of business and the class representative's local residence and reputation.

In these analyses, what we did not find may be as important as what we found. No significant differences emerged from ratings of the perceived advantage or disadvantage of a class representative's type of business, defendant's out-of-state residence, defendant's reputation, or either party's gender, race, ethnicity, religion, socioeconomic status, corporate status, or foreign national status.

Table 4 shows the percentage of plaintiff attorneys who filed in state and federal court who rated the party characteristic as an advantage, a disadvantage, or neither.

60 *See supra* Part II.A.

TABLE 4. PLAINTIFF ATTORNEY RATINGS OF PARTY CHARACTERISTICS BY CHOICE OF FORUM

Variable	Court of Filing	Advantage	No Advantage/ No Disadvantage	Disadvantage
Defendant's type of business (N = 147)	State	52%	45%	3%
	Federal	29%	65%	6%
Class representative's local residence (N = 163)	State	71%	28%	1%
	Federal	1%	52%	47%
Class representative's reputation (N = 131)	State	28%	70%	2%
	Federal	0%	87%	13%

Note: Differences between federal and state court in this table are statistically significant at the .05 level.

The majority of plaintiff attorneys who filed in state court said they had expected the type of business conducted by the defendant to be an advantage to the plaintiff's case; nonetheless, multivariate analyses did not show that defendant's type of business influenced plaintiffs' filing decisions. To a lesser degree, some plaintiff attorneys reported expecting the defendant's type of business to make filing in federal court more advantageous. A limited number of attorneys identified the type of business.[61] They mentioned insurance or financial services (e.g., banking, mortgages, and accounting) most frequently as presenting an advantage to the plaintiff side. Attorneys who filed in state court most often reported viewing a manufacturing business as an advantage, whereas attorneys who filed in federal court reported seeing this type of business as neither an advantage nor a disadvantage.

A majority of attorneys filing in state court reported that the local residence[62] of the class representative made state filing more advantageous to their side. Of the party characteristics, this one had the strongest association with a plaintiff's decision about where to file a class action; nonetheless, it did not surface in the multivariate analysis as a factor in the model predicting choice of forum.[63] Almost one-

61 Because the number of attorneys who provided this information was small, we were unable to conduct a meaningful statistical analysis.

62 Note that the term "local residence" may take on different meaning in the state and federal courts. A local resident, in reference to a state court, probably resided in the same city in which the court was located. A local resident, in reference to a federal court, may well have resided in a different city but in the same state as the court.

63 *See supra* Part II.A.

half of attorneys filing in federal court reported the class representative's local residence to be disadvantageous to their side.

Likewise, more than a quarter of attorneys filing in state court reported that the reputation of the class representative was an advantage to their side. No attorneys who filed in federal court reported the class representative's reputation to be an advantage, but a number did report this party characteristic put their case at a disadvantage in federal court.

2. Differences Between Plaintiff and Defendant Attorneys

We also examined whether there were differences in ratings of the above party characteristics between plaintiff attorneys who filed proposed class actions in state or federal court and defendant attorneys who removed proposed class actions to federal court. We found that there were statistically significant differences between plaintiff and defendant attorneys on the perceived advantage of the defendant's and the class representative's residence and type of business, the defendant's corporate status, and the class representative's gender, race, ethnicity, religion, or socioeconomic status.

No statistically significant differences were found in ratings of the perceived advantage or disadvantage of the defendant's gender, race, ethnicity, religion, or socioeconomic status, the defendant's out-of-state residence, the class representative's corporate status, or the reputation or foreign national status of both the class representative and the defendant.

Table 5 shows the percentage of plaintiff and defendant attorneys who rated the party characteristic as an advantage, a disadvantage, or neither.

TABLE 5. RATINGS OF PARTY CHARACTERISTICS BY ALL PLAINTIFF ATTORNEYS AND BY DEFENDANT ATTORNEYS WHO REMOVED THE NAMED CASE TO FEDERAL COURT

Variable	Attorney	Advantage	No Advantage/ Disadvantage	Disadvantage
Class representative's local residence (N = 395)	Plaintiff	63%	35%	1%
	Defendant	24%	52%	23%
Defendant's type of business (N = 360)	Plaintiff	22%	77%	1%
	Defendant	12%	78%	10%
Class representative's type of business (N = 223)	Plaintiff	43%	52%	4%
	Defendant	39%	40%	22%
Defendant's corporate status (N = 319)	Plaintiff	24%	72%	4%
	Defendant	25%	59%	15%
Class representative's gender, race, ethnicity, religion, or socioeconomic status (N = 294)	Plaintiff	17%	82%	1%
	Defendant	9%	80%	11%

Note: Differences between plaintiff and defendant attorneys are statistically significant at the .05 level.

The parties differed on the perceived advantage of the local residence of the class representative. Plaintiff attorneys were more likely than defendant attorneys to say that they thought the local residence of the class representative would be an advantage to their side. About a quarter of defendants reported expecting the local residence of the class representative to be advantageous to their side, but an equal number expected it to be a disadvantage.

Plaintiff and defendant attorneys' opinions were mixed regarding any advantage related to a defendant's type of business. For example, each set of attorneys reported viewing a defendant's financial services business as an advantage to their side. Regarding an insurance business, however, both sides agreed in effect: Plaintiff attorneys reported viewing an insurance business as an advantage to their side, while defendant attorneys reported viewing an insurance business as a disadvantage to their side.

Overall, more than three-quarters of the attorneys on both sides expected no advantage or disadvantage based on the defendant's type of business. Of those who saw advantages or disadvantages, plaintiff attorneys believed the defendant's type of business was more advantageous to their cases than did defendant attorneys. A number of defendant attorneys expected the type of business conducted by the defendant to be advantageous to their side, but an equal number expected it to be a disadvantage.

Although plaintiff attorneys were more likely to report viewing the class representative's type of business as an advantage for the plaintiff, a number of defendant attorneys also viewed this party characteristic as an advantage for their side. However, defendant attorneys were more likely than plaintiff attorneys to view this party characteristic as a disadvantage. On the whole, both sets of attorneys saw a class of consumer or insured claimants as an advantage to their side. Defendant attorneys viewed a class involving brokers or sales representatives as an advantage to their side, while plaintiff attorneys saw this type of class as a disadvantage to the plaintiffs' success.

A clear majority on both sides reported no advantage or disadvantage associated with a defendant's corporate status. About a quarter of both plaintiff and defendant attorneys expected the defendant's corporate status to be an advantage to their side. However, defendant attorneys were more likely than plaintiff attorneys to expect that the defendant's corporate status would be a disadvantage to their side.

Plaintiff attorneys reported that the gender, race, ethnicity, religion, or socioeconomic status of the class representative was more of an advantage to their case than did defendant attorneys. Again, the majority on each side thought these characteristics were of no consequence.

3. Summary

Debates about why attorneys choose to file class actions in state or federal court point to the legal interests of the parties and party characteristics on both sides of the cases, and those two types of factors often become intertwined. Defendants' corporate status and type of business receive emphasis, as do plaintiffs' local residence, reputation, gender, ethnicity, and so forth. The above analyses help to separate out the relationship of these variables to the decisions about where to file cases. In our analyses, attorneys' expectations of advantages differed somewhat based on party characteristics, but the failure of such characteristics to surface in the multivariate analysis shows that these

party characteristics are not critical factors in plaintiff attorneys' choice of whether to file a class action in state or federal court.[64]

III. PLAINTIFF AND DEFENDANT ATTORNEYS' PERCEPTIONS OF STATE AND FEDERAL JUDGES' PREDISPOSITIONS TOWARD PLAINTIFF AND DEFENDANT INTERESTS

As shown in Part II.A, a key factor in a plaintiff attorney's choice of forum is the attorney's impression of any predispositions federal or state judges might have to rule in favor of interests like those of the attorney's clients. Many attorneys perceived that federal and state judges would rule differently on matters of interest, including rulings on class certification, the merits of their cases, and jurisdictional issues. Our analyses showed that plaintiff attorneys reported that their perceptions of such predispositions strongly influenced their decisions about where to file class actions. We asked the same question of defendant attorneys who had removed cases from state to federal court and found even stronger perceptions on that side as well.

In this Part we analyze in more detail both plaintiff and defendant attorneys' reported perceptions of the predispositions of judges in federal and state courts to rule on a particular class action in favor of interests like those of the attorneys' clients. In Part III.A we report attorney perceptions of judicial predispositions, and in Part III.B we report the extent to which such predispositions are related to differences in federal and state substantive law and procedural and evidentiary rules. Part IV compares those perceptions with the rulings and monetary recoveries and settlements or other outcomes in the removed and remanded cases as a whole. Part V separates out cases in which attorneys reported a perceived judicial disposition and examines the rulings in the underlying cases to determine whether they confirmed the predisposition or not.

A. Attorneys' Perception of Judicial Predispositions

For both the filing and removal settings, our questionnaire pointed to the time the attorney decided where to file or whether to remove and asked the attorney to identify "which of the following statements best describes your impression about any predisposition of state or federal judges toward interests like your clients'?"[65]

Table 6 presents the exact language of the response categories as well as the number and percentage of each response from plaintiff

64 *See supra* Part II.A.

65 *See* FJC REPORT, *supra* note 1, app. at 79 (Questionnaires 1–4, Question 23).

attorneys who filed class action cases in state courts, plaintiff attorneys who filed class actions in federal courts, and defendant attorneys who removed class actions to federal courts.

TABLE 6. ATTORNEY IMPRESSIONS OF JUDICIAL PREDISPOSITIONS TO RULE IN FAVOR OF CLIENT INTERESTS

Impressions About Judicial Predispositions	Plaintiff Attorneys		Defendant Attorneys
	State Filing	Federal Filing	Removed to Federal Court
Federal judges were more likely than state judges to rule in favor of interests like those of my clients	9 (5%)	24 (23%)	182 (74%)
State judges were more likely than federal judges to rule in favor of interests like those of my clients	95 (52%)	27 (26%)	1 (<1%)
We perceived no differences between state and federal judges in this regard	67 (37%)	44 (42%)	44 (18%)
I don't know/Not applicable	12 (7%)	10 (10%)	19 (8%)
Total	183	105	246

Note the context and framework of the question. Each responding plaintiff attorney had decided where to file the action and each defendant attorney had decided to remove the case to federal court. The question calls for the attorney's hindsight judgment about one factor that might have influenced the attorney's assessment of whether there is a meaningful difference between state and federal courts in managing and ruling on class action litigation. If an attorney believed that there was a difference in regard to that single factor, the available options were to indicate a predisposition of one court or the other. An attorney who did not see those response categories as adequate to describe his or her view could, of course, opt for "I don't know/Not applicable." Note also that this question followed lengthy questions about reasons for filing a case in state or federal court or removing a case to federal court and about party characteristics that might have affected an attorney's choice of forum.

Most of the attorneys reported that, at the time they filed or removed the named case, they had clear expectations that judges in state or federal courts were predisposed to rule in favor of interests

like those of their clients. About three out of four defendant attorneys who removed cases perceived federal judges to be more likely than state judges to rule in favor of interests like those of their clients. These perceptions did not vary significantly based on the type of case.

A plurality of plaintiff attorneys who had filed in federal court reported perceiving no material difference between federal and state judges. Fewer than one out of four plaintiff attorneys who filed original actions in federal court perceived federal judges to be likely to rule in favor of interests like those of their clients. An approximately equal percentage of such plaintiff attorneys perceived state judges to be more receptive to their clients' interests, but nonetheless filed their cases in federal court. Perhaps the latter attorneys chose not to file in state court because they were pursuing federal causes of action, including claims within the exclusive jurisdiction of the federal courts that would render the case removable to federal court.

When filing in state court, about half of the plaintiff attorneys perceived state judges as more likely than federal judges to rule in favor of their clients' interests. Plaintiff attorneys who filed class actions in state court were twice as likely as plaintiff attorneys who filed class actions in federal court to express the opinion that state judges were more likely to rule in their clients' interests. Conversely, attorneys who filed actions in federal courts were almost five times more likely than attorneys who filed originally in state court to report their impressions that federal judges were predisposed to rule in favor of interests like those of their clients.

Overall, 29% of all attorneys responded that they perceived no difference between state and federal judges regarding any predisposition toward interests like their clients' interests. A majority (63%) of all attorneys perceived predispositions on the part of judges in one type of court or the other.

B. Substantive Law, Procedural Rules, and Judicial Receptivity in Relation to Attorney Perceptions of Judicial Predispositions

In this Part we attempt to identify relationships that may shed light on the nature of the perceived predispositions. Are attorneys' perceptions of judicial predispositions a surrogate for differences between federal and state substantive law, procedural rules, and/or evidence rules? Or do attorneys actually perceive judicial receptivity to claims like those of their clients? Perceived judicial predispositions appear to represent attorneys' perceptions of substantive legal, procedural, and evidence rules favorable to their clients combined with perceptions of judicial receptivity to enforcing those rules.

Table 7 shows the relationships, in removed cases only, between defendant attorneys' perceived judicial predispositions and those attorneys' assessments of the favorability of law-related factors and of judicial receptivity toward their clients' interests. Note that the two numerical columns represent different sets of attorneys and the figures represent the percentage of each set.

TABLE 7. DEFENDANT ATTORNEYS' ASSESSMENT OF FAVORABILITY OF LEGAL RULES AND OF JUDICIAL RECEPTIVITY TO SUCH RULES IN RELATION TO THEIR IMPRESSIONS OF JUDICIAL PREDISPOSITIONS TOWARD THEIR CLIENTS' INTERESTS (REMOVED CASES ONLY)

Attorneys' Assessments of Favorability or Receptivity	Attorneys Reporting *Judicial Predisposition* Toward Their Clients' Interests	Attorneys Reporting *No Judicial Predisposition* Toward Their Clients' Interests
Federal expert evidence rules (*Daubert/Frye*) were more favorable to our case*	85%	67%
Federal evidentiary rules were more favorable to our case*	85%	69%
Federal discovery rules were more favorable to our case*	84%	67%
The federal court was generally less receptive to motions to certify a class*	84%	64%
The federal court was generally more receptive to the claims on the merits*	83%	70%
Federal class action rules in general imposed more stringent requirements for certifying a class action	77%	66%
Federal substantive law was more favorable to our defense than state substantive law	71%	72%

* These differences are statistically significant at the .05 level.

As we saw in Part III.A, about three out of four attorneys who removed proposed class actions to federal court reported their impression that federal judges were predisposed to rule in favor of inter-

ests like those of their clients.[66] Table 7 shows that several reasons for the attorneys' expectations of favorable rulings lie in the substantive law and procedural rules underlying such rulings. Defendant attorneys who removed cases perceived that federal rules on discovery and evidence (expert and nonexpert) favored their clients' interests. Defendant attorneys also reported their impressions that federal judges were less receptive than state judges to motions to certify a class and more receptive to defendants' positions on the merits. Note that the attorneys' perceptions of judicial receptivity were notably more frequent (83%) than their perceptions of substantive law differences (71%). That discrepancy indicates that a small percentage of these attorneys perceived a judicial receptivity to their clients' claims that existed independently of the applicable substantive law.

Table 8 examines similar phenomena from the perspective of plaintiff attorneys who filed actions in state court. As with Table 7, the two numerical columns in Table 8 represent different sets of attorneys and the figures represent the percentage of each set.

66 *See supra* Table 6.

TABLE 8. PLAINTIFF ATTORNEYS' ASSESSMENT OF FAVORABILITY OF LEGAL RULES AND OF JUDICIAL RECEPTIVITY TO SUCH RULES IN RELATION TO THEIR IMPRESSIONS OF JUDICIAL PREDISPOSITIONS TOWARD THEIR CLIENTS' INTERESTS (REMOVED CASES ONLY)

Attorneys' Assessments of Favorability or Receptivity	Attorneys Reporting *Judicial Predisposition* Toward Interests Like Those of Their Clients	Attorneys Reporting *No Judicial Predisposition* Toward Interests Like Those of Their Clients
State evidentiary rules were more favorable to our case*	80%	44%
The state court was generally more receptive to the claims on the merits*	78%	32%
State class action rules in general imposed less stringent requirements for certifying a class action*	77%	40%
The state court was generally more receptive to motions to certify a class*	76%	36%
State discovery rules were more favorable to our case*	66%	43%
State substantive law was more favorable to our claims than federal substantive law*	61%	43%
State expert evidence rules (*Daubert/Frye*) were more favorable to our case	55%	48%

* These differences are statistically significant at least at the .05 level

About half of plaintiff attorneys who filed cases in state courts reported their impression that state judges were predisposed to rule in favor of interests like their clients' interests.[67] Table 8 reveals some of the apparent reasons for those impressions. Those plaintiff attorneys who perceived a judicial predisposition toward their clients' interests were more likely to perceive that state law as well as state discovery, evidentiary, and class action rules favored their clients' interests. They were also more likely (than plaintiff attorneys who reported no judicial predisposition) to report that state court judges

67 *See supra* Table 6.

were more receptive than federal judges to motions to certify a class and to their clients' claims on the merits. As was the case with defendant attorneys, plaintiff attorneys' perceptions of judicial receptivity to their clients' claims (78%) was considerably higher than those attorneys' perceptions of the favorability of substantive law (61%), indicating that a small percentage of attorneys perceived a judicial receptivity to their clients' claims, a receptivity that existed independently of the applicable substantive law.

In analyzing other aspects of the survey, we found evidence that attorneys' perceptions of judicial predispositions were not accurate when compared with judicial rulings on class certification and other procedural motions. In Part IV we present data based on attorney reports about removed cases, data indicating that the rulings in those cases as a whole did not support the attorneys' perceptions of judicial predispositions.

Attorney perceptions of judicial predispositions, however, were associated with, but not necessarily caused by, the amount of class monetary recoveries and settlements in state and federal courts. In all but one instance the outcome was in the form of a settlement negotiated by the parties. Such outcomes do not appear to be the direct consequence of federal or state judicial predispositions because the only judicial rulings in such cases would have been the decision to certify a class and to approve the proposed settlement. About half of the class certifications were based on settlement classes that are generally agreed to by the parties.[68] In only one instance did a federal judge reject a proposed class settlement for a certified class.[69] Thus, the case outcomes were not the direct product of judicial rulings.

IV. Comparison of Rulings by State and Federal Courts in Removed Cases

Our sample includes 438 cases that were removed from state to federal court; 221 of those cases (50%) were remanded by the federal court to the state court in which they were originally filed. A brief description of the type of cases removed from state courts and identification of states from which they were removed provides a context for examining the rulings and outcomes in those cases.

Case Type. As Table 9 shows, almost three-quarters of the removed cases for which we had information about the nature of suit were contract actions (34%) or actions based on "other statutes" (38%).

68 *See infra* Tables 11 and 15.

69 *See infra* Tables 14 and 21.

TABLE 9. CASE TYPES FOR REMOVED CASES[70]

Case type	Number	Percentage
Other [state] statutes	148	38%
Contract	134	34%
Civil Rights	50	13%
Torts-Personal Injury	42	11%
Torts-Property Damage	15	4%
Total	389*	100%

Note: Categories of case types represent groups of "Nature of Suit" classifications in the Federal Judicial Center's Integrated Data Base and are based on data collected by the Administrative Office of the United States Courts.
* Data were not available for all of the removed cases in the survey.

Given that these cases were originally filed in state court, it seems likely that most involved state law contract issues and the application of state consumer protection and commercial statutes. This would be consistent with our finding in Part II that a state source of law is a primary factor affecting a plaintiff attorney's choice of a state forum. One might reasonably surmise that the vast majority were consumer class actions.

State of Original Filing. Table 10 shows the frequency with which removed cases had been originally filed in various state courts. To provide a basis for comparison, we added a column on the far right that shows the percentage of all federal civil actions terminated in the federal courts of each state during 2004.

A preliminary look at the relationship between the percentage of class actions filed in various states and federal civil activity in those states yielded interesting results. We used recent national data on civil case terminations in all federal district courts in a state as a rough measure of federal civil litigation activity in that state. In some states, removal activity was proportionate to federal civil case activity while, in other states, removal activity was notably higher or lower than the percentage of civil cases terminated in district courts in that state. In a few states, the data suggest a possible relationship between removal activity and class action rules in state and federal courts in that state.

In the vast majority of states, the percentage of all removed class actions was approximately the same (within two percentage points) as the percentage of all civil cases terminated in the federal districts in

70 Note that the sample of class actions excluded labor cases, securities cases, civil rights cases originally filed in federal court, and cases based on "other (federal) statutes." *See* FJC REPORT, *supra* note 1, at 59–60.

TABLE 10. STATE OF ORIGINAL FILING (REMOVED CASES)

State of Filing	Number of Cases	Percentage of Removed Cases	Percentage of Terminated Civil Cases, 2004*
Alabama	12	3%	2%
Arkansas	9	2%	1%
Arizona	6	2%	1%
California	41	11%	10%
Colorado	7	2%	1%
Connecticut	2	1%	1%
Delaware	3	1%	<1%
District of Columbia	1	<1%	1%
Florida	24	6%	6%
Georgia	7	2%	3%
Hawaii	2	1%	<1%
Idaho	1	<1%	<1%
Illinois	36	9%	5%
Indiana	3	1%	2%
Iowa	2	1%	1%
Kansas	8	2%	1%
Kentucky	3	1%	2%
Louisiana	15	4%	2%
Maine	1	<1%	<1%
Maryland	17	4%	2%
Massachusetts	3	1%	1%
Michigan	10	3%	3%
Minnesota	10	3%	2%
Mississippi	3	1%	2%
Missouri	7	2%	2%
Montana	2	1%	<1%
Nebraska	1	<1%	<1%
New Jersey	14	4%	3%
New York	9	2%	8%
North Carolina	3	1%	1%
North Dakota	4	1%	<1%
Ohio	8	2%	4%
Oklahoma	7	2%	1%
Oregon	2	1%	1%
Pennsylvania	19	5%	7%
South Carolina	14	4%	2%
Tennessee	8	2%	2%
Texas	40	10%	8%
Utah	2	1%	1%
Virginia	1	<1%	2%
Washington	15	4%	2%
West Virginia	6	2%	1%
Wisconsin	1	<1%	1%
Total	389†		252,761

* Data for this column were derived from LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2004 ANNUAL REPORT OF THE DIRECTOR app., at 129–31 tbl.C-1 (2004).

† Data were not available for all of the removed cases in the survey.

that state during 2004. This pattern held true even in some states with a high number of removed class action cases. For example, California federal district courts received 11% of the removed class actions as shown in Table 10 and had 10% of the civil case terminations during 2004. Similarly, Florida district courts received 6% of the removed cases and had 6% of all civil terminations during 2004.

A few states present clear exceptions to the above pattern. For example, federal district courts in New York state had 8% of the civil terminations in 2004 and only 2% of the removed cases. These data suggest that defendants may be reluctant to remove cases from New York state courts, lending support to the statement that "in some jurisdictions, the state courts are considered less hospitable to class actions than the corresponding federal forum."[71] At the other end of the spectrum, federal district courts in Illinois had 5% of all civil terminations in 2004 and 9% of all removed cases. These data suggest that defendants may be motivated to remove cases filed in Illinois state courts, lending support to the designation of Madison County, Illinois, as a magnet court for class action plaintiffs.[72]

Further research, which is beyond the scope of this article, would be needed to test the relationship of removal activity to class action rules and attorney expectations about class action rulings in particular states and particular federal districts and circuit courts of appeals. Using our database, the number of cases in any single state is probably too small to detect a statistically meaningful relationship.

Closed Cases. Of the 438 removed cases, 292 had been closed by the time of our survey. Of these closed cases, 169 (58%) were retained in federal court, and federal judges had remanded 123 (42%) to the state court in which they were originally filed. The remanded cases were less likely to be closed (56%) than the cases retained in federal courts (78%).[73] All analyses in this section, except Table 12, use the subset of closed cases.

Information about a group of closed remanded cases provided an opportunity to compare state courts' and federal courts' rulings, procedural outcomes, and monetary recoveries and settlements. The only apparent systematic difference among the remanded and removed cases was that a federal district judge had ruled that there was no federal jurisdiction to hear the remanded cases. We proceed on the assumption that such jurisdictional rulings do not ordinarily turn

71 McGuinness & Gottleib, *supra* note 24, at 15.

72 Beisner & Miller, *supra* note 8, at 160–64.

73 A substantial number of the remanded cases had been closed in federal court because of the remand, but were still pending in state courts at the time of the survey.

on the merits of the claims presented or on the certifiability of the case as a class action. We will examine whether federal and state court rulings on class certification,[74] motions to dismiss or for summary judgment,[75] or reviews of class settlements[76] reveal any systematic differences in the ways federal and state courts resolved the two sets of proposed class actions. We will also examine cases that produced any type of recovery, generally in the form of settlements, for the class.[77]

Assuming that there are no inherent or likely differences in the merits of the two sets of cases, one would expect the outcomes either to be similar or to reflect differences in state and federal rules or in judicial approaches to the same types of cases. Each set of cases was similar in that it was initially filed in state court and removed to federal court. We found no statistically significant differences in the likelihood of a court remanding various types of cases, such as contract, personal injury, property damage, or other types of cases. The following discussion does not and cannot address similarities and differences between removed cases and cases filed in state court and not removed.

As we saw in Parts II and III, attorneys for class action litigants generally anticipate that federal and state judges will rule differently on matters of interest to the attorneys' clients. A large majority (74%) of defendant attorneys who removed cases to federal court indicated they had an impression that "federal judges were more likely than state judges to rule in favor of interests like those of my clients."[78] A smaller but substantial percentage (52%) of plaintiff attorneys who filed a case originally in state court perceived state judges to be "more likely than federal judges to rule in favor of interests like those of my clients."[79] Taking such statements as hindsight based observations—or, perhaps more realistically, as general expectations about federal and state judicial rulings on class certification and on the merits—how well do those statements stand up when we compare them to the outcomes of a sample of cases in federal and state courts?

A. Rulings on Class Certification

Table 11 compares federal and state judicial rulings on class certification.

74 *See infra* Table 11.
75 *See infra* Table 13.
76 *See infra* Table 14.
77 *See infra* Table 15.
78 *See supra* Table 6.
79 *See supra* Table 6.

TABLE 11. COMPARISON OF OUTCOMES REGARDING CLASS CERTIFICATION FOR CLOSED REMOVED CASES WITH CLOSED REMANDED CASES

Outcome Regarding Class Certification	Removed to Federal Court and Remanded to State Court (N = 118)	Removed to Federal Court and Not Remanded (N = 165)
Class certified for trial and litigation or settlement	24 (20%)	37 (22%)
Certified for trial and litigation	12 (50%)	18 (51%)
Certified for settlement	12 (50%)	18 (49%)
Certification denied*	15 (12%)	44 (27%)
No action taken on certification (before case resolved)*	79 (67%)	84 (51%)

* Differences between remanded and removed cases are statistically significant at the .05 level.

In both federal and state courts, cases were almost equally unlikely to be certified as class actions. The slightly lower certification rate in state courts is not statistically significant. The likelihood of certification for trial and litigation or for settlement is also approximately the same in federal and state courts.[80]

In both federal and state forums, a majority of cases filed as class actions received no ruling on class certification. Federal judges, however, were more likely than state judges to rule on class certification, and federal judges were more than twice as likely to deny class certification.[81] Federal judges' higher rate of denying class certification appears to be a counterpart of state judges' higher rate of not ruling on class certification.

80 The overall class certification rate for all removed cases was 21%. Note that the class certification rate for all the named cases in the survey was 24%, *see infra* Part VI.A, indicating that cases filed originally in federal court had a slightly higher class certification rate than cases removed from state court.

81 In the *FJC 1996 Study*, researchers found that federal judges certified as class actions 152 (37%) of the 407 proposed class actions in the study; 59 (39%) of the 152 certified class actions were settlement classes. FJC 1996 STUDY, *supra* note 37, at 9. At that time in those courts, the certification rate for both litigation and settlement classes was notably higher than the rate in either federal or state court in the current study.

1. Differences Between a Ruling Denying Class Certification and the Absence of Such a Ruling

Table 11 shows that cases removed to federal court were more likely than cases remanded to state court to include a ruling on class certification. What, if any, difference in a case's outcome did a ruling denying class certification have?

Looking at all cases in the study (not just the removed cases) we found no statistically significant difference in the likelihood that a case that was denied certification or a case that had no action taken on certification would produce a monetary recovery for the proposed class. Neither type of case was very likely to lead to a monetary recovery. Nor was there any statistically significant difference in the likelihood either type of case would produce a nonmonetary recovery (such as a coupon settlement or injunctive relief) or even a recovery that included no nonmonetary relief.

Table 12 presents data on the procedural outcomes of cases in which no class action was certified, broken out by whether the trial court denied a motion to certify a class or took no action on class certification.

TABLE 12. COMPARISON OF RULINGS AND PROCEDURAL OUTCOMES FOR CASES FILED BUT NOT CERTIFIED AS CLASS ACTIONS (ALL CASES)

Rulings and Procedural Outcomes	Class Certification Denied ($N = 92$)	No Action on Class Certification ($N = 275$)
Dismissed on merits	23 (24%)	67 (24%)
Dismissed for lack of jurisdiction	4 (4%)	22 (8%)
Summary judgment entered	12 (13%)	18 (6%)
Settled on individual basis*	38 (41%)	70 (25%)
Settled as part of another case	3 (3%)	13 (5%)
Voluntarily dismissed*	18 (19%)	85 (31%)
Tried on an individual basis	5 (5%)	3 (1%)

Note: The categories do not add up to 100% because respondents could select more than one category and because "other" responses have been omitted.
* Differences are statistically significant at the .05 level.

Cases in which the court denied class certification were more likely than cases with no action on class certification to end with individual settlements for named plaintiffs and less likely to be voluntarily dismissed by the parties. None of the other differences in outcomes proved to be statistically significant.

Support for defendant attorneys' expectations that federal court rulings were more likely than state court rulings (or the absence of rulings) to end up favoring their clients' interests boils down to a greater likelihood that federal courts will expressly deny class certification while state courts are more likely not to act on the matter. Overall, the data suggest that there was little practical difference between federal court rulings denying class certification and state court inaction regarding class certification.

B. Rulings in Cases Not Certified as Class Actions

Turning back to removed cases, Table 13 compares rulings and procedural outcomes for noncertified cases (including cases in which there was no ruling on class certification), based on whether those cases were remanded to state court or resolved in federal court.

TABLE 13. COMPARISON OF RULINGS AND PROCEDURAL OUTCOMES FOR REMOVED AND REMANDED CASES FILED, BUT NOT CERTIFIED, AS CLASS ACTIONS

Rulings and Procedural Outcomes	Removed to Federal Court and Remanded to State Court ($N = 90$)	Removed to Federal Court and Not Remanded ($N = 126$)
Dismissed on merits	20 (22%)	28 (22%)
Summary judgment entered	8 (8%)	11 (8%)
Settled on individual basis*	20 (22%)	48 (38%)
Settled as part of another case*	9 (9%)	4 (3%)
Voluntarily dismissed	22 (24%)	36 (29%)
Judgment after individual trial	2 (2%)	4 (3%)
Judgment after class trial	0 (0%)	0 (0%)

Note: Total percentages may exceed 100% because respondents could select more than one category.

* Differences between remanded and removed cases are statistically significant at the .05 level.

Table 13 shows, in cases filed as class actions but not certified, state and federal judges were equally likely to dismiss individual claims on their merits or to enter summary judgment on those claims. These data regarding rulings on the merits do not support attorneys' perceptions of the predispositions of state judges to rule in favor of plaintiffs' interests or of federal judges to rule in favor of defendants' interests. The only statistically significant difference we found in the outcomes

of the two sets of cases was that cases removed to federal court and not remanded to state court were more likely to be settled on an individual basis and less likely to be settled as part of another case. That tendency may in turn be related to our earlier finding regarding the denial or absence of class certification. Rulings that expressly denied certification were related to the likelihood of individual settlements. The fact of a ruling, and not the absence of class certification, seems to be the key factor.

C. Procedural Outcomes of Certified Class Actions

We also looked for differences in procedural outcomes of certified class actions according to whether they were remanded to state court or retained in federal court. Table 14 shows little variation in results. Federal courts were somewhat more likely than state courts to approve a proposed class-wide settlement or to approve a revised settlement, but, again, the differences were not statistically significant.

TABLE 14. COMPARISON OF PROCEDURAL OUTCOMES FOR REMOVED AND REMANDED CERTIFIED CLOSED CLASS ACTIONS

Outcomes of Certified Cases*	Removed to Federal Court and Remanded to State Court ($N = 28$)	Removed to Federal Court and Not Remanded ($N = 37$)
Class-wide settlement approved	23 (82%)	33 (88%)
Class-wide settlement revised and approved	1 (4%)	2 (5%)
Class representatives settled on individual basis	0 (0%)	1 (3%)
Class-wide trial resulting in defendant judgment	0 (0%)	1 (3%)
Case dismissed on merits	1 (4%)	1 (3%)
Case dismissed on grounds other than merits	1 (4%)	0 (0%)
Case stayed after defendant filed bankruptcy	1 (4%)	1 (3%)

Note: The categories may not add up to 100% because respondents could select more than one category and because "other" responses have been omitted.
* The differences between remanded and removed cases in this table are not statistically significant at the .05 level.

Table 15 presents data showing substantial differences in financial recoveries when comparing certified class actions remanded to

state courts and certified class actions retained in federal courts. A monetary recovery or settlement was more likely to occur when a federal court retained a case after removal (44%) than after a federal court remanded a case to state court (33%). That outcome, however, might be an artifact of the timing of the survey.[82]

TABLE 15. COMPARISON OF MONETARY RECOVERIES AND SETTLEMENTS AND CLASS SIZE IN REMANDED AND REMOVED CERTIFIED CLASS ACTIONS

Monetary Recovery/ Class Size	Removed to Federal Court and Remanded to State Court (N = 74)	Removed to Federal Court and Not Remanded (N = 118)
Cases with a monetary recovery or settlement*	25 (33%)	52 (44%)
Median amount of monetary recovery or settlement†	$850,000	$300,000
Median size of class†	5000	1000
Median recovery per class member	$350	$517

* Differences are statistically significant at the .05 level, based on a chi-square test.
† Differences in the medians are statistically significant at the .05 level, based on a Mann-Whitney test of medians.

Both the size of the class and the amount of any monetary recovery or settlement were substantially larger in cases remanded to state courts than in cases retained in federal courts. Most of these recoveries were based on settlements approved by judges.[83] The total recovery for the class, of course, represents the common benefit to the class that typically serves as the primary basis for the court to calculate attorney fees for class counsel.

In the remanded cases, the median class recovery was $850,000; in the removed cases retained in federal courts, $300,000. From the individual class member's perspective, differences in the amount of recovery, however, were more than compensated by differences in the sizes of the classes. By dividing the reported class size in each case

82 As is true for all reports on procedural and case outcomes, we excluded pending cases from the analysis in Table 15. We used the date of termination in federal court as the cutoff date for our sample. For remanded cases, a number remained pending at the time of the survey. One might infer that those cases had survived early dismissal and thus may have been more likely than the closed cases to produce a monetary recovery when they came to a conclusion in the state court after our survey.

83 *See supra* Table 14.

into the total monetary recovery, we calculated the recovery per class member. In the retained cases, the typical (i.e., median) recovery per class member was $517, almost 50% higher than the $350 typical recovery in remanded cases. Thus, smaller monetary recoveries in federal versus state court appear to be a product of the smaller class sizes.

Nor was the proportion of monetary recoveries devoted to attorney fees different in a statistically significant way in state and federal court in removed and remanded cases. In the remanded cases, the typical state court awarded 30% of the total monetary recovery as attorney fees; the typical federal court awarded 25%. The average award was 27% in cases remanded to state courts and 29% in cases removed to and retained in federal courts.

D. Summary

In comparing remanded and removed cases, we found few differences in legal rulings on procedural motions in state or federal courts. Federal and state judges were about equally likely to certify a class, whether for trial and litigation or settlement. One notable difference, however, was that federal judges were more likely to deny a motion to certify a class while state judges were more likely to take no action regarding such a motion. That difference, though, turns out to have little practical significance for a proposed class; it appears primarily to be related to the procedural outcome of individual claims, whether by voluntary dismissal or adjudication.

Thus, data based on state and federal judges' rulings do not support attorneys' perceptions that state courts are likely to favor plaintiffs in class action litigation and that federal courts are likely to favor defendants. In the next Part we examine those rulings in direct relationship to specific perceptions and expectations of plaintiff and defendant attorneys.

V. Relationships Among Attorney Perceptions of Judicial Predispositions in Individual Cases and Outcomes of Judicial Rulings on Motions

In this Part we focus specifically on attorneys' statements about perceived judicial predispositions toward the attorneys' clients and the rulings in those cases. We look at federal and state court rulings on class certification and on procedural matters in certified and noncertified cases. The small number of cases with monetary recoveries does not allow us to look closely at the outcome of the litigation, attorney fee awards, and class recoveries.

Table 16 compares federal and state judicial rulings on class certification in relation to plaintiff attorneys' perceptions that judicial predispositions existed in the state courts that would favor their clients' interests.

TABLE 16. COMPARISON OF ATTORNEY REPORTS OF CLASS CERTIFICATION RULINGS IN REMANDED AND REMOVED CASES WHERE PLAINTIFF ATTORNEYS PERCEIVED A JUDICIAL PREDISPOSITION IN STATE COURT IN FAVOR OF PLAINTIFF

Outcome Regarding Class Certification	Removed to Federal Court and Remanded to State Court ($N = 20$)	Removed to Federal Court and Not Remanded ($N = 35$)
Class certified for trial and litigation or settlement	5 (25%)	11 (31%)
Certified for trial and litigation	2 (30%)	6 (60%)
Certified for settlement	4 (70%)	4 (40%)
Certification denied	5 (25%)	7 (20%)
No action taken on certification (before case resolved)	10 (50%)	17 (49%)

Note: The differences in this table are not statistically significant. Apparent differences between totals and subtotals are the result of rounding of weighted responses by two attorneys in the same case.

The most noteworthy aspect of the data in Table 16 is that there are no statistically significant differences in the rulings on whether or not to certify a class in state and federal courts. Despite plaintiff attorneys' expectations—reported with the benefit of hindsight after these cases had closed—that a state court would rule more favorably toward interests like the plaintiffs' interests, these plaintiffs in fact received comparable rulings from state and federal courts on the central issue of whether or not to certify a class. In other words, the attorneys' perceptions of judicial predispositions proved to be no more accurate than a prediction based on flipping a coin. The fact that these predispositions were asserted in response to a survey conducted after the cases had closed suggests that attorney assertions about judicial predispositions reflect general suppositions about the two sets of courts more than specific predictions about the case at hand.

Table 17 presents the defendant-federal court counterpart of Table 16.

TABLE 17. COMPARISON OF ATTORNEY REPORTS OF CLASS CERTIFICATION RULINGS IN REMANDED AND REMOVED CASES WHERE DEFENDANT ATTORNEYS PERCEIVED A JUDICIAL PREDISPOSITION IN STATE COURT IN FAVOR OF DEFENDANT

Outcome Regarding Class Certification	Removed to Federal Court and Remanded to State Court ($N = 55$)	Removed to Federal Court and Not Remanded ($N = 61$)
Class certified for trial and litigation or settlement	6 (11%)	8 (13%)
Certified for trial and litigation	4 (67%)	4 (50%)
Certified for settlement	2 (33%)	4 (50%)
Certification denied*	9 (16%)	19 (31%)
No action taken on certification (before case resolved)†	40 (73%)	34 (56%)

* Difference is statistically significant at the .05 level.
† Difference is statistically significant at the .10 level.

As with plaintiff attorneys,[84] defendant attorneys' statements about judicial predispositions yielded no significant differences in the likelihood that a federal or state court would certify a class. Federal judges certified classes slightly more often than state judges, but the differences are not statistically significant. Fewer than 15% of the judges in either type of court certified classes. While the likelihood of class certification was substantially lower than the plaintiff predisposition cases reported in Table 16, that likelihood was not significantly different in state or federal court. Like the perceptions of plaintiff attorneys discussed above, defendant attorneys' perceptions of judicial predispositions regarding affirmatively certifying a class proved to be no more accurate than a prediction based on a coin toss. Judges in federal court, however, denied class certification statistically significantly more often than state court judges. As was the case with remanded cases as a whole,[85] state judges were more likely to have taken no action on class certification.

Table 18 presents data comparing rulings and procedural outcomes for removed noncertified cases (including cases in which there was no ruling on class certification) in which a plaintiff attorney perceived a judicial predisposition in state court.

84 *See supra* Table 16.
85 *See supra* Part IV.A.

TABLE 18. COMPARISON OF ATTORNEY REPORTS OF RULINGS AND PROCEDURAL OUTCOMES IN REMANDED AND REMOVED NONCERTIFIED CLASS ACTIONS WHERE A PLAINTIFF ATTORNEY PERCEIVED A JUDICIAL PREDISPOSITION IN STATE COURT IN FAVOR OF PLAINTIFFS

Rulings and Procedural Outcomes	Removed to Federal Court and Remanded to State Court ($N = 27$)	Removed to Federal Court and Not Remanded ($N = 29$)
Dismissed on merits	2 (7%)	3 (10%)
Dismissed for lack of jurisdiction	1 (4%)	1 (3%)
Summary judgment entered	1 (4%)	1 (3%)
Settled on individual basis*	4 (15%)	12 (41%)
Settled as part of another case	1 (4%)	1 (3%)
Voluntarily dismissed*	18 (67%)	10 (34%)
Tried on an individual basis	0 (0%)	1 (3%)

Note: The categories do not add up to 100% because respondents could select more than one category and because "other" responses have been omitted.
* Differences are statistically significant at the .05 level.

As with the rulings on class certification, judicial rulings on the merits of the case in the form of motions to dismiss or for summary judgment fail to reveal any relationship with plaintiff attorneys' perceptions that state courts will favor their clients' interests. The relatively small number of cases dismissed, or resolved by summary judgment, in federal and state courts are not different in any statistically significant way. Cases remanded to state court were more likely to be voluntarily dismissed and less likely to be settled on an individual basis. Neither of those outcomes is the direct result of a judicial ruling. Moreover, assuming that voluntary dismissal is a less beneficial outcome for the plaintiff than an individual settlement, those data do not support plaintiff attorneys' perceptions that state courts would favor their clients' interests.

Table 19 presents the defendant-federal court counterpart of Table 18.

TABLE 19. COMPARISON OF ATTORNEY REPORTS OF RULINGS AND PROCEDURAL OUTCOMES IN REMANDED AND REMOVED NONCERTIFIED CLASS ACTIONS WHERE A DEFENDANT ATTORNEY PERCEIVED A JUDICIAL PREDISPOSITION IN FEDERAL COURT IN FAVOR OF DEFENDANTS

Rulings and Procedural Outcomes*	Removed to Federal Court and Remanded to State Court ($N = 50$)	Removed to Federal Court and Not Remanded ($N = 56$)
Dismissed on merits	12 (24%)	13 (23%)
Dismissed for lack of jurisdiction	3 (6%)	1 (2%)
Summary judgment entered	5 (10%)	8 (14%)
Settled on individual basis	12 (24%)	19 (34%)
Settled as part of another case	3 (6%)	1 (2%)
Voluntarily dismissed	14 (28%)	14 (25%)
Judgment after individual trial	1 (2%)	0 (0%)

Note: Total percentages may exceed 100% because respondents could select more than one category.

* The differences between remanded and removed cases in this table are not statistically significant.

Whether a federal or state court resolved the case appears to have made no difference. In the cases remanded to state courts, 40% were dismissed or had summary judgments entered, and in the cases retained in the federal courts, 39% were dismissed or had summary judgments. Of course, the slight difference is not statistically significant. Again, we find no support for defendant attorneys' perceptions that federal courts were more likely to rule in favor of their clients' interests.

We also examined the attorneys' perception of judicial predispositions from another angle—the procedural outcomes in state and federal courts, including the outcome of reviewing class settlements, for cases certified as class actions. As with our analysis of those outcomes in Part IV.C,[86] we found that the results were substantially the same in state and federal courts: class-wide settlements were approved in both sets of courts. The small number of cases, however, does not support a reliable test of statistical significance.

We also asked whether there was any relationship between attorney perceptions and the amount recovered by the class, the size of the

86 *See supra* Table 14.

class, and the amount and percentage of attorney fees awarded to the attorney for the class. We were unable to come to any firm conclusions because relatively few cases met the preconditions of having both a class-wide monetary recovery and a perceived judicial predisposition in one direction or the other. For those few cases in which data were available, the results paralleled those presented in Table 15. Total monetary recoveries for the class were higher in state court and consequently attorney fee recoveries in state court were higher. Class sizes were smaller in federal courts and the recovery per class member somewhat higher in federal court.

A. Summary

Attorney perceptions of judicial predispositions toward their clients' interests show little or no relationship to the judicial rulings in the surveyed cases, even when we analyzed the cases according to the direction of the perceived predispositions. Judges certified or dismissed class actions with equivalent frequency in state and federal courts. The sole difference was that judges in federal courts more frequently denied certification while state courts more frequently took no action on class certification.

VI. Procedural Outcomes, Monetary Recoveries, and Settlements in All Named Cases (Removed and Not Removed)

A. Certification for Settlement or Trial and Litigation

This Part shifts focus to examine the larger number of attorney responses in the total sample of all closed cases in the study (including the cases filed as original actions in federal court, not just the removed cases discussed in Parts IV and V). In the majority of cases (57%) the court took no action regarding class certification. Judges certified 24% of the cases as class actions and denied certification to the other 19%.[87] Considering only cases in which a court ruled on certification, 56% of those rulings were to certify a class.

In their 1996 study, FJC researchers found that 152 of 407 (37%) proposed class actions had been certified as class actions, either for settlement or for trial.[88] That study was based on an examination of court files, not attorney recollections, and was limited to proposed

87 The 24% class certification rate suggests that federal question cases are more likely to be certified than diversity cases, which were certified at a 21% rate. *See supra* Part IV.A. Detailed comparison of federal question and diversity cases is beyond the scope of this report.

88 FJC 1996 Study, *supra* note 37, at 9.

class actions that had been terminated between 1992 and 1994 in four federal districts. Despite the differences in research methods, given the objectivity of class certification, it seems reasonable to infer that the class certification rate has decreased considerably in recent years.

Of the cases reported as certified, 42% were certified for trial and litigation and 58% were certified for settlement.[89] Relatively few (10%) of the cases certified for settlement were certified before the parties presented a settlement to the trial court. In the *1996 FJC Study*, 59 of 152 (39%) certified class actions were certified for settlement purposes only.[90] While the methods of study and the populations of cases for the two studies were different, together they suggest that the percentage of class actions certified for settlement has increased considerably, and, correspondingly, the percentage certified for trial and litigation has decreased equivalently.

In the current study, all cases certified for settlement in fact settled. A small percentage (5%) settled only after the parties revised a proposed settlement. Cases certified for trial and litigation usually settled, but not always. Table 20 shows the outcomes for class actions certified for trial and litigation compared with class actions certified for settlement only.

89 *See infra* Table 20, columns 2 & 3.

90 FJC 1996 STUDY, *supra* note 37, at 9.

TABLE 20. COMPARISON OF CASE OUTCOMES FOR CLASS ACTIONS CERTIFIED FOR TRIAL AND LITIGATION AND CLASS ACTIONS CERTIFIED FOR SETTLEMENT

Outcomes of Certified Class Actions	Certified for Trial and Litigation ($N = 52$) (42%)	Certified for Settlement ($N = 73$) (58%)
Class-wide settlement approved*	38 (72%)	69 (95%)
Class-wide settlement revised and approved	2 (3%)	4 (5%)
Class-wide settlement proposed and not approved by court	1 (2%)	0 (0%)
Class representative settled individually	1 (2%)	0 (0%)
Class-wide trial resulting in plaintiff judgment	3 (6%)	0 (0%)
Class-wide trial resulting in defendant judgment	3 (6%)	0 (0%)
Case dismissed on merits	5 (10%)	0 (0%)
Case dismissed on other grounds	2 (4%)	0 (0%)

Note: Categories may exceed 100% because respondents could select more than one category.

* Differences are statistically significant at the .05 level.

It is often said that most or even all class actions settle. Data from the current study as well as the earlier FJC study reveal an important qualification for that statement: almost all certified class actions settle. This is not to say that certification causes settlement. In the earlier study, settlement often preceded certification or followed certification by a considerable time.[91] In the current study, we asked how often certification for settlement purposes preceded settlement and found that only three cases (10%) were certified as settlement classes before settlement.

Most cases (77%) certified for trial and litigation also ended up as settlements; in one case a court rejected a settlement. Note, however, the claim that "all class actions settle" does not even hold for certified class actions. Almost a quarter of cases certified for trial and litigation did not result in an approved class-wide settlement: 14%

91 *Id.* at 61–62, 180 tbl.2 (reporting data indicating that class settlements in four federal district courts preceded certification 15%, 23%, 37%, and 54% of the time).

were dismissed altogether, primarily on the merits, and certified class action lawsuits went to trial at a rate (12%) that exceeds the overall rate (2–4%) for federal civil cases.[92] One might expect, of course, that cases that have survived pretrial motions would have a higher trial rate. When we include all closed cases, combining data from two columns of Table 21, we find that 13 of 486 cases (3%) went to trial on an individual (2%) or class-wide (4%) basis.

Table 20 shows that six cases were tried to verdicts, three for plaintiffs and three for defendants. In the only case in which an attorney reported a monetary amount recovered by a plaintiff class as a result of a jury trial, the amount was $1.6 million; $400,000 of that amount was allocated for attorney fees.

B. Outcomes of Certified and Noncertified Cases Compared

Courts and commentators often point to a certification decision as the key decision in setting the future course of a class action.[93] Our data support the proposition that class certification is at least one of the key decisions in class action litigation. One should not assume, however, that certified cases had not earlier faced and survived motions to dismiss and motions for summary judgment. The earlier FJC study reported that rulings on such motions often preceded any action on class certification.[94]

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92 *Id.* at 66, 167 tbl.16 (showing trial rates "not notably different from the 3% to 6% trial rates for nonprisoner nonclass civil actions" in the four districts studied). The trial rate has diminished in the last decade from 4.3% in 1990 to 2.2% in 2000. Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 125 (2002) (citing LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS app. at 153 tbl.C-4 (1990); LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 ANNUAL REPORT OF THE DIRECTOR app. at 159 tbl.C-4) (2000).

93 For empirical data on this point, see Bryant G. Garth, *Power and Legal Artifice: The Federal Class Action*, 26 LAW & SOC'Y REV. 237, 263 (1992) (finding "it is clear that certified class actions in general have more settlement clout and a greater staying power"). *See also In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1295 (7th Cir. 1995) (indicating that "orders certifying suits as class actions. . . . often, perhaps typically, inflict irreparable injury on the defendants (just as orders denying class certification often, perhaps typically, inflict irreparable injury on the members of the class)").

94 *See* FJC 1996 STUDY, *supra* note 37, at 29–35. That study reported that rulings on motions to dismiss and motions for summary judgment often preceded court action on class certification. In those instances, rulings on dispositive motions would be the key determinants of whether the case would proceed to the class certification stage. *Id.* A 2003 amendment to Rule 23(c) was designed to ratify this practice by allowing sufficient time for the court to rule on dispositive motions before ruling on class certification, permitting class certification decisions to be made "at an early prac-

Table 21 compares survey data for certified and noncertified cases filed as proposed class actions. Cases certified for settlement are included in the certified column.

TABLE 21. COMPARISON OF CASE OUTCOMES FOR CERTIFIED AND NONCERTIFIED CASES FILED AS CLASS ACTIONS

Outcomes of Cases	Certified (N = 119)	Not Certified (N = 367)
Proposed class settlement approved	101 (85%)	Not applicable
Revised class settlement approved	5 (4%)	Not applicable
Class settlement proposed and rejected	1 (1%)	3 (1%)
Case dismissed for lack of jurisdiction	Not applicable	26 (7%)
Case dismissed on merits	5 (4%)	90 (24%)
Case dismissed on other grounds	2 (2%)	Not applicable
Summary judgment granted	None	29 (8%)
Class representatives settle individually	1 (1%)	107 (29%)
Case dismissed voluntarily	Not applicable	103 (28%)
Individual trials held	Not applicable	8 (2%)
Class trial held	5 (4%)	Not applicable

Note: The categories do not add up to 100% because respondents could select more than one category and because "other" responses have been omitted.

In three-quarters of the noncertified cases that were dismissed on the merits, the ruling on the merits preceded any court action on certification. This follows the pattern observed in the *1996 FJC Study*.[95]

The dichotomy between certified and noncertified cases could hardly be clearer. A certification decision appears to mark a turning point, separating cases and pointing them toward divergent outcomes. A profile of certified cases suggests that they have shown class-wide merit, at least in the sense of surviving or avoiding motions to dismiss or motions for summary judgment. Certified cases concluded with a court-approved, class-wide settlement 89% of the time; a few were tried and a few were dismissed involuntarily. Noncertified cases did not show evidence of having class-wide merit; they were dismissed by a

ticable time" rather than "as soon as practicable." FED. R. CIV. P. 23(c)(1) advisory committee's note. The committee note, citing the 1996 FJC empirical study, suggests that the new rule "reflects prevailing practice" and "captures the many valid reasons that may justify deferring the initial certification decision." *Id.*

95 *See* FJC 1996 STUDY, *supra* note 37.

court, settled on an individual basis, or voluntarily dismissed 97% of the time; a few had individual trials.

C. Monetary and Nonmonetary Recoveries and Settlements

Survey data suggest that attorney perceptions of favorable or unfavorable treatment in federal courts may have a relationship with the total monetary amount of class-wide recoveries and settlements. Class recoveries were almost always the result of negotiated class settlements, not directly the result of court judgments or jury verdicts, but reported class settlements almost always occurred in cases that a court certified as a class action for settlement or trial and litigation.[96]

1. Monetary Recovery or Settlement

Overall, 142 (23%) of the named cases led to a class-wide monetary recovery or settlement; attorneys estimated the amount of recovery in 120 of those cases. The typical recovery or settlement was $800,000; 25% of the attorneys reported recoveries and settlements of $5.2 million or more, and 25% reported $50,000 or less.

2. Nonmonetary Recovery

Table 22 shows the frequency of providing four types of nonmonetary relief in a class recovery: transferable and nontransferable coupons, injunctive relief, and *cy pres* class/public interest remedies. Altogether, these nonmonetary remedies were the sole remedies provided to the class in fifteen cases.[97] The total numbers in Table 22 include cases in which there was no class recovery, monetary or otherwise.

96 *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), made it clear that a class settlement cannot be approved unless a class can be certified under Rule 23 standards, with the sole exception that the manageability of a class need not be established when the certification is for settlement. *Id.* at 620.

97 *See infra* Table 22 column 4.

TABLE 22. FORM OF NONMONETARY RELIEF IN CLOSED CLASS ACTION CASES

Form of Relief	Total of All Reports, Including Monetary Recovery (N = 318)	No Monetary Recovery (N = 166)	No Monetary Recovery and No Other Nonmonetary Recovery (N = 152–156)
Transferable coupons	19 (6%)	8 (5%)	6 (4%)
Nontransferable coupons	10 (3%)	3 (2%)	2 (1%)
Injunction	29 (9%)	6 (3%)	5 (3%)
Cy pres class/public interest award	4 (1%)	3 (2%)	2 (1%)

Note: The third column is a subset of the second column, and the fourth column is a subset of the third.

Courts and commentators have criticized the use of coupons, particularly nontransferable coupons with no market value, to settle class action lawsuits.[98] As Table 22 shows, attorneys reported that transferable coupons were part or all of the recovery in nineteen cases (6% of all cases). Of those cases, eight (5% of cases without a monetary recovery) had no monetary recovery, and in six cases (4% of cases with no other recovery) transferable coupons represented the only remedy provided to the class.[99] Nontransferable coupons were reported in ten cases (3% of all cases), all but three of which (2% of cases with no monetary recovery) were accompanied by a monetary recovery for the class. In two cases (1% of cases with no other recovery), nontransferable coupons were the sole remedy for the class.

D. Attorney Fees and Expenses

Attorney fees have been characterized as "the lightning rod in the controversy over damage class actions."[100] Attorney fees and expenses were reported for 103 of 142 cases in which there was a monetary recovery or settlement for a class. The typical case included fees and expenses that amounted to 29% of the total recovery.[101] At the high

98 *See, e.g., In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 808–09 (3d Cir. 1995); *see also* HENSLER ET AL., *supra* note 23, at 488–89.

99 We have no further information about whether the transferable coupons were in fact marketable.

100 HENSLER ET AL., *supra* note 23, at 434.

101 These data dovetail with the results of the earlier FJC study in which researchers reported that the "fee-recovery rate infrequently exceeded the traditional 33.3%

end, at least 36% of the total recovery was allocated to attorney fees and expenses in 25% of the cases. At the low end, 9% or less of the recovery went to attorney fees and expenses in 25% of the cases.

E. Summary

Reviewing the outcomes of the survey cases largely confirms previous FJC research on class action litigation in federal courts.[102] As found in the two studies, a diminishing minority of cases filed as class actions survived the litigation process to the point of having a class certified. Noncertified cases tended to be dismissed, granted summary judgment, or resolved by settling the claims of the named plaintiffs.

Certified class actions generally produced settlements and monetary recoveries. The typical recovery or settlement was $800,000.

We uncovered evidence of transferable and nontransferable coupon recoveries in twenty-nine cases, representing 9% of cases with a class recovery. Three of those cases (2%) involved nontransferable coupons and no monetary remedy.

We found that attorney fees typically represented about 29% of the monetary recovery or settlement and that one case in four involved fees of 36% or more, findings that were very close to those reported in the *1996 FJC Study*.

CONCLUSION

We based our analyses on responses to questionnaires completed by 728 attorneys in 621 recently terminated class action cases that had been filed in federal court or removed to federal court. The returned questionnaires represented a random, national sample sufficiently large to test the statistical significance of differences among the response categories of interest. The questionnaire asked attorneys about the reasons they either filed in state or federal court or removed the case to federal court, and about the judicial rulings and outcomes of the cases.

We began by asking what factors affected plaintiff and defendant choice of forum. For plaintiff and defendant attorneys, we found that expectations of favorable treatment, based on perceived judicial predispositions to favor interests like those of their clients, were a major force in attorneys' respective decisions about where to litigate. Those

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contingency fee rate. Median rates ranged from 27% to 30%." FJC 1996 STUDY, *supra* note 37, at 69.

102 *See generally* FTC 1996 STUDY, *supra* note 37 (reporting findings substantially similar to the more recent FJC study).

expectations, though, were not necessarily the product of attorney perceptions of judicial bias. We found for plaintiff attorneys that expectations about judicial predispositions were related to attorney perceptions of favorable substantive law and favorable discovery rules in the state forum they selected. Similarly, for defendant attorneys, expectations about judicial predispositions were also related to perceptions of favorable substantive law and discovery rules as well as to favorable class action and expert evidence rules in the federal forum they selected. In their responses to our survey, defendant attorneys described an almost totally favorable legal environment for their clients in the federal courts—a convergence of judicial receptivity, predispositions, and favorable substantive and procedural rules.

We found plaintiff attorneys' preferences for state forums to be associated with local (that is, state) factors, such as the source of plaintiffs' legal claims in state law, the factual origins of plaintiffs' claims in the forum state, and the number of class members residing in the forum state. A class representative's local residence also played a role. Indeed, the defendant's type of business was the only factor strongly associated with a plaintiff's choice of forum that did not necessarily have a local nexus. These empirical findings are not consistent with some of the assumptions and findings in the Class Action Fairness Act of 2005.[103]

We also analyzed differences between state and federal courts' rulings in the closed cases in our sample. The general expectation—from attorney responses to our questionnaire and conventional wisdom—was that state courts are more permissive toward class actions. However, we found little difference in the rulings issued by the two sets of courts. Class actions were equally unlikely to be certified in both state and federal courts—fewer than one in four cases filed as class actions were certified as such. Federal courts were more likely to deny class certification explicitly; state courts were more likely to take no action regarding class certification. Rulings on dispositive procedural motions were not significantly different in the two sets of courts.

The outcomes of settlements differed in the aggregate in state and federal courts, but not on an individual class member basis. In the aggregate, the typical (median) monetary class settlement in state court was more than twice the amount of the typical settlement in federal court. On an individual level, however, class members in our sample were awarded amounts that were about 50% higher in federal court than in state court. The percentage of attorney fees did not vary much between state and federal courts, but the larger class awards

103 *See supra* text accompanying notes 3–7.

(resulting from larger class membership in state cases) yielded larger attorney fee awards. While attorneys did not identify fee awards as a major factor affecting their choice of forum in a given class action, the results of our study indicate that the differences in the amounts of attorney fee awards in state and federal courts were large enough to serve as an incentive to file class actions in state courts. Our data suggest, however, that the size of the class, not the type of forum, is the predominant factor in determining award sizes. A larger class in a federal court would be expected to generate as large a fee award as the same size class in a state court.

Even when we matched attorney perceptions of judicial predispositions with judicial rulings in the cases for which those predispositions were reported, we did not find evidence that the attorneys' perceptions were accurate. To the contrary, the percentage of class actions certified, the percentage dismissed, and the percentage of settlements approved were indistinguishable in state and federal courts without regard to whether an attorney predicted a predisposition in that court or not.

In the end, the data from this study document the conventional expectations of lawyers in choosing a forum. At the same time, the case-based findings reveal that those expectations did not prove to be accurate predictors of judicial rulings in a random sample of cases. State forums were not typically more favorable for plaintiffs, and federal forums were not typically more favorable for defendants. Plaintiff and defendant expectations proved to be true in about half of the cases, which suggests that those outcomes were highly likely to have occurred by chance. Attorney choice of forum may have been influenced by routine acceptance of a general set of preconceptions about the differences between state and federal courts.