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A FIDUCIARY JUDGE'S GUIDE TO AWARDING FEES IN CLASS ACTIONS

*Brian T. Fitzpatrick**

It is often said that judges act as fiduciaries for the absent class members in class action litigation. If we take this seriously, how then should judges award fees to the lawyers who represent these class members? The answer is to award fees the same way rational class members would want if they could do it on their own. In this Essay, I draw on economic models and data from the market for legal representation of sophisticated clients to describe what these fee practices should look like. Although more data from sophisticated clients is no doubt needed, what we do know calls into question several fee practices that are in common use today: (1) presuming that class counsel should earn only 25 percent of any recovery, (2) reducing that percentage further if class counsel recovers more than $100 million, and (3) reducing that percentage even further if it exceeds class counsel's lodestar by some multiple.

INTRODUCTION

Judges take a much more active role in class action litigation than they do in individual litigation. First and foremost, they decide whether the case will proceed as a class action on behalf of absent parties.[1] In doing so, they decide whether the litigation will bind the absent class members at all. They also decide which lawyers will represent absent class members,[2] whether and on what terms absent class members will settle,[3] and how much absent class members must pay their lawyers.[4]

Judges do these things because absent class members are involuntary plaintiffs. Sometimes they are stuck in the class action whether they like it

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1. *See* FED. R. CIV. P. 23(c)(1)(A).
2. *Id.* r. 23(g).
3. *Id.* r. 23(e).
4. *See id.* r. 23(h).

or not because they are not allowed to opt out.[5] Even when they can opt out, sometimes they do not receive notice that they are even part of the class action.[6] Even when they can opt out and do receive notice, there may be no point to opting out because they have so little at stake they would never sue on their own.[7] Judges therefore step in to make decisions on their behalves.

For this reason, it is often said that judges act as fiduciaries for absent class members.[8] This description may be more figurative than literal because judges do not dwell on the implications of that description when they discharge their duties in class actions.[9] But in this Essay, I take the description seriously and ask what it means for one of those duties: the duty to decide how much absent class members must pay the lawyers appointed to represent them.

It is important to note that this is not the only perspective from which we might try to guide fee decisions in class action litigation. For example, we might put to the side the private interests of class members and focus instead on what fees are best for social welfare. I have taken that perspective in the past.[10] But in this Essay, I wish to try something different: how should judges set fees if they are really acting as fiduciaries to class members?

Drawing on agency law, my answer is that judges should set fees in the same way rational class members would have set them at the outset of the case if they had had the opportunity to do so. If judges could perfectly

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5. *Id.* r. 23(c)(2)(B)(v).

6. *Id.* r. 23(c)(2)(B) (requiring courts to direct only "the best notice that is practicable under the circumstances"); *see also* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (holding that notice need only be "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

7. *See* BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 59–61 (2019) (noting that class actions are necessary because individuals lack the incentive to sue to remedy small harms); *id.* at 88 (noting that class members often do expend much effort to collect payments from the class fund); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1533 (2004) (finding that "opt-out . . . rates increase as per capita recovery increases").

8. *See, e.g.*, Flanagan, Lieberman, Hoffman & Swaim v. Ohio Pub. Emps. Ret. Sys., 814 F.3d 652, 657 (2d Cir. 2016); Ehrheart v. Verizon Wireless, 609 F.3d 590, 594 (3d Cir. 2010); Rodriguez v. West Publ'g Corp., 563 F.3d 948, 968 (9th Cir. 2009); *In re* Wireless Tel. Fed. Cost Recovery Fees Litig., 396 F.3d 922, 932 (8th Cir. 2005); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class."); *In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 225 (5th Cir. 1981); Ray v. Mechel Bluestone, Inc., No. 15-CV-03014, 2018 WL 1309731, at *4 (S.D.W. Va. Mar. 13, 2018); Jackson v. Innovative Sec. Servs., LLC, 283 F.R.D. 13, 15 (D.D.C. 2012); *In re* Lupron Mktg. & Sales Pracs. Litig., 345 F. Supp. 2d 135, 138 (D. Mass. 2004); *see also* 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 13:40 (5th ed. 2020) (noting that in class action litigation "the law requires the judge to act as a fiduciary" of absent class members).

9. *See, e.g.*, Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 BYU L. REV. 1239, 1322 ("[C]ourts portraying themselves as fiduciaries fail to articulate what the status requires in this context, much less what they have done to satisfy their fiduciary duties for the benefit of absent class members.").

10. *See generally* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043 (2010).

monitor class counsel, any fee arrangement that class counsel would accept would work because the judge could always ensure that counsel would work hard for the class. But it is not realistic to think that class counsel can be monitored perfectly—and it may not even be realistic to think that class counsel can be monitored well (particularly when the monitoring is usually done at the end of the process rather than during). What would rational class members want then? In this Essay, I draw on two sources to answer this question: economic models of rational actors and data from marketplaces where clients exhibit their actual preferences.

According to the economic models, there is no fee formula that entirely relieves clients of monitoring lawyers who work on contingency, like class counsel does. Moreover, the models are indeterminate: the optimal formula depends on *how well* clients can monitor and *what* clients can monitor best. For example, the well-known formula that pays lawyers a percentage of what they recover requires clients to monitor against their lawyers settling cases prematurely for a smaller recovery than would have been obtained had the litigation continued; the lower the percentage, the greater the need to monitor. This danger of premature settlement can be mitigated by paying a percentage that escalates as the litigation matures or the recovery increases. The danger can be all but eliminated by a formula that pays a percentage plus a fee equal to the lawyer's normal hourly rate for the hours worked to achieve the recovery—i.e., contingent lodestar plus percentage—but then this requires the client to verify the lawyer's lodestar. Whether the percentage method or the contingent-lodestar-plus-percentage method is preferable will therefore depend on which sort of monitoring the client prefers: verifying the lodestar or guarding against premature settlement.

The data we have from the marketplace for contingent representation shows that clients prefer to monitor against premature settlement over verifying the lodestar. No one—not even the most sophisticated client—appears to use the contingent-lodestar-plus-percentage formula. Rather, drawing on preexisting data and new data I recently collected, I show that even sophisticated clients use the percentage method. Moreover, they use the same fixed and escalating percentages that unsophisticated clients use. These clients do this even in the most enormous cases, where we would expect the lawyers to benefit from economies of scale.

What does this mean for judges in class action cases? I think it means that judges have two options. If judges believe they are better at monitoring class counsel's lodestar than they are at monitoring against premature settlement, then they could try to use the contingent-lodestar-plus-percentage method. But to use this method, judges must have some way to determine the right percentage. In the absence of any data from the marketplace—as I said, this method is not used in the marketplace—the only way for judges to do that is to hold an auction for class counsel. But that introduces a host of other problems that I will discuss. If judges do not believe they can make auctions work, or, like sophisticated clients, they believe they are better at monitoring against premature settlement, then judges should probably pay class counsel a fixed percentage of one-third of the recovery or percentages that escalate even higher as litigation matures. These conclusions call into question several fee practices commonly used by judges today: (1) presuming that class counsel should earn only 25 percent of any recovery, (2) reducing that percentage further if class counsel recovers more than $100 million, and (3) reducing that percentage even further if it exceeds class counsel's lodestar by some multiple.

I. JUDGES AS FIDUCIARIES

What does it mean to say that judges act as fiduciaries for absent class members? If we want to take this claim seriously, it means that judges are acting as agents for absent class members.[11] Like any other agent, that means a judge should do what absent class members would have done if they had been able to interact with class counsel directly.[12]

The Restatement (Third) of the Law of Agency says that agents should do what their principals would "reasonably" want them to do unless they receive explicit instructions otherwise.[13] This means that when acting on behalf of absent class members, judges should assume that such members would be *rational* when interacting with class counsel. We are all familiar with the findings from behavioral economics showing that we are often systematically irrational.[14] But judges should ignore these findings; by definition, absent class members are not in a position to give judges explicit instructions to follow irrational practices. Thus, judges should assume that absent class members would interact with class counsel as their best, most rational selves.

My focus in this Essay is on attorneys' fees. Judges almost always set attorneys' fees in class actions after the cases are over and class counsel has already won recovery for class members.[15] At that moment, the rational thing for absent class members to want is to keep all the recovery for

11. *See* RESTATEMENT (THIRD) OF THE L. OF AGENCY § 1.01 (AM. L. INST. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf.").

12. *See id.* § 8.01 ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.").

13. *Id.* § 8.10 ("An agent has a duty, within the scope of the agency relationship, to act reasonably and to refrain from conduct that is likely to damage the principal's enterprise."); *id.* § 2.02 cmt. f ("The agent's fiduciary duty to the principal obliges the agent to interpret the principal's manifestations so as to infer, in a reasonable manner, what the principal desires to be done in light of facts of which the agent has notice at the time of acting."); *id.* cmt. h ("[I]f it is normally not reasonable to believe that the principal will benefit from an act, a reasonable agent should not infer that the principal wishes the agent to do the act and therefore should not commit the act unless the principal communicates specifically that the principal wishes the act to be done.").

14. *See* FITZPATRICK, *supra* note 7, at 104 (noting that "people, it turns out, are not very rational," briefly discussing the wealth of literature "showing how all of us make the same types of mistakes over and over again when we try to process information," and citing sources).

15. *See id.* at 91 ("[J]udges almost always set the fee award at the end of the case."); *id.* at 87 ("[M]any courts wait to see how many class members apply for money before awarding fees.").

themselves and give none of it to class counsel.[16] But, of course, if that is what judges did, then lawyers would never take on class action cases because they would know that they would get stiffed at the end. Absent class members would obviously not want that in the long run. Thus, when it comes to attorneys' fees, absent class members acting as their best, most rational selves would want to pay class counsel at the end of the case the amount they would have paid class counsel to take the case to begin with—what we often call "ex ante." As good fiduciaries, then, that is exactly what judges should do as well.

II. HOW WOULD RATIONAL CLASS MEMBERS PAY THEIR LAWYERS EX ANTE?

The lawyers who take on class action cases are usually paid only from the class's recovery.[17] This means they are lawyers who work on contingency: if they recover nothing, they get paid nothing; even if they recover something, their fees will be limited by the size of the recovery.[18] How would rational absent class members want to pay lawyers, ex ante, who work on contingency like this? There are two sources of insight we can call on to answer this question: economic models of rational actors and data from the marketplace where clients exhibit their actual preferences. I will draw on these sources in turn below, but it is important to note that they both come with limitations. First, economic models are purely theoretical and one always worries theoretical models are incomplete. Second, most of the data comes from the marketplace for representation of unsophisticated clients. One might worry that the findings from behavioral economics mentioned above taint this data. Moreover, this data comes from cases involving individual representation, not class cases. This is because, other than auctions for class counsel (which I will address below), there is no market in class cases. Fees are set by judges, not by clients. This is important because some think that lawyers who take class cases benefit from economies of scale compared to individual cases; therefore, the individual-case market may not be very probative of what absent class members would need to pay a lawyer to take a class action.[19] One possible way to overcome both of these

16. *See id.* at 91 (noting that the short-term rational decision for a class member paying his lawyer at the end of the case is to "give him as little as possible so I can keep as much as possible for myself!").

17. *See* Fitzpatrick, *supra* note 10, at 2051 ("In most cases, . . . fee awards come from proceeds that would otherwise go to class members."). An interesting example to the contrary is *Hyland v. Navient Corp.*, No. 18-CV-9031, 2019 WL 2918238 (S.D.N.Y. Oct. 9, 2020), which describes a class counsel who was paid noncontingent fees by the American Federation of Teachers.

18. *See* Alon Klement & Zvika Neeman, *Incentive Structures for Class Action Lawyers*, 20 J.L. ECON. & ORG. 102, 108–09 (2004) (noting that "[a]ny noncontingent fee [is] infeasible in this context" and "the attorney can never collect a fee higher than the actual amount recovered").

19. *See* Fitzpatrick, *supra* note 10, at 2063 ("[A]ggregate litigation permits plaintiffs to reap the benefits of economies of scale in litigation, and, in a competitive marketplace, one might expect those economies to be passed on to clients in the form of lower attorneys' fees.").

limitations is to focus on data from sophisticated corporate clients who hire lawyers in high-stakes cases—i.e., clients for whom the behavioral findings are less relevant[20] and cases that might offer their own economies of scale. This will be my strategy below.

A. Economic Models

How do the economic models suggest rational class members should pay lawyers who work on contingency, like class counsel? Most of the literature compares two formulas: the lodestar method and the percentage method.[21] The lodestar method pays the lawyer a fee equal to the number of hours the lawyer worked multiplied by the lawyer's normal hourly rate. The percentage method pays the lawyer a fee equal to some percentage of the amount recovered for the client. But most of the literature compares the percentage method to the *non*-contingent-lodestar method.[22] The *contingent*-lodestar method that must be considered here is typically assessed only in the literature on class actions,[23] statutory fee shifting,[24] and the English civil justice system (where the percentage method is forbidden and contingent agreements can only use the lodestar method).[25] The contingent-lodestar method differs from the noncontingent method not only because payment is guaranteed only in the latter but because the former permits enhancement of the lodestar by a discretionary number (the multiplier) to compensate for that risk of nonpayment.[26]

If clients could perfectly monitor their lawyers and thereby eliminate agency costs—that is, if clients could ensure their lawyers would do exactly what they wanted them to do every time—it would not matter which of these arrangements was employed. Indeed, clients could even pay their lawyers fixed fees. In all these arrangements, the outcome for the clients would be exactly the same. Clients would presumably want the arrangement that

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20. *See* FITZPATRICK, *supra* note 7, at 104 (noting that behavioral law and economics does not suggest that "the teams of people who run corporations are systematically irrational in the same way the rest of us are").

21. *See, e.g.*, Lynn Baker, Comment, *Facts About Fees: Lessons for Legal Ethics*, 80 TEX. L. REV. 1985, 1986 (2002).

22. *See, e.g.*, *id.*; Daniel L. Rubinfeld & Suzanne Scotchmer, *Contingent Fees*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 415, 416 (Peter Newman ed., 2002) ("It is common to compare a contingency fee arrangement with the alternative in which an attorney is paid an hourly wage.").

23. *See, e.g.*, FITZPATRICK, *supra* note 7, at 85–98 (explaining the pros and cons of the contingent-lodestar method and the percentage method); Klement & Neeman, *supra* note 18, at 108–110; William Lynk, *The Courts and the Plaintiffs' Bar: Awarding the Attorney's Fee in Class-Action Litigation*, 23 J. LEGAL STUD. 185, 191–95 (1994).

24. *See, e.g.*, Maureen Carroll, *Fee-Shifting Statutes and Compensation for Risk*, 95 IND. L.J. 1021, 1048–61 (2020) (discussing different fee arrangements, including statutory fee shifting); Martha Pacold, Comment, *Attorneys' Fees in Class Actions Governed by Fee-Shifting Statutes*, 68 U. CHI. L. REV. 1007 (2001).

25. *See, e.g.*, Winand Emons & Nuno Garoupa, *US-Style Contingent Fees and UK-Style Conditional Fees: Agency Problems and the Supply of Legal Services*, 27 MANAGERIAL & DECISIONS ECON. 379 (2006).

26. *See, e.g.*, Fitzpatrick, *supra* note 10, at 2051.

would be cheapest in a given case, but depending on the relative risk aversion of client and lawyer, we could imagine them agreeing to any arrangement.

We can quickly put aside the model where clients can perfectly monitor their lawyers. I doubt any client can do that—this is why there is an entire field of economics that studies agency costs—but it is certainly not possible in class action cases. The clients—class members—are, by definition, absent.[27] Moreover, their monitor—the judge acting as their fiduciary—is an imperfect monitor at best. As scholars have long noted, judges do not exercise day-to-day, week-to-week, month-to-month, or sometimes even year-to-year oversight of class counsel.[28] They are passive monitors until a milestone like settlement presents itself in the litigation.[29] Asking a judge to enter the litigation at a milestone and understand the intricacies of what has transpired is a tall order.[30] It is an even taller order in light of the docket pressure that incentivizes judges to rubber-stamp whatever class counsel and the defendant have agreed to.[31] For class actions, we need a model that assumes clients cannot monitor their lawyers perfectly—or even well.

What do models like this tell us? I will assume that client and attorney have the same information about the merits of the case for simplicity.[32] Moreover, I will assume that any recovery will come in cash; the client's options become much narrower if the recovery is injunctive or declaratory. Even with these assumptions, there is no formula that frees clients entirely from monitoring.[33] The contingent-lodestar method is perhaps worst of all

27. I am ignoring the possibility that monitoring will take place by the class representative. Outside of securities fraud class actions, most class representatives are unsophisticated figureheads. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 5 (1991) ("The named plaintiff does little—indeed, usually does nothing—to monitor the attorney in order to ensure that representation is competent and zealous, or to align the interests of the attorney with those of the class or corporation.").

28. *See, e.g.*, Alon Klement, *Who Should Guard the Guardians?: A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 45 (2002) ("[C]ommon law courts are institutionally incapable of obtaining information unless presented to them by the litigants.").

29. *See id.* at 45–46 ("[T]he paradigmatic common law court is passive and relies solely on the adversary process for its education about the case.").

30. *See id.* at 45 ("Constrained by the institutional requirements of neutrality and passivity set by the adversary system . . . courts have been left, by and large, uninformed about the parameters necessary to effectively regulate class attorneys.").

31. *See id.* at 47 ("On top of these institutional barriers, courts are also constrained by their limited resources. Dockets are full, and support personnel are scarce. Conducting meaningful investigations without the necessary means is often unworkable. Moreover, in the specific context of attorney fee applications, courts are expected to apply restraint and limit the extent of factual investigations. They are urged not to allow protracted satellite litigation and to control and expedite fee award determinations." (footnote omitted)).

32. For models that relax that assumption, see, for example, James Dana & Kathryn Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J.L. ECON. ORG. 349 (1993); Klement & Neeman, *supra* note 18; *see also* Rubinfeld & Scotchmer, *supra* note 22, at 417–18 (summarizing these models).

33. The only thing that frees clients from monitoring is the outright sale of their claims to their lawyers. *See* Macey & Miller, *supra* note 27, at 108 (proposing an auction approach where "[t]he winning bidder becomes the owner of the claim, and therefore acts as its own agent").

because it renders the lawyer completely indifferent to the magnitude of recovery and adverse to the client on the speed with which it comes about; the client would have to monitor to ensure the lawyer does not prolong the case or recommend an inadequate settlement.[34] It is true that the lawyer might feel constrained by professional or ethical norms, but those, too, are hard to monitor. The percentage method is better because the lawyer is not indifferent to the size or speed of recovery; like the client, the lawyer wants a big recovery and the lawyer wants it quickly.[35] But the percentage causes the lawyer to want to settle *too* quickly: if the fee percentage is less than 100 percent, then the lawyer must bear all the effort of going forward with the litigation while collecting only a fraction of the return on the effort. This incentivizes the lawyer to want to settle prematurely, even if it means a smaller recovery, so the client must monitor to ensure that does not happen.[36] The lower the percentage, the greater the divergence between the interests of client and lawyer. The optimal fixed percentage therefore depends on how well the client can monitor against premature settlement.[37] The danger of premature settlement can be mitigated if the fee percentage escalates as the recovery increases or the litigation matures, but it cannot be eliminated.[38]

34. *See* Emons & Garoupa, *supra* note 25, at 380 ("[C]ontingent fees are more efficient than conditional fees."); Fitzpatrick, *supra* note 10, at 2051–52 ("Under the lodestar method, class counsel's compensation increased the longer the litigation wore on; class members, by contrast, prefer cases to end as quickly as possible so they can receive their compensation as quickly as possible. Moreover, class counsel were compensated irrespective of how much they recovered for the class; class members, by contrast, prefer to receive as much as possible."); Klement & Neeman, *supra* note 18, at 108–10; Lynk, *supra* note 23, at 191–95.

35. *See* Emons & Garoupa, *supra* note 25, at 380; Fitzpatrick, *supra* note 10, at 2052 ("To better align the interests of class counsel and the class, judges began compensating class counsel by awarding them a percentage of the class's recovery. This way, the more the class recovers, the more class counsel are paid, and class counsel have no incentive to drag cases on unnecessarily.").

36. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 435 (2009) ("Under contingency fee arrangements . . . the lawyer . . . press[es] for settlement more often than when the settlement offer exceeds the expected judgment net of litigation costs because the lawyer bears all the litigation costs but obtains only a percentage of the settlement."); Lynk, *supra* note 23, at 194; Murray Schwartz & Daniel Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970). *But see* Mitchell Polinsky & Daniel Rubinfeld, *A Note on Settlements Under the Contingent Fee Method of Compensating Lawyers*, 22 INT'L REV. L. & ECON. 217, 217 (2002) ("[T]he lawyer could have an insufficient motive to settle, the opposite of what is usually believed.").

37. *See* Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503, 508–11 (1996) (noting that the optimal fee minimizes the agency costs generated from a lawyer's underinvestment in the claim and rent-seeking behavior).

38. *See* John C. Coffee Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 697 (1986) ("[T]he most logical answer to this problem of premature settlement would be to base fees on a graduated, increasing percentage of the recovery formula—one that operates, much like the Internal Revenue Code, to award the plaintiff's attorney a marginally greater percentage of each defined increment of the recovery. While this approach cannot be said to eliminate the inevitable tension between the interests of plaintiff's attorneys and their clients in class actions, it can at least partially counteract the tendency for premature settlements."); Jill E. Fisch, *Lawyers on the Chopping Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 679 (2002) ("By increasing the reward to counsel, increasing percentage bids reduce the incentive for

The closest we can come to eliminating the danger of premature settlement is to use the formula devised many years ago by Kevin Clermont and John Currivan: contingent lodestar plus percentage.[39] Here, the client pays the lawyer an hourly rate, only if there is some recovery, plus a percentage of that recovery.[40] This formula pits the contingent-lodestar and percentage methods against one another to improve on them both: the percentage component of the formula incentivizes the lawyer to care about the magnitude and speed of the recovery, while the lodestar component mitigates the incentive to settle prematurely. But even this formula does not entirely eliminate the problem of premature settlement.[41] Moreover, it introduces a new monitoring need: the client needs to verify that the lawyer's lodestar is not inflated.

The economic models are therefore indeterminate. It is possible the contingent-lodestar-plus-percentage formula is what a rational absent class member would want, but it is also possible that a rational absent class member would want the percentage method. It depends on whether it would be easier to monitor against premature settlement or monitor the lodestar. It is possible a rational absent class member would want to pay a low fixed percentage, a high fixed percentage, or a marginally escalating percentage. It depends on how easy it is to monitor against premature settlement.

B. Data from Sophisticated Clients

The data on the contingent-fee arrangements clients choose in the marketplace strongly suggests that clients prefer to monitor against premature settlement than to monitor the lawyer's lodestar. The most famous

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cheap settlements and motivate counsel to pursue high levels of recovery."); Bruce L. Hay, *Optimal Contingent Fees in a World of Settlement*, 26 J. LEGAL STUD. 259, 260 (1997) ("[T]he bifurcated fee structure is preferable to the unitary structure . . . . The optimal bifurcated fee often couples a relatively high trial percentage for the lawyer (one that would be excessive if the case were actually going to trial) with a relatively low settlement percentage. The rationale of the large trial percentage is that it generates a large settlement; the rationale of the small settlement percentage is that it avoids paying the lawyer for (trial) work he does not perform.").

39. *See* Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 530 (1978).

40. *See id.* at 581 ("The contingent hourly-percentage fee is payable only in the event of recovery and equals the sum of two components: (1) the lawyer's time charge for the hours devoted to the case; and (2) a percentage (*x*) of the amount by which the recovery (*s*) exceeds that time charge." (footnotes omitted)).

41. *See* A. Mitchell Polinsky & Daniel Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 AM. L. & ECON. REV. 165, 182 n.30 (2003) ("This payment scheme is only fully successful, however, if the plaintiff is certain to obtain a settlement or a trial victory."). Although there are ways to perfect the formula, they are complex and involve third parties; as such I am not sure how realistic the perfections are. *See id.* at 166–69 (proposing a variation in which a third-party administrator "will contract with the lawyer and agree to pay him for the appropriate fraction of his time"); Alon Klement et al, Auctioning Class Action Representation 4 (Sept. 8, 2020) (unpublished manuscript) (on file with the *Fordham Law Review*) ("The proposed auction is divided into two stages. In the first stage, risk neutral insurers bid the highest percentage they are willing to pay the representing lawyer, over the hours she invests in the case.").

studies come from Herbert Kritzer, who surveyed lawyers who work on contingency in Wisconsin.[42] Ninety-five percent of clients chose the percentage method.[43] Most of the time, the agreements employed fixed percentages (most often one-third but occasionally one-fourth), but sometimes the agreements employed percentages that escalated as the litigation matured.[44] None of the percentages escalated or deescalated with the size of the recovery except percentages that escalated for clients who already had a settlement offer when they hired the lawyer.[45] The other 5 percent was split among a variety of methods with a contingent component, but none of them appeared to be contingent lodestar plus percentage.[46]

The Kritzer studies are largely based on fee agreements with unsophisticated clients.[47] For the reasons I noted above, I doubt whether such agreements reflect our best, most rational selves. As I said, I prefer to examine fee agreements with sophisticated clients like large corporations.

Unfortunately, it is difficult to find systematic data from large corporations. Most of the time, of course, they do not hire lawyers on contingency at all; rather, they pay them by the hour with a non-contingent-lodestar method. But there are two areas of litigation where this is not true: patent cases and, of all things, class action cases—in particular, the small number of class action cases comprised of corporate class members. Although there is not much systematic data on the fee agreements sophisticated clients use in these areas, the data that exists all points to the same conclusion: sophisticated clients are just like unsophisticated ones. That is, they use the percentage method, either with fixed percentages or escalating percentages as litigation matures. Moreover, despite the enormous stakes in some of these cases, the percentages are the same ones that unsophisticated clients with smaller cases choose. The contingent-lodestar-plus-percentage formula is nowhere to be found.

42. *See* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS 19 (2004) ("[T]he geographical focus of my research is the state of Wisconsin . . . . My initial data collection was a survey of Wisconsin contingency fee practitioners . . . ."). Eric Helland and Seth Seabury have surveyed the other studies and found that they all "are quite consistent in their findings. Fees are typically 33 percent." Eric Helland & Seth A. Seabury, *Contingent-Fee Contracts in Litigation: A Survey and Assessment*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 383, 385 (Jennifer Arlen ed., 2013).

43. KRITZER, *supra* note 42, at 39.

44. *See id.* at 39–40.

45. *See id.* at 40.

46. *See id.* Although some of these methods combined lodestar and percentage components, none of the lodestar components were contingent. *See id.* The only examples of the contingent lodestar plus percentage I have seen are in cases where there could be fee shifting: the lawyer might be able to receive a lodestar-based fee-shifting award as well as a percentage of the recovery. *See* 1 ROBERT L. ROSSI, ATTORNEY'S FEES § 10.6 (3d. ed. 2020) ("[Some] courts have held or indicated that an attorney may retain both the fee award and the contingent fee where the fee agreement provides for such a result.").

47. KRITZER, *supra* note 42, at 35 (noting that "personal injury was the dominant type of case" handled by the lawyers who responded to the survey).

Let me begin with patent litigation. The best study here comes from Professor David Schwartz.[48] Professor Schwartz interviewed patent lawyers and their clients in 2010 and 2011 and obtained copies of their contingent-fee agreements.[49] Many of these cases presented enormous potential damages.[50] Nonetheless, he found that corporations that hire patent litigators on contingency use the same two types of fee agreements that unsophisticated clients do. Those two types were fixed percentages (he found a mean of 38.6 percent) or escalating percentages as the litigation matured (he found a mean upon filing of 28 percent and, through appeal, of 40.2 percent), with more clients choosing the latter over the former.[51] No one escalated or deescalated based on recovery size.

Now consider corporate class action litigation. One place to find data here is in the antitrust cases in the pharmaceutical industry where large corporations sue each other.[52] With a research assistant, I recently collected systematic data in these cases. The cases pitted a class of approximately twenty drug wholesalers—many of which are Fortune 500 companies, some at the very top of that list—against drug manufacturers accused of exploiting their monopolies to inflate drug prices. The potential damages in many of these cases were enormous. The first case in the series settled in April 2003, and, although the cases continue, I stopped collecting them for this Essay in April 2020. During those seventeen years, there have been thirty-three cases; in the Appendix, I set forth the following details about them: how much each case resolved for, how much was sought by class counsel in fees, what the retainer agreements between class counsel and the corporate class representative said, and any positive or negative reaction to the fee requests from the corporate class members. Although the fee requests ranged from a fixed percentage of 27.5 percent to a fixed percentage of one-third, one-third *heavily* dominated: the average was 32.85 percent. (The requests in the Appendix that were near one-third were one-third requests inclusive of

48. *See* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 356–57 (2012).

49. *See id.* at 356–57.

50. *See id.* at 363 ("[The most elite contingent-fee patent litigators] select cases that they perceive to be strong on the merits, and importantly, to have extremely high potential damages. For example, one lawyer in this category explained: '$25 million expected value against one infringer. That's the general rule.' Others had similar high cut points, saying things like 'we'd like to be at $100 million on our cases. Those are good cases. The very least, I don't take a case unless we think we could pull in well into 8 figures.'" (footnote omitted)).

51. *See id.* at 360.

52. Securities fraud class actions are another area of potential data because large sophisticated institutions serve at least as the representative class members. But efforts to systematically collect retainer agreements here have thus far failed because the agreements are rarely publicly disclosed. *See* Lynn A. Baker et al., *Is the Price Right?: An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1389–91 (2015) ("The study's analysis began by looking for cases in which proposed lead plaintiffs offered the court proof of the ex ante fee agreements they had negotiated. Although Congress and the drafters of the lead plaintiff mechanism seemed to anticipate that such agreements would be the norm, there is little evidence that they play a significant role in a court's selection of the lead plaintiff. There were very few cases—just 11.29%—in which the lead plaintiff candidate or the court discussed an ex ante agreement during the appointment process.").

litigation expenses.) Moreover, although I was able to find retainer agreements in only three of the cases, in all of them, the agreement called for a fixed percentage of one-third. Finally, in the vast majority of cases, one or more of these corporate class members—often the biggest class members—came forward to voice affirmative support for the fee requests, and not a single one of these corporate class members objected to the fee request in any of the thirty-three cases. Although this support among class members for class counsel's fee requests is not formally ex ante market data—the support came at the end of the cases—because it was the same class of corporations in case after case and often the same counsel in case after case, class members could have tried to alter this pattern at any time. But they did not; they have gone along with it for seventeen years. In other words, the corporations in these cases appear perfectly happy with the percentage method and perfectly happy with the same fixed percentage of one-third that most unsophisticated clients also choose.

Although we obviously need more corporate data to draw any firm conclusions, the data we do have forces us to ask why even sophisticated clients eschew the elegance of the contingent-lodestar-plus-percentage formula. One possibility is that the economic modeling is simply missing something. As I noted at the outset, this is one of the limitations of using economic models that are unconfirmed by empirical investigation. Another possibility is path dependence: contingency agreements have been using the percentage method with a one-third percentage for a very long time; maybe inertia explains why that has not changed.[53] On the other hand, the Clermont-Currivan paper has been around for decades and corporate clients are experimenting with many other fee arrangements; why not with this one too? The best answer in my view is something I mentioned above: monitoring preference. Sophisticated clients may find it easier to monitor against premature settlement than they do their lawyers' lodestars. Hence, they choose the percentage method over the contingent lodestar plus percentage. Indeed, dissatisfaction with the lodestar is what has driven them to consider alternative fee arrangements in the first place.[54]

Why these sophisticated clients did not negotiate lower fee percentages than those unsophisticated clients pay is a more difficult question. The sizes of the cases discussed above are large enough that one would think they would present similar economies of scale to the largest class actions;[55] indeed, some of the cases *were* the largest class actions.[56] It may be that it is

53. *Cf.* Peter B. Rutledge & Christopher R. Drahozal, "*Sticky" Arbitration Clauses?: The Use of Arbitration Clauses After* Concepcion *and* Amex, 67 VAND. L. REV. 955, 959 (2014) ("[C]ontracts . . . may be 'sticky' and resistant to change.").

54. *See generally* 1 JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES § 4:7 (2020).

55. *See* Silverman v. Motorola Sols., Inc., 739 F.3d 956, 959 (7th Cir. 2013) ("Many costs of litigation do not depend on the outcome; it is almost as expensive to conduct discovery in a $100 million case as in a $200 million case . . . . There may be some marginal costs of bumping the recovery from $100 million to $200 million, but as a percentage of the incremental recovery these costs are bound to be low.").

56. *See* Appendix.

expensive to negotiate away from the default one-third arrangement; there are not only transaction costs but strategic uncertainties to consider if the parties have asymmetric information about the merits (something I assumed away when discussing the economic models).[57] A further explanation is that the investment needed to win the cases examined above may have correlated with the stakes of the cases. If this was so, the optimal fixed percentage would remain constant even as the stakes increased.[58] A final explanation is simply that they do not want to exacerbate agency costs and thereby increase the burden of monitoring against premature settlement that comes along with lower percentages.[59]

In any event, although more data is certainly needed, the data we have from sophisticated clients shows that they prefer the same arrangements that unsophisticated clients do: the percentage method with fixed percentages of one-third or escalating percentages as the litigation matures.

III. WHAT SHOULD JUDGES DO IN CLASS ACTIONS?

The previous part showed that economic modeling is indeterminate on how rational absent class members would want to pay class counsel. If it is easier to verify class counsel's lodestar than it is to monitor against premature settlement, then the models suggest the contingent-lodestar-plus-percentage method is ideal. But if it is easier to monitor against premature settlement, the percentage method is better. Whether the percentage should be fixed or escalating and what the percentage should be depends on how well the client can monitor against premature settlement. The (albeit limited) data from sophisticated clients in the market suggests that they believe it is easier to monitor against premature settlement, because they uniformly select the percentage method. The data is mixed between fixed and escalating percentages, but all of the escalation comes from litigation maturity, not recovery size.

Where does that leave our judges overseeing class actions? Although more data is needed to draw firm conclusions, based on what we know, I think judges acting as good fiduciaries could responsibly discharge their duties with either the percentage method or the contingent-lodestar-plus-percentage method. But, for the reasons I explain now, I think judges should usually choose the percentage method. I also think this percentage should either be fixed or escalate with litigation maturity.

57. *See supra* note 32 and accompanying text. Another explanation comes from Eyal Zamir et al., *Who Benefits from the Uniformity of Contingent Fee Rates?*, 9 REV. L. & ECON. 357, 359 (2013) ("The non-negotiability of the . . . rate precludes lawyers from exploiting their private information about the expected value of the lawsuit and the amount of work it might entail. Clients with a good sense of the ranking of lawyers are able to hire the best lawyer among the ones who are willing to handle the case. The uniformity also enables the clients to retain the transaction's entire surplus.").

58. *See* Hay, *supra* note 37, at 519 ("[C]ases in which the ceiling is high but in which it is costly for the lawyer to move upward should involve the same fee as cases in which the ceiling is low but in which it is easy for the lawyer to move upward." (emphasis omitted)).

59. *See id.* at 511.

A. Best Practices

First, for the same reason sophisticated corporations seem to opt for the percentage method, so should judges: it will usually be easier for judges to monitor against premature settlement than to verify the lodestar. It is true that judges have experience verifying lodestars; they do it frequently in fee-shifting and bankruptcy cases.[60] But that was true of our corporate clients as well; they pay lawyers noncontingent lodestars all the time. Even still, corporate clients apparently believe it is easier to guard against premature settlement when they hire on contingency. I think the same is probably true for judges. They should be able to look at a case and assess what it is worth in light of the various legal and factual risks more easily than they can assess how many hours it should take to litigate it. Many judges are long out of practice or never practiced in class actions at all. Yet, they observe the outcomes in a variety of cases every single day.

Second, the contingent-lodestar-plus-percentage method comes with an added challenge: it is more difficult to choose the percentage. As I noted above, although the economic models are indeterminate on the right percentage for the percentage method, we at least have data on what even sophisticated clients in enormous cases choose when they use this method. We can use this data to set percentages in class action cases if we use the percentage method. But we do not have such data for the contingent-lodestar-plus-percentage formula because no one uses it. That means judges will have to figure out what the "market" percentage is in this formula through other means.

One way to do this is to create market-like competition by holding an auction for class counsel. Judges could ask lawyers to compete for the right to represent the class by bidding on the smallest percentage they would be willing to accept in the contingent-lodestar-plus-percentage formula. In theory, the lowest bid would represent the market price for a class action lawyer in that particular case. Auctions have great theoretical appeal[61] and judges have even tried them a handful of times in class action cases.[62] But judges and scholars have soured on auctions for a variety of reasons I address below. Although judges and scholars have not considered auctions using the contingent-lodestar-plus-percentage formula, I am not sure the reasons they have soured on them can be overcome by it.

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60. *See* Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 551 (2010) ("[T]he 'lodestar' figure has . . . become the guiding light of our fee-shifting jurisprudence."); 1 JOAN N. FEENEY ET AL., BANKRUPTCY LAW MANUAL § 4:38 (5th ed. 2020) ("Courts use a lodestar calculation to determine reasonableness of any fee application.").

61. *See* FITZPATRICK, *supra* note 7, at 98 (noting that an auction would in theory "drive down the winning fee percentage to the lowest possible price"); Macey & Miller, *supra* note 27, at 108–10 (noting that an auction could reduce agency costs and transaction costs).

62. For a detailed review of litigation where the presiding judge used an auction to select class counsel, see LAURAL L. HOOPER & MARIE LEARY, FED. JUD. CTR., AUCTIONING THE ROLE OF CLASS COUNSEL IN CLASS ACTION CASES: A DESCRIPTIVE STUDY (2001), https://www.fjc.gov/sites/default/files/2012/auctioning.pdf [https://perma.cc/7QJR-F54H].

Perhaps the most serious concern with fee auctions is that judges have difficulty picking the winning bid. Part of this concern stems from the fact that the judges who tried auctions permitted lawyers to submit bids that were so complex—the lawyers often did not bid fixed percentages—that it was difficult to figure out which bid was the lowest one.[63] I think this concern is easy to overcome by using the contingent-lodestar-plus-percentage formula: judges could allow the lawyers to bid only on the percentage component and only a fixed percentage. But part of the concern stems from the fact that the lowest bidder may not be the best lawyer and it is difficult for judges to trade quality for price.[64] This concern is not so easy to overcome. In public contracting, this trade-off is made either by restricting bidders to those that are well qualified for the job or by using a scoring system that tries to assign points for price along with other considerations.[65] I could imagine using the former approach in auctions for class counsel—for example, the judge could limit bidders to the ten or twenty most experienced class action firms. However, that would lock incumbents into class counsel positions and make it difficult for new firms to enter the market. That is good neither for competition nor for furthering the desire many have to diversify the profession.[66] The latter approach strikes me as hopelessly subjective and

63. Fisch, *supra* note 38, at 674–82 (discussing the difficulty of selecting the lowest bidder in auctions for class counsel); *see also* THIRD CIR. TASK FORCE ON THE SELECTION OF CLASS COUNS., FINAL REPORT 49–51 (2002), https://www.ca3.uscourts.gov/sites/ca3/files/final%20report%20of%20third%20circuit%20task%20force.pdf [https://perma.cc/7G8Y-Q7ZF] (same).

64. *See* Fisch, *supra* note 38, at 683–90 (noting that "a lead counsel auction cannot select among competing bids solely on the basis of price" and discussing the difficulties posed by incorporating an analysis of firm quality into the auction process).

65. 48 C.F.R. § 9.201 (2020) ("Qualified bidders list (QBL) means a list of bidders who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product or have otherwise satisfied all applicable qualification requirements. Qualified manufacturers list (QML) means a list of manufacturers who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product."); *id.* § 15.305 ("Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings."); 1 STEVEN FELDMAN, GOVERNMENT CONTRACT AWARDS: NEGOTIATION AND SEALED BIDDING § 10:20 (2020) (providing an example of a scoring system).

66. *See* Ralph Chapoco, *Calls for Lawyer Diversity Spread to Complex Class Litigation*, BLOOMBERG L. (July 30, 2020, 4:45 AM) https://news.bloomberglaw.com/social-justice/calls-for-lawyer-diversity-spread-to-complex-class-litigation [https://perma.cc/CQZ6-KSGH] ("Judge James Donato of the U.S. District Court for the Northern District of California declined to certify two firms . . . as interim co-lead class counsel in a securities action . . . . In a July 14 order, Donato cited 'a lack of diversity in the proposed lead counsel,' noting that all four lead counsel were male, and [had] been lead counsel in other cases, what legal experts refer to as 'repeat players.'" (quoting Order Re: Consolidation & Interim Class Counsel, *In re* Robinhood Outage Litig., No. 20-cv-01626, 2020 WL 6130884 (N.D. Cal. July 14, 2020))); *see also* Michael H. Hurwitz, *Judge Harold Baer's Quixotic Crusade for Class Counsel Diversity*, 17 CARDOZO J.L. & GENDER 321, 324–27 (2011) (discussing Judge Harold Baer's orders imposing a diversity requirement on class counsel).

therefore unlikely to inspire much more confidence in fee auctions than we have today.[67]

Another concern with auctions is that they can exacerbate agency costs.[68] For example, in auctions that use the percentage method, the lawyer winning the auction with the lowest bid will also have the strongest incentive to settle the case too early for too little. If the judge cannot monitor the lawyer well enough, then this could end up making absent class members worse off rather than better: they will end up paying a smaller fee percentage but on an even smaller recovery. The contingent-lodestar-plus-percentage formula solves this monitoring problem, but as I noted, it introduces another monitoring problem and, if I am correct above, a worse one: verifying the lodestar component. In short, contingent-lodestar-plus-percentage auctions are no more promising than the percentage auctions that have largely failed. Better, then, to stick to the percentage method where we have preexisting data to draw on.

Third, when judges use the percentage method, the percentages should be fixed or escalate with litigation maturity. Although it is not unheard of to use deescalating or escalating percentages based on recovery size, I believe they were not found in the data discussed above because it is too difficult to set the cut points ex ante.[69] Before discovery and the like, it is difficult to know how good or bad the case is and where to start escalating or deescalating. The cut points for litigation maturity are well known (even if imperfect[70]): trials, appeals, and maybe a few others.

B. Current Practices Revisited

The conclusions in the previous section affirm some of what judges do now to award fees in class actions, but they call into question some of what they do, too.

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67. *See* 2 FELDMAN, *supra* note 65, § 12:2 ("[C]ontracting officials usually have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results [to award a contract]."); THIRD CIR. TASK FORCE ON THE SELECTION OF CLASS COUNS., *supra* note 63, at 51 ("The courts that have conducted auctions have recognized that price cannot be the sole factor in awarding class counsel; there must be some quality control as well. Yet if the court takes into account anything other than price to choose among competing bids, it enters into the same kind of subjective determinations as occur under the traditional method of appointing class counsel.").

68. *See* Fisch, *supra* note 38; *see also* THIRD CIR. TASK FORCE ON THE SELECTION OF CLASS COUNS., *supra* note 63, at 45 ("The auction method could encourage firms to submit unduly low bids in order to win the position of class counsel. Underbidding can result in lawyers cutting corners or settling too early in order to maintain a profit margin.").

69. *See* Fisch, *supra* note 38, at 674–78 (discussing the difficulty of evaluating bids with changing percentages).

70. *See* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 201 (1987) ("It is at best a rough corrective . . . because it substitutes a small number of discrete increments for what is in fact a continuous process—the reduction in the attorney's expected future costs as the case progresses.").

Let me begin with the good: judges often use the percentage method to award fees in class actions.[71] This was not always the case, and much to the credit of our judges, they have been persuaded by economic models and market data to replace the lodestar method with the percentage method in large numbers.[72] But now the bad.

First, many judges do not use a "pure" percentage method but instead something called the "percentage method with a lodestar cross-check." This is something of the opposite of the Clermont-Currivan formula. Rather than contingent lodestar *plus* a percentage of the recovery, this method awards a contingent percentage *capped* at some multiple of the lodestar. What multiple is used in the cap? It is up to the discretion of judges, and they seem most interested in preventing the appearance of a "windfall" to the lawyer.[73] I have never seen the lodestar cross-check formally modeled, but it would seem this method would behave like the percentage method when the lodestar is high but like the contingent-lodestar method when the lodestar is low. Because it will not be known at the outset whether a case will be a high or low lodestar endeavor, for all the same reasons rational clients who could not monitor well would reject the lodestar method, they would reject this method too.[74] Indeed, I have never seen this method used in the market for contingency representation, whether among sophisticated or unsophisticated clients. If judges want to do what rational absent class members would want to do, then they should not do this.

Second, judges that use the percentage method presume that the fee percentage in class actions should be lower than one-third. I and others have found that the average fee percentage is only 25 percent,[75] and some circuits even go so far as to explicitly require district courts to presume that 25 percent is the right number.[76] But, if the data discussed above is

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71. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 832 (2010) (finding that courts use the percentage method 69 percent of the time, more often than not without the lodestar cross-check); *see also* Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. REV. 937, 945 (2017) (finding the percentage method with lodestar cross-check was used approximately 38 percent of the time versus approximately 54 percent for the percent method without lodestar cross-check).

72. *See* Fitzpatrick, *supra* note 10, at 2052.

73. 5 RUBENSTEIN, *supra* note 8, § 15:85 ("[M]any courts also undertake a lodestar cross-check as a means of ensuring that the percentage award is not a windfall.").

74. *See* FITZPATRICK, *supra* note 7, at 92 (explaining that the lodestar cross-check is "the same thing as the lodestar method, just dressed up in nicer clothing"); *see also* Williams v. Rohm & Haas Pension Plan, 658 F.3d 629, 636 (7th Cir. 2011) ("The . . . argument . . . that any percentage fee award exceeding a certain lodestar multiplier is excessive . . . echoes the 'megafund' cap we rejected in *Synthroid*.").

75. *See* Fitzpatrick, *supra* note 71, at 833 (finding that "[t]he average award [under the percentage method] was 25.4 percent and the median was 25 percent"); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD., 241, 260 (2010) (finding that "[t]he median and mean fee to recovery ratios were 0.24 and 0.25, respectively" in percentage method cases).

76. Fitzpatrick, *supra* note 71, at 833 ("[T]he Ninth Circuit has adopted a presumption that 25 percent is the proper fee award percentage in class action cases."); *see also* Eisenberg & Miller, *supra* note 75, at 259 ("The Ninth Circuit has a 25 percent benchmark fee in common

representative, 25 percent is lower than the fixed percentages that even sophisticated clients pay in the market for contingency representation.

The lower percentage could be justified for class settlements if judges awarded higher percentages after class trials. This would be consistent with the models that recommend escalating percentages as the litigation matures as well as the market data that often shows escalating fees in patent cases (where average percentages began at 28 percent and rose to over 40 percent if an appeal was taken). But because trials are so rare in class actions, there are no published studies that demonstrate that is what judges are in fact doing.[77]

Rather, the lower percentage in class actions has been justified on account of the economies of scale that come from class versus individual representation. The notion here is that it is not one thousand times harder to represent a class of one thousand than it is a class of one, and a competitive market would bring marginal price down to marginal cost.[78] It is true that the economic models show that the optimal percentage is lower in higher stakes cases if the investment required to win the cases does not go up as quickly.[79] But the data discussed above suggests that sophisticated clients do not negotiate lower percentages in bigger cases where we would expect the same economies: it is not one thousand times harder to win a $10 billion patent case than it is a $10 million one.[80] As I noted, I am not sure why sophisticated clients do not negotiate lower percentages in their biggest contingency cases despite the economies of scale. It could simply be a function of the limited data, but the best explanations I can think of are that bringing marginal price down to marginal cost is not free (it increases the burden of monitoring against premature settlement) and negotiation introduces transaction costs and strategic uncertainty. If corporate clients do not think they can discharge these burdens, should judges think they can? I don't think so; as I noted above, it is doubtful that judges are better lawyer monitors than sophisticated corporations. Moreover, we have no way of knowing how great the economies of scale are in any given case and, therefore, no way of knowing what the marginal price should be—unless we hold an auction and take on the difficulties with that, as discussed above. All of this argues against deviating from the data from sophisticated clients in the market for large-case contingency representation. If judges want to be good fiduciaries for absent class members, then they should probably presume that one-third is the correct fixed percentage, not one-fourth.

fund cases but allows departures based on individual case factors, and the Eleventh Circuit has indicated that its district courts view 25 percent as a benchmark.").

77. Professor Bill Rubenstein, however, has proprietary data suggesting judges do this. *See* Expert Declaration of William B. Rubenstein in Support of the Plaintiffs' Motion for Attorney's Fees & Expenses at 12, Hale v. State Farm Mut. Ins. Co., No. 12-cv-00660 (S.D. Ill. Oct. 16, 2018), ECF No. 954-3.

78. Fitzpatrick, *supra* note 10, at 2063 ("[A]ggregate litigation permits plaintiffs to reap the benefits of economies of scale in litigation, and, in a competitive marketplace, one might expect those economies to be passed on to clients in the form of lower attorneys' fees.").

79. *See* Hay, *supra* note 37, at 517–23.

80. *See* Silverman v. Motorola Sols., Inc., 739 F.3d 956, 959 (7th Cir. 2013).

Third, many judges choose percentages even below 25 percent when class counsel recovers more than $100 million simply because the recovery is so large. As I and others have found, the average percentages judges choose are lower in recoveries over $100 million, and they get even lower until they reach around 10 percent in billion dollar recoveries.[81] This is even worse than the practice I described above that presumes lawyers should get less than one-third in a class action because the case is a class action. Rather, here, courts are paying the lawyer a different percentage at the end of the very same case depending on whether the lawyer recovered a lot or a little; the more the lawyer recovered, the lower the fixed percentage awarded at the end. This sort of arrangement would obviously fare terribly in economic models because it dramatically exacerbates agency costs: now the lawyer can be made better off by settling cases for smaller recoveries than larger recoveries, even if lawyer effort is kept constant.[82] That only happens with fixed percentages that do not vary with recovery size if lawyers can save effort.[83] For this reason, varying a fixed percentage on recovery size like this is unheard of in the marketplace.[84]

In the Seventh Circuit, courts sometimes decrease percentages *marginally* with recovery size—for example, paying the lawyer one-third of the first $100 million of a recovery and 25 percent of the next $100 million.[85] As I noted above, the economic models prefer fixed or marginally increasing percentages; marginally decreasing percentages exacerbate rather than mitigate agency costs.[86] Although the data from sophisticated clients that I

81. Fitzpatrick, *supra* note 71, at 838 ("[I]t appears that fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent."); *see also* Eisenberg & Miller, *supra* note 75, at 265 (reporting a mean fee of 12.0 percent and a median fee of 10.2 percent for recoveries over $175.5 million).

82. *See In re* Synthroid Mktg. Litig., 264 F.3d 712, 718 (7th Cir. 2001) (noting that "[u]nder the district court's approach" of capping attorneys' fees at 10 percent of recovery for settlements over $75 million, "no sane lawyer would negotiate a settlement of more than $74 million and less than $225 million; even the higher figure would make sense only if it were no more costly to obtain $225 million for the class than to garner $74 million"); FITZPATRICK, *supra* note 7, at 93–94 (providing an example and explaining "if you pay the lawyer a bigger percentage of smaller sums, he or she is better off sometimes resolving cases for smaller sums").

83. *See supra* note 36 and accompanying text.

84. *In re Synthroid*, 264 F.3d at 718 ("[C]ounsel for the consumer class could have received $22 million in fees had they settled for $74 million but were limited to $8.2 million in fees because they obtained an extra $14 million for their clients (the consumer fund, recall, is $88 million). Why there should be such a notch is a mystery. Markets would not tolerate that effect; the district court's approach compels it.").

85. *Id.* ("A notch could be avoided if the 10% cap in 'megafund' cases were applied only to the *portion* of the recovery that exceeded $74 million, but that is not what the district court did; it capped fees at 10% of the whole fund.").

86. *See* Fisch, *supra* note 38, at 678 ("Because it fails to align counsel's interests with those of the plaintiff class at high levels of recovery, a declining percentage of recovery fee structure is especially likely to create a significant moral hazard problem."); *see also In re Synthroid*, 264 F.3d at 721 ("[D]eclining marginal percentages . . . create declining marginal

discussed did not find any marginally decreasing rates, such rates are at least not unheard of in the marketplace.[87] Nonetheless, given that they increase agency costs and even sophisticated clients apparently do not use them often (as I said, I suspect because it is so difficult to set the cut points ex ante),[88] judges should not use them either, unless judges believe they can monitor and set cut points better than even large corporations believe they can—something, I have said, that I find implausible. Rather, judges should either stick with fixed percentages that do not vary with recovery or use percentages that escalate with litigation maturity, like sophisticated clients usually do. (Although escalating percentages based on recovery size are, too, not unheard of,[89] they introduce the same cut-point problem discussed above.)

CONCLUSION

If judges want to act as fiduciaries for absent class members like they say they do, then they should award attorneys' fees in class actions the way that rational class members who cannot monitor their lawyers well would do so at the outset of the case. Economic models suggest two ways to do this: (1) pay class counsel a fixed or escalating percentage of the recovery or (2) pay class counsel a percentage of the recovery plus a contingent lodestar. Which method is better depends on whether it is easier to verify class counsel's lodestar (which favors the contingent-lodestar-plus-percentage method) or to monitor against premature settlement (which favors the percentage method) as well as whether it is possible to run an auction to determine the market percentage for the contingent-lodestar-plus-percentage method. The (albeit limited) data from sophisticated clients who hire lawyers on contingency shows that such clients overwhelmingly prefer to monitor against premature settlement, since they always choose the percentage method. Whether the percentage should be fixed or escalating depends on how well clients can do this monitoring. Data from sophisticated clients shows both that they choose to pay fixed one-third percentages or even higher escalating percentages based on litigation maturity just like unsophisticated clients do, and they do so even in the most enormous cases. Unless judges believe they can monitor

returns to legal work . . . . This feature exacerbates the agency costs inherent in any percentage-of-recovery system.").

87. *See* Silverman v. Motorola Sols., Inc., 739 F.3d 956, 959 (7th Cir. 2013) ("Awarding counsel a decreasing percentage of the higher tiers of recovery enables them to recover the principal costs of litigation from the first bands of the award, while allowing the clients to reap more of the benefit at the margin (yet still preserving some incentive for lawyers to strive for these higher awards)."); *In re Synthroid*, 264 F.3d at 721 (noting that "negotiations and auctions often produce diminishing marginal fees when the recovery will not necessarily increase in proportion to the number of hours devoted to the case").

88. Daniel Rubinfeld and Suzanne Scotchmer have reported that such arrangements are "quite common," but they did not cite anything for that assertion. *See* Rubinfeld & Scotchmer, *supra* note 22, at 415.

89. *See, e.g.*, *In re* AT&T Corp., 455 F.3d 160, 163 (3d Cir. 2006). This case described the following fee agreement between class counsel and "the lead plaintiff New Hampshire Retirement Systems": "The formula provided attorneys' fees would equal 15% of any settlement amount up to $25 million, 20% of any settlement amount between $25 million and $50 million, and 25% of any settlement amount over $50 million."

differently than sophisticated corporate clients can, judges acting as good fiduciaries should follow these practices as well. This conclusion calls into question several fee practices commonly used by judges today: (1) presuming that class counsel should earn only 25 percent of any recovery, (2) reducing that percentage further if class counsel recovers more than $100 million, and (3) reducing that percentage even further if it exceeds class counsel's lodestar by some multiple.

APPENDIX

Direct Purchaser Pharmaceutical Antitrust Settlements, April 2003–April 2020

Date	**Case Name**	**Settlement Amount**	**Fee Percentage Requested**	**Retainer Agreement**	**Class Member Objections**	**Class Member Support**
November 9, 2018	Hartig Drug Co. v. Senju Pharmaceutical Co.[90]	$9,000,000	33.33%	N/A	None	No
October 24, 2018	*In re* Blood Reagents Antitrust Litigation[91]	$41,500,000	33.33%	N/A	None	No
September 20, 2018	*In re* Lidoderm Antitrust Litigation[92]	$166,000,000	27.11%	33.33%	None	Yes
July 18, 2018	*In re* Solodyn (Minocycline Hydrochloride) Antitrust Litigation[93]	$76,846,250	31.45%	N/A	None	No
April 18, 2018	American Sales Co. v. Pfizer, Inc.[94]	$94,000,000	32.69%	33.33%	None	Yes

90. Settlement Agreement Between Plaintiff Hartig Drug Co. Inc. & Defendants Senju Pharmaceutical Co. Ltd., Kyorin Pharmaceutical Co., Ltd. & Allergan, Inc., Hartig Drug Co. v. Senju Pharm. Co., No. 14-00719 (D. Del. Feb. 16, 2018).

91. Order Granting Plaintiffs' Motion for (1) an Award of Attorneys' Fees, (2) Reimbursement of Litigation Expenses & (3) Service Awards for the Class Representatives, *In re* Blood Reagents Antitrust Litig., MDL No. 09-2081 (E.D. Pa. Oct. 24, 2018).

92. Order Granting Final Approval of Settlement with Direct Purchaser Class & Entering Final Judgment of Dismissal with Prejudice, *In re* Lidoderm Antitrust Litig., No. 14-md-02521 (N.D. Cal. Sept. 20, 2018).

93. Settlement Agreement Between Implax Laboratories, Inc. & the Direct Purchaser Class, *In re* Solodyn (Minocycline Hydrochloride) Antitrust Litig., MDL No. 14-md-2503 (D. Mass. Mar. 10, 2018).

94. Order Granting Direct Purchaser Class Plaintiffs' Unopposed Motion for Final Approval of Settlement & Distribution Plan, Attorneys' Fees, Reimbursement of Expenses, Service Awards to the Class Representative Plaintiffs & Entry of Final Judgment & Order of Dismissal, Am. Sales Co. v. Pfizer, Inc., No. 14-cv-00361 (E.D. Va. Apr. 18, 2018).

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
December 19, 2017	*In re* Aggrenox Antitrust Litigation[95]	$146,000,000	33.33%	33.33%	None	Yes
December 7, 2017	*In re* Asacol Antitrust Litigation[96]	$15,000,000	33.33%	N/A	None	Yes
October 23, 2017	Castro v. Sanofi Pasteur, Inc.[97]	$61,500,000	33.33%	N/A	None	Yes
October 5, 2017	*In re* K-Dur Antitrust Litigation[98]	$60,200,000	33.33%	N/A	None	Yes
October 15, 2015	King Drug Co. of Florence v. Cephalon, Inc.[99]	$512,000,000	27.50%	N/A	None	Yes
May 20, 2015	*In re* Prograf Antitrust Litigation[100]	$98,000,000	33.33%	N/A	None	Yes

95. Final Judgment & Order of Dismissal, *In re* Aggrenox Antitrust Litig., No. 14-md-02516 (D. Conn. Dec. 19, 2017).

96. Order & Final Judgment Finding Notice to Satisfy Due Process, Approving Settlement, Awarding Attorneys' Fees & Expenses, Approving Service Awards to Representative Plaintiffs & Ordering Dismissal with Prejudice, *In re* Asacol Antitrust Litig., No. 15-cv-12730 (D. Mass. Dec. 7, 2017).

97. Order for an Award of Attorneys' Fees, Reimbursement of Expenses & Payment of Service Awards to the Class Representatives, Castro v. Sanofi Pasteur, Inc., No. 11-cv-7178 (D.N.J. Oct. 23, 2017).

98. Order Granting Final Judgment & Order of Dismissal Approving Direct Purchaser Class Settlement & Dismissing Direct Purchaser Class Claims Against Defendants, *In re* K-Dur Antitrust Litig., MDL No. 1419, No. 01-cv-01652 (D.N.J. Oct. 5, 2017).

99. Order Granting Final Judgment & Order of Dismissal Approving Direct Purchaser Class Settlement & Dismissing Direct Purchaser Class Claims Against the Cephalon Defendants, King Drug Co. of Florence v. Cephalon, Inc., No. 06-cv-01797 (E.D. Pa. Oct. 15, 2015).

100. Order & Final Judgment Approving Settlement, Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal with Prejudice, *In re* Prograf Antitrust Litig., MDL No. 2242 (D. Mass. May 20, 2015).

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
January 20, 2015	*In re* Prandin Direct Purchaser Antitrust Litigation[101]	$19,000,000	33.33%	N/A	None	Yes
September 15, 2014	Mylan Pharmaceuticals, Inc. v. Warner Chilcott Public Ltd. Co.[102]	$15,000,000	33.33%	N/A	None	No
August 6, 2014	Louisiana Wholesale Drug Co. v. Pfizer, Inc.[103]	$190,416,438	33.33%	N/A	None	Yes
June 30, 2014	*In re* Skelaxin (Metaxalone) Antitrust Litigation[104]	$73,000,000	33.33%	N/A	None	Yes
April 16, 2014	*In re* Plasma-Derivative Protein Therapies Antitrust Litigation[105]	$64,000,000	33.33%	N/A	None	No

101. Order & Final Judgment Approving Class Action Settlement, *In re* Prandin Direct Purchaser Antitrust Litig., No. 10-cv-12141 (E.D. Mich. Jan. 20, 2015).

102. Order, Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co., No. Civ. 12-3824 (E.D. Pa. Sept. 15, 2015).

103. Final Judgment & Order of Dismissal Approving Proposed Class Settlement & Dismissing Actions, La. Wholesale Drug Co. v. Pfizer, Inc., Nos. 02-1830 & 02-2731 (D.N.J. Aug. 6, 2014).

104. Order Granting Class Counsel's Motion for Attorney Fees, Reimbursement of Expenses & Awards for the Named Plaintiffs, *In re* Skelaxin (Metaxalone) Antitrust Litig., MDL No. 2343, No. 12-cv-83 (E.D. Tenn. June 30, 2014).

105. Corrected Order & Judgment Approving Settlement & Dismissing with Prejudice Baxter International, Inc. & Baxter Healthcare Corporation, *In re* Plasma-Derivative Protein Therapies Antitrust Litig., MDL No. 2109, No. 09 C 7666 (N.D. Ill. Apr. 16, 2014).

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
June 14, 2013	American Sales Co. v. Smithkline Beecham Corp.[106]	$150,000,000	33.33%	N/A	None	Yes
April 10, 2013	Louisiana Wholesale Drug Co. v. Becton Dickinson & Co.[107]	$45,000,000	33.33%	N/A	None	Yes
November 7, 2012	*In re* Wellbutrin XL Antitrust Litigation[108]	$37,500,000	33.33%	N/A	None	Yes
May 31, 2012	Rochester Drug Co-Operative, Inc., v. Braintree Laboratories Inc.[109]	$17,250,000	33.33%	N/A	None	Yes
January 12, 2012	*In re* Metoprolol Succinate Antitrust Litigation[110]	$20,000,000	33.33%	N/A	None	Yes

106. Final Order & Judgment Approving Settlement, Am. Sales Co. v. Smithkline Beecham Corp., No. 08-cv-3149 (E.D. Pa. June 14, 2013).

107. Order & Final Judgment Approving Direct Purchaser Class Settlement, Awarding Attorneys' Fees & Expenses, Awarding Incentive Awards to Class Representatives, Approving Plan of Allocation & Dismissing Claims Against Defendant, La. Wholesale Drug Co. v. Becton Dickinson & Co., MDL No. 1730, No. 05-cv-1602 (D.N.J. Apr. 10, 2013).

108. Final Order & Judgment Approving Settlement, *In re* Wellbutrin XL Antitrust Litig., No. 08-cv-2431 (E.D. Pa. Nov. 7, 2012).

109. Order & Final Judgment Approving Settlement, Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to the Defendant, Rochester Drug Co-Operative, Inc., v. Braintree Lab'ys, Inc., No. 07-142 (D. Del. May 31, 2012).

110. Order & Final Judgment Approving Settlement, Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiffs Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to All Defendants, *In re* Metoprolol Succinate Antitrust Litig., No. Civ 06-52 (D. Del. Jan. 12, 2012).

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
November 28, 2011	*In re* DDAVP Direct Purchaser Antitrust Litigation[111]	$20,250,000	33.33%	N/A	None	Yes
November 21, 2011	*In re* Wellbutrin SR Antitrust Litigation[112]	$49,000,000	33.33%	N/A	None	Yes
August 11, 2011	Meijer, Inc. v. Abbott Laboratories[113]	$52,000,000	33.33%	N/A	None	Yes
January 31, 2011	*In re* Nifedipine Antitrust Litigation[114]	$35,000,000	33.33%	N/A	None	Yes
January 25, 2011	*In re* Oxycontin Antitrust Litigation[115]	$16,000,000	33.33%	N/A	None	Yes
April 23, 2009	*In re* Tricor Direct Purchaser Litigation[116]	$250,000,000	33.33%	N/A	None	Yes

111. Order & Final Judgment Approving Settlement Between Purchaser Class Plaintiffs & Defendants Ferring B.V., Ferring Pharmaceuticals, Inc. & Aventis Pharmaceuticals, Inc., *In re* DDAVP Direct Purchaser Antitrust Litig., No. 05 Civ. 2237 (S.D.N.Y. Nov. 28, 2011).

112. Order & Final Judgment Approving Direct Purchaser Class Settlement & Awarding Attorneys' Fees, Reimbursement of Costs & Class Representative Awards, *In re* Wellbutrin SR Antitrust Litig., No. Civ. 04-5525 (E.D. Pa. Nov. 21, 2011).

113. Order Granting Final Approval of Settlement & Entering Final Judgment of Dismissal with Prejudice, Meijer, Inc. v. Abbott Lab'ys, No. C. 07-5985 (N.D. Cal. Aug. 11, 2011).

114. Order Granting Class Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Additional Expenses & Awards to Certified Class Representatives, *In re* Nifedipine Antitrust Litig., MDL No. 1515, No. 03-MC-223 (D.D.C. Jan. 31, 2011).

115. Order & Final Judgment Approving Settlement Between Direct Purchaser Class Plaintiffs & Defendants Purdue Pharma L.P., Perdue Frederick Co., P.F. Laboratories, Inc., Purdue Pharmaceuticals L.P. & Purdue Pharma Inc., Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to All Defendants, *In re* Oxycontin Antitrust Litig., No. 04-md-1603 (Jan. 25, 2011 S.D.N.Y.).

116. Order & Final Judgment Approving Settlement, Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to All Defendants, *In re* Tricor Direct Purchaser Litig., No. 05-340 (D. Del. Apr. 23, 2009).

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
April 20, 2009	Meijer, Inc. v. Barr Pharmaceuticals, Inc.[117]	$22,000,000	33.33%	N/A	None	Yes
November 9, 2005	*In re* Remeron Direct Purchaser Antitrust Litigation[118]	$75,000,000	33.33%	N/A	None	Yes
April 19, 2005	*In re* Terazosin Hydrochloride Antitrust Litigation[119]	$74,572,327	32.41%	N/A	None	Yes
November 30, 2004	North Shore Hematology-Oncology Associates, P.C. v. Bristol-Myers Squibb Co.[120]	$50,000,000	33.33%	N/A	None	No
April 9, 2004	*In re* Relafen Antitrust Litigation[121]	$175,000,000	33.33%	N/A	None	No

117. Order & Final Judgment Approving Settlement Between Direct Purchaser Class Plaintiffs & Defendant Barr Pharmaceuticals, Inc., Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to All Defendants, Meijer, Inc. v. Barr Pharms., Inc., No. Civ. 05-2195 (D.D.C. Apr. 20, 2009).

118. Final Judgment & Order of Dismissal Approving Proposed Settlement & Dismissing Actions, *In re* Remeron Direct Purchaser Antitrust Litig., No. 03-CV-0085 (D.N.J. Nov. 9, 2005).

119. Order & Final Judgment, *In re* Terazosin Hydrochloride Antitrust Litig., MDL No. 99-1317, Nos. 98-3125 & 99-7143 (S.D. Fla. Apr. 19, 2005).

120. Final Order & Judgment Approving Settlement Between Class Plaintiff & Defendant Bristol-Myers Squibb Company, N. Shore Hematology-Oncology Assocs., P.C. v. Bristol-Myers Squibb Co., No. 04cv248 (D.D.C. Nov. 30, 2004).

121. Order & Final Judgment, *In re* Relafen Antitrust Litig., No. 01-12239 (D. Mass. Apr. 9, 2004).

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
April 11, 2003	Louisiana Wholesale Drug Co. v. Bristol-Myers Squibb Co.[122]	$220,000,000	32.96%	N/A	None	Yes
			N = 33 Median = 33.33% Mean = 32.85%	3/33	0/33	26/33

122. Order & Final Judgment, La. Wholesale Drug Co. v. Bristol-Myers Squibb Co., MDL No. 1413, No. 01-CV-7951 (S.D.N.Y. Apr. 11, 2003).