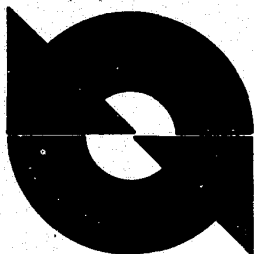


U.S. Department of Justice  
Washington, D.C. 20350



# ~~X~~ Revision of Class Damage Procedures: Empirical Studies

Arthur Young & Company

Federal Justice Research Program  
Office for Improvements in the  
Administration of Justice

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Revision of Class Damage Procedures:

Empirical Studies

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ACQUISITIONS

by

Arthur Young & Company

Washington, D. C.

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# United States Department of Justice

## OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE

WASHINGTON, D.C. 20530

### Preface

Since early 1977, the Office for Improvements in the Administration of Justice has prepared a proposal for comprehensive revision of the federal procedure governing the class damage action. The studies described in this report were initiated to provide better estimates of the impact and costs of these revisions of federal procedure.

Initially, the contractor, Arthur Young and Company, examined the proposal's fiscal impact on the government. The proposal accords the United States and the States a greater role in the litigation of mass, small claim actions. Plaintiff lawyers in securities, truth-in-lending, and antitrust practice were surveyed to determine the resources required for government to undertake this increased responsibility. Once data on the average time required by type of case were generated, budget data from the Department of Justice were used to estimate fiscal impact, given differing assumptions as to the degree of government involvement.

The second study, which arose from discussions between this Office and the Small Business Administration, examined small business' participation over the last decade in antitrust class damage actions. After an extensive search of reported and unreported data, the amount of antitrust recoveries paid to, and extracted from, small business was calculated to see if small business had a significant monetary stake in the performance of present procedures. These data were then compared by this Office to various estimates of the monetary injury inflicted annually on small business in order to estimate the impact on small businesses of the proposed reform.

Finally, the study team was asked to undertake an inquiry of unclaimed recoveries that "escheat" to the government and are used for subsequent enforcement. Typically, in the mass, small claim action, where a monetary judgment is entered, a substantial portion of that recovery is not claimed by injured persons due to difficulties in their identification or their failure to respond to notice. The study estimated the funds likely to be available from such unclaimed recoveries.

We hope that these studies have advanced development of a proposal concerning this complex area of civil procedure. The information they provided has already been useful to the Department in its efforts in this area.

EVALUATION OF CERTAIN IMPACTS  
OF DRAFT LEGISLATION  
AMENDING RULE 23(b)(3) PROCEDURES

EVALUATION OF CERTAIN IMPACTS  
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1. INTRODUCTION

The Department of Justice is currently proposing that legislation amending Rule 23(b)(3) of the Federal Rules of Civil Procedure be enacted by Congress.

The proposed legislation differs significantly from the current form of Rule 23(b)(3) in several respects. While the current Rule provides for a single form of class action, the proposed amendment provides for 2 types of class action suits: Public Penalty Actions and Class Compensatory Actions. Public Penalty Actions are limited to situations in which individual plaintiffs have incurred \$300 or less in economic injury, and the legislation provides for an incentive of up to \$10,000 for the plaintiff bringing the suit in which the class prevails in the action.

Class Actions instituted currently under Rule 23(b)(3) are predominantly litigated on behalf of the class by private attorneys. The proposed legislation, however, requires that U.S. Attorneys review all public penalty actions, and assume, at their discretion, those actions which they deem warrant assumption. The remainder would either be assigned to the appropriate State Attorney General or permitted to be litigated by the private attorney filing the action.

(1) Purpose and Scope of This Study

The purpose of this study is to provide estimates of the potential impact on the staff resources of the Office of the U.S. Attorney that would result from amending Rule 23(b)(3). The estimates will be based on a "worst case" assumption suggested by the Department of Justice; that U.S. Attorneys would pursue a number of class actions equal to those currently filed in the areas of antitrust, securities, and truth-in-lending under the existing Rule 23(b)(3) (hereafter referred to as cases of interest).<sup>1/</sup>

A second objective of this study is to provide an estimate of the percentage of all Rule 23(b)(3) actions that are brought by business entities.

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<sup>1/</sup>This was taken to represent a "worst case" assumption since, under the proposed legislation, U.S. Attorneys would only be assuming a fraction of the total number of cases.

In addressing these two areas of interest, this report presents an analysis of several aspects of existing and anticipated conditions associated with the present and amended versions of Rule 23(b) (3) :

- . The present structure of Rule 23(b) (3) actions as derived from cases reported at the district court level
- . Cost structure of class actions currently pursued by private law firms in antitrust, securities and truth-in-lending actions
- . An analysis of the relationship between litigation expenses for selected class actions in New York City and Philadelphia compared to the country as a whole
- . Costs of U.S. Attorneys associated with litigation
- . An analysis of the U.S. Attorneys' costs for litigating class actions under the "worst case" assumption
- . An estimate of the proportion of class actions brought by business entities under Rule 23(b) (3) as a percent of total Rule 23(b) (3) filings and total Rule 23(b) (3) filings for cases of interest.

(2) Data Sources

Several sources of data were employed in the present analysis:

- . Effective Procedural Remedies for Unlawful Conduct Causing Mass Economic Injury, Draft Statute with Comments, United States Department of Justice Office for Improvements in the Administration of Justice, Washington, D.C., 1977
- . The Administrative Office of the U.S. Courts maintains records of class actions filed and terminated by fiscal year, and its Annual Report of the Director provides a compilation of the number and types of class actions
- . The JURIS system of the Department of Justice was accessed to provide data on the distribution of class actions among and within each of the three subsections of Rule 23(b) decided and reported at the district court level
- . Cost data for U.S. Attorneys was provided by the Executive Office of the U.S. Attorneys
- . Data on resource requirements of private firms conducting class actions was garnered from questionnaires sent to several private firms which presently specialize in class actions. Concomitantly, interviews with those firms which

responded were conducted in an attempt to gain a more thorough understanding of the cost structure of class actions.

- . DuVal, Benjamin S. Jr., "The Class Action as an Antitrust Enforcement Device: The Chicago Experience (1)." 1 American Bar Foundation Research Journal 1023, (1976).
- . Kennedy, John E., "Securities Class and Derivative Actions in the United States District Court For the Northern District of Texas: An Empirical Study" 14 Houston Law Review 769, (1977).
- . Various District Court decisions reported in Federal Supplement and CCH Trade Cases discussing attorneys' fee awards in class actions.

## 2. GENERAL OVERVIEW OF CLASS ACTIONS

Rule 23 of the Federal Rules of Civil Procedures sets forth the procedure which must be followed if a plaintiff wishes to institute an action on behalf of a class of which he/she is a member. Rule 23(b) provides for situations where class actions may be maintained; 23(b)(1) and 23(b)(3) relate to actions where a legal remedy is sought; while 23(b)(2) relates to actions where equitable relief is sought, although damages have also been awarded recently under 23(b)(2) in actions involving the Civil Rights Act of 1964.

While the great majority of class actions for damages are brought under Rule 23(b)(3), in recent years it has been difficult for plaintiffs with "individual claims under \$10,000 or without the financial resources to bear the cost of individual notice to all identifiable class members" to gain access to Federal courts.<sup>2/</sup> As noted in the Department of Justice's Draft Statute with Comments, this has permitted mass economic injury to be visited upon individuals whose joint damages have been major but whose several damages have been minor. Concomitantly, defendants find that Rule 23(b)(3) as presently structured is inefficient and, at times, invidious. It is to ameliorate the above situation that the legislative changes of Rule 23(b)(3) are considered.

## 3. ESTIMATION OF U.S. ATTORNEYS' INCREMENTAL WORKLOAD

This section estimates the resource requirements and costs of current litigation for selected types of class actions and develops an extrapolation of these costs to the Government under the premise that these actions are assumed by the U.S. Attorneys.

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<sup>2/</sup>Effective Procedural Remedies for Unlawful Conduct Causing Mass Economic Injury Draft Statute with Comment, p.26.

The basic approach followed in this section is to first estimate the total number of class action suits filed annually under Rule 23(b)(3) for each type of the cases of interest. We then apply typical cost estimates by type of case, supplied by law firms, to arrive at a total incremental time cost to the Government. Finally, using Government dollar cost figures, this time cost is translated into an incremental dollar figure for the U. S. Attorneys.

(1) Number of Class Action Cases Currently Filed Under Rule 23(b)(3)

To estimate the number of class actions filed under Rule 23(b)(3) we make use of two data sources: Records of the Administrative Office of the U.S. Courts and the Department of Justice's JURIS system.

The Administrative Office of the U.S. Courts maintains records of class actions filed and terminated by fiscal year. These records simply report a case by its title, docket number, date of termination and/or filing, and the relevant judicial district. No information on the subsection of Rule 23(b) under which the case was filed is provided. However, the Annual Report of the Director, Administrative Office of the U.S. Courts, provides figures on the distribution of class actions by type for each fiscal year. The number of cases by subsection of Rule 23(b)(3) must be estimated, since it cannot be obtained directly, except through an examination of the actual complaints. The JURIS system was accessed to obtain the required information for this estimation.

The first issue was to decide the appropriate data set from JURIS to be used for the estimation of the number of Rule 23(b)(3) filings. The basic criterion would have to be the closeness with which the data set would resemble the universe of filings with respect to the factors which would be used for the estimation.

After deliberations with Department of Justice personnel we have used the information contained in the Federal Supplement, i.e., cases decided and reported by the District Courts, because it was felt that this data set is as representative a sample as any available of the universe of filings in terms of proportions of cases of interest over total cases (the data element used to make the transition from the JURIS system to the filings records). Other sets, such as Federal Rules Decisions, could have been used, alone or in combination to provide the data set; but this choice is not very critical given the "worst case" nature of this investigation. Further analysis of this point may be required at a subsequent phase to refine the results of this study.

The JURIS system was, therefore, accessed for Federal Supplement 401 to 439, roughly representing the years 1974 through 1976. Each case was examined to determine the type and the

subsection of Rule 23(b) it was brought under. Those cases brought under alternative subsections were also noted. The results are presented in Table 1 and Exhibit 1. As noted in Table 1, approximately 94% of all cases of interest were brought under Rule 23(b)(3), while only 17% of other cases, were brought under that subsection.

Under the assumption that the percentage of all cases of interest filed under Rule 23(b)(3) is the same on the average between Federal Supplement and the universe of filings, the proportions derived from the JURIS sample were applied to the latter.

From the records of the Administrative Office of the U.S. Courts we know that a total of 3153 class action cases were filed in U.S. District Courts in FY 1977. From the Annual Report we know that of these, 533 cases were of interest and 2620 were not. Applying the factors presented in Table 1 to these figures we obtain the estimates shown in Table 2. Thus, we estimate that 500 cases of interest were filed under Rule 23(b)(3) versus 33 under other subsections of the Rule. Table 2 also provides an estimate of total Rule 23(b)(3) cases (958).

The "worst case" estimate of the number of cases which will be litigated annually by U.S. Attorneys is 500, as derived above. We may further divide this figure on the basis of proportions obtained by applying the 94% factor from Table 1 to actual 1977 filings for each type. The estimated numbers are 221 for anti-trust cases, 164 for securities cases and 115 for truth-in-lending cases.

## (2) Costs Incurred by Law Firms

To obtain cost data from private firms currently litigating class actions, a questionnaire was prepared and distributed to eight law firms located in the Southern District of New York and the Eastern District of Pennsylvania, henceforth referred to as New York and Philadelphia, respectively (See Appendix B for sample questionnaire). Four of these firms were subsequently interviewed to gain a broader understanding of the costs and structure of class action litigation. The responses requested from the law firms are couched in terms of time costs (hours) rather than dollar values associated with litigating class action suits of the three selected types. This form was selected to yield homogeneous resource data from the firms surveyed in addition to restricting the amount of information requested.

The estimation of the incremental costs to the U.S. Attorneys from the promulgation of the proposed Rule 23(b)(3) requires an extrapolation of the hour figures provided by private firms and U.S. Attorneys' unit labor costs into a figure representing the expected U.S. Attorneys' litigation cost. For purposes of the

present study, it is assumed that the law firms interviewed are representative of those firms litigating class actions. While the firms interviewed can be seen to be involved in more complex litigation in terms of larger actions being generally more complex because of the amount of damages involved, these same firms would be expected to be more efficient because of their specialization in litigating such actions and the large number of cases litigated (This point is further discussed in section (5) below.)

Interviews with private attorneys provided figures on resource requirements for litigating Rule 23(b)(3) actions as well as insights into the present structure of class action litigation. While the firms interviewed represented plaintiffs' interests for the most part, several also represented defendants. The resource requirement data derived are standardized and include hours spent on motions, identification of the class and distribution of the claims. For the firms interviewed, the average antitrust and security class action requires an input of approximately 4000 to 5000 hours of attorneys' time; actual figures provided range between 1,200 to 40,000 attorney hours. While antitrust actions require more resources at times, all interviewees agreed that securities and antitrust actions require essentially the same level of time resources. Truth-in-lending actions, however, require only approximately 60% of the time resources of securities and antitrust actions. Within the various actions there is found a division of time between partners and associates that ranges from an equality of partners' and associates' time, to 1 hour of partners' time to 3 hours of associates' time. The average seems to be approximately 1 1/2 hours of associates' time to 1 hour of partners' time.

In an attempt to verify the estimates of hours expended obtained in the interviews, several district court decisions concerning class action fee awards to law firms were accessed. Two of the cases, City of Detroit, et al. v. Grinnell Corp., et al., 1976-1 Trade Cases 60913 and Lindy Brothers Bldrs. Inc. of Phila. v. American R & S San. C., 382 F. Supp. 999 (1974), are salient in the area of class action fee determination in that it is within the context of these cases that the court develops the concept of the "multiple" to be applied to the number of hours spent on an action in determining the fee awarded (This concept basically states that a plaintiff's law firm is entitled to a court determined multiple of its hours spent in view of the risk involved in litigating class actions, i.e., the firm receives no fee whenever it is unsuccessful in obtaining a settlement or a favorable verdict.)

In addition to the above, other cases where fee award was at issue were examined and the results are reported in Table 3. The hour figures for the cases cited in Table 3 are generally higher than many of the figures obtained in the interviews. This can be laid to the latter being average figures while the former

are for individual cases of greater than normal complexity. Cases involving multiple law firms, such as In Re Gypsum Cases, cited in Table 3, undoubtedly overstate the amount of resources necessary for litigation in that duplication of effort inevitably occurs. Entin v. Borg, cited in Table 3, is a relatively "small" securities case which presents a figure for hours that is less than the estimate obtained from the interviews and employed in the extrapolation of private hours into U.S. Attorneys' costs. Thus, the cases cited in Table 3 seem to lend credence to the average hour figures derived above.

The attorneys interviewed indicated that, while the length of time between filing and termination of a class action varies between 1 and 10 years, the average class action is terminated after 4 to 5 years. This reflects the fact that most cases are not settled until shortly before trial, although it is possible to settle a case rather quickly after it is filed. Settling a case before trial does not substantially reduce the amount of attorneys' time required to complete litigation. Only the time spent during the trial, typically a few hundred hours, is saved by settling before trial since most trial preparation is usually completed before settling.

The attorneys point out that while the length of time between filing and termination may be higher in some districts due to court congestion (e.g., Southern District of New York), the resources required to litigate a class action remain fairly constant across districts. The interviewees also indicated that less than 10% of the actions they were involved in went to trial, which is borne out by the U.S. Courts' data on terminations.

Motion practice is an important part of any class action. Motions encountered in almost all class actions include those to stay pending consolidation, strike part of pleadings, stay pending class action discovery, dismiss, permit litigation as a class action and permit discovery. The attorneys interviewed indicated that the amount of time devoted to motion practice, as well as the number of motions, depends in large part upon the judge handling the case. Those cases handled by an informal judge require less time for motion practice and proceed to trial much faster than those assigned to a formal judge. Plaintiffs' counsel generally files only 15 to 20 motions during the course of a class action since it is to their advantage to minimize the number of motions. Defendants' counsel were viewed by the interviewees as the party which generally posits the majority of motions in an attempt to protract the litigation on behalf of the economically stronger party. The time requirement for an "average" motion is difficult to define since some motions (such as a motion to dismiss) are very important and therefore command a greater amount of attorneys' time.

Half of the firms did not use paralegals to assist the attorneys while those that did used about 1 paralegal hour to 4 attorney hours. Other expenses associated with litigating a class action varied considerably across the sample of firms interviewed. General expense which includes travel, meals, lodging, etc. ranged from a low of \$10,000 to a high of \$300,000. U.S. Attorneys would also be incurring such costs. Costs for administration of claims after settlement or trial were estimated at approximately \$30,000, although there have been instances where administration of claims has cost up to one million dollars. Identifying the class and administration of claims is generally handled by banks or accounting firms which examine the stockholder lists in securities actions and the purchase orders in antitrust actions to garner the names and addresses of class members. Under the proposed Rule 23(b)(3) expenses for identification of the class and administration of claims will be handled somewhat differently. No longer will identification of all class members be a requisite of a class action since statistical methods will be permitted to be employed in defining the damages and class size. This will ease the burden of identification and notification considerably. A separate fund will be created to administer the claims.

Thus, if we assume that the U.S. Attorney will experience the same amount of resource requirements as presently experienced by private law firms in litigating class actions, the U.S. Attorney will incur the following resource costs:

- . Litigating securities and antitrust actions will require 4500 attorney hours per case on the average
- . Litigating truth-in-lending actions will require 2700 attorney hours per case on the average
- . Travel, meals, etc., will consume approximately \$30,000 per action over the normal level of overhead experienced by U.S. Attorneys.

(3) Cost Structure of U.S. Attorneys

The implementation of the proposed change in Rule 23(b)(3) will increase the workload of the U.S. Attorneys in that it posits that the U.S. Attorneys will review all public penalty actions filed and assume litigation of a number of these actions. To estimate the expense expected to be incurred by the U.S. Attorneys, it is necessary to determine the cost structure of legal inputs of the U.S. Attorneys. The Executive Office of the U.S. Attorneys provided cost data for their personnel which are as follows:

Senior Attorneys' cost per hour	<u>\$23.57</u>
Junior Attorneys' cost per hour	<u>\$12.12</u>

Support Staff cost per attorney hour                    \$ 7.35  
(secretarial, administrative and paralegal)

Overhead per attorney hour                                \$ 7.00.

In the above calculations it is assumed that a senior attorney is a GS-16 and a junior attorney is a GS-12. The hourly figures are calculated by dividing the annual salary per level (plus 9% benefits) by 1960 hours worked per year. While salary is paid for 2080 hours per year it is postulated that 120 hours are consumed by leave. Overtime is not accounted for, and this will temper any adjustments needed due to attorneys' administrative functions, conferences, etc. Other direct costs such as court fees, travel, and transcripts are assumed to be comparable to those experienced by private law firms.

(4) Calculation of Incremental Workload of U.S. Attorneys

Using the averages developed in the preceding sections, the labor inputs for the U.S. Attorneys can be derived for the estimated "worst case" of 500 class actions. Using the figure of 385 securities and antitrust cases and 115 truth-in-lending cases derived previously we find that the total attorney resource requirements to litigate these actions is  $(4500 \times 385 + 2700 \times 115) = 2,043,000$  attorney hours or 1042 attorney years (using the figure of 1960 hours per year as discussed previously). Of course, the 1042 attorney years will be spread out over the length of the actions. Using 4 years as an average length we find that 260 attorneys would be required the first year while a similar number would be added to the staff for the next three years (see Table 4). Thus, the fourth year would find 1042 attorneys handling 500 cases in their first year, 500 cases in their second year, 500 cases in their third year and 500 cases in their fourth year and about to be terminated. In the fifth year and beyond there would be no increase in attorneys required except to the extent that the number of filings of cases of interest increases.

These hour figures can be translated into dollar figures in the following manner. First the number of senior attorneys' hours is calculated using the ratio of 1:1 1/2 described earlier as the ratio between partners' and associates' time. For the first year this yields 104 senior attorney years or 203,840 senior attorney hours. Applying the hourly rate provided by the Executive Office of the U.S. Attorneys yields a cost of 4.8 million dollars. Applying the same methodology to junior attorneys yields 156 years or 305,760 hours (@ \$12.12) or 3.7 million dollars. Added to these figures is overhead and support staff costs of \$7.00 and \$7.35 per attorney hour, respectively, or 6.75 million dollars the first year. The total cost the first year is thus 15.25 million dollars. In succeeding years the cost is as follows: second year = 30.5 million dollars, third year = 45.75 million dollars, fourth and succeeding years = 61 million dollars. The

succeeding years' costs are covered by the caveat noted previously that increases in yearly caseload will bring increased costs. The above cost figures are expressed in current dollars. Since paralegals are included in staff costs they do not have to be added to the above figures. Travel costs, fees, and the like, however, must be added. These will amount to approximately \$15 million over the four years. However, since a portion of that is already included in the overhead figure, the increment will be lower.

#### (5) Factors Influencing Workload Estimates

Certain factors which we have not been able to fully quantify in the confines of this study will influence the figures provided above in varying degrees. We are providing below a discussion of such factors.

We begin with factors which are likely to decrease the estimates stated above.

##### "Worst Case" Includes Actions with Individual Claims Over \$300

The U.S. Attorney will only be permitted to litigate Penalty Actions involving cases where pecuniary damage per claimant is \$300 or less. The "worst case" figure is, therefore, undoubtedly too high. Using a survey of derivative security and class action cases occurring in the Northern District of Texas as reported by John Kennedy, it can be noted that of shareholder derivative actions containing a class action aspect 2 of 9 or 22% resulted in awards of less than \$300 per claimant. If the assumption is made that shareholder derivative actions in the Northern District of Texas are representative of class actions across the country, it is possible to suggest that the worst case figures are perhaps more than four times the actual figures.

##### Motion Practice

As noted above, plaintiffs' counsel generally attempts to minimize the number of its motions in order to minimize costs. The proposed legislation contains a disincentive feature which, if effective, will decrease the number of motions posited by both plaintiffs' and defendants' counsel. This will reduce plaintiffs' costs in two ways: (1) Plaintiffs' counsel (U.S. Attorneys) will not make as many motions, and (2) more importantly, plaintiffs' counsel will not have to defend against superfluous motions made by defendants' counsel.

### Judges' Training

The proposed legislation provides for training in class action practices for judges and magistrates located in districts where 2% of the total class actions are filed. If effective, this training will permit the judges to be more efficient and thus speed the adjudication process. This would translate into reduced costs to the parties litigating the action. Thus, the training provided to judges may reduce the resource costs of U.S. Attorneys litigating class actions.

### Interview Biases

The interviews with attorneys providing inputs for the present study yielded a figure of 4 to 5 years as an average length of time for termination of a typical class action. Using termination data for Fiscal Year 1977 from the Administrative Office of the U.S. Courts a different picture emerges. The mean of years required for litigation was derived for cases of interest for several districts containing large cities and the results are presented in Table 5. An inspection of these data reveals that the average action requires approximately one half of the time suggested by the interviewees. This suggests strongly that the firms interviewed are litigating more complex actions than the average actions, which in turn suggests that they may be expending considerably more than the average resources in litigating their actions. If this is accurate, the expected cost that the U.S. Attorney will incur will be reduced accordingly.

### Paralegal Assistance

It was noted by some of the attorneys interviewed that paralegals can be efficiently employed in certain phases of class action litigation. It is possible that, through the use of paralegals to an equal or greater extent than used by the attorneys interviewed, the U.S. Attorneys can reduce the estimated incremental costs of litigating class actions.

### Administration of Claims

The U.S. Attorneys will not be responsible for administration of the claims since the legislation makes provision for administration of claims by the Administrative Office of the U. S. Courts.

Below we discuss certain factors which would tend to increase the estimates stated above.

### Continuity Factor

All of the attorneys interviewed stressed that the U.S. Attorneys would experience difficulties dealing with complex and often protracted litigation in light of the higher turnover rate in U.S. Attorneys' staff than experienced by private firms. While an associate remains with a firm approximately 4 to 5 years on the average (and much longer if made a partner), junior attorneys remain with the U.S. Attorney for a shorter period of time. This influences the number of hours required to litigate a class action suit.

### Experience and Specialization Factors

Some of the attorneys interviewed noted that they have developed an expertise in dealing with class actions which the U.S. Attorneys office will have difficulty in matching. Dealing with a variety of class and other actions the U.S. Attorneys would, in effect, have to establish several groups of attorneys working with only class actions to gain the requisite expertise and efficiency of the private firms currently litigating in the area. The private attorneys also noted that expertise of a different type was required in dealing with defense counsel in cases of pecuniary significance. As one explained, "You have to understand and trust your adversary counsel." This relationship, he noted, is only developed over the many years of working together. Lack of expertise in this area by the U.S. Attorneys, interviewees maintain, will lead to more protracted litigation than currently occurs.

### Incentive Factor

The proposed legislation provides an incentive award of up to \$10,000 for the person instituting a public penalty action which proves successful. The effect of this provision is unknown and it is one of the reasons why the "worst case" assumption is made. It is possible that the number of class actions instituted will exceed the "worst case" estimate. Should this occur, it follows that the estimated incremental cost of the U.S. Attorney will be further increased.

(6) Summary

This report presents estimates of the "worst case" incremental workload and incremental costs that will be experienced by the U.S. Attorneys upon implementation of the proposed Rule 23(b)(3). It is estimated that the first year incremental cost will be 260 attorney years or \$15.25 million. In the next two years costs will increase by the same amount annually. In the fourth and succeeding years the incremental costs are estimated to be \$61 million, assuming the number of cases filed remains constant. These estimates may be positively and/or negatively impacted by the above and other factors. Without a further investigation of some of these factors it is difficult to objectively determine the ultimate incremental cost to the U.S. Attorneys that will be associated with the implementation of the proposed change in Rule 23(b)(3).

4. BUSINESS ENTITIES AS PLAINTIFFS IN CLASS ACTIONS

While the great majority of class actions are brought by individuals and groups, in a number of class actions the plaintiff is a business entity. A business entity is defined as a corporation, partnership or privately held company (including sole proprietorships). To determine the number and percentage of business initiated Rule 23(b)(3) actions, those actions decided and reported by the district court for the period 1973 to 1976 are used to estimate the number of actions filed by business entities.

The distribution of class actions brought by business entities and nonbusiness entities derived from JURIS is presented in Table 6 and Table 7. Table 6 presents the business/nonbusiness distribution of cases in the context of the subsections of Rule 23(b). It will be noted that 6 of 9 or 67%, of those cases brought by business entities are filed under Rule 23(b)(3), while 3 of 9 are brought under subsections 1 and 2 of Rule 23(b). Similarly, Table 7 presents the business/nonbusiness distribution of cases in the context of actions of interest and actions not of interest. Of the 9 cases filed by business in the JURIS sample, 6, or 67%, are actions of interest, while 3, or 33%, are actions not of interest. Nonbusiness plaintiffs, however, file 10 of 127 actions, or 8%, in the "cases of interest" category and 117 of 127 or 92% in the "cases not of interest" category.

The JURIS system was employed in estimating the total number of cases filed by business entities in Fiscal Year 1977. An examination of the same JURIS data employed earlier revealed that of actions brought by business entities, approximately 50 percent can be identified through an inspection of their citations as being brought by business entities (e.g. General Motors Corp. v. Smith). From this, the assumption is made that applying this percentage to those cases filed and determined to have been brought by business entities through an inspection of citations will provide a reliable estimate of the number of actions filed by business in the period chosen. Thus, a factor of two is applied to the number of business initiated actions derived from a visual inspection of the citations of all class actions filed in Fiscal Year 1977 to obtain an estimate of 216 business initiated class actions.

To estimate the number of actions brought by business entities under Rule 23(b)(3), the proportions exhibited in Table 6 are applied to this number, 216, and the results are presented in Table 8. As noted in Table 8, it is estimated that 144 Rule 23(b)(3) actions are brought by business entities in Fiscal Year 1977. The same procedure is used to estimate the number of suits of interest brought by business entities in Fiscal Year 1977, and these estimates are presented in Table 9. These estimates are based upon the assumption that the proportions of class actions brought by business entities under Rule 23(b)(3) and other subsections of Rule 23(b) are identical for those cases filed and those decided and reported by the District Courts during the selected period. The estimates are also based on the assumption that the proportions of class actions of interest and not of interest brought by business entities are identical for those cases filed and those decided and reported by the District Courts during the selected period.

It is thus estimated that 144 of the 3,153 cases filed in Fiscal Year 1977, or 5% of the total class actions filed, are brought by business entities under Rule 23(b)(3); that 144 of the 533 cases of interest, or 27%, are cases of interest brought by business entities under Rule 23(b)(3), and 144 of 216, or 67%, of the total cases brought by business entities are actions under Rule 23(b)(3). Finally, 144 of the previously estimated 500 cases of interest filed under Rule 23(b)(3), or 29% of the total cases of interest filed under Rule 23(b)(3), are filed by business entities.

It is noteworthy that the figure estimated in Table 8 for total Rule 23(b)(3) cases, 838, differs from the estimate obtained independently for the same figure in Table 2, 958, by only 120 cases, or less than 4% of the total cases. This seems to provide some check of the validity and internal consistency of our results.

TABLE 1

Class Actions Decided and Reported by the U. S. District Court Under Subsections of Rule 23(b) by Cases of Interest and Other 1973 to 1976.

Rule 23	Cases of Interest	Other	Total
(b) (1), (b) (2)	1 (6%)	99 (83%)	100 (74%)
(b) (3)	15 (94%)	21 (17%)	36 (26%)
Total	16 (100%)	120 (100%)	136 (100%)

Source: Federal Supplement 401 to 439 accessed through the Justice Department's JURIS system.

Note: The figures within the parentheses are percentages within each column.

TABLE 2

Estimated Class Actions Filed in the U. S. District Court Under Subsections of Rule 23(b) by Cases of Interest and Other in Fiscal Year 1977.

Rule 23	Cases of Interest	Other	Total
(b) (1), (b) (2)	(33)	(2162)	(2195)
(b) (3)	(500)	(458)	(958)
Total	533	2620	3153

( ) Estimated

Source: For nonestimated values, 1977 Annual Report of the Director Administrative Office of the U.S. Courts

TABLE 3

## SELECTED CLASS ACTIONS IN WHICH FEE AWARDS ARE DISCUSSED

	<u>Attorney Hours Expended</u>	<u>Paralegal/ Clerk Hours Expended</u>
1. <u>Lindy Brothers Bldrs., Inc. of Philadelphia v. American R&amp;S Co., 382 F. Supp. 999</u>	Firm 1 4533 Firm 2 1954	1235
2. <u>In Re Gypsum Cases, 386 F. Supp. 959</u>	Firm 1 5677 Firm 2 5266 Others 3837	2893
3. <u>In Re Penn Central Securities Litigation, 416 F. Supp. 907</u>	4796.9	1219.7
4. <u>Entin v. Borg, 412 F. Supp. 508</u>	3417	
5. <u>City of Detroit, et al. v. Grinnell Corp., et al., 1976-1 Trade Cases 60913 CCH</u>	3577	
6. <u>Dorey Corp. v. E.I. du Pont de Nemours &amp; Co., 1977-1 Trade Cases 61313 (1977)</u>	6409	

TABLE 4

ESTIMATED INCREMENTAL ATTORNEY YEARS REQUIRED  
UNDER PROPOSED LEGISLATION

	Incremental Number of Attorneys Added	Total Incremental Attorneys Employed
First Year	260	260
Second Year	260	520
Third Year	260	780
Fourth Year	260	1040
Fifth and Succeeding Years		1040

TABLE 5

MEAN YEARS TO TERMINATION OF CLASS ACTIONS FOR SELECTED DISTRICTS  
INDICATED BY PRINCIPAL CITY FOR FISCAL YEAR 1977

City	Type of Action		
	Securities	Antitrust	Truth-in-Lending
New York City	3.3	2.8	1.9
Philadelphia	1.5	1.4	.8
Los Angeles	1.3	1.8	4.5
Chicago	2.3	*	.75
San Francisco	3.4	1.4	2.2

\* Not representative: A large number of State Attorney General v. General Motors cases were settled in Chicago in Fiscal Year 1977 in a consolidated action.

Source: Administrative Office of the U.S. Courts data on class action terminations for Fiscal Year 1977.

TABLE 6

Class Actions Decided and Reported by the U.S. District Court Under Subsections of Rule 23(b) by Business and Nonbusiness Plaintiffs 1973 to 1976.

Rule 23	Business	Nonbusiness	Total
(b) (1), (b) (2)	3 (33%)	97 (76%)	100 (74%)
(b) (3)	6 (67%)	30 (24%)	36 (26%)
Total	9 (100%)	127 (100%)	136 (100%)

Source: Federal Supplement 401 to 439 accessed through the Justice Departments JURIS system.

Note: The figures within the parentheses are percentages within each column.

TABLE 7

Class Actions Decided and Reported by the U. S. District Court  
by Types of Actions Brought by Business and Nonbusiness Plaintiffs  
1973 to 1976.

	Business	Nonbusiness	Total
Of Interest	6 (67%)	10 (8%)	16 (12%)
Other	3 (33%)	117 (92%)	120 (88%)
Total	9 (100%)	127 (100%)	136 (100%)

Source: Federal Supplement 401 to 439 accessed through the  
Justice Department's JURIS system.

Note: The figures within the parentheses are percentages within  
each column.

TABLE 8

Estimated Class Actions Filed in the U.S. District Courts Under Subsections of Rule 23(b) by Business and Nonbusiness Plaintiffs in Fiscal Year 1977.

Rule 23	Business	Nonbusiness	Total
(b) (1), (b) (2)	(72)	(2243)	(2315)
(b) (3)	(144)	(694)	(838)
Total	(216)	(2937)	3153

( ) Estimated

Source: For nonestimated value, 1977 Annual Report of the Director, Administrative Office of the U. S. Courts.

TABLE 9

Estimated Class Actions Filed in the U.S. District Courts by  
Types of Actions Brought by Business and Nonbusiness Plaintiffs  
Fiscal Year 1977.

	Business	Nonbusiness	Total
Of Interest	(144)	(389)	533
Other	(72)	(2548)	2620
Total	(216)	(2937)	3153

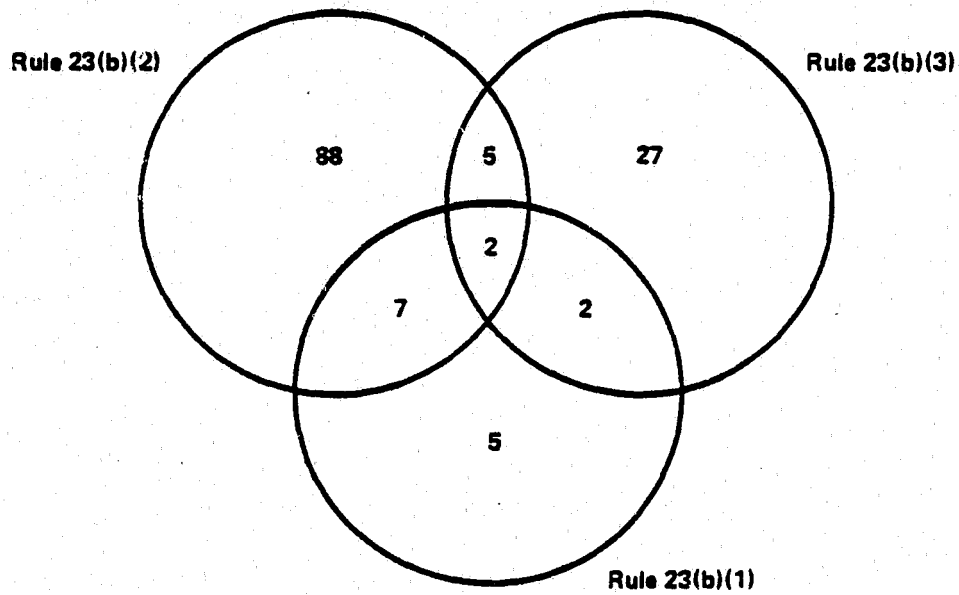
( ) Estimated

Source: For nonestimated values, 1977 Annual Report of the Director,  
Administrative Office of the U. S. Courts

# EXHIBIT 1

## DISTRIBUTION OF RULE 23 CLASS ACTIONS

DERIVED FROM AN EXAMINATION OF FEDERAL SUPPLEMENT 401 TO 439 THROUGH THE JUSTICE DEPARTMENT'S JURIS SYSTEM.



TOTAL CASES = 136

## APPENDIX A

### Distribution of Class Actions

This appendix presents data on class action for the Fiscal Years 1973 to 1977. The data is drawn from the Annual Report of the Director, Administrative Office of the U.S. Courts

#### Total Class Actions Filed by Fiscal Year

<u>YEAR</u>	<u>NUMBER</u>
<u>1973</u>	<u>2654</u>
<u>1974</u>	<u>2717</u>
<u>1975</u>	<u>3061</u>
<u>1976</u>	<u>3584</u>
<u>1977</u>	<u>3153</u>

#### Selected Types of Class Actions Filed by Fiscal Year

	Antitrust	Securities	Truth-in-Lending	Total of Types
1973	157	235	118	510
1974	174	305	114	593
1975	190	258	109	557
1976	191	212	109	512
1977	235	176	122	533

#### Selected Types as Percentage of Total Class Actions by Fiscal Year

1973	19.2
1974	21.8
1975	18.1
1976	14.1
1977	16.9

APPENDIX B

QUESTIONNAIRE ON LAW FIRM ACTIVITIES  
IN CONNECTION WITH RULE 23 CLASS ACTIONS

1. What number of Rule 23(b) (3) class actions has your firm been retained to work on in the last three years?

Type 1 Antitrust \_\_\_\_\_

Type 2 Securities \_\_\_\_\_

Type 3 Truth in Lending \_\_\_\_\_

2. Of the categories in which actions have been brought, what average costs were associated with each of the suits in the above cases in the last three years?

	Type 1	Type 2	Type 3
partners' time in hours	_____	_____	_____
associates' time in hours	_____	_____	_____
paralegals' time in hours	_____	_____	_____
overhead in dollars	_____	_____	_____
court expenses, fees, etc.	_____	_____	_____

(Your responses to questions 3 through 7 are kindly requested, but only to the extent they are readily obtainable from your records.)

3. What is the approximate number of docketed filings by type of action?

Type 1 \_\_\_\_\_; Type 2 \_\_\_\_\_; Type 3 \_\_\_\_\_

4. What is the average expense in terms of partners' time (in hours) incurred per docketed filing?

Type 1 \_\_\_\_\_; Type 2 \_\_\_\_\_; Type 3 \_\_\_\_\_

5. What is the average expense in terms of associates' time (in hours) incurred per docketed filing?

Type 1 \_\_\_\_\_; Type 2 \_\_\_\_\_; Type 3 \_\_\_\_\_

6. What percentage of docketed filings above were denied by the court?

Type 1 \_\_\_\_\_; Type 2 \_\_\_\_\_; Type 3 \_\_\_\_\_

7. What percentage of costs can be attributed to defining and locating the class by type of class action during the entire litigation?

Type 1 \_\_\_\_\_; Type 2 \_\_\_\_\_; Type 3 \_\_\_\_\_

RESOURCE REQUIREMENTS IN DEPARTMENT OF JUSTICE  
OF PROPOSED PUBLIC ACTION

RESOURCE REQUIREMENTS IN DEPARTMENT OF JUSTICE  
OF PROPOSED PUBLIC ACTION

I. INTRODUCTION

The Department of Justice has developed legislation replacing Rule 23(b) (3) of the Federal Rules of Civil Procedure. This legislation provides for two types of class damage procedures: a Public Action and a Class Compensatory Action. Public Actions would be available if at least 200 persons individually are injured not in excess of \$300; there is \$60,000 aggregate in controversy; and the injury arises out of the same course of conduct.

Class damage actions now instituted under Rule 23(b) (3) are predominantly litigated by private attorneys. In the public action the United States would have the option of "assuming" (or taking over) the lawsuit, or referring it to an appropriate State attorney general. Such a decision will entail review of early litigation materials and possible full litigation by the United States of certain matters.

The purpose of this study is to provide an estimate of the potential impact of the proposed change in Rule 23(b) (3) on the staff resources in the Department of Justice. This impact is expressed in terms of the cost of the assumption by the Department of Justice of antitrust, securities and truth-in-lending cases (hereinafter referred to as "cases of interest") where the per claimant damages are \$300 or less. The study does not estimate potential increases in cases brought as public actions, or resource requirements to review actions not assumed. However, as discussed below, the assumption data overstates resources required, which would tend to provide "slack" to offset increases in litigation and time taken to review early materials in cases not assumed.

A second objective of this study is to provide an estimate of the percentage of all Rule 23(b) (3) actions that are brought by business entities, in particular, small business.

In addressing these two areas of interest, this report presents an analysis of several aspects of existing and anticipated conditions:

- . The present structure of Rule 23(b) (3) actions as derived from cases reported at the district court level.
- . Costs of class damage actions currently pursued by law firms in antitrust, securities and truth-in-lending areas pertinent to the manufacture or sale of goods or services.
- . A comparison of the litigation expenses for cases of interest in New York City and Philadelphia and the country as a whole.

- . Costs of Department of Justice now associated with litigation.
- . An analysis of the projected increase in Department of Justice costs for litigating class damage actions of interest.
- . An estimate of the proportion of class actions brought by business entities under Rule 23(b)(3) as a percent of total Rule 23(b)(3) filings; and total Rule 23(b)(3) filings of cases of interest. A similar estimate is made concerning small business entities.

Several sources of data were employed in the present analysis:

- . United States Department of Justice Office for Improvements in the Administration of Justice, Effective Procedural Remedies for Unlawful Conduct Causing Mass Economic Injury, Draft Statute with Comment (1977).
- . The Administrative Office of the United States Courts maintains records of class actions filed and terminated by fiscal year, and its Annual Report of the Director provides a compilation of the number and types of class actions. The Office also maintains data on multidistrict consolidations.
- . The JURIS system of the Department of Justice was accessed to provide data on the distribution of class actions among and within each of the three subsections of Rule 23(b) decided and reported at the district court level.
- . Cost data for the Department of Justice was provided by the Executive Office of the U.S. Attorneys.
- . Data on resource requirements of private firms conducting class damage actions was garnered from questionnaires sent to and completed by 4 private firms which presently specialize in class actions. Concomitantly, interviews with these firms were conducted in an attempt to gain a more thorough understanding of the cost structure of class actions.
- . DuVal, "The Class Action as an Antitrust Enforcement Device: The Chicago Experience (I)," 1 American Bar Foundation Research Journal 1023 (1976).
- . Kennedy, "Securities Class and Derivative Actions in the United States District Court For the Northern District of Texas: An Empirical Study," 14 Houston Law Review 769 (1977).

- Bernstein, Judicial Economy and Class Actions, unpublished (1977). (A study on all class damage actions in the Eastern District of Pennsylvania and the Southern District of New York for Fiscal Years 1971 and 1972. These data were collected by sending blind questionnaires to attorneys and included figures on class size and settlement amounts.)
- Bernstein, unpublished data on settlements for cases in the Eastern District of Pennsylvania and the Southern District of New York.
- Moore, editor of Class Action Reports. Mr. Moore has collected available data on class actions involving securities for the period 1966 to 1976.
- Various District Court decisions reported in Federal Supplement and CCH Trade Cases discussing attorney's fee awards in class actions.

## II. THE PUBLIC ACTION: RANGE OF ESTIMATES OF DEPARTMENT OF JUSTICE RESOURCE REQUIREMENTS

This section estimates the resource requirements and costs of current litigation for selected types of class damage actions and develops an extrapolation of these costs to the United States under varying "assumption" (or take-over) estimates.

The approach used is to first estimate the total number of class action suits filed annually under Rule 23(b) (3) for cases-of-interest. Second, an estimate is made of class actions falling within the public action's reach. Third, varying assumptions are made as to the percentage of these cases likely to be "government cases," i.e., cases to be litigated by the United States or State attorneys general. Fourth, varying assumptions are made as to which of these cases are to be litigated by the United States. Using "law firm" time estimates and government cost estimates for comparable time, the cost to the United States is then estimated.

### A. Number of Class Action Cases Currently Filed Under Rule 23(b) (3)

To estimate the number of class actions filed under Rule 23(b) (3) use was made of two data sources: records of the Administrative Office of the United States Courts and the Department of Justice's JURIS computer-retrieval system.

The Administrative Office of the United States Courts maintains records of class actions filed and terminated by fiscal year. These records simply report a case by its caption, docket number, date of termination and/or filing, and the relevant judicial district. No information on the subsection of Rule 23(b) under which the case was filed is provided. However, the Annual

Report of the Director provides data on the distribution of class actions by substantive area for each fiscal year. The number of subsection (b)(3) cases within these areas must be estimated, since this data cannot be obtained without an examination of the complaints. The JURIS system was used to make this estimation.

The system was accessed for the Federal Supplement numbers 401 to 439, roughly representing the years 1974 through 1976. Each class action was examined to determine its substantive type and the subsection(s) of Rule 23(b) involved. Actions were subdivided into cases of interest and others. The former are likely to generate the bulk of the potential government litigation under the coverage of the public action. The results are presented in Table 1 and Exhibit 1. As noted in Table 1, approximately 94% of all cases of interest were brought under Rule 23(b)(3), while only 17% of other cases were brought under that subsection.

Under the assumption that the percentage of all cases of interest filed under Rule 23(b)(3) is the same (on the average) for Federal Supplement reported decisions and all filings, the JURIS proportions were applied to all cases-of-interest filings.

From the records of the Administrative Office of the United States Courts we know that a total of 3153 class action cases were filed in United States District Courts in FY 1977. From the Annual Report we know that of these, 533 cases were of interest and 2620 were not. Applying the factors presented in Table 1 to these figures we obtain the estimates shown in Table 2. Thus, it is estimated that 500 cases of interest were filed under Rule 23(b)(3) versus 33 under other subsections of the Rule. The same procedure can be followed according to sub-category of cases of interest to estimate their (b)(3) filings. The estimated numbers are 221 for antitrust cases, 164 for securities cases and 115 for truth-in-lending cases. Table 2 also provides an estimate of total Rule 23(b)(3) cases (958).

#### (B) Rule 23(b)(3) Cases Covered by the Public Action

Of the 500 cases of interest estimated, only those with claims less than \$300 per claimant could be litigated by the Department of Justice.<sup>1/</sup> To determine the number of actions in this subset, four sources of data specified above were analyzed: the article by John Kennedy; the study and unpublished data by Roger Bernstein; and the Moore data. (See 3 supra).

Kennedy presents data on 20 derivative-and-class security actions of which 10 have ascertainable class sizes and recoveries.

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<sup>1/</sup>Under the Department of Justice's direction and for the sake of the analysis, we are making the assumption here that recoveries are equal to claims.

Of these, 3 or 30% have average recoveries less than \$300.<sup>2/</sup>

Mr. Bernstein's data from his unpublished study, "Judicial Economy and Class Actions," indicate that in 5 of 21 actions, or 23%, the settlement amount was less than \$300 per claimant.

Mr. Bernstein's second set of unpublished data contained 12 cases of which one, or 8%, contained a settlement of less than \$300 per claimant.

Mr. Moore's 157 cases were examined and data collected on settlement amount and class size where both were present in a case. Often, only the settlement amounts were available. Of the 6 cases in which both class size and settlement amount were available, in 3, or 50%, the settlement amount was less than \$300 per claimant.

By pooling the individual data sets, a single percentage estimate of number of present (b) (3) cases of interest likely to be less than \$300 was derived. Twelve cases out of a total of 49, or approximately 25%, involved average settlements per claimant of less than \$300. This percentage, applied to the 500 cases of interest, estimated above, yields 125 cases assumable by either the United States or the State Attorneys General.

It is possible that some bias exists in the above data sets because of sample selection. Both Moore's and Kennedy's data sets are securities cases while the Bernstein data covered all (b) (3) actions filed. It is possible that security case bias overestimates cases under the \$300 limit since antitrust and truth-in-lending actions may involve a higher percentage of higher claim cases. Further, of course, the data pertains to settlements, which could understate actual injury and lower the percentage of less than \$300 cases. See n.1 supra.

In order to obtain a more accurate estimate of total cases of interest under Rule 23(b) (3), the number of cases filed which were subsequently consolidated was also considered. The Multidistrict Panel of the United States Courts is responsible for the consolidation before a single judge of pre-trial activity in actions filed in the various districts when this will save inter alia court resources. Since many of the consolidations contain class damage aspects and are cases of interest, it is possible that the estimate of 500 cases of interest derived earlier is an overestimate of the number of actions because some of those cases filed may be duplicative. To determine if this is the case, the complaints for all consolidations containing class aspects were examined for consolidations made in Fiscal Years 1975, 1976, and 1977. Complaints which were consolidated

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<sup>2/</sup> Kennedy, p. 820.

were physically examined in all but three consolidations. In the latter, due to the large number of actions, only about one-half of the cases were sampled.<sup>3/</sup>

It is found that 20 consolidations contained class action damage cases of interest. These consolidations contained 256 actions of interest in Fiscal Years 1975, 1976, and 1977. Thus, approximately 85 class damage actions of interest were aggregated into 7 consolidations each year. When this was compared with the number of class actions of interest filed during this period (See Appendix A) it was found that these consolidated actions comprised about 16% of such actions. Under the proposed legislation such duplication would be eliminated for a net reduction of about 78 cases per year. This figure is derived by subtracting the 7 consolidations that would be filed from the 85 individual actions these consolidations replace. This amounts to a 15% net reduction due to consolidation. This factor applied to the 500 (b) (3) cases of interest estimated above results in a reduction of 75 cases. This assumes the same proportion (15%) holds for the sample of 500 cases of interest.

To estimate the impact of consolidations by the Multidistrict Panel upon the number of cases assumable by the Department of Justice, the earlier estimate of 125 cases must be reduced by the percentage of cases consolidated. Thus, when the 125 cases are reduced by 15%, the estimate of cases assumable by the Department of Justice is reduced to 106 cases per year.

#### C. Costs Incurred by Law Firms

To obtain cost data from private firms currently litigating class actions, a questionnaire was prepared and distributed to eight law firms located in the Southern District of New York and the Eastern District of Pennsylvania, henceforth referred to as New York and Philadelphia, respectively (See Appendix B for sample questionnaire). Four of these firms responded and were subsequently interviewed to gain a broader understanding of the costs and structure of class action litigation. The responses requested from the law firms are couched in terms of time costs (hours) rather than dollar values associated with litigating class action suits of the three selected types. This form was selected to yield homogeneous requirement data pertinent to the government situation.

<sup>3/</sup>There is a lag between the filing of complaints and consolidation by the Multidistrict Panel and the length of this period varies greatly within and among consolidations. Because filing data for cases consolidated was not readily at hand, it was assumed that the year of consolidation matched the year of filing.

The estimation of the incremental costs to the Department of Justice from the promulgation of the proposed Rule 23(b)(3) requires an extrapolation of the hour figures provided by private firms and the Department of Justices' unit labor costs into a figure representing the expected Department of Justice litigation cost. For purposes of the present study, it is assumed that the law firms interviewed are representative of those firms litigating class actions. While the firms interviewed can be seen to be involved in more complex litigation partly because of their geographical location, these same firms could be expected to be more efficient because of their specialization and the large number of cases litigated. (This point is further discussed infra.)

Interviews with private attorneys provided figures on resource requirements for litigating Rule 23(b)(3) actions as well as insights into the present structure of class action litigation. While the firms interviewed represented plaintiffs' interests for the most part, several also represented defendants. The resource requirement data derived is standardized and includes hours spent on motions, identification of the class and distribution of the claims. For the firms interviewed, the average antitrust and security class action requires an average input of approximately 4000 to 5000 hours of attorneys' time. The range of estimates was between 1,200 to 40,000 attorney hours. While antitrust actions occasionally require more resources, all interviewees agreed that securities and antitrust actions require essentially the same level of time resources. Truth-in-lending actions, however, only require approximately 60% of the time resources as securities and antitrust actions. Within the various actions there is found a division of time between partners and associates that ranges from an equality of partners' and associates' time to 1 hour of partners' time to 3 hours of associates' time. The average seems to be approximately 1 1/2 hours of associates' time to 1 hour of partners' time.

In an attempt to verify the estimates of hours expended obtained in the interviews, several district court decisions concerning class action fee awards to law firms were accessed. See, e.g., City of Detroit, et al. v. Grinnell Corp., et. al., 1976-1 Trade Cases 60913, rev. 560 F.2d 1093 (1977) and Lindy Brothers Bldrs. Inc. of Phil. v. American R & S San. C., 382 F. Supp. 999 (1974), vac. 540 F.2d 102 (1976). The results are reported in Table 3. The hour figures for the cases cited in Table 3 are generally higher than many of the figures obtained in the interviews. This can be laid to the latter being average figures while the former are for individual cases of greater than normal complexity. Cases involving multiple law firms, such as In Re Gypsum Cases, 386 F. Supp. 959 (1974), may have overstated the

amount of resources necessary for litigation due to multiple overlapping actions. Entin v. Borg 412 F. Supp. 508 (1976), cited in Table 3, is a relatively "small" securities case which presents a figure for hours that is less than the estimates obtained in the interviews and employed in the extrapolation of private hours into Department of Justice costs. Thus, the cases cited in Table 3 seem to lend credence to the average hour figures derived above.

The attorneys indicated that, while the length of time between filing and termination of a class action varies between 1 and 10 years, the average class action is terminated after 4 to 5 years. This reflects the fact that most cases are not settled until shortly before trial, although some are settled rather quickly after filing. Settling a case before trial does not substantially reduce the amount of attorneys' time required. Only the time spent during the trial, typically a few hundred hours, is saved by settling before trial since most trial preparation is usually completed before settling.

The attorneys point out that while the length of time between filing and termination may be higher in some districts due to court congestion (e.g., Southern District of New York), the resources required to litigate a class action remain fairly constant across districts. The attorneys also indicated that less than 10% of the actions in which they were involved went to trial. This is borne out by the United States Courts' data on terminations.

Motion practice is an important part of any class action. Motions encountered in almost all class actions include those to stay pending consolidation, strike part of pleadings, stay pending class action discovery, dismiss, permit certification as a class action and permit discovery. The attorneys indicated that the amount of time devoted to motion practice, as well as the number of motions, depends in large part upon the judge's handling of the case. Those cases handled by an informal judge require less time for motion practice and proceed to trial much faster. Plaintiff's counsel normally files only 15 to 20 motions during the course of a class action since it is to counsel's advantage to minimize the number of motions. This occurs because plaintiff's counsel normally works on a contingency fee basis and will generally find it advantageous to minimize outlays of time and expense.

Defendants' counsel were viewed by the attorneys as those generally making the majority of motions so as to protract the litigation. This puts off the time of a potential judgment and perhaps exploits their superior litigation resources.

Half of the firms did not use paralegals to assist the attorneys. Those that did used about 1 paralegal hour to 4 attorney hours. Other expenses associated with litigating a class

action varied considerably across the sample of firms interviewed. General expense, which includes travel, meals, lodging, etc. ranged from a low of \$10,000 to a high of \$300,000. The Department of Justice would also be incurring such costs. Costs of administration of claims after settlement or trial were estimated at approximately \$30,000, although there have been instances where administration of claims has cost up to one million dollars. Identifying the class and administration of claims is generally handled by banks or accounting firms which examine the stockholder lists in securities actions and the purchase orders in antitrust actions to garner the names and addresses of class members. Under the public action, these expenses will be handled differently and borne by the recovery fund administered by the Administrative Office of the United States Courts. Further, prior to judgment individual proof of claim procedures need not be followed.

Thus, the assumption that the Department of Justice will experience resource requirements equal to the private law firms probably overstates its burden. See also discussion *infra*, pp. 11-12. If it does not, then the Department might anticipate incurring the following resource costs:

- . 4500 attorney hours per security and antitrust action on average
- . 2700 attorney hours per truth-in-lending action on average
- . travel, meals, etc., costing \$30,000 per action.

D. Cost Structure of Department of Justice

Next the cost structure of use of Department of Justice personnel was analyzed. As directed by the Department of Justice, we contacted the Executive Office of the United States Attorneys which provided cost data for their personnel which are as follows:

Senior Attorneys' cost per hour	<u>\$23.57</u>
Junior Attorneys' cost per hour	<u>\$12.12</u>
Support Staff cost per attorney hour (secretarial, administrative and paralegal)	<u>\$ 7.35</u>
Overhead per attorney hour	<u>\$ 7.00.</u>

In the above calculations it is assumed that a senior attorney is a GS-16 and a junior attorney is a GS-12. The hourly figures are calculated by dividing the annual salary per level (plus 9% fringe benefits) by 1960 hours worked per year. While salary is paid for 2080 hours per year it is postulated that 120 hours are consumed by leave (including holidays). Overtime is not accounted for, and this will temper any adjustments needed due to attorneys'

administrative functions, conferences, etc. Other direct costs such as court fees, travel, and transcripts are assumed to be comparable to those experienced by private law firms.

E. Aggregate Cost of All Public Actions Whether or Not Assumed

Before determining the actual United States burden under varying assumptions, it is necessary to calculate the cost of litigating all potential public actions. The United States will only litigate a fraction, with the rest litigated by the States or the private bar.

Using the input requirements developed in the preceding sections the government's labor inputs can be derived for the 106 class actions estimated to be assumable by the U.S. Attorneys (assuming the U.S. Attorneys choose to litigate all of these cases themselves). As noted above, securities and antitrust actions average 4500 hours of attorneys time while truth-in-lending actions average 2700 hours. As discussed previously, however, those sample actions found assumable by the Department of Justice can be seen to be more heavily weighted with securities actions than the population of cases in general. Thus, a figure of 4300 hours per case is employed to approximate the average action cost. This figure reflects the fact that the majority of "government cases" are expected to be security actions while providing an adjustment for a smaller number of expected truth-in-lending actions which consume 2700 hours of attorney time. Using the figure of 106 new cases per year derived previously, we find that the total attorney resource requirements to litigate these actions is  $(106 \times 4300) = 455,800$  attorney hours or about 232 attorney years (based on 1960 hours per year as discussed previously). Of course, the 232 attorney years will be spread out over the length of the actions. Using 4 years as an average length we find that 58 private or public attorneys would be required the first year while a similar number would need to be added for each of the next three years. Thus, the fourth year would find 232 attorneys handling a caseload of 424 cases (106 cases per year). In the fifth year and beyond there would be no increase in attorneys required except to the extent that the number of filings of cases of interest increases.

F. Cost to United States of Assumption of Government Cases

These hour figures can be translated into dollar figures in the following manner. First the number of senior attorneys' hours is calculated using the ratio of 1:1.5 described earlier as the ratio between partners' and associates' time. For the first year this yields 23 senior attorney years or 45,472 senior attorney hours. Applying the hourly rate provided by the Executive Office of the U.S. Attorneys yields a cost of 1.1 million dollars. Applying the same methodology to junior attorneys yields 35 years or 68,600 hours (@ \$12.12) or .83 million dollars. Added to these

figures are overhead and support staff costs of \$7.00 and \$7.35 per attorney hour, respectively, or 1.6 million dollars the first year.

The above cost figures are expressed in current dollars. Since paralegals are included in staff costs they do not have to be added to the above figures. Travel costs, fees, and the like, however, must be added. These will amount to approximately \$3.3 million per year.

It is anticipated that only a fraction of the 106 public actions will be assumed. These are the "State and Federal Government case" public actions. Within the "State and Federal Government cases" are "national" actions to be assumed by the United States. Others, the "regional actions" will be offered to the States.

Tables 4 through 8 depict the varying costs that the Department of Justice could experience as increasing percentages of public action "State and Federal Government cases" are assumed (in 10 percentile increments). Thus, for example, Table 5 depicts the cost to the United States or the States of assuming 20% of the cases. If the Department of Justice chose to litigate all of these cases a total cost of 2.82 million dollars or 46.4 attorney years would be expected. As increasing percentages of these cases are assumed by State attorneys general, the cost to the Department of Justice declines. Tables C-1, C-2, and C-3 in Appendix C, likewise, present costs to the Department of Justice for varying percentage assumptions after the "government case" pools are widened by hypothesis.

#### G. Factors Influencing Workload Estimates

Certain factors which we have not been able to fully quantify will influence the figures provided above.

We begin with factors which are likely to decrease the estimates stated above.

##### Motion Practice

As noted above, some counsel attempt to minimize the number of its motions in order to minimize costs. For those counsel not operating in this manner, the proposed legislation contains a disincentive feature calling for economic charges on counsel after a stated percentage of unsuccessful motions are filed. If effective, these charges will decrease the number of motions filed. This could reduce United States' costs in two ways: (1) The Department of Justice will not make as many motions, and (2) more importantly, it will not have to defend against as many superfluous motions made by defendants' counsel.

In addition, attorney's fee award provisions attempt to avoid unnecessary "churning" of the lawsuit, i.e., unnecessary discovery and legal research.

- Litigation Timetables, Expediting Judicial Rulings, Mandatory Transfer and Consolidation

Work duplication will be influenced by provisions requiring strong judicial stewardship.

- Streamlined Prerequisites

Generally, the present unnecessary collective action prerequisites have been sharply reduced to cut down on unnecessary motion practice and legal research.

- Preliminary Hearing

The court will be able to examine much earlier the reasonable grounds for the public action which will more effectively weed out frivolous suits and save litigation resources.

- Public Recovery

The procedure for calculating recovery should be much less onerous for counsel.

- Administration of Class Settlements

This will be undertaken by the Administrative Office of the United States Courts.

- Interview Biases

The interviews with attorneys for the study yielded a figure of 4 to 5 years as an average length of time for termination of a typical class action. Using termination data for Fiscal Year 1977 from the Administrative Office of the United States Courts a different picture emerges. The mean years required for litigation was derived for cases of interest for several districts containing large cities and the results are presented in Table 8. An inspection of these data reveals that the average action requires approximately one half of the time suggested by the interviewees. This suggests strongly that the firms interviewed are litigating more complex actions than the average actions, which in turn suggests that they may be expending considerably more than the average resources in litigating their actions than the United States might employ. If this is accurate, the expected cost that the Department of Justice might incur might be reduced accordingly.

. Administrative Assistance

It was noted by some of the attorneys interviewed that administrative personnel, including paralegals, can be more efficiently employed in certain phases of class action litigation. It is possible that, through the use of administrative personnel to an equal or greater extent than used by the attorneys interviewed, the Department of Justice can reduce the estimated incremental costs of litigating class damage actions. Attorney's fee award provisions in the public action encourage paralegal use.

Below we discuss certain factors which would tend to increase the estimates stated above.

. Continuity Factor

All of the attorneys interviewed stressed that the Department of Justice would experience difficulties dealing with complex and often protracted litigation in light of the higher turnover rate in Department of Justice staff than experienced by private firms. While an associate remains with a firm approximately 4 to 5 years on the average (and much longer if made a partner), junior attorneys remain with the Department of Justice for a shorter period of time. This will influence the number of hours required to litigate a class action suit.

. Experience and Specialization Factors

Some of the attorneys interviewed noted that they have developed an expertise in dealing with class actions which the Department of Justice will have difficulty in matching. Dealing with a variety of class and other actions the Department of Justice would, in effect, have to establish groups of attorneys working with only class actions to gain the requisite expertise and efficiency of the private firms currently litigating in the area. The private attorneys also noted that expertise of a different type was required in dealing with defense counsel in cases of pecuniary significance. As one explained, "You have to understand and trust your adversary counsel." This relationship, he noted, is only developed over the many years of working together. Lack of expertise in this area by the Department of Justice, interviewees maintain, might lead to more protracted litigation than currently occurs.

. Incentive Factor

The proposed legislation provides an incentive award of up to \$10,000 for the person instituting a public action which

proves successful. While the effect of this provision is unknown, it can be assumed that it will lead to additional actions being filed. If this occurs, the estimated incremental cost of the Department of Justice will increase proportionately.

#### H. Summary

This report presents estimates of the incremental workload and incremental costs that might be experienced by the Department of Justice upon implementation of the public action. A reasonable maximum expectation is that no more than 40% of the 106 public actions will be appropriate for assumption as "state or federal government" public actions. A maximum of 50% of these actions are likely (at the outside) to be assumed by the United States. The resulting high side cost to the United States is likely to be \$2.8 million per year. This estimate may be positively and/or negatively impacted by the above consideration and other factors. It can be varied using the tables provided.

#### III. Small and Large Business Entities as Plaintiffs in Public and Class Compensatory Actions

While the great majority of present class actions are brought by natural persons, in a number of class damage actions the plaintiff is a business entity. A business entity is defined as a corporation, partnership or privately-held company (including sole proprietorships). To see how small and large business entities might be influenced by the legislation the present number and percentage of business initiated Rule 23(b)(3) actions are estimated using two independent methods. In the first method, the actions decided and reported by the district courts for the period 1973 to 1976 were used. A second method was based on inspection of case files for a sample of cases from the Eastern District of Pennsylvania.

##### (A) Cases Brought by Business Entities Estimated from Filings

The distribution of class actions brought by business entities and nonbusiness entities derived from JURIS is presented in Table 9 and Table 10. Table 9 presents the business/nonbusiness distribution of cases depending on the subsections of Rule 23(b). It will be noted that 6 of 9, or 67%, of those cases brought by business entities are filed under Rule 23(b)(3), while 3 of 9 are brought under paragraphs (1) and (2) of Rule 23(b). Similarly, Table 10 presents the business/nonbusiness distribution of cases in the context of actions of interest<sup>4/</sup> and actions not of interest. Of the 9 cases filed by business in the JURIS sample, 6, or 67%, are actions of interest, while 3, or 33%, are actions not of interest. Nonbusiness plaintiffs, however, file 10 of 127

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<sup>4/</sup>See definition supra p. 1.

actions, or 8%, in the "cases of interest" category and 117 of 127 or 92% in the "cases not of interest" category.

The JURIS system was used to estimate the total number of cases filed by business entities in Fiscal Year 1977. An examination of the same JURIS data employed earlier (supra at 3) revealed that of actions brought by business entities, approximately 50 percent can be identified through an inspection of their citations as being brought by business entities (e.g. General Motors Corp. v. Smith). From this, the assumption is made that applying a factor of 2 to those cases determined to have been brought by business entities by citation inspection will provide a reliable estimate of the number of actions filed by business in the period chosen. The estimate of 216 business initiated class actions results.

To estimate the number of actions brought by business entities under Rule 23(b)(3), the proportions exhibited in Table 9 are applied to this number, 216, and the results are presented in Table 11. As noted in Table 11, it is estimated that 144 Rule 23(b)(3) actions were brought by business entities in Fiscal Year 1977. The same procedure is used to estimate the number of suits of interest brought by business entities in Fiscal Year 1977, and these estimates are presented in Table 12. These estimates are based upon the assumption that the proportions of class actions brought by business entities under Rule 23(b)(3) and other subsections of Rule 23(b) are identical for those cases filed and those decided and reported by the District Courts during the selected period. The estimates are also based on the assumption that the proportions of class actions of interest and not of interest brought by business entities are identical for those cases filed and those decided and reported by the District Courts during the selected period.

It is thus estimated that 144 of the 3,153 cases filed in Fiscal Year 1977, or 5% of the total class actions filed, are brought by business entities under Rule 23(b)(3); that 144 of the 533 cases of interest, or 27%, are antitrust, securities, truth-in-lending actions brought by business entities under Rule 23(b)(3), and 144 of 216, or 67%, of the total cases brought by business entities are actions under Rule 23(b)(3). Finally, 144 of the previously estimated 500 cases of interest filed under Rule 23(b)(3), or 29% of the total cases of interest filed under Rule 23(b)(3), are filed by business entities.

It is noteworthy that the figure estimated in Table 8 for total Rule 23(b)(3) cases, 838, differs from the estimate obtained independently for the same figure in Table 2, 958, by only 120 cases, or less than 4% of the total cases. This seems to provide some check of the validity and internal consistency of our results.

(B) Cases Brought by Small and Large Business Entities from Inspection of a Sample of Case Files

To obtain a second, independent estimate of the percentage of cases brought by business entities, especially small business enterprises, a data set of 46 Rule 23(b)(3) class damage actions commenced in the Eastern District of Pennsylvania during the period FY 1971-1972 was analyzed. This data set was originally collected by Bernstein for his study of class actions and judicial economy.<sup>5/</sup> Only 38 of 46 cases are presented here, since 4 were not cases of interest and sufficient data were not obtainable in Philadelphia for the other four actions since they were either transferred to another district by the Multidistrict Panel or their files were not available. In the present analysis, the 38 cases were divided into the following subsets after additional data were collected from the Administrative Office of the United States Courts, an examination of the complaints in Philadelphia, and Dun and Bradstreet:

- . Cases of interest by type of action
- . Cases of interest in which businesses were plaintiffs
- . Cases of interest in which small and large businesses were plaintiffs.

The results of this differentiation are presented in Table 13. It will be noted from Table 13 that 14 of 38 of the cases, or 37%, are cases initiated by business and 12 of the 38, or 31%, are brought by "small businesses". Small businesses are defined as those with less than 100 employees and sales less than 5 million dollars per year.

During the examination of the Moore data on securities class actions<sup>6/</sup> it was determined that, while most securities class actions are not initiated by business entities, many of such actions' class members include business entities which are investors in the securities involved in the litigation. Thus, it may be assumed that the above proportions of business cases underestimate the proportions in which businesses are plaintiffs in these securities cases.

The possible understating in the above estimates is also borne out in the antitrust area. Data provided to the Antitrust & Monopolies Subcommittee of the United States Senate in 1977 by Daniel Berger shows that of the 59 price fixing cases detailed,

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<sup>5/</sup>See citation supra p. 3.

<sup>6/</sup>See citation supra p. 3.

21 involved direct purchasers only, 15 involved indirect purchasers only and 23 involved both direct and indirect purchasers. While 36% (the direct purchase cases) can be seen to have only business plaintiffs, 76% involve direct purchasers to some extent. Thus, in price fixing cases, businesses can be seen to comprise a large percentage of plaintiffs.

In summary, we have derived independent estimates of the percentage of cases of interest brought by business entities ranging from 29% to 37%. It appears that this range provides fairly reliable evidence that approximately one-third of all cases of interest are brought by business entities. Of these actions, 86% are brought by small business entities.

TABLE 1

Class Actions Decided and Reported by the U. S. District Court Under Subsections of Rule 23(b) by Cases of Interest and Other 1973 to 1976.

Rule 23	Cases of Interest	Other	Total
(b) (1), (b) (2)	1 (6%)	99 (83%)	100 (74%)
(b) (3)	15 (94%)	21 (17%)	36 (26%)
Total	16 (100%)	120 (100%)	136 (100%)

Source: Federal Supplement 401 to 439 accessed through the Justice Department's JURIS system.

Note: The figures within the parentheses are percentages within each column. As indicated in Exhibit 1, some actions are filed under alternative subsections of Rule 23(b). In the present analysis, when an action is filed alternatively under Rule 23(b) (3) and another subsection, the action is classified as being filed under Rule 23(b) (3).

TABLE 2

Estimated Class Actions Filed in the U. S. District Court Under Subsections of Rule 23(b) by Cases of Interest and Other in Fiscal Year 1977.

Rule 23	Cases of Interest	Other	Total
(b) (1), (b) (2)	(33)	(2162)	(2195)
(b) (3)	(500)	(458)	(958)
Total	533	2620	3153

( ) Estimated

Source: For nonestimated values, 1977 Annual Report of the Director Administrative Office of the United States Courts.

TABLE 3

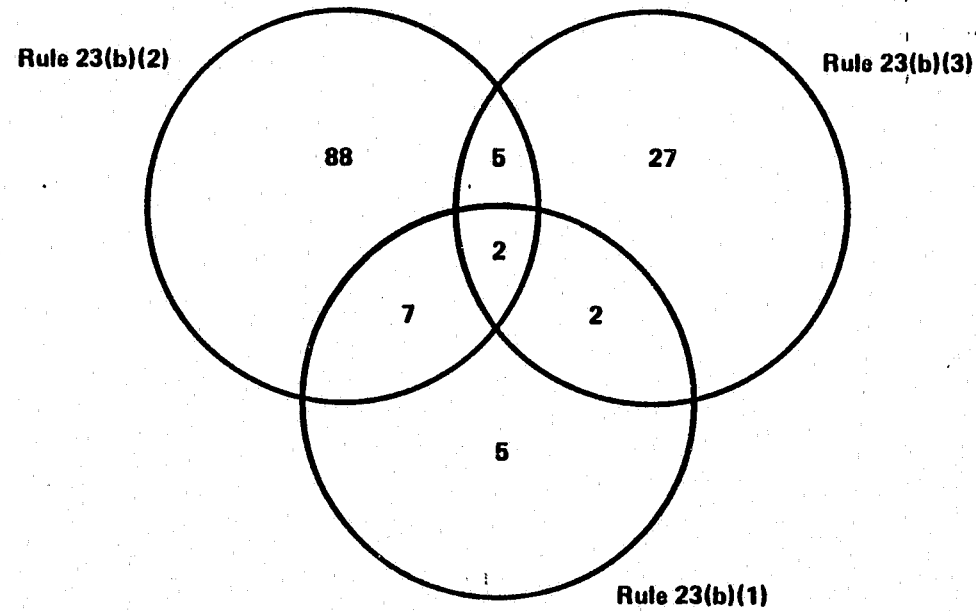
## SELECTED CLASS ACTIONS IN WHICH FEE AWARDS ARE DISCUSSED

	<u>Attorney Hours Expended</u>	<u>Paralegal/ Clerk Hours Expended</u>
1. <u>Lindy Brothers Bldrs., Inc. of Philadelphia v. American R&amp;S Co., 382 F. Supp. 999 (E.D. Pa. 1974), vac. 540 F.2d 102 (3d Cir. 1976)</u>	Firm 1 4533 Firm 2 1954	1235
2. <u>In Re Gypsum Cases, 386 F. Supp. 959 (N.D. Cal. 1974)</u>	Firm 1 5677 Firm 2 5266 Others 3837	2893
3. <u>In Re Penn Central Securities Litigation, 416 F. Supp. 907 (E.D. Pa. 1976) rev. 560 F.2d 1138 (3d Cir. 1977)</u>	4796.9	1219.7
4. <u>Entin v. Borg, 412 F. Supp. 508 (E.D. Pa. 1976)</u>	3417	
5. <u>City of Detroit, et al. v. Grinnell Corp., et al., 1976-1 Trade Cases 60913 CCH, rev. 560 F.2d 1093 (2d Cir. 1977)</u>	3577	
6. <u>Dorey Corp. v. E.I. du Pont de Nemours &amp; Co., 426 F. Supp. 944 (S.D. N.Y. 1977)</u>	6409	

EXHIBIT 1.

DISTRIBUTION OF ALL RULE 23 CLASS ACTIONS

DERIVED FROM AN EXAMINATION OF FEDERAL SUPPLEMENT 401 TO 439 THROUGH THE JUSTICE DEPARTMENT'S JURIS SYSTEM.



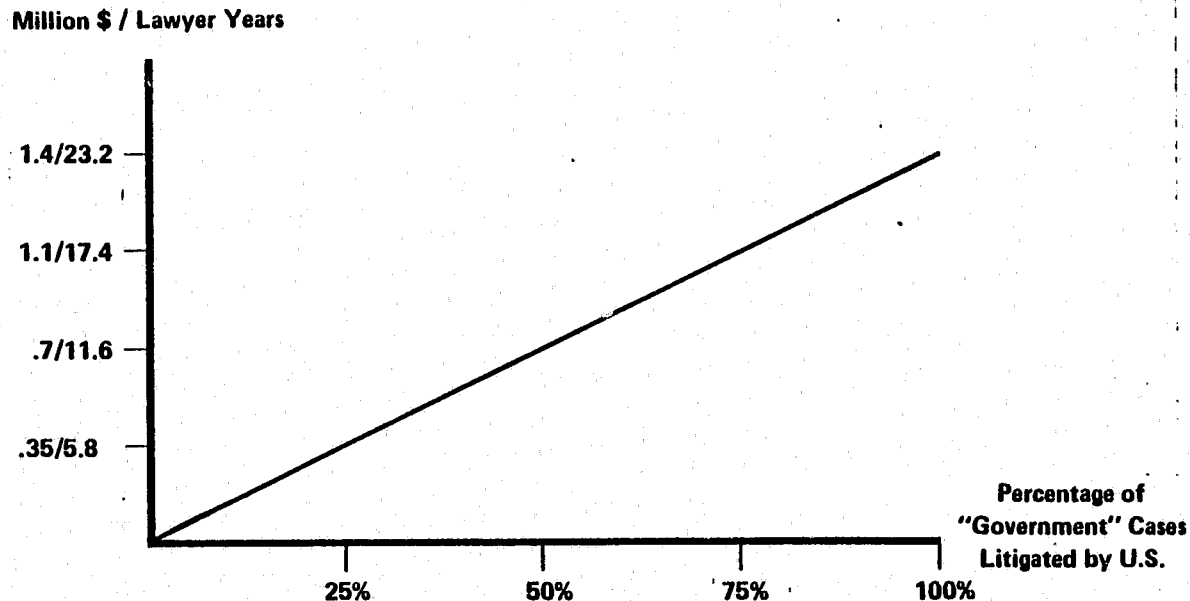
TOTAL CASES = 136

UNITED STATES DISTRICT COURT: LITIGATION OF  
 "GOVERNMENT" PUBLIC ACTIONS  
 ["GOVERNMENT CASES" EQUAL 10% OF PUBLIC ACTIONS] \*

TABLE 4

% of "Gv." Cases Litigated by U.S.	COST TO U.S.*	
	\$ (Millions)	Attorney Years
100	1.41	23.2
90	1.27	20.9
80	1.13	18.6
70	.98	16.2
60	.85	13.9
50	.71	11.6
40	.56	9.3
30	.42	6.9
20	.28	4.6
10	.14	2.3

EXHIBIT 2



\* Date shows cost to the United States of Department of Justice litigation of varying percentages of "Government" public actions (public actions suitable for State or Federal interest, p. 3 text *supra*). Table 4 and Exhibit 2 assume that "Government" public actions equal 10% of public actions. Other tables and Exhibits vary this premise.

Figures represent the average stable per year cost to the United States after three transitional years. See p. 10 text *supra*. Average cost figures derive from private firms currently handling the rough equivalent of such actions.

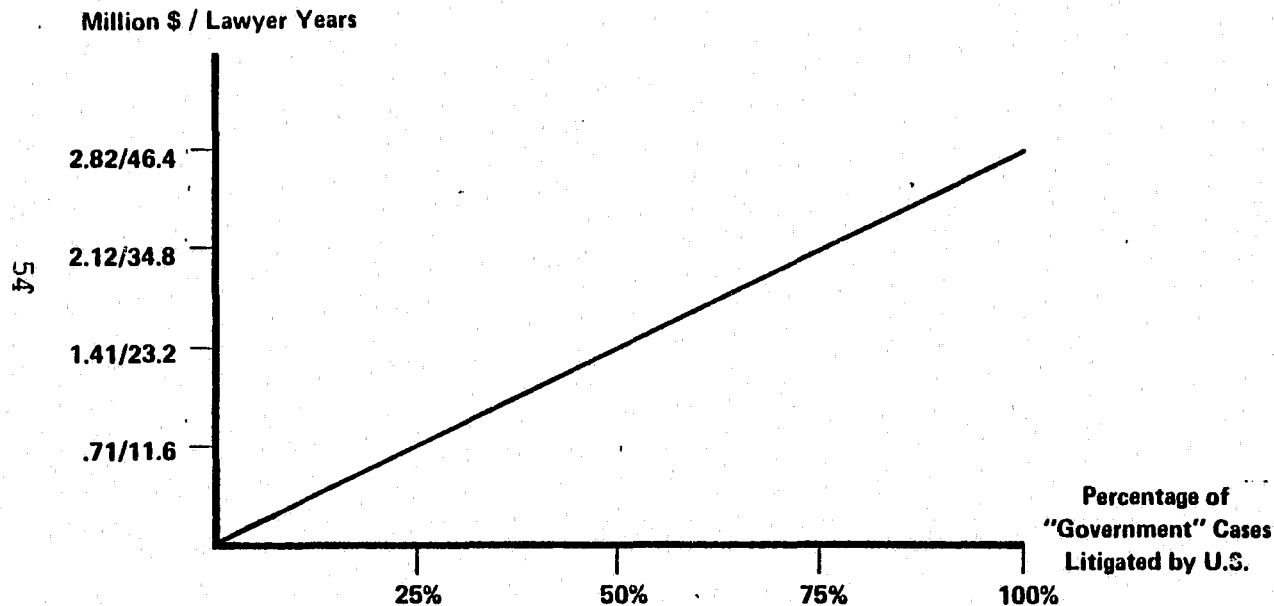
These figures do not include travel costs, fees, etc. which are estimated after a transitional period to be \$3.3 million per year at 100% United States litigation of "Government" cases.

**UNITED STATES COST: LITIGATION OF  
"GOVERNMENT" PUBLIC ACTIONS  
["GOVERNMENT CASES" EQUAL 20% OF PUBLIC ACTIONS] \***

**TABLE 5**

% of "Gv." Cases Litigated by U.S.	COST TO U.S.*	
	\$ (Millions)	Attorney Years
100	2.82	46.4
90	2.54	41.8
80	2.26	37.1
70	1.97	32.5
60	1.68	27.8
50	1.41	23.2
40	1.13	18.6
30	.85	13.9
20	.56	9.3
10	.28	4.6

**EXHIBIT 3**



\* Date shows cost to the United States of Department of Justice litigation of varying percentages of "Government" public actions (public actions suitable for State or Federal interest, p. 3 text supra). Table 5 and Exhibit 3 assume that "Government" public actions equal 20% of public actions. Other tables and Exhibits vary this premise.

Figures represent the average stable per year cost to the United States after three transitional years. See p. 10 text supra. Average cost figures derive from private firms currently handling the rough equivalent of such actions.

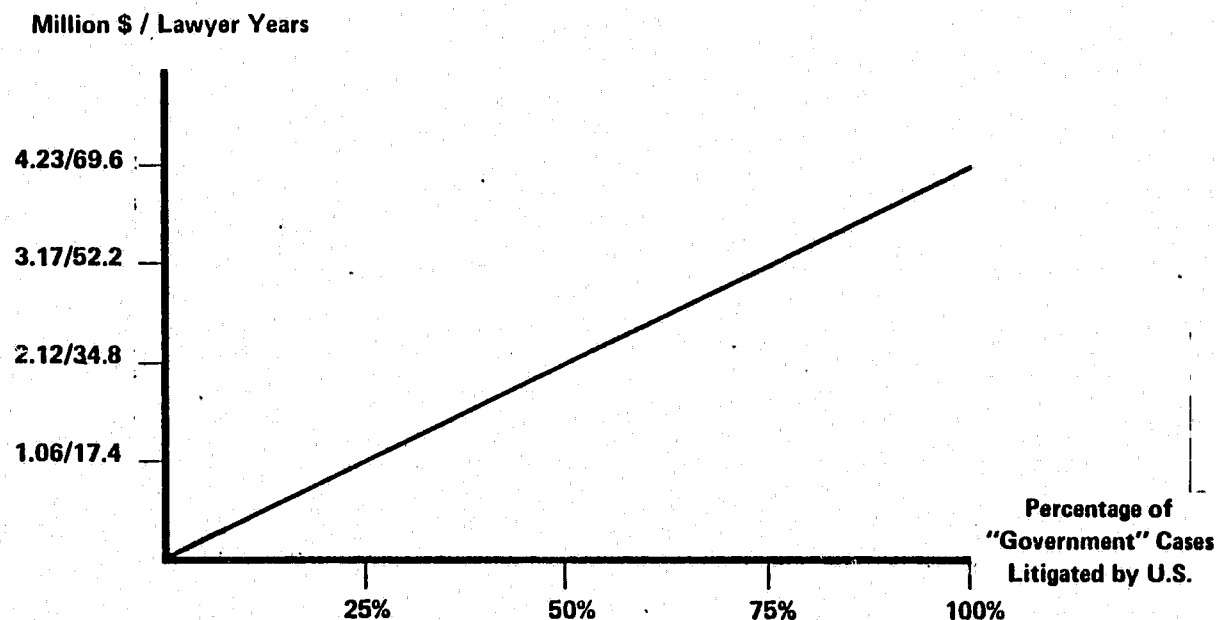
These figures do not include travel costs, fees, etc. which are estimated after a transitional period to be \$3.3 million per year at 100% United States litigation of "Government" cases.

**UNITED STATES COST: LITIGATION OF  
"GOVERNMENT" PUBLIC ACTIONS  
["GOVERNMENT CASES" EQUAL 30% OF PUBLIC ACTIONS] \***

**TABLE 6**

% of "Gv." Cases Litigated by U.S.	COST TO U.S.*	
	\$ (Millions)	Attorney Years
100	4.23	69.6
90	3.81	62.6
80	3.38	55.7
70	2.96	48.7
60	2.54	41.8
50	2.12	34.8
40	1.69	27.8
30	1.27	20.9
20	.85	13.9
10	.42	6.9

**EXHIBIT 4**



\* Date shows cost to the United States of Department of Justice litigation of varying percentages of "Government" public actions (public actions suitable for State or Federal interest, p. 3 text supra). Table 6 and Exhibit 4 assume that "Government" public actions equal 30% of public actions. Other tables and Exhibits vary this premise.

Figures represent the average stable per year cost to the United States after three transitional years. See p. 10 text supra. Average cost figures derive from private firms currently handling the rough equivalent of such actions.

These figures do not include travel costs, fees, etc. which are estimated after a transitional period to be \$3.3 million per year at 100% United States litigation of "Government" cases.

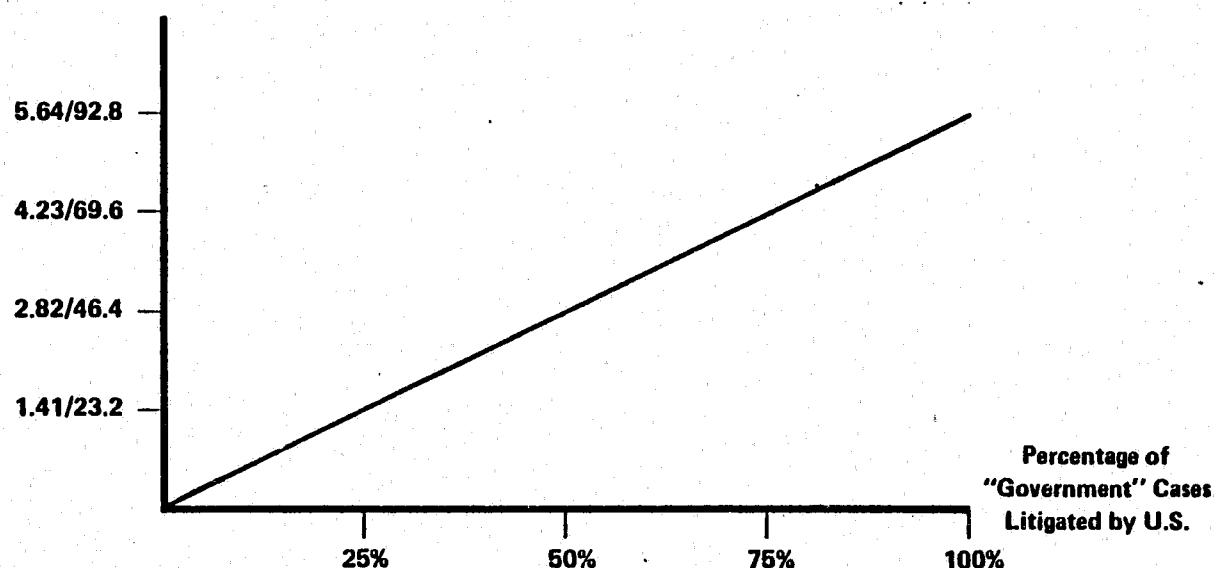
**UNITED STATES COST: LITIGATION OF  
"GOVERNMENT" PUBLIC ACTIONS  
["GOVERNMENT CASES" EQUAL 40% OF PUBLIC ACTIONS] \***

**TABLE 7**

% of "Gv." Cases Litigated by U.S.	COST TO U.S.*	
	\$ (Millions)	Attorney Years
100	5.64	92.8
90	5.08	83.5
80	4.51	74.2
70	3.95	64.9
60	3.38	55.7
50	2.82	46.4
40	2.26	37.1
30	1.69	27.8
20	1.13	18.6
10	.56	9.3

**EXHIBIT 5**

Million \$ / Lawyer Years



\* Data shows cost to the United States of Department of Justice litigation of varying percentages of "Government" public actions (public actions suitable for State or Federal interest, p. 3 text *supra*). Table 7 and Exhibit 5 assume that "Government" public actions equal 40% of public actions. Other tables and Exhibits vary this premise.

Figures represent the average stable per year cost to the United States after three transitional years. See p. 10 text *supra*. Average cost figures derive from private firms currently handling the rough equivalent of such actions.

These figures do not include travel costs, fees, etc. which are estimated after a transitional period to be \$3.3 million per year at 100% United States litigation of "Government" cases.

TABLE 8

MEAN YEARS TO TERMINATION OF CLASS ACTIONS FOR SELECTED DISTRICTS  
INDICATED BY PRINCIPAL CITY FOR FISCAL YEAR 1977

City	Type of Action		
	Securities	Antitrust	Truth-in-Lending
New York City	3.3	2.8	1.9
Philadelphia	1.5	1.4	.8
Los Angeles	1.3	1.8	4.5
Chicago	2.3	*	.75
San Francisco	3.4	1.4	2.2

\* Not representative: A large number of State Attorney General v. General Motors cases were settled in Chicago in Fiscal Year 1977 in a consolidated action.

Source: Administrative Office of the U.S. Courts data on class action terminations for Fiscal Year 1977.

TABLE 9

Class Actions Decided and Reported by the U.S. District Court Under Subsections of Rule 23(b) by Business and Nonbusiness Plaintiffs 1973 to 1976.

Rule 23	Business	Nonbusiness	Total
(b) (1), (b) (2)	3 (33%)	97 (76%)	100 (74%)
(b) (3)	6 (67%)	30 (24%)	36 (26%)
Total	9 (100%)	127 (100%)	136 (100%)

Source: Federal Supplement 401 to 439 accessed through the Justice Department's JURIS system.

Note: The figures within the parentheses are percentages within each column. As indicated in Exhibit 1, some actions are filed under alternative subsections of Rule 23(b). In the present analysis, when an action is filed alternatively under Rule 23(b)(3) and another subsection, the action is classified as being filed under Rule 23(b)(3).

TABLE 10

Class Actions Decided and Reported by the U. S. District Court  
by Types of Actions Brought by Business and Nonbusiness Plaintiffs  
1973 to 1976.

	Business	Nonbusiness	Total
Of Interest	6 (67%)	10 (8%)	16 (12%)
Other	3 (33%)	117 (92%)	120 (88%)
Total	9 (100%)	127 (100%)	136 (100%)

Source: Federal Supplement 401 to 439 accessed through the  
Justice Department's JURIS system.

Note: The figures within the parentheses are percentages within  
each column. As indicated in Exhibit 1, some actions are  
filed under alternative subsections of Rule 23(b). In  
the present analysis, when an action is filed alternatively  
under Rule 23(b)(3) and another subsection, the action is  
classified as being filed under Rule 23(b)(3).

TABLE 11

Estimated Class Actions Filed in the U.S. District Courts Under Subsections of Rule 23(b) by Business and Nonbusiness Plaintiffs in Fiscal Year 1977.

Rule 23	Business	Nonbusiness	Total
(b) (1), (b) (2)	(72)	(2243)	(2315)
(b) (3)	(144)	(694)	(838)
Total	(216)	(2937)	3153

( ) Estimated

Source: For nonestimated value, 1977 Annual Report of the Director, Administrative Office of the United States Courts.

TABLE 12

Estimated Class Actions Filed in the U.S. District Courts by  
Types of Actions Brought by Business and Nonbusiness Plaintiffs  
Fiscal Year 1977.

	Business	Nonbusiness	Total
Of Interest	(144)	(389)	533
Other	(72)	(2548)	2620
Total	(216)	(2937)	3153

( ) Estimated

Source: For nonestimated values, 1977 Annual Report of the Director,  
Administrative Office of the United States Courts.

TABLE 13

## Business Cases of Interest By Type

Type \ Business	Non Business	Business	Small Business
Antitrust	5	10	8
Securities	17	3	3
Truth-in-Lending	2	1	1
Total	24	14	12

## APPENDIX A

### Distribution of Class Actions

This appendix presents data on class action for the Fiscal Years 1973 to 1977. The data is drawn from the Annual Report of the Director, Administrative Office of the United States Courts.

#### Total Class Actions Filed by Fiscal Year

<u>YEAR</u>	<u>NUMBER</u>
<u>1973</u>	<u>2654</u>
<u>1974</u>	<u>2717</u>
<u>1975</u>	<u>3061</u>
<u>1976</u>	<u>3584</u>
<u>1977</u>	<u>3153</u>

#### Selected Types of Class Actions Filed by Fiscal Year

	Antitrust	Securities	Truth-in-Lending	Total of Types
1973	157	235	118	510
1974	174	305	114	593
1975	190	258	109	557
1976	191	212	109	512
1977	235	176	122	533

#### Selected Types as Percentage of Total Class Actions by Fiscal Year

1973	19.2
1974	21.8
1975	18.1
1976	14.1
1977	16.9

## APPENDIX B

### QUESTIONNAIRE ON LAW FIRM ACTIVITIES IN CONNECTION WITH RULE 23 CLASS ACTIONS

1. What number of Rule 23(b) (3) class actions has your firm been retained to work on in the last three years?

Type 1    Antitrust \_\_\_\_\_

Type 2    Securities \_\_\_\_\_

Type 3    Truth in Lending \_\_\_\_\_

2. Of the categories in which actions have been brought, what average costs were associated with each of the suits in the above cases in the last three years?

	Type 1	Type 2	Type 3
partners' time in hours	_____	_____	_____
associates' time in hours	_____	_____	_____
paralegals' time in hours	_____	_____	_____
overhead in dollars	_____	_____	_____
court expenses, fees, etc.	_____	_____	_____

(Your responses to questions 3 through 7 are kindly requested, but only to the extent they are readily obtainable from your records.)

3. What is the approximate number of docketed filings by type of action?

Type 1 \_\_\_\_\_;      Type 2 \_\_\_\_\_;      Type 3 \_\_\_\_\_

4. What is the average expense in terms of partners' time (in hours) incurred per docketed filing?

Type 1 \_\_\_\_\_;      Type 2 \_\_\_\_\_;      Type 3 \_\_\_\_\_

5. What is the average expense in terms of associates' time (in hours) incurred per docketed filing?

Type 1 \_\_\_\_\_;      Type 2 \_\_\_\_\_;      Type 3 \_\_\_\_\_

6. What percentage of docketed filings above were denied by the court?

Type 1 \_\_\_\_\_;      Type 2 \_\_\_\_\_;      Type 3 \_\_\_\_\_

7. What percentage of costs can be attributed to defining and locating the class by type of class action during the entire litigation?

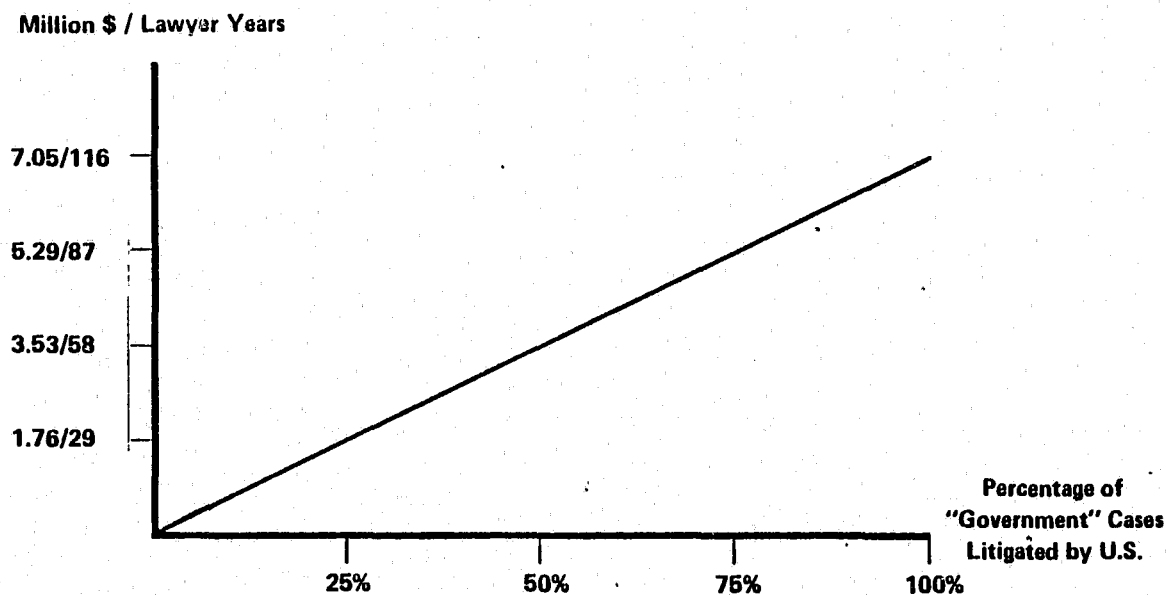
Type 1 \_\_\_\_\_;      Type 2 \_\_\_\_\_;      Type 3 \_\_\_\_\_

**UNITED STATES CO. LITIGATION OF  
"GOVERNMENT" PUBLIC ACTIONS  
["GOVERNMENT CASES" EQUAL 50% OF PUBLIC ACTIONS] \***

**TABLE C-1**

% of "Gv." Cases Litigated by U.S.	COST TO U.S.*	
	\$ (Millions)	Attorney Years
100	7.05	116
90	6.35	104.4
80	5.64	92.8
70	4.94	81.2
60	4.23	69.6
50	3.53	58
40	2.82	46.4
30	2.12	34.8
20	1.41	23.2
10	.71	11.6

**EXHIBIT C-1**



\* Date shows cost to the United States of Department of Justice litigation of varying percentages of "Government" public actions (public actions suitable for State or Federal interest, p. 3 text *supra*). Table C-1 and Exhibit C-1 assume that "Government" public actions equal 50% of public actions. Other tables and Exhibits vary this premise.

Figures represent the average stable per year cost to the United States after three transitional years. See p. 10 text *supra*. Average cost figures derive from private firms currently handling the rough equivalent of such actions.

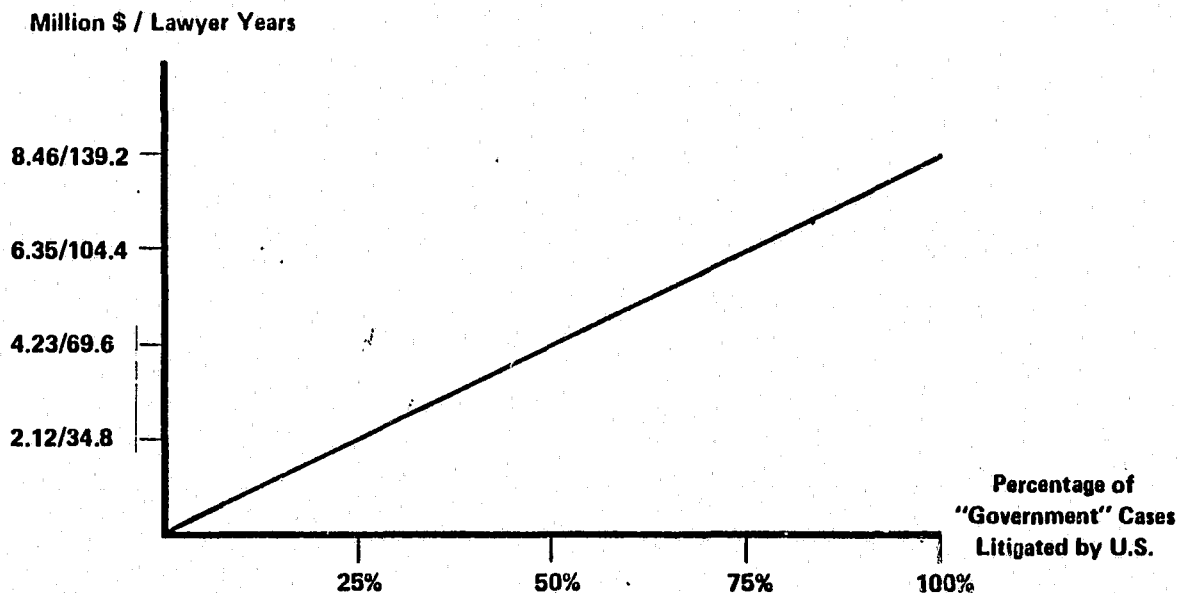
These figures do not include travel costs, fees, etc. which are estimated after a transitional period to be \$3.3 million per year at 100% United States litigation of "Government" cases.

**UNITED STATES COST: LITIGATION OF  
"GOVERNMENT" PUBLIC ACTIONS  
["GOVERNMENT CASES" EQUAL 60% OF PUBLIC ACTIONS] \***

**TABLE C-2**

% of "Gv." Cases Litigated by U.S.	COST TO U.S.*	
	\$ (Millions)	Attorney Years
100	8.46	139.2
90	7.61	125.3
80	6.77	111.4
70	5.92	97.4
60	5.08	83.5
50	4.23	69.6
40	3.38	55.7
30	2.54	41.8
20	1.69	27.8
10	.85	13.9

**EXHIBIT C-2**



\* Data shows cost to the United States of Department of Justice litigation of varying percentages of "Government" public actions (public actions suitable for State or Federal interest, p. 3 text supra). Table C-2 and Exhibit C-2 assume that "Government" public actions equal 60% of public actions. Other tables and Exhibits vary this premise.

Figures represent the average stable per year cost to the United States after three transitional years. See p. 10 text supra. Average cost figures derive from private firms currently handling the rough equivalent of such actions.

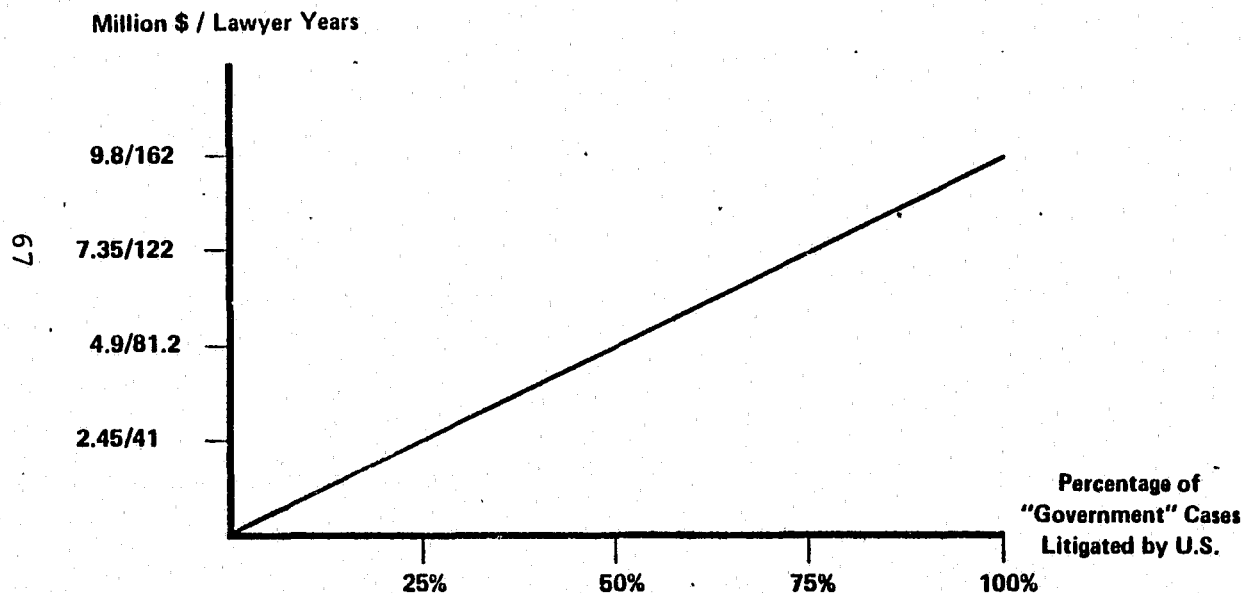
These figures do not include travel costs, fees, etc. which are estimated after a transitional period to be \$3.3 million per year at 100% United States litigation of "Government" cases.

UNITED STATES COURT OF  
 "GOVERNMENT" PUBLIC ACTIONS  
 ["GOVERNMENT CASES" EQUAL 70% OF PUBLIC ACTIONS] \*

TABLE C-3

% of "Gv." Cases Litigated by U.S.	COST TO U.S.*	
	\$ (Millions)	Attorney Years
100	9.80	162
90	8.82	146
80	7.84	130
70	6.96	113
60	5.98	97
50	4.90	81
40	3.92	65
30	2.94	49
20	1.96	32
10	.98	16

EXHIBIT C-3



\* Data shows cost to the United States of Department of Justice litigation of varying percentages of "Government" public actions (public actions suitable for State or Federal interest, p. 3 text supra). Table C-3 and Exhibit C-3 assume that "Government" public actions equal 70% of public actions. Other tables and Exhibits vary this premise.

Figures represent the average stable per year cost to the United States after three transitional years. See p. 10 text supra. Average cost figures derive from private firms currently handling the rough equivalent of such actions.

These figures do not include travel costs, fees, etc. which are estimated after a transitional period to be \$3.3 million per year at 100% United States litigation of "Government" cases.

SMALL BUSINESS REPRESENTATION  
IN FEDERAL ANTITRUST CLASS ACTIONS

## SMALL BUSINESS REPRESENTATION IN FEDERAL ANTITRUST CLASS ACTIONS

### I. INTRODUCTION

This report analyzes the involvement of small businesses as litigants in present Rule 23(b) (3), Fed. R. Civ. P., antitrust class actions for damages in the United States District Courts. Data are presented below on (1) the number of cases in which industrial and nonindustrial small businesses are represented as named litigants on the plaintiff or defendant side; (2) the percentage likelihood that, when a small business is involved as a named litigant in one of these actions, it will be on the plaintiff or defendant side; and (3) the monetary amounts paid to and extracted from small businesses in antitrust actions in which claimants have prevailed and received recoveries of funds.

Two definitions of small business are used.

"Small" small businesses: Business entities which employ less than 100 persons and/or have revenues of less than \$5 million. 1/ Depending on whether employment or revenue data are used, this definition covers 97.6% or 99% of full-time businesses.

"Large industrial" small businesses: Industrial business entities which do not appear on the Fortune 1000 list for 1977. This expanded definition would include all but less than 1% of full-time businesses.

### II. SMALL BUSINESS REPRESENTATION ON THE PLAINTIFF AND DEFENDANT SIDE IN ANTITRUST CLASS ACTIONS

To determine small business' interest in these actions three data sources have been used. The first two sources, Federal Supplement 401-439 (1973-1976) and Federal Rules Decisions (1977-1978), were accessed through the Department of Justice's JURIS computer system. The third source, filings of antitrust class damage actions in the Eastern District of Pennsylvania in 1971 and 1972, was accessed at the United States Courthouse in Philadelphia. 2/ A small business is treated as represented on the plaintiff or defendant side of the antitrust class action whenever it is named alone or in combination with other litigants in the complaint.

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1/ It will be noted that business classifications in this study are uniformly based on 1977 financial data based on Dun & Bradstreet, Million Dollar Directory 1979; Million Dollar Directory Vol. 2 The Middle Market 1979; Standard & Poor, Standard & Poor's Register of Corporations, Directors and Executives 1978. These data were used because a large portion of the decisions were rendered in this approximate time period.

2/ Identified using data from Bernstein, Judicial Economy and Class Actions, 7 J. Legal Stud. 349 (1978).

The results of the study of small business representation are presented in Tables 1 and 2. The data in Table 1 are derived from those in Table 2. In those antitrust class damage actions over an eight-year period in which "small" small businesses are involved, 3/ Table 1 shows that these businesses are likely to be on the plaintiff side 100% of the time. Where the definition of small business is enlarged to include both "small" small businesses and "large industrial" small businesses, 4/ the figures are 94% on the plaintiff side and 6% on the defendant side. Table 2 indicates that either sort of small business was involved on one side or the other in these actions 76% of the time. That is, they were present in 26 of the 34 antitrust class damage actions surveyed. Table 2 presents a breakdown of cases by type of small business definition.

### III. MONETARY AMOUNTS PAID TO OR EXTRACTED FROM SMALL BUSINESSES

To determine the damages paid to or extracted from small businesses in antitrust class actions two sources of data were used. Initially, the population of antitrust actions was obtained from Moore's study of antitrust recoveries in Class Action Reports. 5/ These data were supplemented by claimant records maintained by the attorneys, where necessary.

The Moore antitrust actions were divided into two sets: (1) the ten actions in which the greatest total cash recoveries were obtained; and (2) the remaining smaller actions.

In 5 of the largest 10 actions, attorneys' claimant records were randomly sampled and the "small" small businesses were identified. 6/

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3/ See p. 1 supra.

4/ Id.

5/ 5 Class Action Reports 334 (1978). These data involve recoveries reported between 1966 and present. Moore's sources include reported decisions of the district courts, correspondence with attorneys which litigated these actions, various legal periodicals, and Newberg on Class Actions. The correspondence with attorneys either supplemented reported decisions or provided fee petitions or court orders on individual actions. Information was collected on 33 of 36 actions cited. On the remaining 3 actions, it was not possible to obtain information.

6/ See p. 1 supra. For this phase of the study the "small" small business definition alone is used in Tables 3 and 4, given that (1) the "large industrial" small businesses make up approximately less than 1% of the full-time small businesses, id.; and (2) based on the results of part one, these businesses were not often involved in these actions. There were only 3 cases out of a total of 34 that involved a "large industrial" small business as either a plaintiff or defendant. In this part of the report, 16 of 33 cases can definitely be identified as having no litigants classified as "large industrial" small businesses, while 28 of 33 cases would have few if any such litigants. An added reason for concentrating on "small" small businesses is the relative inability of attorneys contacted to make estimates involving such fine distinctions among small businesses.

Information on the remaining five cases was obtained directly from the attorneys. The small business identification process required use of Standard & Poor's Register of Corporations and, for businesses which remained undefined, telephone calls were made to the businesses, or to their attorneys.

In the second set, attorneys' estimates were the predominant source of small business benefit or exposure data. For one case in this set, Detroit v. Grinnell, records were sampled.

The results are provided in Tables 3 and 4. In the large and small cases combined, "small" small businesses received a total of \$141.1 million dollars. Extracted from these businesses was \$2.3 million. Small business' recoveries therefore exceeded its payments by a factor of over 60.

Table 3, presents results for the set of the 10 largest recoveries. "Small" small businesses made up 39.9% of the claimants in these actions. They received on average 37.8% of the net recoveries. There were no small business defendants in the 10 largest actions and hence no recoveries from small businesses. The aggregate of net recoveries to small business amounted to \$134,756,750.

The results for the second set of antitrust actions are provided in Table 4. "Small" small businesses made up on the average 42.1% of the claimants. They received an average of 41.2% of the net recovery. The aggregate net recovery to "small" small businesses for those cases where information was available was \$5,206,699.

"Small" small businesses in these less-massive cases were defendants on the average 20.7% of the time, and an average of 20.1% of the recoveries was paid by those small businesses. The recoveries from small business cases where information was available, totalled \$2,289,550. Thus, net recoveries paid to these businesses in the smaller size damage actions were 2.3 times as great as those recoveries extracted from them.

Table 1

Antitrust Class Damage Actions  
in the United States District Courts

Small Business Represented on Plaintiff or Defendant Side Alone

Small Business Defined as  
"Small" Small Businesses  
Only\*

Small Business Defined to Include  
Both "Small" and "Large Industrial"  
Small Business\*

% of Time Plaintiff	% of Time Defendant	% of Time Plaintiff	% of Time Defendant
100% (17 Cases)	0% (0 Cases)	94% (18 Cases)	6% (1 Case)

Source: Table 2, infra.

- \* "Small" business is defined as an industrial or nonindustrial entity with less than 100 employees and/or less than \$5 million in revenues. "Large industrial" small businesses are those industrial small businesses not large enough to be included on the Fortune 1000 list for 1977. Industrial small businesses under the first definition are also included in the second.

The data used to compute the percentages excluded actions in which small businesses were involved as both plaintiffs and defendants (8 cases). All these cases involved "small" small businesses on both sides.

Table 2

Antitrust Class Damage Actions in the United States District Courts 1/  
(Total Action Surveyed: 34 over an Eight-Year Period)

Small Business Represented on Plaintiff Side

"Small" Small Businesses 2/

Industrial	2
Nonindustrial	<u>23</u>
Total	25

"Large Industrial" Small Businesses 3/ 2

Small Business Represented on Defendant Side

"Small" Small Businesses 2/

Industrial	0
Nonindustrial	<u>8</u>
Total	8

"Large Industrial" Small Businesses 3/ 1

Total Actions where a "Small" Small Business was Involved: 25

Total Actions where a "Large Industrial" Small Business was Involved: 3

Total Actions where neither "Small" or "Large Industrial" Small Business was Involved: 8

Sources: District Court Cases for Calendar Years 1973-1978.  
(Federal Supplement 401-439 and Federal Rules Decisions  
73-79): Accessed on Department of Justice's JURIS System.

Antitrust Class Damage Actions filed in Eastern District  
of Pennsylvania Fiscal Years 1971 and 1972.

1/ Data includes cases where small businesses are on both sides.  
Table 1 excludes these cases.

Where a litigant's size could not be determined from Standard and Poor's or Dun & Bradstreet data, the counsel or business was telephoned to ascertain its size. There were a total of 34 anti-trust actions surveyed of which 26 involved either "small" or "large industrial" small businesses. Of these 26 actions, 25 had small business plaintiffs, 9 had small business defendants and 8

Table 2

(Continued)

had small businesses as both plaintiffs and defendants. For a description of the latter case, see Table 1.

There were 6 actions with a named business litigant of indeterminate size (5 of these actions involved a defendant of indeterminate size). These latter actions were excluded from the above data.

- 2/ Cases in which one or more small businesses are involved where small business is defined as an entity with less than 100 employees and/or less than \$5 million in revenues.
- 3/ Cases in which one or more small industrial businesses are involved, where small business is defined as an entity not included in the Fortune 1000 list for 1977.

Table 3  
Estimates of Small Business Recoveries or Payment in the 10 Largest Antitrust Class Damage Actions

Case Name*	Total Cash Recovery From Defendants	Net Cash Recovery to Claimants	Plaintiffs			Defendants		
			Small Businesses as Percent of Claimants	Percentage of Net Recovery to Small Businesses	Net Cash Recovery to Small Businesses	Small Businesses as Percent of Defendants	Percentage of Recovery Funds From Small Businesses	Total Cash Recovery from Small Businesses
1. In re Antibiotics Antitrust Litigation	219,094,727	177,213,293	3	32	56,708,254	0	0	0
2. In re Gypsum Cases 1/	75,000,000	65,737,445	82	63	41,414,590	0	0	0
3. In re Plumbing Fixtures Antitrust Litigation	35,300,000	32,514,764	21	7	2,276,034	0	0	0
4. Philadelphia v. American Oil Co.	29,875,000	23,689,013	35	22	5,211,583	0	0	0
5. Philadelphia Electric Co. v. Anaconda American Brass Co.	21,175,000	16,681,250	15	5	834,063	0	0	0
6. In re Master Key Antitrust Litigation	21,000,000	16,750,795	10	15	2,512,619	0	0	0
7. Dorey Corp. v. E.I. duPont de Nemours & Co.	16,700,000	15,522,592	29	4	620,904	0	0	0
8. Alexander v. National Football League 1/ 2/	13,675,000	13,503,209	100	100	13,503,209	0	0	0
9. Labbe v. Wm. Wrigley Jr. Co. 1/	13,580,000	8,725,163	100	100	8,725,163	0	0	0
10. In re Ampicillin Antitrust Litigation	11,000,000	9,826,753	4	30	2,948,026	0	0	0
TOTALS/ (Average Percentages)	456,399,727	380,164,277	(39.9)	(37.8)	134,756,750	0	0	0

\* Case Citations provided in Appendix A.

Sources: Recovery data derived from 5 Class Action Reports 334 (1978)

Small business data derived from sampling attorneys' claimant records and from attorneys' estimates.

1/ Recovery figures do not include recovery in the form of unquantified prospective relief.

2/ In Alexander v. National Football League (number 8 above) the claimants, although individuals, are classified as small businesses. If these claimants were classified as individuals the claimant percentage and recovery figures would change, e.g., the total net amount recovered would be reduced by \$13,503,209.

Table 4

## Estimate of Small Business Recoveries or Payments in Smaller Antitrust Class Damage Actions

Case Name	Total Cash Recovery From Defendants	Net Cash Recovery to Claimants	Plaintiffs		Net Cash Recovery to Small Businesses	Defendants		Total Cash Recovery From Small Businesses
			Small Businesses as Percent of Claimants	Percentage of Net Recovery to Small Businesses		Small Businesses as Percent of Defendants	Percentage of Recovery Funds From Small Businesses	
1. In re Arizona Bakery Products Litigation	6,000,000	4,621,878	1	40	1,048,751	0	0	0
2. Barr v. WUI-TAS	336,160	255,160	95	95	242,402	0	0	0
3. Butowsky v. Prince George's County Bd. of Realtors, Inc. 1/	305,000	178,122	0	0	0	0	0	0
4. In re Cast Iron Pipe Cases	1,700,000	1,372,921	0	0	0	0	0	0
5. In re Clark Oil & Refining Corp. Antitrust Litigation 1/	1,900,000	1,354,103	100	100	1,354,103	0	0	0
6. Colson v. Hilton Hotels Corp.	6,928,008	5,945,679	N.A. 2/	N.A.	N.A.	0	0	0
7. Dennis v. Saks & Co.	5,211,000	4,417,752	0	0	0	0	0	0
8. Detroit v. Grinnell Corp.	10,000,000	9,586,155	40	9	862,754	0	0	0
9. Forbes v. Greater Minneapolis Area Bd. of Realtors 1/	635,000	0	5	5	0	23	23	146,050
10. G & K Foods, Inc. v. Kentucky Fried Chicken	258,923	0	100	100	0	0	0	0
11. Goldfarb v. Virginia State Bar 1/	226,000	163,869	0	0	0	100	100	226,000
12. Hemley v. American Honda Motor Co.	6,600,000	5,763,863	1	N.A.	N.A.	0	0	0
13. Hill v. Art Rice Realty Co. 1/	52,500	0	0	0	0	100	100	52,500
14. In re International House of Pancakes Franchise Litigation 1/	1,825,000	500,000	100	100	500,000	0	0	0
15. James v. Phoenix Real Estate Bd., Inc.	65,000	0	0	0	0	100	100	65,000
16. Liebman v. J.W. Peterson Coal & Oil Co. 1/	1,800,000	1,450,307	94	75	1,087,730	100	100	1,800,000
17. Mazur v. Behrens 1/	347,287	210,001	0	0	0	33	N.A.	N.A.
18. Merola v. Atlantic Richfield Co. 1/	42,336	0	100	100	0	0	0	0

**CONTINUED**

**1 OF 2**

Table 4 (Cont.)

Case Name	Total Cash Recovery From Defendants	Net Cash Recovery to Claimants	Plaintiffs			Defendants		
			Small Businesses as Percent of Claimants	Percentage of Net Recovery to Small Businesses	Net Cash Recovery to Small Businesses	Small Businesses as Percent of Defendants	Percentage of Recovery Funds From Small Businesses	Total Cash Recovery From Small Businesses
19. New York v. Darling-Deleware, Inc.	5,100,000	3,574,662	90	N.A.	N.A.	N.A.	N.A.	N.A.
20. Nurserymen's Exchange, Inc. v. Yoder Bros., Inc. <sup>1/</sup>	112,438	87,438	100	100	87,438	0	0	0
21. Philadelphia v. General Host Co.	475,000	344,101	0	0	0	0	0	0
22. School District of Philadelphia v. Harper & Row Publishers, Inc. <sup>1/</sup>	8,929,888	7,352,373	0	0	0	0	0	0
23. Sunrise Toyota, Ltd. v. Toyota Motor Co. <sup>1/</sup>	810,000	0	100	100	0	0	0	0
TOTALS/(Average Percentages)	59,659,540	47,178,384	(42.1)	(41.2)	5,983,178 <sup>3/</sup>	(20.7)	(20.1)	2,289,550 <sup>3/</sup>

\* Case Citations provided in Appendix B.

Sources: Recovery data derived from 5 Class Action Reports 334 (1978)

Small business data derived from attorneys' estimates and sampling attorneys' claimant records.

<sup>1/</sup> Recovery figures do not include recovery in the form of unquantified prospective relief.

<sup>2/</sup> N.A. indicates not available.

<sup>3/</sup> This figure is simply an aggregate of the available columnar figures.

APPENDIX A  
CASE CITATIONS FOR THE TEN LARGEST ANTITRUST  
ACTIONS IN TERMS OF RECOVERY AMOUNTS

1. In Re Antibiotics Antitrust Litigation

A. GLOBAL SETTLEMENT

- i. CONSUMER/GOVERNMENT ENTITIES CLASSES-  
West Virginia v. Chas. Pfizer & Co.,  
Inc., 3 Newburg on Class Actions  
1586-1656 (Report of Special Master);  
1973 Trade Cases Par. 74,749  
Par. 74,827 (S.D.N.Y.) Philadelphia v.  
Chas. Pfizer & Co., Inc., 345 F. Supp.  
454 (S.D.N.Y. 1972)

- ii. WHOLESALE/RETAILER CLASSES-  
Alpine Pharmacy v. Chas. Pfizer  
& Co., Inc., 1973 Trade Cases  
Par. 74,350 (S.D.N.Y.), aff'd in  
part & remanded, 481 F.2d 1045  
(2d Cir. 1-973), 1973 Trade Cases  
Par. 74,826 (S.D.N.Y.)

- B. PRIVATE HOSPITAL/BLUE CROSS CLASSES-  
Hartford Hospital v. Chas. Pfizer &  
Co., Inc., 1972 Trade Cases Par. 74,112  
(S.D.N.Y.)

- C. "NONSETTLING" CONSUMER/GOVERNMENT ENTITIES CLASSES-  
410 F. Supp. 706 (D. Minn. 1975)

D. FARM CASES

- i. FARMER/VETERINARIAN CLASSES-  
410 F. Supp. 680,704 (D. Minn.  
1975)
- ii. WHOLESALE CLASS-  
410 F. Supp. 722 (D. Minn. 1975)

2. In re Gypsum Cases, 386 F. Supp. 959  
(N.D. Cal. 1974)
3. In re Plumbing Fixtures Antitrust Litigation
  - A. WHOLESALE CLASS-  
Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp., No. 41,773 (E.D. Pa. Dec. 7, 1970)
  - B. CONTRACTOR CLASS-  
Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp., 322 F. Supp. 834 (E.D. Pa. 1971),  
aff'd as modified sub nom. Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971)
  - C. GOVERNMENT ENTITY CLASS-  
Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp., No. 41,774 (May & Nov. 19, 1971)
  - D. BUILDER-OWNER CLASS-  
Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.,  
487 F.2d 161 (3d Cir. 1973), on remand 382 F. Supp. 999 (E.D. Pa. 1974) vacated & remanded, 540 F.2d 102 (3rd Cir. 1976). (en banc)
4. Philadelphia v. American Oil Co., No. 647-68  
(D.N.J. June 22, 1973)
5. Philadelphia Elec. Co. v. Anaconda American Brass Co.,  
47 F.R.D. 557 (E.D. Pa. 1969)
6. In re Master Key Antitrust Litigation,  
1978-1 Trade Cases Par. 61,887 (D. Conn.)
7. Dorey Corp. v. E.I. duPont de Nemours & Co.,  
1977-1 Trade Cases Par. 61,313 (S.D.N.Y.)

8. Alexander v. National Football League,  
1977-2 Trade Cases Par. 61,730 (D. Minn.)
9. Labbee v. Wm. Wrigley Jr. Co.,  
719 BNA Antitrust & Trade  
Reg. Rep. A-29 (W.D. Wash. 1975)
10. In re Ampicillin Antitrust Litigation,  
MDL No. 50 (D.D.C. Nov. 22, 1978)

APPENDIX B

CASE CITATIONS FOR THE SMALLER  
ANTITRUST ACTIONS

1. In re Arizona Bakery Products Litigation,  
No. 74-208-A-PHX (D. Ariz. Oct. 28, 1976)
2. Barr v. WUI-TAS, 1976-1  
Trade Cases Par. 60,725 (S.D.N.Y.)
3. Butowsky v. Prince George's County Bd. of Realtors, Inc.,  
No. 71-1086 (D. Md. Nov. 10, 1975)
4. In re Cast Iron Pipe Cases,  
No. 71-516 (N.D. Ala. 1973)
5. In re Clark Oil & Refining Corp. Antitrust Litigation,  
422 F. Supp. 503 (E.D. Wis. 1976)
6. Colson v. Hilton Hotels Corp.,  
59 F.R.D. 324 (N.D. Ill. 1972)
7. Dennis v. Saks & Co.,  
1978-1 Trade Cases Par. 61,871  
(S.D.N.Y.)
8. Detroit v. Grinnell Corp.,  
1976-1 Trade Cases Par. 60,913 (S.D.N.Y.)  
rev'd, 560 F.2d 1093 (2d Cir. 1977), 1978-1  
Trade Cases Par. 61,111 (2d Cir.)
9. Forbes v. Greater Minneapolis Area Bd. of Realtors,  
No. 72-569 (D. Minn. Aug. 8, 1975)

10. G & K Foods, Inc. v. Kentucky Fried Chicken,  
No. 71-5 (M.D. Fla. Dec. 13, 1972)
11. Goldfarb v. Virginia State Bar,  
No. 75-72 (E.D. Va. 1977)
12. Hemley v. American Honda Motor Co.,  
No. 72-4127 (S.D.N.Y. Sept. 28, 1976)
13. Hill v. Art Rice Realty Co.,  
66 F.R.D. 449 (N.D. Ala. 1974)
14. In re International House of Pancakes Franchise Litigation,  
1974 Trade Cases Par. 74,932 (W.D. Mo.), rev'd & remanded  
in part sub nom. Grunin v. International House of Pancakes,  
513 F.2d 114 (8th Cir. 1975)
15. James v. Phoenix Real Estate Bd., Inc.,  
No. 73-559 (D. Ariz. 1975)
16. Liebman v. J. W. Peterson Coal & Oil Co.,  
63 F.R.D. 684 (N.D. Ill. 1974)
17. Mazur v. Behrens,  
1974 Trade Cases Par. 75,213 (N.D. Ill.)
18. Merola v. Atlantic Richfield Co.,  
515 F.2d 165 (3d Cir. 1975) No. 71-1020  
(W.D. Pa. May 30, 1975)
19. New York v. Darling-Delaware, Inc.,  
440 F.Supp. 1132, (S.D.N.Y. 1977)
20. Nurserymen's Exchange, Inc. v. Yoder Bros., Inc.,  
No. 70-1510, (N.D. Cal. Dec. 17, 1971)
21. Philadelphia v. General Host Co.,  
No. 68-704 (E.D. Pa. Nov. 24, 1970)

22. School District of Philadelphia v. Harper & Row Publishers, Inc.,  
No. 68-2144 (N.D. Ill. Sept. 28, 1970), sub nom. Illinois v.  
Harper & Row Publishers, Inc., 55 F.R.D. 221 (N.D. Ill. 1972)  
see also DuVal,  
"The Class Action as an Antitrust Enforcement Device-II,"  
1976 A.B.F. Res. J. 1273, 1311.
23. Sunrise Toyota, Ltd. v. Toyota Motor Co.,  
1973 Trade Cases Par. 74,398 (S.D.N.Y.)

ESTIMATION OF ESCHEAT FUNDS:  
PROPOSED PUBLIC ACTION (H.R. 5103)

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Finally, we wish to thank Stephen Berry of the Department of Justice for his understanding of the many difficulties encountered in this research and his many helpful comments.

## I. INTRODUCTION

This study presents estimates of the amount of funds which may escheat\* to the United States Treasury annually under the proposed public action (H.R. 5103). The study employs data obtained from attorneys who litigated class actions. Where a fund was sufficient to pay estimated damages claimed, cases were utilized that distributed the funds according to damages estimated. Cases were not used which ensured exhaustion of the fund by dividing it prorata according to the relative sizes of claims. The latter sometimes results in recoveries in excess of damages estimated. Also, the study assumes that all class actions litigated by the federal and State governments under the public action which result in settlements will have settlement agreements which will provide some mechanism to determine damages, and there will be no prorata distribution. Depending on the assumptions made, it is estimated that between \$10 million and \$75 million will escheat to the U.S. Treasury each year after promulgation of the proposed rule (\$5 million to \$59 million from antitrust actions and \$5 million to \$15 million from securities actions). Under H.R. 5103 these funds would be made available to finance subsequent private and public enforcement efforts.

The analysis upon which these estimates are based is presented in the following order:

- . Overview of methodology employed in estimating funds escheating to U.S. Treasury
- . Data collection
- . Estimation of percentage of funds disbursed in previous class actions
- . Estimation of average total recovery
- . Estimation of win rate in class actions of interest
- . Estimation of funds escheating to U.S. Treasury

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\*"Escheat" signifies a reversion of property to the state in the absence of a claimant.

## II. OVERVIEW OF METHODOLOGY EMPLOYED

The method employed to estimate the amount of funds which are likely to escheat to the U.S. Treasury (and thus be available for enforcement) is based on information concerning actual disbursement to claimants, amounts of total recovery in class actions, and win rates in class damage actions. Estimates of these three parameters are combined with the estimate of the annual number of cases assumable by the Department of Justice or the states derived in a previous Arthur Young & Company report to produce the estimates of escheat funds. The formula employed in the estimation procedure is as follows:

$$E = (1 - FD) \times (TR) \times (WR) \times (CA)$$

where, E = Funds estimated to escheat per year

FD = Average percentage of funds actually disbursed

TR = Average total recovery disbursed to small claimants  
(claims less than \$300).

WR = Win rate

CA = Cases assumed

The number of cases assumed is estimated to be 106 per year. \*/

This level of cases is expected to occur in four years after a transitional period. It must also be noted that given the nature of collective actions, recoveries and distributions will not occur until a considerable number of years after assumption. Only after a distribution has occurred will escheat occur since by definition funds only escheat to the government when no one is able to claim a superior right to those funds. As noted in Section VII below, we have also estimated separate amounts for antitrust and securities actions.

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\*/Estimated in a previous study for the Department of Justice by Arthur Young & Company, Resource Requirements in Department of Justice of Proposed Public Action, April 1978.

### III. COLLECTION OF DATA ON CLASS ACTION DISBURSEMENTS

In order to determine two elements in the formula given in Section II (percent of funds disbursed and average total recovery), data on cases where a settlement occurred and funds distributed were collected. Cases were obtained from:

- . Antitrust cases identified in Class Action Reports (Vol. 5, No. 4) in which a settlement was achieved and funds recovered by the claimants (34 cases)
- . A systematic random sampling of half of the securities actions from the total of those listed in Class Action Reports (106) in which a settlement was achieved (53 cases)
- . Cases suggested by the Department of Justice and Beverly Moore, Editor of Class Action Reports (approx. 15 cases).

To estimate the portion of funds disbursed to claimants only those cases were selected from the above sources which did not rely on prorata distribution of funds. Non-prorata distributions are defined as those where amounts received by claimants are independent of the number of claims filed. Non-prorated distributions were desired, since when a prorata distribution occurs <sup>\*</sup>/, all funds (net of fees and costs) are disbursed leaving no possibility for escheat under the new Rule.

In the antitrust cases and fifty-three securities actions, lawyers for the plaintiff were contacted and questioned concerning settlement amounts and whether prorating occurred. If their cases were non-prorated they were asked to estimate funds remaining after disbursements were made. For cases suggested by the Department of Justice, information was obtained from reported opinions.

If the settlements were distributed on a prorata basis, the lawyers were asked if they could estimate funds that would have remained if claimants had received amounts for damages claimed. Most lawyers were unable to provide such an estimate. In two cases it was learned that had non-prorating occurred, the settlement fund would have been insufficient to cover all claims.

Historically, cases with non-prorata distributions are extremely rare for many reasons. Hence, to estimate the percent of funds

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<sup>\*</sup>/A prorata distribution is defined as one where claims are paid on a proportionate basis. That is, those claims which are submitted and verified share proportionately in the net recovery (gross recovery minus lawyers' fees and costs) and the fund is entirely exhausted.

disbursed, prorated cases were employed if it was possible to "reconstruct" what percent of funds might have been disbursed had the settlement fund been non-prorated.

To develop the average total recovery (TR) figures for securities and antitrust it was necessary to obtain data on settlement amounts and number of claimants for cases in both areas. Hence, lawyers were also questioned on these two points, even if the case was prorated. However, in many cases, the lawyers could not recall or were unwilling to provide the information requested.

Total recovery figures and number of claimants were obtained for approximately forty cases. However, in estimating the average total recovery, only cases where the average claim was less than \$700 were used. This criterion, developed by the Department of Justice, was used to focus on those types of cases (in terms of settlement amounts and number of claimants) where government involvement would be possible because of the presence of large numbers of small claimants. Hence, seventeen cases were used to estimate average total recovery, all having an average claim less than \$700.

In estimating the percentage of funds disbursed and the average total recovery, the largest possible sample of cases was sought. Since the vast majority of cases considered could not be used (primarily because of prorating and lack of information, especially about successive distributions), a random sample from that universe would not be useful. Thus, after the initial round of data collection was completed, all cases found suitable for purposes of estimation were included in the sample. Although the resulting sample is in a sense a "total" sample of eligible cases, it is not clear how it represents the universe of relevant cases. Therefore, it has not been possible to attach probabilities as to how well this set of cases will approximate the mix and character of cases actually litigated under the public action.

#### IV. ESTIMATION OF PERCENTAGE OF FUNDS TO BE DISBURSED IN PUBLIC ACTIONS

Data on gross total settlement amounts, amount of funds disbursed, and percent of total recovery disbursed in antitrust cases selected are presented in Table 1. Table 2 presents identical data for securities actions. It must be noted that four of all the cases in Tables 1 and 2 contained prorata clauses, but it was possible to estimate the amount of money which might have reverted had there been no prorata clause. Estimation of this amount is based on published data concerning disbursements before prorating or on conversations with plaintiff's attorneys.

In addition to the sources in Section III, securities data were obtained from the Delaware Trust Company, which serves as disbursement agent for law firms which have successfully litigated security actions. The Delaware Trust data are presented in Table 3 and the raw data are presented in Appendix A. Although these securities cases had prorata distributions, it was determined that a probable indicator of percentage of funds disbursed under a non-prorated settlement agreement would be the percentage of claimants paid from the potential class. This assumes that the propensity for large and small claimants to come forward is approximately equal and that the settlement fund would have been sufficient to cover claims for all class members. The number of class members may be understated, as some mailings may have been to large brokerage firms. For example, in a typical securities action a significant proportion of stock is held by brokerage firms for their customers in "street name."

To estimate the percentage of funds to be disbursed to claimants under the proposed public action, the percentage of funds disbursed for each case in the two categories, antitrust and securities, was added and the sum was then divided by the number of cases. This method was employed to preclude the settlement amount in several cases from overwhelming the sample. Since percentage of funds disbursed should not reflect the size of the settlement, the average obtained in this manner is independent of the size of the settlement. The size of the settlement amount enters the escheat formula in the average total recovery figures, and hence should not be reflected in the percentage of funds disbursed estimation. If settlement and amounts disbursed had been averaged, the average percent disbursed would have increased.

As noted in Tables 2 and 3, we estimated that 48 percent of the funds were disbursed to claimants in the antitrust cases and 47 percent were disbursed to claimants in the securities cases. Data provided by Delaware Trust Company suggests that the figure for distributions in securities actions is lower (38%). It should be noted that these data are based on claimants rather than claim amounts as are the other

data. It is probable that these figures understate the percentage of funds disbursed since those claimants with larger potential recoveries may be more likely to tender claims than will those with small potential recoveries. As noted, using claimant data such as these also requires the assumption that the settlement funds are sufficient to pay all potential class damage. The Delaware Trust data thus are used as a low estimate for percentage of funds disbursed while the data presented in Table 2 are used as a high estimate.

## V. ESTIMATION OF AVERAGE TOTAL RECOVERY

To estimate average total recovery in class actions litigated under the proposed public action, cases were considered where the average recoveries were less than \$700. Use of these cases should present a more accurate picture of recovery amounts than employment of cases with larger average recoveries. The cases utilized are presented in Table 4.

The proposed public action covers only claimants with \$300 or less in damages. As such, the cases enumerated in Table 4 contain many claimants who could not recover under the public action. To estimate the average total recovery of those claimants with recoveries of less than \$300 of damages, individual claimant distributions were plotted from several antitrust settlements previously obtained by Arthur Young & Company and applied to the sample of less than \$700 actions.

It appeared that these distributions approximated a log-normal distribution, where over one-half of the cases fall to the left of the average recovery amount, i.e., the distribution is right skewed. Hence, assuming a log-normal distribution, and using the estimated mean claim for each case and an average standard deviation of \$3000, the percent of claims under \$300 was calculated and applied to the total cash recovery in each case.

The majority of the antitrust cases presented in Table 4 were litigated prior to the decision in Illinois Brick. Some of the actions, e.g., Antibiotics, Plumbing Fixtures, and Gypsum may not be litigated today by virtue of the decision in State of Illinois v. Illinois Brick 431 U.S. 748 (1977). This is due to the fact that many of the claimants were indirect purchasers, i.e., they purchased from wholesalers which in turn purchased from manufacturers. Hence two estimates were used for antitrust cases, the latter obtained by deleting cases which might not be litigated today owing to this precedent.

Employing the distribution above, we estimate that the average antitrust class action under the proposed public action will recover approximately \$5,707,346 (including all cases) and \$1,558,710 (excluding Illinois Brick cases) and the average securities class action will recover \$753,710.

## VI. ESTIMATION OF WIN RATE IN CLASS ACTIONS

To estimate the win rate in class actions litigated under the public action, current class actions were examined to determine the percentage of cases won. A case is considered won for purposes of the current study if cash is recovered by the plaintiff class. This, of course, may understate the true win rate since some cases where no cash is recovered represent victories in every sense of the word, e.g., where discounts are granted to future purchasers.

Two sources of data were employed in estimating win rates:

- (1) Print-outs of class action terminations for FY 1974 to FY 1978 provided by the Administrative Office of the U.S. Courts;
- (2) Duval, Benjamin S. Jr., "The Class Action as an Antitrust Enforcement Device", 1976 American Bar Foundation Research Journal 1021 (1976).

The Administrative Office of the U.S. Courts provided print outs of terminations selected by type of case, i.e., antitrust and securities. The following data were provided for each year:

- . District Court
- . Docket Number
- . Date action filed
- . Type of action e.g., security, antitrust
- . Class Action
- . Citation
- . Date action terminated
- . Disposition of case

Code: 1 Before issue joined - no action

2 After motion decided but before issue joined - action

3 Issue joined, no other court action - no action

4 Issue joined, and after judgement of court on motion - action

5 Issue joined, and after pretrial conference but before trial

6 During court trial case, terminated

7 During jury trial case, terminated

8 After court trial case, terminated

9 After jury trial

. Amount received in thousands of dollars

. Fiscal year and month terminated

. Time interval from filing to termination

(See Appendix B for an example of the printouts provided by the U.S. Courts)

Unfortunately, the data do not list all settlements that occurred. The clerk's office either was not appraised of settlements and/or did not record them.

Table 5 presents number of settlements and total terminations by type of action for the five years for which data were obtained. The average win rate for the five years in cases where settlement data were recorded is 3% (68 of 2059 cases). It is very likely that win rates are significantly higher than this due to the non-reporting problem noted, especially in FY 1974 and 75 where the win rate is 0.

However it can be noted that the data contain a code identifying the stage of litigation at termination. Typically, the higher the code (ranging between 1 and 9) the stronger the plaintiff's case. Certification of the class by the court permits the action to go forward on a class basis and increases the probability that a cash settlement will be achieved.\*/ It will be noted, for example, that in 1977 those terminated antitrust actions in which a cash recovery is indicated (8% or 16 of 193) had an average termination code of 7. Going further, it is found that 60% of the cases had a termination code of 7 or better in 1977. Thus, it is safe to assume that the percentage of antitrust wins is somewhere between 8% and 60% for 1977. It must be noted that the data for FY 1974 and 1975 indicate that settlement amounts were not recorded at all for these years. Using the remaining 3 years of data, the average percentage of antitrust

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\*/See, e.g., Miller, An Overview of Federal Actions: Past, Present and Future, 12(1977) (Federal Judicial Center Monograph).

wins, calculated in the same manner that an estimate for 1977 was calculated above, is between 6% and 34%. Similarly the figure for securities action is between 6% and 39%.

The DuVal study cited above included 117 class actions in which damages were sought.\*/ This source examined antitrust class actions filed in the Northern District of Illinois between 1966 and 1973, and is based upon data from docket books and files of the District Court and interviews with attorneys. DuVal employed a classification scheme of clustered and unclustered cases: a clustered case was one where more than one case involved the same subject matter or parties. Of the 117 class actions in which damages were sought, DuVal classified 31 as unclustered and 86 as clustered cases. Included in the clustered group are the Children's Books actions and the General Motors actions (this was confirmed by telephone). Many of these actions were transferred to the Northern District of Illinois for the convenience of the Court and the parties (by the Multidistrict Panel) and judicial economy. Hence, knowing the Children's Books and General Motors actions are included it is estimated that in excess of 80 percent of the 117 class damage actions resulted in a monetary settlement for the plaintiffs. The 80% figure may be regarded as uncharacteristic of the national win rate in that it included many cases transferred to the Northern District of Illinois in two very large antitrust cases.

The relative disparities in win rates presented by the two data sources suggest that current data do not permit estimation of a single win rate to which a high degree of confidence can be attached. It is also uncertain whether the current win rate for class damage actions will be the same as that of the public action, given the several procedural modifications implemented. Thus, it is proposed that a win rate of between 20 and 50 percent be employed with amounts escheating to the U.S. Treasury estimated at 10 percent intervals, i.e., 20%, 30%, 40% and 50%.

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\*/See DuVal at 1035.

VII. ESTIMATION OF FUNDS ESCHEATING TO U.S. TREASURY  
FROM THE PUBLIC ACTION

The estimation of funds which may escheat to the U.S. Treasury upon implementation of the proposed public action relies upon the formula presented in Section II and the parameters developed in previous studies and in Sections III through VI above. Since the estimates of average recovery and percent of funds disbursed differs between antitrust and securities actions, the estimation of escheat amounts are carried out separately for each category and these amounts are then aggregated. As noted in Section I, we are assuming that the cases litigated under the public action contain non-prorata distribution clauses and the claimant response will be the same under the new procedure.

Thus, the formula employed to estimate the amount which will escheat is as follows:

$$E = [(1-FD_s) \times TR_s \times WR \times CA_s] + [(1-FD_a) \times TR_a \times WR \times CA_a]$$

Symbol definitions are the same as those in Section II except that subscripts have been added for antitrust (a) and securities (s) actions. The cases assumed are divided between securities and antitrust using the proportion of cases of the two types terminated in FY 1978, (obtained from class action printouts, U.S. Attorney's Office) i.e., 62 and 38 percent, respectively.

The amounts estimated to escheat in antitrust and securities actions are presented in Table 6. For example, looking at the cell which assumes a 20% win rate and 38% estimation of funds disbursed, it is estimated that the escheat to the U.S. Treasury per year from securities will be \$6,168,363. It will be noted that the high antitrust figures are based on the \$5.7 million total recovery while the low figure is based on the lower \$1.5 million Illinois Brick figure. Securities figures differ depending on the assumptions used concerning funds disbursed. As noted in Section IV, we used two sources of data, i.e. estimates derived in this study and those from Delaware Trust Company data (based on class response).

Table 7 presents total funds escheated to the U.S. Treasury using the different assumptions for securities and antitrust litigation. Estimates range from \$10.1 million to \$74.8 million. It must be recognized that these amounts will not escheat until several years after the promulgation of the new action because class action litigation is complex. It should be noted these escheat figures are gross amounts, attorney's fees and costs have not been deducted.

TABLE 1  
Cases Used to Estimate Percent of  
Funds Disbursed - Antitrust

	Total Cash Recovery	Funds Disbursed	% of Funds Disbursed
Aamco Automatic Transmissions, Inc v. Taylor <u>1/</u>	\$ 1,959,711	\$ 735,000	38%
Colson v. Hilton Hotels <u>2/</u>	\$ 5,176,380	\$ 18,000	0.3%
Dennis v. Saks & Co. <u>3/</u>	\$ 5,211,000	\$ 4,417,752	85%
Hemley v. American Honda <u>4/</u>	\$ 3,300,000	\$ 1,490,836	45%
In re Arizona Bakery Products Litigation <u>5/</u>	\$ 2,700,000	2,300,000	85%
Mazur v. Behrens <u>6/</u>	1,750,000	210,000	12%
West Va. v. Chas. Pfizer <u>7/</u>	82,927,226	60,000,000	72%
Average % Funds Disbursed: <u>8/</u>			48%

1/ No. 73-1615 (E.D.Pa. 1978)

2/ 59 F.R.D. 324 (N.D.Ill. 1972)  
Only 1 day's notice of settlement published in the Wall Street Journal  
remaining funds were used in reducing room charges.

3/ 1978-1 Trade Cases II 61,871 (S.D.N.Y.)  
Case prorated downward (claimants received less than full damages),  
Total Cash Recovery includes lawyers' fees and costs; all remaining  
funds disbursed.

4/ No. 72-4127 (S.D.N.Y. Sept. 28, 1976)  
Disbursement information obtained from Delaware Trust Co. \$3.3 million  
cash recovery based on maximum settlement amount possible.

5/ No. 74-208-A-PHX (D.Ariz. Oct. 28, 1976)  
Case prorated downward (claimants received less than full damages),  
Total Cash Recovery includes lawyers' fees and costs, all remaining  
funds disbursed.

6/ 1974 Trade Cases II 75,213 (N.D. Ill.)

7/ S.R. Shepherd, "Damage Distribution in Class Actions: The Cy Pres  
Remedy" 38 University of Chicago Law Review, 446 (1972).

8/ Average % Funds Disbursed =  $\frac{\Sigma(\% \text{ of Funds Disbursed})}{\text{Number of Cases}}$  See text supra,  
at 5.

TABLE 2  
Cases Used to Estimate Percent  
Funds Disbursed - Securities 1/

	<u>Total Cash Recovery</u>	<u>Funds Disbursed</u>	<u>% Funds Disbursed</u>
Beecher v. Able <u>2/</u>	\$ 5,500,000	\$ 1,334,198	24%
Blank v. Talley <u>3/</u>	14,088,062	10,509,694	75%
Grimm v. Whitney-Fidalgo Seafoods, <u>4/</u> Inc.	120,000	20,000	17%
Jones v. Oranstein <u>5/</u>	759,000	596,500	79%
Mutual Shares Corp. v. Genesco, <u>6/</u> Inc.	4,457,754	1,720,000	39%
Sirota v. Econo-Car International <u>7/</u> Inc.	747,000	672,300	90%
Van Gemert v. Boeing <u>8/</u>	3,289,359	657,872	20%
Voege v. Ackerman <u>9/</u>	241,346	1,668	0.7%
Weber v. Teledyne <u>10/</u>	2,450,000	1,870,000	76%
Average % of Funds Disbursed: <u>11/</u>			47%

1/ Information obtained from conversations with plaintiff's lawyers or literature review.

2/ 441 F. Supp. 426 (S.D.N.Y. 1977), aff'd. 575 F. 2d 1010 (2d cir. 1978)

3/ 390 F. Supp. 1 (S.D.N.Y. 1975)

4/ 458 F. Supp. 7 (S.D.N.Y. 1978)  
Claims totaled \$20,000 due to passage of time and unforeseeable tender offer.

5/ No. 71-5576 (S.D.N.Y. Sept. 13, 1977)  
Prorated case, however, after first distribution, \$3,000 - \$4,000 remained. It was not feasible to distribute this amount among the claimants, and it went to the State of New York.

6/ No. 66-2475 (S.D.N.Y. 1968)  
Maximum recovery of \$4,457,754 if all class members filed claims.

7/ 61 F.R.D. 604 (S.D.N.Y. 1974)

8/ 590 F. 2d 433 (2d Cir. 1978), (en banc) cert granted, 47 U.S.L.W. 3654 (U.S. April 2, 1979)

9/ 70 F.R.D. 693 (S.D.N.Y. 1976)

10/ No. 70-1568 (C.D. Cal.)

11/ Average % Funds Disbursed =  $\frac{\Sigma(\% \text{ of Funds Disbursed})}{\text{Number of Cases}}$  . See text supra, at 5.

TABLE 3

Cases Used to Estimate Percent  
of Class Members Paid - Securities 1/

	Potential No. <u>2/</u> of Class Members	No. of Claims Paid	% of Class Members Paid
CERRO Litigation <u>4/</u>	26,706	10,958	41%
Clinton Oil Co. Securities <u>5/</u> Litigation	150,000	25,347	17%
Cooper v. Lewson <u>6/</u>	600	269	45%
Fried v. Utilities Leasing <u>7/</u>	2,514	1,000	40%
Grossman v. Cable Funding <u>8/</u>	807	331	41%
MGM Litigation <u>9/</u>	1,489	616	41%
Miller v. FISCO <u>10/</u>	1,788	1,589	89%
Neuberger and Berman v. Northern <u>11/</u> Electric	405	26	6%
Thompson v. Pacific Gamble Robinson <u>12/</u>	900	301	33%
U.S. Financial Securities Litigation <u>13/</u>	11,375	3,411	30%
Average % of Class Members Paid <u>14/</u>			38%

1/ Based on cases processed by Delaware Trust Company. (cities not provided)

2/ Based on Mailings to potential class members.

3/ 75 Civ. No. 2035 S.D.N.Y. (1977)

4/ M.D.L. No. 137, D. Kan. (1975)

5/ 73 Civ. 666, S.D.N.Y. (1977)

6/ 71 Civ. 55, E.D.Pa. (1975)

7/ Civ. No. 4720, D. Del. (1978)

8/ Civ. No. 4410, D. Del. (1977)

9/ CCH Fed. Sec. L. Rep. II 96,348 E.D.Pa. (1978)

10/ 74 Civ. No. 4497, S.D.N.Y. (1978)

11/ 73 Civ. No. 1374, D.D.C. (1976)

12/ M.D.L. No. 161, S.D.Cal. (1978)

13/ Average % of class members paid =  $\frac{\text{L}(\% \text{ of Class Members Paid})}{\text{Number of Cases}}$  See text supra, at 5.

TABLE 4

Estimation of Average Total Recovery Received by Small Claimants <sup>1/</sup>

<u>Antitrust Cases</u>	<u>Total Cash Recovery</u>	<u>Number of Claimants</u>	<u>Average Per Claim</u>	<u>% of Recovery Going to Claimants &lt; \$300</u> <sup>2/</sup>	<u>Recovery Claimants &lt; \$300</u>
Barr v. MUI-TAS <sup>3/</sup>	\$ 336,160	40,000	\$ 8.	.9975	\$ 335,320
Nurserymen's Exchange Inc. v. Yoder Bros. <sup>4/</sup>	112,748	10,000	11.00	.9969	112,398
In re Arizona Baking Products <sup>5/</sup>	2,700,000	250,000	11.00	.9969	2,691,630
Hawley v. American Honda <sup>6/</sup>	1,490,836	46,006	32.00	.9936	1,481,593
In re Antibiotics Antitrust Litigation <sup>7/</sup> "Non-settling" Consumer Government Entities	41,103,284	1,000,000	41.00	.9932	40,823,782
Dennis v. Saks & Co. <sup>8/</sup>	5,211,000	55,000	95.00	.9920	5,169,312
Goldfarb v. Virginia State Bar <sup>9/</sup>	226,000	2,000	113.00	.9906	223,876
In re Gypsum Cases <sup>10/</sup> General Subcontractor Class	6,100,000	30,000	270.00	.6591	5,338,710
Forbes v. Greater Minneapolis Board of Realtors <sup>11/</sup>	1,400,000	26,000	285.00	.6406	896,840
In re Plumbing Fixtures Antitrust Litigation <sup>12/</sup>	35,300,000	56,000	630.00	.0000 <sup>19/</sup>	0
Average Cash Recovery Paid to Small Claimants (filing claims less than \$300)					\$5,707,346
Average Cash Recovery Paid to Claimants Small Claimants (filing claims less than \$300) excluding those which might not be litigated presently due to Illinois Brick decision					\$1,558,710
<u>Securities Cases</u>					
In re King Resources Co. Securities Litigation <sup>13/</sup>	1,800,000	16,000	113.00	.9906	1,783,080
Burger v. CPC International Inc. <sup>14/</sup>	1,000,000	7,100	141.00	.9861	986,100
Jones v. Orenstein <sup>15/</sup>	759,000	2,500	304.00	.5080	385,100
Thomas v. A.V.M. Corp. <sup>16/</sup>	700,000	2,000	350.00	.1014	126,980
In re Equity Funding Corp of America <sup>17/</sup>	60,000,000	15,000	400.00	.0207	1,242,000
Sirota v. Econo-Car International Inc. <sup>18/</sup>	747,000	1,600	476.00	.0000 <sup>19/</sup>	0
Average Cash Recovery Paid to Small Claimants (filing claims less than \$300)					\$ 735,710

<sup>1/</sup> Small Claimants are those who receive \$300 or less  
<sup>2/</sup> Based on lognormal distribution with a standard deviation of \$3000

<sup>3/</sup> 1976-1 Trade Cases II 60,725 (S.D.N.Y.)

<sup>4/</sup> No. 70-1510 (N.D. Cal. Dec. 17, 1971)

<sup>5/</sup> See Table 1, note 5, supra

<sup>6/</sup> See Table 1, note 4, supra

<sup>7/</sup> 410 F. Supp 706 (D.Minn 1975)  
 Total recovery for all subclasses was \$219,094,727, however, only subclasses receiving an average less than \$700 were used.

<sup>8/</sup> See Table 1, note 3, supra

<sup>9/</sup> No. 75-72 (E.D. Va. 1977)

<sup>10/</sup> 386 F. Supp 959 (N.D. Cal. 1974)

<sup>11/</sup> No. 72-569 (D. Minn. Aug 9, 1975)

Total recovery for all subclasses was \$75,000,000, however, only subclasses receiving an average of less than \$700 were used

<sup>12/</sup> I. Wholesaler Class - No. 41,773 (E.D.Pa. 1970)

II. Contractor Class - 322 F. Supp 834 (E.D.Pa. 1971) aff'd as modified sub. nom, Ace Heating & Plumbing Co. v. Crane Co.,

453 F.2d 30 (3d. Cir. 1971)

III. Government Entity Class - No. 41,774 (1971)

IV. Builder - Owner Class - 487 F.2d 161 (3d Cir. 1973), on remand, 382 F. Supp 999 (E.D.Pa. 1974), vacated & remanded,

540 F. 2d 102 (3d. Cir 1976) (en banc)

<sup>13/</sup> 420 F. Supp 610 (D.Colo. 1976)

<sup>14/</sup> 1977 CCH Fed. Sec. L. Rep. II 96,157 (S.D.N.Y.)

<sup>15/</sup> See Table 2, note 5, supra

<sup>16/</sup> No. 74-1549 (S.D.N.Y. May 12, 1975)

<sup>17/</sup> 438 F. Supp 1303 (C.D.Cal. 1977)

<sup>18/</sup> See Table 2, note 7, supra

<sup>19/</sup> Results are smaller than 4 decimal places

TABLE 5

CLASS ACTION TERMINATIONS FY 1974-FY 1978

	<u>1978</u>	<u>1977</u>	<u>1976</u>	<u>1975</u>	<u>1974</u>
Antitrust - Cases (Terminations)	124	193	159	205	137
Certain recovery*	12	16	2	0	0
Possible recovery**	36	115	11	0	0
Securities - Cases (Terminations)	204	223	214	276	324
Certain recovery*	10	19	9	0	0
Possible recovery**	28	120	102	0	0

Source: Data provided by Administrative Office of the U.S. Courts

\* Cases in which recoveries are registered in data provided by the Administrative Office of the U.S. Courts.

\*\* Cases in which the disposition code is greater than or equal to the average disposition code in which recoveries were registered for that fiscal year by case type.

TABLE 6  
ESTIMATION OF FUNDS ESCHEATING  
SECURITIES AND ANTITRUST

	WIN RATE			
	<u>20%</u>	<u>30%</u>	<u>40%</u>	<u>50%</u>
Antitrust (TR = \$5,707,346)	\$ 23,742,559	\$ 35,613,839	\$ 47,485,119	\$ 59,356,398
Antitrust (TR = \$1,558,710)	\$ 4,820,234	\$ 7,230,350	\$ 9,640,467	\$ 12,050,584
Securities (FD = .47)	\$ 6,272,955	\$ 7,909,433	\$ 10,545,910	\$ 13,182,387
Securities (FD = .38)	\$ 6,168,363	\$ 9,252,544	\$ 12,336,725	\$15,420,906

TABLE 7

## TOTAL FUNDS ESCHEATING

	WIN RATE			
	<u>20%</u>	<u>30%</u>	<u>40%</u>	<u>50%</u>
Antitrust - High Estimate				
Securities - High Estimate	\$ 29,910,992	\$ 44,866,383	\$ 59,821,844.	\$ 74,777,304
Antitrust - High Estimate				
Securities - Low Estimate	\$ 29,015,514	\$ 43,523,272	\$ 58,031,029	\$ 72,538,785
Antitrust - Low Estimate				
Securities - High Estimate	\$ 10,988,597	\$ 16,482,894	\$ 21,977,192	\$ 27,471,490
Antitrust - Low Estimate				
Securities - Low Estimate	\$ 10,093,189	\$ 15,139,783	\$ 20,186,377	\$ 25,232,971

APPENDIX A

DELAWARE TRUST COMPANY DATA

CASE	CLASS PERIOD	POSSIBLE NUMBER OF CLASS MEMBERS	NUMBER OF ADDITIONAL FORMS PROVIDED AFTER INITIAL MAILING	DATE OF INITIAL MAILING	CLAIMS PROCESSED	REJECTS REMAINING	DISTRIBUTIONS
B & B Investment Club v. Kleinert's (u)	5-17-72 to 12-7-72	NA	NA	NA	418 1	37	381 claimants 1-23-79 \$1,329,038.97
Bruno v. Pacific Holding	owned stock on 5-6-77 and sold or tendered prior to 1-28-78 (Tender/Seller)  owned as of 1-28-78 (Merger)	5,359  3,111	3,000 to Brokers  76 to Individual	2-8-78	1,849	48	(1) 1,801 claimants 7-21-78 \$ 914,090.00  (2) 1,801 claimants 3,120 merger class members 9-21-78 \$ 471,465.26
CERRO Litigation	purchased stock between 6-12-74 and 7-26-74 and sold or tendered prior to 2-24-76 (Tender/Seller)  owned as of 2-24-76 (Merger)	26,706	6,450 to Brokers  787 to Individual	5-5-77	10,972	14	10,958 claimants 12-27-77 \$2,084,515.83

CASE	CLASS PERIOD	POSSIBLE NUMBER OF CLASS MEMBERS	NUMBER OF ADDITIONAL FORMS PROVIDED AFTER INITIAL MAILING	DATE OF INITIAL MAILING	CLAIMS PROCESSED	REJECTS REMAINING	DISTRIBUTIONS
Clinton Oil Company Securities Litigation	1-1966 to 6-2-72	150,000 approx.	35,000 approx.	1-16-76	29,000 approx.	3,600 approx.	(1) 25,232 claimants 12-14-77 \$3,000,000.00  (2) 25,347 claimants 4-10-78 \$4,627,154.95
Cooper v. Lewson (GMI Litigation)	1-14-72 to 9-27-72	600 approx.	203 to Brokers  55 to Individuals	NA	281	12	269 claimants 10-13-78 \$191,271.39
Fried v. Utilities Leasing	2-12-69 to 1-30-72	2,514	NA	1-30-76	1,050 approx.	50 approx.	1,000 claimants 8-3-76 \$801,746.40
Gissen v. Colorado Interstate Corp. (b)	As of 1-2-73	NA	NA	NA	NA	NA	(1) 4,974 claimants 8-11-75 \$3,506,532.00  (2) 4,997 claimants 7-15-76 \$601,023.96
Grossman v. Cable Funding (c)	8-22-72 to 8-31-73	807	NA	5-5-78	331	32	NA

CASE	CLASS PERIOD	POSSIBLE NUMBER OF CLASS MEMBERS	NUMBER OF ADDITIONAL FORMS PROVIDED AFTER INITIAL MAILING	DATE OF INITIAL MAILING	CLAIMS PROCESSED	REJECTS REMAINING	DISTRIBUTIONS
Hemley v. American Honda Motor Co. (a)	1966 to 1973	535,000	NA	3-3-76	49,000	4,000	(1) 45,809 claimants 12-31-76 \$1,482,665.95  (2) 197 claimants 10-27-77 \$6,180.53
MGM Litigation	11-21-73 to 6-26-75	(1) 1,309 (2) 180	42 Brokers 63 Individuals	10-5-77 (1) 11-8-77 (2)	648	33	616 claimants 5-8-78 \$1,194,914.72
Miller v. FISCO	12-10-70 to 1-15-74	1,788  1,592 Notice	NA	1-17-78	1,788	192	1,586 claimants 5-1-78 \$3,404,017.04
Heuterger and Berman v. Northern Electric	9-26-74 to 10-3-74	(1) 202 (2) 213	NA	1-4-79 (1) 3-15-79(2)	33	7	26 claimants 7-16-79 \$355,603.40
Thompson v. Pacific Gamble Robinson	As of 8-15-72	900 approx.	NA	5-26-76	NA	NA	(1) 304 claimants 8-23-76 \$364,831.26  (2) 301 claimants 2-21-77 \$1,486.94

CASE	CLASS PERIOD	POSSIBLE NUMBER OF CLASS MEMBERS	NUMBER OF ADDITIONAL FORMS PROVIDED AFTER INITIAL MAILING	DATE OF INITIAL MAILING	CLAIMS PROCESSED	REJECTS REMAINING	DISTRIBUTIONS
U.S. Financial Securities Litigation	1-1-70 to 12-5-72	11,375	NA	10-24-78	3,879	468	(1) 3,411 claimants. 1-16-79 \$22,100,000.00 (2) Expected February, 1980
Valente v. PepsiCo (a) (d)	As of 7-26-72	(1) 4,178 (2) 3,271	NA	2-15-78 (1) 3-1-78 (2)	2,663 at last count	330	NA

Notes:

NA - Not Available

When DTC did not do the initial mailings, information on number of class members is not available. Also, if the numbers of possible class members is very small, the number of additional forms mailed out would be insignificant.

- (a) Cases wherein defendants may have gotten (or will get) funds back depending on the number of claims which were filed. See the Notices pertaining to the specific cases.
- (b) DTC received approved claims from class representative and issued checks based on the information on the claims. No other work was done.
- (c) DTC retained to process claims. The distribution was to have been done by the Geneve Corporation.
- (d) The Court has yet to rule on numerous claims because of disagreement among parties as to the validity of certain claims.

APPENDIX B

SAMPLE PRINTOUT OF COURT TERMINATION DATA

DOCKET DIST CO NUMBER	DATE FILED	J P/S	D R	C RESD	A JUDGE	FILED SUIT	STYL	DATE TERMED	P D	N J	J F	TERM JUDGE	AMT. RECV	TERM YRMC	INT. YRMO
0646	11	730229	100273	3850	1			092677	4					709	0311
0647	31	730341	082073	3850	1			121977	5					712	0404
0648	11	007946	052971	3850	1	-	0315 GIBSON ETAL V STEENBERGEN ETAL	053078	5					805	0701
0648	11	760146	032476	3850	1			090277	4					709	0106
0649	31	008052	101272	3850	1			011078	4			0005		801	0503
0752	11	702151	082870	3850	1	-		111177	9					711	0703
0752	11	713831	040271	3850	1	-	2000 CHATZ ETAL V WALSTON & CO INC ETAL	042578	3					804	0700
0752	11	722551	101272	3850	1			113077	2					711	0501
0752	11	730046	010473	3850	1			112077	2					711	0410
0752	11	740970	071875	3850	4			062078	5					806	0211
0752	11	750272	012775	3850	5			063078	5					806	0305
0752	11	750347	020375	3850	5			063078	5					806	0304
0752	11	771421	042577	3850	1			022178	1					802	0010
0752	11	772124	061477	3850	1			071877	1					707	0001
0752	11	772327	062977	3850	1			110777	1					711	0005
0752	11	772554	071577	3850	1			122077	2					712	0005
0752	11	780461	020478	3850	1			051978	2					805	0013
0754	31	720037	030272	3850	1			052278	8					805	0602
0755	31	720203	101672	3850	1			100777	5					710	0500
0756	11	760405	072076	3850	5			032978	4			0003		803	0108
0756	11	770205	040777	3850	1		0004 BRICKLEY ETAL V PLANK ETAL	012078	3					801	0002
0864	41	760122	032574	3850	1			030678	8			0056		803	0400
0864	41	760309	081574	3850	1			112577	5					711	0303
0864	41	760358	081076	3850	1			062678	5					806	0110
0864	61	760055	022776	3850	1		0000 MCMEYER V BURNETT	102777	5					710	0108
0869	31	750326	042575	3850	1			120677	3					712	0208
0869	51	745043	070775	3850	1			102877	3					710	0203
0869	51	755060	090875	3850	1			050178	1					805	0208
0971	31	721955	103072	3850	1			081177	8					708	0410
0971	31	730326	030273	3850	1			061578	3					806	0503
0971	31	730637	041973	3850	5			043078	4					804	0500
0971	31	752707	121875	3850	1			072777	4					707	0107
0971	31	771353	051877	3850	1			082377	3					708	0003
0972	11	000467	111870	3850	1	-	0018 JADON ETAL V WORLD AMR AIRLIFT ETAL	043078	7			0175		804	0705
0973	21	732283	103876	3850	1	-		022378	5			0113		802	0704
0973	21	710189	012271	3850	1	-	2000 WHITTINGTON V HORNLOWER & ETAL	022478	5					802	0701
0973	21	710949	040271	3850	1	-	2000 BAER ASSOCIATES ETAL V HORNLOWER & W	022478	3					802	0610
0973	21	712924	121371	3850	1	-		040578	8					804	0604
0973	21	730134	011073	3850	1			022478	8					802	0501
0973	21	730705	041273	3850	1			092877	3					709	0405
0973	21	730743	040573	3850	1			092877	3					709	0405
0973	21	740739	032074	3850	6			061678	3					806	0403
0973	21	760966	123076	3850	1			011178	2					801	0101
0973	21	771502	051377	3850	1		0999 SKOGIUND ETAL V ORMAND ETAL	072277	2					707	0002
0973	21	771972	060177	3850	1		0999 BERSHIN V GOVERNMENT EMPLOY INS	110777	2					711	0005
0973	21	781623	042678	3850	2			050578	2					805	0001
0974	31	730361	081073	3850	1			112277	1					711	0403
0978	21	760246	121376	3850	1			060978	1					806	0106

**END**