

The Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

SEAN WILSON, individually and on behalf of
all others similarly situated,

Plaintiff,

v.

HUUUGE, INC., a Delaware corporation,

Defendant.

No. 18-cv-05276-RSL

**EXPERT DECLARATION OF
PROFESSOR CHARLES SILVER ON
THE REASONABLENESS OF CLASS
COUNSEL’S REQUEST FOR A FEE
AWARD AND REIMBURSEMENT OF
EXPENSES**

I, CHARLES SILVER, declare as follows:

I. SUMMARY OF OPINIONS

1. Class Counsel’s request for a fee award equal to 25 percent of the recovery is reasonable for a variety of reasons. It adheres to the benchmark rate set by both the Ninth Circuit and the Supreme Court of Washington. It falls below the range of rates that sophisticated clients normally pay lawyers who handle large lawsuits on contingency. And the application of three evaluative factors—the risk incurred, the customary fee, and awards in similar cases—supports it.

2. My opinion is based on my understanding of the economics of class action litigation, prevailing market rates paid by sophisticated clients in large lawsuits—both when suing individually and when serving as representatives of plaintiff classes, the risks Class Counsel incurred, and prevailing hourly rates for lawyers’ services. Thus, I believe that the requested fee and cost award is in keeping with what class members rationally should want to pay lawyers engaged with the object of maximizing their recoveries and with what sophisticated clients actually do pay lawyers they hire to undertake the same mission.

II. CREDENTIALS

3. I hold the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law. I joined the Texas faculty in 1987, after receiving an M.A. in political science at the University of Chicago and a J.D. at the Yale Law School. I received tenure in 1991. Since then, I have been a Visiting Professor at University of Michigan School of Law (twice), the Vanderbilt University Law School, and the Harvard Law School.

4. The study of attorneys' fees has been a principal focus of my academic career. I published my first article on the subject shortly after I joined the law faculty at the University of Texas at Austin. See Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991). Since then, I have published about a dozen more articles, two of which are empirical studies of fee awards in class actions. Lynn A. Baker, Michael A. Perino, and Charles Silver, *Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment*, 66 VANDERBILT L. REV. 1677 (2013); and Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371 (2015) ("*Is the Price Right?*"). The CORPORATE PRACTICE COMMENTATOR chose *Is the Price Right?* as one of the ten best in the field of corporate and securities law in 2016.

5. My writings are also cited and discussed in leading treatises and other authorities, including the MANUAL FOR COMPLEX LITIGATION, THIRD (1996), the MANUAL FOR COMPLEX LITIGATION, FOURTH (2004), the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, and the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT. More recently, Justice Goodwin Liu cited several of my publications in his concurring opinion in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 376 P.3d 672 (2016).

6. From 2003 through 2010, I served as an Associate Reporter on the American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). Many courts have cited the PRINCIPLES with approval, including the U.S. Supreme Court.

1 7. I have testified as an expert on attorneys' fees many times. Judges have cited or
2 relied upon my opinions when awarding fees in many class actions, including *In re Payment*
3 *Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 05-MD-1720, 2019 WL
4 6888488 (E.D.N.Y. 2019), *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, 586
5 F. Supp. 2d 732 (S.D. Tex. 2008), and *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d
6 1185 (S.D. Fla. 2006), all of which settled for amounts exceeding \$1 billion.

7 8. Finally, because awards of attorneys' fees may be thought to raise issues relating
8 to the professional responsibilities of attorneys, I note that I have an extensive background,
9 publication record, and experience as an expert witness testifying on matters relating to this field.
10 I also served as the Invited Academic Member of the Task Force on the Contingent Fee created
11 by the Tort Trial and Insurance Practice Section of the American Bar Association. In 2009, the
12 Tort Trial and Insurance Practice Section of the American Bar Association gave me the Robert
13 B. McKay Award in recognition of my scholarship in the areas of tort and insurance law.

14 9. I have attached a copy of my resume as Appendix I to this Declaration.

15 **III. DOCUMENTS REVIEWED**

16 10. In preparing this report, I received the items listed below which, unless noted
17 otherwise, were generated in connection with this case. I may also have reviewed other
18 materials, including case reports, treatises, articles published in law reviews, empirical studies,
19 and so forth.

- 20 • Class Action Settlement Agreement
- 21 • Declaration of Todd Logan [Submitted in Support of Motion for Preliminary
22 Approval of Proposed Settlement]
- 23 • Unopposed Motion for Preliminary Approval of Class Action Settlement
24 Agreement
- 25 • Order on Preliminary Approval of Class Action Settlement
- 26 • *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018)
- 27 • *Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d 457 (D. Md. 2015), *aff'd*, 851 F.3d
315 (4th Cir. 2017)

- Edelson PC Firm Resume

IV. FACTS

11. The facts relied upon in this Declaration are described in detail in the materials listed above. The following paragraphs provide a brief summary.

12. Social casino games are big business. In 2014, Churchill Downs, the Defendant in *Kater v. Churchill Downs Inc.*, No. 15-cv-00612-RSL (W.D. Wash.), purchased Big Fish Games for \$885 million. It sold the company four years later for “nearly \$1 billion.” Taylor Soper, *Judge Approves \$155M Class Action Settlement Related to Big Fish Games and Online Gambling Lawsuit*, GEEKWIRE, Aug. 31, 2020, available at <https://www.geekwire.com/2020/big-fish-games-pay-155m-tweak-games-part-class-action-settlement-gambling/>.

13. The defining feature of social casino games is that players must buy chips to wager but cannot win money. The games’ upside potential consists of the opportunity to win free chips that can be used to play games longer without paying more.

14. Believing that social casino games violate certain states gambling statutes, Class Counsel filed six federal court lawsuits in 2015. The theory advanced was that because the chips offered as prizes for winning games had value, the games constituted gambling and were unlawful. The complaints sought to recover the dollars that class members spent on chips, along with other remedies.

15. The cases went poorly. As of mid-2016, all six had been dismissed. Shortly thereafter, the dismissal in one case, *Mason v. Machine Zone*, had been affirmed on appeal. See *Mason*, 140 F. Supp. 3d 457 (D. Md. 2015), *aff’d*, 851 F.3d 315 (4th Cir. 2017).

16. The Plaintiffs’ prospects brightened in 2018, when the Ninth Circuit reversed the dismissal in *Kater* and ruled that social casino games qualify as gambling under Washington law because the chips offered as prizes were items of value. *Kater v. Churchill Downs Inc.*, 886 F.3d

1 784 (9th Cir. 2018). Thereafter, Class Counsel filed an additional seven cases in the U.S. District
2 Court for the Western District of Washington.

3 17. The instant lawsuit is part of the second wave of filings. After the Plaintiffs
4 fended off the Defendant's efforts to have the case sent to arbitration, the parties reached a
5 proposed settlement with the help of Layn Phillips, one of the country's most prominent
6 mediators. If approved, the settlement will return \$6.5 million (less attorneys' fees and expenses)
7 to class members, who will receive amounts ranging from a minimum of 10 percent to more than
8 50 percent of their losses. The settlement will also require the Defendant to change its operations
9 and to offer addiction-related resources and a comprehensive self-exclusion policy.

10 **V. BACKGROUND ANALYSIS: SETTING COMMON FUND FEES ACCORDING**
11 **TO MARKET RATES MAXIMIZES CLASS MEMBERS' EXPECTED**
12 **RECOVERIES**

13 18. Throughout my academic career, I have urged judges to base fee awards from
14 common funds on rates prevailing in the private market for legal services. Although the view
15 was not widely shared when I first expressed it, its popularity has greatly increased. Today,
16 judges routinely want to know what market rates are and give them weight when deciding how
17 much to award lawyers whose efforts create common funds. In this Declaration, I will show that
18 Class Counsel's request for a fee equal to 25 percent of the recovery falls below the range of
19 percentages that prevails in the private market, which typically runs from 30 percent to 40
20 percent even in cases with the potential to generate enormous recoveries.

21 **A. Fee-Setting Is A Positive-Sum Interaction**

22 19. Many people think that fee-setting is a zero-sum game in which more for a lawyer
23 means less for a client. Because the object of class litigation is to help the victims, they infer that
24 lower fees are always better than higher ones.

25 20. This belief is mistaken. Fee-setting is a positive-sum interaction in which higher
26 fees can help claimants. To see this, imagine how class members would fare if courts set
27 common fund fee awards at 0 percent. When the fee is zero, the expected recovery is zero too

1 because lawyers cannot afford to represent class members (or signed clients) on these terms.
2 From class members' perspective, any fee between 1 percent and 99 percent is better than zero
3 because any positive recovery is better than no recovery.

4 21. When regulating fees, then, the object should *not* be to set them as close to zero as
5 possible. *It should be to maximize class members' net expected recoveries*—the amounts they
6 expect to take home after paying their attorneys. Because a claimant who nets \$1 million after
7 paying a 40 percent fee is better off than one who nets \$500,000 after paying a 20 percent fee, it
8 is rational for clients to offer higher percentages when doing so is expected to leave them with
9 more money after fees are paid.

10 22. Judges have known this for years. In 2002, a task force on fees commissioned by
11 the Third Circuit stated: “The goal of appointment [of class counsel] should be to maximize the
12 net recovery to the class and to provide fair compensation to the lawyer, *not to obtain the lowest*
13 *attorney fee*. The lawyer who charges a higher fee may earn a proportionately higher recovery
14 for the class than the lawyer who charges a lesser fee.” *Third Circuit Task Force Report*, 208
15 F.R.D. 340, 373 (Jan. 15, 2002) (emphasis added). The Seventh Circuit made a similar point in
16 *In re Synthroid Marketing Litigation*, 264 F.3d 712 (7th Cir. 2001). It rejected the so-called
17 “mega-fund rule,” according to which fees must be capped at low percentages when recoveries
18 are very large, noting that “[p]rivate parties would never contract for such an arrangement”
19 because it would encourage cheap settlements. *Id.* at 718. When fees are capped at low levels,
20 lawyers' incentives are weakened and they may lose any financial interest in holding out for
21 higher dollars, which are harder to recover and require lawyers to bear greater risks. Private
22 clients want lawyers to maximize the value of their claims, not to settle them cheaply.

23 **B. The Case For Mimicking The Market**

24 23. In the market for legal services, claimants negotiate fees when litigation starts, not
25 when it ends. Upfront, they see the risks that lie ahead and appreciate the virtue of paying

1 contingent fee lawyers on terms that encourage them to bear them. As the Seventh Circuit
2 observed,

3 The best time to determine [a contingent fee lawyer's] rate is the beginning of the
4 case, not the end (when hindsight alters the perception of the suit's riskiness, and
5 sunk costs make it impossible for the lawyers to walk away if the fee is too low).
6 This is what happens in actual markets. Individual clients and their lawyers never
7 wait until after recovery is secured to contract for fees. They strike their bargains
8 before work begins.

9 *In re Synthroid Mktg. Litig.*, 264 F.3d at 718.

10 24. Unfortunately, judges typically set fee terms when class actions settle.
11 Consequently, the hindsight bias may cause them to set fees too low. This can only harm class
12 members in the long run by weakening lawyers' incentives.

13 25. To guard against this, I believe that judges should base fee awards on the amounts
14 that class members would rationally have agreed to pay had they bargained directly with class
15 counsel when litigation was about to commence. A general insight from the economics of
16 contracts is that rational parties agree on terms that are expected to maximize the amount of
17 wealth that is available for them to share. *See* Alan Schwartz and Robert E. Scott, *Contract*
18 *Theory and the Limits of Contract Law*, 113 YALE L. J. 541, 552 (2003) (“[P]arties at the
19 negotiation stage prefer to write contracts that maximize total benefits.”). When markets are
20 competitive, as the market for legal services plainly is, clients and lawyers should settle on the
21 lowest percentages that maximize their joint expected return. The market thus provides good
22 evidence regarding the fees that class members would rationally want to pay.

23 26. The market rate also provides a natural cross-check on the reasonableness of fee
24 requests. When a request falls within the range that sophisticated clients normally pay when
25 hiring lawyers on contingency to handle large cases, there is reason to believe that class members
26 would have agreed to pay it had they been able to bargain with class counsel directly before
27 litigation commenced. The best evidence of the terms of hypothetical bargains are the terms that
real clients and lawyers agree to in similar circumstances.

1 27. As discussed in more detail below, the information I have gathered over years of
2 study shows that claimants typically agree to pay contingent fees in the range extending from 30
3 percent to 40 percent. Even sophisticated clients promise to pay fees in this range when hiring
4 lawyers to handle large commercial lawsuits on contingency. To encourage lawyers to maximize
5 class members' net recoveries, I believe that courts should set fee awards from common funds in
6 this range.

7 **VI. FEES PREVAILING IN THE PRIVATE MARKET FOR LEGAL SERVICES**

8 **A. Market Rates Increasingly Dominate the Fee-Setting Process**

9 28. In both scholarly works and expert reports written over decades, I have urged
10 judges to take guidance from the market for legal services when sizing fee awards. As
11 mentioned, more and more judges are embracing the "mimic the market" approach. They
12 increasingly understand that "market rates, where available, are the ideal proxy for [class action
13 lawyers'] compensation." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000).

14 29. Although only the Seventh Circuit mandates the use of market rates, all federal
15 circuits permit judges to take guidance from them, and judges across the country do so routinely.
16 Examples include *Guevoura Fund Ltd. v. Sillerman*, No. 1:15-CV-07192-CM, 2019 WL
17 6889901, at *21 (S.D.N.Y. Dec. 18, 2019); *In re TRS Recovery Servs., Inc. & Telecheck Servs.,*
18 *Inc., Fair Debt Collection Practices Act (FDCPA) Litig.*, No. 2:13-MD-2426-DBH, 2016 WL
19 543137, at *9 (D. Me. Feb. 10, 2016); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F.
20 Supp. 3d 781, 788 (N.D. Ill. 2015); *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*,
21 No. 3:10-CV-30163-MAP, 2014 WL 6968424, at *6 (D. Mass. Dec. 9, 2014); *In re New Motor*
22 *Vehicles Canadian Exp. Antitrust Litig.*, 842 F. Supp. 2d 346 (D. Me. 2012); *In re Trans Union*
23 *Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at *9 (N.D. Ill. Dec. 9, 2009), *order*
24 *modified and remanded*, 629 F.3d 741 (7th Cir. 2011); *In re Cabletron Sys., Inc. Sec. Litig.*, 239
25 F.R.D. 30, 40 (D.N.H. 2006).

1 30. When awarding fees from the enormous settlement in *Allapattah Servs., Inc.*, 454
2 F. Supp. 2d at 1203, which exceeded \$1 billion, the federal district court judge “conclude[d] that
3 the most appropriate way to establish a bench mark is by reference to the market rate for a
4 contingent fee in private commercial cases tried to judgment and reviewed on appeal.”
5 Anchoring the fee to the market rate avoids arbitrariness by providing an objective basis for
6 awarding a particular amount and also creates desirable incentives. It also “create[s] incentives
7 for the lawyer to get the most recovery for the class by the most efficient manner (and penalize
8 the lawyer who fails to do so).” *Nilsen v. York Cty.*, 400 F. Supp. 2d 266, 277–78 (D. Me. 2005).
9 *See also In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56
10 F.3d 295, 307 (1st Cir.1995) (observing that the percentage-of-fund method eliminates incentive
11 to be inefficient, as inefficiency just reduces the lawyer's own recovery); and *Wal-Mart Stores,*
12 *Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (the percentage method “directly aligns
13 the interests of the class and its counsel” and provides a powerful incentive for efficiency and
14 early resolution).

15 31. State court judges see the wisdom of mimicking the market too. For example, in
16 *Laffitte*, 1 Cal. 5th 480, 376 P.3d 672, the Supreme Court of California cited the desirability of
17 approximating the market as a reason for permitting judges to grant percentage-based fee awards
18 from common funds.

19 We join the overwhelming majority of federal and state courts in holding that
20 when class action litigation establishes a monetary fund for the benefit of the class
21 members, and the trial court in its equitable powers awards class counsel a fee out
22 of that fund, the court may determine the amount of a reasonable fee by choosing
23 an appropriate percentage of the fund created. The recognized advantages of the
24 percentage method—including relative ease of calculation, alignment of
25 incentives between counsel and the class, ***a better approximation of market
conditions in a contingency case***, and the encouragement it provides counsel to
26 seek an early settlement and avoid unnecessarily prolonging the litigation ...
27 convince us the percentage method is a valuable tool that should not be denied our
trial courts.

Laffitte, 376 P.3d at 686 (emphasis added) (citations omitted).

1 32. Judges use the market-based approach and methods that approximate market
2 conditions because they appreciate the importance of incentivizing lawyers properly and because
3 they want an objective basis for deciding how much lawyers will be paid. The two
4 considerations—incentives and objectivity—are linked. By taking guidance from the market,
5 judges constrain their discretion and thereby make lawyers’ incentives clearer and more reliable.

6 33. Although the Ninth Circuit has not formally instructed district court judges to
7 base fee awards in class actions on prevailing market rates, it has come close to doing so. First, it
8 has given judges discretion to use the percentage method and to do so without lodestar cross-
9 checks. This makes sense because the market has selected against the use of the lodestar method
10 decisively. Real plaintiffs never use it. As shown below, the percentage method dominates the
11 market for contingent fee representations.

12 34. Second, the Ninth Circuit has set 25 percent of the recovery as the benchmark rate
13 for fee awards in class actions. *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th
14 Cir. 1989) (“Ordinarily, . . . fee awards [from common funds] range from 20 percent to 30
15 percent of the fund created. We note with approval that one court has concluded that the ‘bench
16 mark’ percentage for the fee award should be 25 percent.”) (quoting *Mashburn v. Nat’l*
17 *Healthcare, Inc.*, 684 F. Supp. 679, 692 (M.D. Ala. 1988)). *See also Vizcaino v. Microsoft Corp.*,
18 290 F.3d 1043, 1047 (9th Cir. 2002) (agreeing that the benchmark award is 25 percent of the
19 recovery). As shown below, sophisticated clients typically pay 30 percent to 40 percent of the
20 recovery as fees when they hire lawyers on straight contingency. The benchmark is thus in the
21 vicinity of the market range.

22 35. Third, the Ninth Circuit has given district courts discretion to deviate from the
23 benchmark when warranted by identified factors, one of which is “the customary fee.” *Kerr v.*
24 *Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975) (adopting the factors identified in
25 *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)). A lawyer’s customary
26 fee is simply his or her market rate.

1 36. *Johnson v. Georgia Highway Express, Inc.* also identified “awards in similar
2 cases” as a relevant consideration. Although awards in other class actions are discussed in detail
3 below, it bears mentioning here that as more and more courts have adopted a market-based
4 approach, this factor has pushed ever more strongly in the same direction as “the customary fee.”

5 37. To this point, I have focused on Ninth Circuit law. But both the size of the fee
6 award and the means of calculating it may be governed by state law. The following passage from
7 *Vizcaino* states both that state law applies and that, in common fund cases, Washington courts
8 use the percentage method exclusively.

9 Because Washington law governed the [substantive] claim, it also governs the
10 award of fees. [Citation omitted.] Under Washington law, the percentage-of-
11 recovery approach is used in calculating fees in common fund cases. *Bowles v.*
12 *Dep’t of Ret. Sys.*, 121 Wash. 2d 52, 72, 847 P.2d 440, 451 (1993) (holding that in
a common fund case, “the size of the recovery constitutes a suitable measure of
the attorneys’ performance”).

13 *Vizcaino*, 290 F.3d at 1047. *See also Bowles*, 847 P.2d at 451. (“This being a common fund case,
14 we apply the percentage of recovery approach.”); and *City of Seattle v. Okeson*, 137 Wash. App.
15 1051 (2007) (“Unlike a lodestar approach, the award of fees under the common fund doctrine is
16 borne by the prevailing party and the court uses a percentage of recovery rather than actual hours
17 expended in computing attorney fees.”) (citing *Bowles*, 847 P.2d at 450). Because Washington
18 courts use the percentage method exclusively, the application of Washington law should lead the
19 Court to do the same.

20 38. In *Bowles*, the Supreme Court of Washington also identified 25 percent of the
21 recovery as the benchmark rate.

22 While the lodestar method is generally preferred when calculating statutory
23 attorney fees, the percentage of recovery approach is used in calculating fees
24 under the common fund doctrine. . . . In common fund cases, the “benchmark”
award is 25 percent of the recovery obtained.

25 *Bowles*, 847 P.2d at 450-51 (emphasis deleted).

1 39. In sum, Washington law and Ninth Circuit precedent lead to the same result.
2 When awarding fees from common funds, courts must use the percentage method, must use 25
3 percent of the recovery as the benchmark, and must or should refrain from using the lodestar
4 method as a cross-check. Both the Ninth Circuit and the State of Washington thus adhere fairly
5 closely to the market-based approach recommended here. The only difference is that the
6 benchmark is slightly below the market rate, which extends from 30 percent to 40 percent, as
7 shown below.

8 **B. In Contingent Fee Litigation, Percentage-Based Compensation Predominates**

9 40. Having established that market rates are “ideal” proxies, it remains to consider
10 how the market compensates plaintiffs’ attorneys. In this section and the next, I explain what I
11 have learned about this subject.

12 41. I start by noting that when clients hire lawyers to handle lawsuits on straight
13 contingency, the market sets lawyers’ compensation as percentages of claimants’ recoveries.
14 Even sophisticated business clients with complex, high-dollar legal matters use the percentage
15 approach.

16 42. Abundant evidence supports this contention. When two co-authors and I studied
17 hundreds of settled securities fraud class actions specifically looking for terms included in fee
18 agreements between lawyers and investors seeking to serve as lead plaintiffs, all the agreements
19 we found provided for contingent percentage fees. *Is the Price Right, supra*. No lead plaintiff
20 agreed to pay its lawyers by the hour; nor did any retain counsel on a lodestar-multiplier basis.

21 43. The finding that sophisticated businesses use contingent fee arrangements when
22 hiring lawyers to handle securities class actions was expected. Over the course of my academic
23 career, I have studied or participated in hundreds of class actions, many of which were led by
24 sophisticated business clients. To the best of my recollection, I have encountered only one in
25 which a lead plaintiff paid class counsel out of pocket; that case is more than 100 years old and
26 was decided before the common fund doctrine was well established. Even wealthy named

1 plaintiffs like prescription drug wholesalers and public pension funds that, in theory, could pay
2 lawyers by the hour use contingent, percentage-based compensation arrangements instead.
3 Because percentage-based compensation arrangements dominate the market, courts should also
4 use them when awarding fees from common funds.

5 44. The market also favors fee percentages that are flat or that rise as recoveries
6 increase. Scales with percentages that decline at the margin are rarely employed. Professor John
7 C. Coffee, Jr., the country's leading authority on class actions, made this point in a report filed in
8 the antitrust litigation relating to high fructose corn syrup.

9 I am aware that "declining" percentage of the recovery fee formulas are used by
10 some public pension funds, serving as lead plaintiffs in the securities class action
11 context. However, I have never seen such a fee contract used in the antitrust
12 context; nor, in any context, have I seen a large corporation negotiate such a
contract (they have instead typically used straight percentage of the recovery
formulas).

13 *Declaration of John C. Coffee, Jr.*, submitted in *In re High Fructose Corn Syrup Antitrust*
14 *Litigation*, MDL 1087 (C.D. Ill. Oct. 7, 2004), Dkt. 1421, ¶ 22. My experience is similar. I know
15 of few instances in which large corporations used scales with declining fee percentages. Instead,
16 they use flat percentages or scales that rise with the duration of litigation or the size of the
17 recovery.

18 45. The preference for flat percentages and rising scales has a sound economic basis.
19 Flat percentages and rising scales reward plaintiffs' attorneys for recovering higher dollars that
20 are harder to obtain. Larger recoveries demand a willingness on the part of counsel to proceed
21 ever closer to trial, thereby increasing their costs and exposing them to greater risk of loss. In
22 other words, flat percentages and percentages that increase with the recovery encourage
23 attorneys to advise clients to reject inadequate settlements, even though rejections require
24 lawyers to bear costs and risks that settling would avoid.

1 **C. Sophisticated Clients Normally Pay Fees of 30 Percent to 40 Percent When**
2 **Hiring Lawyers to Handle Commercial Lawsuits on Straight Contingency**

3 46. Countless plaintiffs have hired lawyers on contingency to handle cases of diverse
4 types. Consequently, the market for legal services is a rich source of information about lawyers'
5 fees. In this section, I survey this evidence.

6 47. Before doing so, I wish to note that there is broad agreement that in most types of
7 plaintiff representations contingent fees range from 30 percent to 40 percent of the recovery, and
8 that higher fees prevail in litigation areas like medical malpractice and patents where costs and
9 risks are unusually great.¹ *See, e.g., George v. Acad. Mortg. Corp. (UT)*, 369 F. Supp. 3d 1356,
10 1382 (N.D. Ga. 2019) (“Plaintiffs request for approval of Class Counsel’s 33% fee falls within
11 the range of the private marketplace, where contingency-fee arrangements are often between 30
12 and 40 percent of any recovery”); and *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 201 (N.D.
13 Ill. 2018) (“a typical contingency agreement in this circuit might range from 33% to 40% of
14 recovery”). The same range is known to prevail in high-dollar, non-class, commercial cases. *See,*
15 *e.g., Kopolka v. Anchor Drilling Fluids USA, LLC*, No. 2:18-CV-01007-NR, 2019 WL 5394751,
16 at *10 (W.D. Pa. Oct. 22, 2019); and *Cook v. Rockwell Int’l Corp.*, No. 90-CV-00181-JLK, 2017
17 WL 5076498, at *2 (D. Colo. Apr. 28, 2017).

18 48. The point of surveying the evidence, then, is not to establish something new. It is
19 to show that what everyone already knows is correct. The market rate for contingent fee lawyers
20 generally runs from 30 to 40 percent of clients’ recoveries, with 33 percent being especially
21 common.

22 49. We do not know as much about fees paid in large commercial lawsuits as we
23 might. No publicly available database collects information about this sector of the market, and

24 ¹ I have studied the costs insurance companies incur when *defending* liability suits. *See*
25 Bernard Black, David A. Hyman, Charles Silver and William M. Sage, *Defense Costs and*
26 *Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from*
27 *Texas, 1988-2004*, 10 AM. L. & ECON. REV. 185 (2008). Unfortunately, this information sheds no
light on the amounts that businesses pay when acting as plaintiffs.

1 businesses that sue as plaintiffs often keep their fee agreements secret. Consequently, most of
2 what is known is drawn from anecdotal reports.² That said, the evidence available on the use of
3 contingent fees by sophisticated clients shows that percentages tend to fall in the indicated range.

4 1. Sophisticated Named Plaintiffs in Class Actions

5 50. Sophisticated business clients commonly agree to pay fees of 33 percent or
6 greater when serving as lead plaintiffs in class actions. Here are a few examples.

- 7 • In *San Allen, Inc. v. Buehrer*, No. CV-07-644950 (Ohio – Court of Common
8 Pleas), which settled for \$420 million, seven businesses serving as named
9 plaintiffs signed retainer contracts in which they agreed to pay 33.3 percent of the
10 gross recovery obtained by settlement as fees, with a bump to 35 percent in the
11 event of an appeal. Expenses were to be reimbursed separately.
- 12 • In *In re U.S. Foodservice, Inc. Pricing Litigation*, No. 3:07-md-1894 (AWT) (D.
13 Conn.), a RICO class action that produced a \$297 million settlement, both of the
14 businesses that served as named plaintiffs were represented by counsel in their fee
15 negotiations and both agreed that the fee award might be as high as 40 percent.
- 16 • In *In re International Textile Group Merger Litigation*, C.A. No. 2009-CP-23-
17 3346 (Court of Common Pleas, Greenville County, South Carolina), which settled
18 in 2013 for relief valued at about \$81 million, five sophisticated investors serving
19 as named plaintiffs agreed to pay 35 percent of the gross class-wide recovery as

21 ² Businesses sometimes use hybrid arrangements that combine guaranteed payments with
22 contingent bonuses. For example, when representing Caldera International, Inc. in a dispute with
23 IBM, Boies, Schiller & Flexner LLP billed two-thirds of its lawyers' standard hourly rates and
24 stood to receive a contingent fee equal to 20 percent of the recovery. Letter from David Boies
25 and Stephen N. Zack to Darl McBride dated Feb. 26, 2003, *available at*
26 [https://www.sec.gov/Archives/edgar/data/1102542/000110465903028046/a03-
27 6084_1ex99d1.htm](https://www.sec.gov/Archives/edgar/data/1102542/000110465903028046/a03-6084_1ex99d1.htm) (last visited Dec. 9, 2020). According to Wikipedia, the damages sought in
the lawsuit initially totaled \$1 billion, but were later increased to \$3 billion, and then to \$5
billion. Wikipedia, *SCO Group, Inc. v. International Business Machines Corp.*, *available at*
https://en.wikipedia.org/wiki/SCO_Group,_Inc._v._International_Business_Machines_Corp.
(last visited Dec. 9, 2020).

1 fees, with expenses to be separately reimbursed. (The fee was initially set at over
2 40 percent but was later bargained down to 35 percent.)

3 51. Similar rates prevail in antitrust class actions in which businesses participate as
4 plaintiffs. For example, I studied and prepared expert reports in a series of pharmaceutical cases
5 brought against manufacturers that engaged in pay-for-delay settlements to patent challenges. The
6 named plaintiffs in these cases were drug wholesalers. All were large companies; some were of
7 Fortune 500 size or bigger. All also had in-house or outside counsel monitoring the litigations.
8 The potential damages were enormous. In one case, *King Drug Company of Florence, Inc. v.*
9 *Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa. Oct. 8, 2015), the plaintiffs recovered over
10 \$500 million. In the series as a whole, they won more than \$2 billion. In most of the cases, these
11 sophisticated businesses supported fees equal to one-third of the recovery. In one case, they
12 endorsed a fee of 30 percent and in another of 27.5 percent.

13 52. These cases were not exceptional. Professor Brian Fitzpatrick gathered
14 information on an even larger number of pharmaceutical antitrust cases—33 in all—that were
15 resolved between 2003 and 2020. According to his forthcoming article, “the fee requests ranged
16 from a fixed percentage of 27.5% to a fixed percentage of one-third”; “one-third *heavily*
17 dominated” the sample; and “the average was 32.85%.” To confirm the point made here, which
18 is that sophisticated clients typically pay fees in the 30 percent to 40 percent range, Professor
19 Fitzpatrick also noted that “in the vast majority of cases, one or more of these corporate class
20 members—often the biggest class members—came forward to voice affirmative support for the
21 fee request, and not a single one of these corporate class members objected to the fee request in
22 any of the 33 cases.” Brian T. Fitzpatrick, *A Fiduciary Judge’s Guide to Awarding Fees in Class*
23 *Actions*, FORDHAM L. REV. (forthcoming 2021). Professor Fitzpatrick’s table of cases appears in
24 Appendix II.

25 53. In sum, when sophisticated business clients seek to recover money in risky
26 commercial lawsuits involving large stakes, they typically pay contingent fees ranging from 30
27

1 percent to 40 percent, with fees of 33 percent or more being promised in most cases. As well,
2 there is little variation in fee percentages across cases of different sizes.

3 2. Patent Cases

4 54. Now consider patent infringement cases, another context in which sophisticated
5 business clients often hire law firms on contingency. There are many anecdotal reports of high
6 percentages in this area. The most famous one relates to the dispute between NTP Inc. and
7 Research In Motion Ltd., the company that manufactures the Blackberry. NTP, the plaintiff,
8 promised its law firm, Wiley Rein & Fielding (“WRF”), a 33⅓ percent contingent fee. When the
9 case settled for \$612.5 million, WRF received more than \$200 million in fees. Yuki Noguchi,
10 *D.C. Law Firm’s Big BlackBerry Payday: Case Fees of More Than \$200 Million Are Said to*
11 *Exceed Its 2004 Revenue*, WASHINGTON POST, March 18, 2006, D03, available at
12 [https://www.washingtonpost.com/archive/business/2006/03/18/dc-law-firms-big-blackberry-](https://www.washingtonpost.com/archive/business/2006/03/18/dc-law-firms-big-blackberry-payday-span-classbankheadcase-fees-of-more-than-200-million-are-said-to-exceed-its-2004-revenuespan/8a76dbb5-0918-46b9-a7b2-4d9284d5e0d3/)
13 [payday-span-classbankheadcase-fees-of-more-than-200-million-are-said-to-exceed-its-2004-](https://www.washingtonpost.com/archive/business/2006/03/18/dc-law-firms-big-blackberry-payday-span-classbankheadcase-fees-of-more-than-200-million-are-said-to-exceed-its-2004-revenuespan/8a76dbb5-0918-46b9-a7b2-4d9284d5e0d3/)
14 [revenuespan/8a76dbb5-0918-46b9-a7b2-4d9284d5e0d3/](https://www.washingtonpost.com/archive/business/2006/03/18/dc-law-firms-big-blackberry-payday-span-classbankheadcase-fees-of-more-than-200-million-are-said-to-exceed-its-2004-revenuespan/8a76dbb5-0918-46b9-a7b2-4d9284d5e0d3/).

15 55. The fee percentage that WRF received is typical, as Professor David L. Schwartz
16 found when he interviewed 44 experienced patent lawyers and reviewed 42 contingent fee
17 agreements.

18 There are two main ways of setting the fees for the contingent fee lawyer [in
19 patent cases]: a graduated rate and a flat rate. Of the agreements using a flat fee
20 reviewed for this Article, the mean rate was 38.6% of the recovery. The graduated
21 rates typically set milestones such as “through close of fact discovery,” “through
22 trial,” and “through appeal,” and tied rates to recovery dates. As the case
continued, the lawyer’s percentage increased. Of the agreements reviewed for this
Article that used graduated rates, the average percentage upon filing was 28% and
the average through appeal was 40.2%.

23 David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L.
24 REV. 335, 360 (2012). In a case like this one that required the lawyers to bear significant

1 litigation and trial preparation hours and expenses with no guarantee of payment or
2 reimbursement, a high fixed percentage would apply.³

3 56. Clearly, in the segment of the market where sophisticated business clients hire
4 lawyers to litigate patent cases on contingency, successful lawyers earn sizeable premiums over
5 their normal hourly rates. The reason is obvious. When waging patent cases on contingency,
6 lawyers must incur large risks and high costs, so clients must promise them hefty returns. Patent
7 plaintiffs have the option of paying lawyers to represent them on an hourly basis, but still prefer
8 a contingency arrangement, even at 30-40 percent, to bearing the risks and costs of litigation
9 themselves.

10 3. Other Large Commercial Cases

11 57. As mentioned above, many courts have observed that attorneys regularly contract
12 for contingent fees of 33 $\frac{1}{3}$ percent or greater when asked to handle commercial lawsuits on
13 straight contingency. *See, e.g., Kapolka*, 2019 WL 5394751, at *10; *Lincoln Adventures LLC v.*
14 *Those Certain Underwriters at Lloyd's, London Members*, No. CV 08-00235 (CCC), 2019 WL
15 4877563, at *8 (D.N.J. Oct. 3, 2019); *Cook*, 2017 WL 5076498, at *2; and *In re Schering-Plough*
16 *Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744, at *32 (D.N.J. Oct. 1,
17 2013).

18 58. Many examples support this assessment. A famous case from the 1980's involved
19 the Texas law firm of Vinson & Elkins ("V&E"). ETSI Pipeline Project ("EPP") hired V&E to

20
21 ³ Professor Schwartz's findings are consistent with reports found in patent blogs, one of which
22 stated as follows.

23 *Contingent Fee Arrangements*: In a contingent fee arrangement, the client does not
24 pay any legal fees for the representation. Instead, the law firm only gets paid from
25 damages obtained in a verdict or settlement. Typically, the law firm will receive
26 between 33-50% of the recovered damages, depending on several factors. This is
27 strictly a results-based system.

28 Matthew L. Cutler, *Contingent Fee and Other Alternative Fee Arrangements for Patent Litigation*,
29 HARNESS DICKEY, (June 8, 2020), available at <https://www.hdp.com/blog/2020/06/08/contingent-fee-and-other-alternative-fee-arrangements-for-patent-litigation/>.

1 sue Burlington Northern Railroad and other defendants, alleging a conspiracy on their part to
2 prevent EPP from constructing a \$3 billion coal slurry pipeline. V&E took the case on
3 contingency, “meaning that if it won, it would receive one-third of the settlement and, if it lost, it
4 would get nothing.” David Maraniss, Texas Law firm Passes Out \$100 Million in Bonuses,
5 WASHINGTON POST, Aug. 22, 1990, *available at* [https://www.washingtonpost.com/archive/
6 politics/1990/08/22/texas-law-firm-passes-out-100-million-in-bonuses/8714563b-10b8-4f85-
7 b74a-1e918d030144/](https://www.washingtonpost.com/archive/politics/1990/08/22/texas-law-firm-passes-out-100-million-in-bonuses/8714563b-10b8-4f85-b74a-1e918d030144/). After many years of litigation, a series of settlements and a \$1 billion
8 judgment against a remaining defendant yielded a gross recovery of \$635 million, of which the
9 firm received around \$212 million in fees. Patricia M. Hynes, *Plaintiffs’ Class Action Attorneys
10 Earn What They Get*, 2 J. INST. FOR STUDY OF LEGAL ETHICS 243, 245 (1991). It bears
11 emphasizing that the clients who made up the plaintiffs’ consortium, Panhandle Eastern Corp.,
12 the Bechtel Group, Enron Corp. and K N Energy Inc., were sophisticated businesses with access
13 to the best lawyers in the country. No claim of undue influence by V&E can possibly be made.

14 59. The National Credit Union Administration’s (“NCUA”) experience in litigation
15 against securities underwriters provides a more recent example of contingent fee terms that were
16 used successfully in large, related litigations. After placing 5 corporate credit unions into
17 liquidation in 2010, NCUA filed 26 complaints in federal courts in New York, Kansas, and
18 California against 32 Wall Street securities firms and banks. To prosecute the complaints, which
19 centered on sales of investments in faulty residential mortgage-backed securities, NCUA retained
20 two outside law firms, Korein Tillery LLP and Kellogg, Hansen, Todd, Figel, & Frederick
21 PLLC, on a straight contingency basis. The original contract entitled the firms to 25 percent of
22 the recovery, net of expenses. As of June 30, 2017, the lawsuits had generated more than \$5.1
23 billion in recoveries on which NCUA had paid \$1,214,634,208 in fees.⁴

24
25 ⁴ The following documents provide information about NCUA’s fee arrangement and the
26 recoveries obtained in the litigations: Legal Services Agreement dated Sept. 1, 2009, *available at*
27 <https://www.ncua.gov/services/Pages/freedom-of-information-act/legal-services-agreement.pdf>;
National Credit Union Administration, *Legal Recoveries from the Corporate Crisis*, *available at*
<https://www.ncua.gov/regulation-supervision/Pages/corporate-system-resolution/legal->

1 60. When it retained outside counsel on contingency, NCUA knew that billions of
2 dollars were at stake. The failed corporate credit unions had sustained \$16 billion in losses, and
3 NCUA's objective was to recover as much of that amount as possible. It also knew that dozens
4 of defendants would be sued and that multiple settlements were possible. Even so, NCUA agreed
5 to pay a straight contingent percentage fee in the standard market range on all the recoveries. It
6 neither reduced the fees that were payable in later settlements in light of fees earned in earlier
7 ones, nor bargained for a percentage that declined as additional dollars flowed in, nor tied the
8 lawyers' compensation to the number of hours they expended.

9 61. In *In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327 (D. Md. 2000), the
10 bankruptcy trustee wanted to assert claims against Ernst & Young. He looked for counsel willing
11 to accept a declining scale of fee percentages, found no takers, and ultimately agreed to pay a
12 law firm a straight 40 percent of the recovery. Ernst & Young subsequently settled for \$185
13 million, at which point the law firm applied for \$71.2 million in fees, 21 times its lodestar. The
14 bankruptcy judge granted the request, writing: “[v]iewed at the outset of this representation, with
15 special counsel advancing expenses on a contingency basis and facing the uncertainties and risks
16 posed by this representation, the 40% contingent fee was reasonable, necessary, and within a
17 market range.” *Id.* at 335.

18 62. Based on what lawyers who write about fee arrangements in business cases have
19 said, contingent fees of 33⅓ percent or more remain common. In 2011, *The Advocate*, a journal
20 produced by the Litigation Section of the State Bar of Texas, published a symposium entitled
21 “Commercial Law Developments and Doctrine.” It included an article on alternative fee
22 arrangements, which reported typical contingent fee rates of 33 percent to 40 percent.

23 A pure contingency fee arrangement is the most traditional alternative fee
24 arrangement. In this scenario, a firm receives a fixed or scaled percentage of any
25 recoveries in a lawsuit brought on behalf of the client as a plaintiff. Typically, the

26 recoveries.aspx; Letter from the Office of the Inspector General, National Credit Union
27 Administration to the Hon. Darrell E. Issa, Feb. 6, 2013, *available at*
<https://www.ncua.gov/About/leadership/CO/OIG/Documents/OIG20130206IssaResponse.pdf>.

1 contingency is approximately 33%, with the client covering litigation expenses;
2 however, firms can also share part or all of the expense risk with clients. Pure
3 contingency fees, which are usually negotiated at approximately 40%, can be
4 useful structures in cases where the plaintiff is seeking monetary or monetizable
5 damages. They are also often appropriate when the client is an individual, start up,
6 or corporation with limited resources to finance its litigation. Even large clients,
7 however, appreciate the budget certainty and risk-sharing inherent in a contingent
8 fee arrangement.

9 Trey Cox, *Alternative Fee Arrangements: Partnering with Clients through Legal Risk Sharing*,
10 56 THE ADVOCATE (TEXAS) 20 (2011).

11 63. In sum, when seeking to recover money in class actions involving large stakes and
12 in commercial lawsuits, sophisticated business clients typically pay contingent fees ranging from
13 30 percent to 40 percent, with fees of 33 percent or more being promised in most cases.

14 **VII. RISK INCURRED**

15 64. In the market for legal services, the percentages that contingent fee lawyers
16 charge vary with the risks they incur. Lawyers who handle medical malpractice cases typically
17 receive higher fees than lawyers who handle personal injury cases of other types because they
18 incur greater costs and face more daunting prospects before judges and juries. Lawyers who
19 handle commercial airplane crash cases often charge lower fees than others because major
20 carriers often concede liability, leaving only damages at issue.

21 65. When Class Counsel filed the first cases in this series, the risk of losing was
22 severe. The litigation track record makes that clear. Not only did the plaintiffs lose in this Court;
23 they lost in every other district court too. Zero-for-six is both as bad as it gets and the surest sign
24 of risk one could want. (Really, Class Counsel went zero-for-seven, having also lost the appeal in
25 *Mason v. Machine Zone, Inc.*, as mentioned.)

26 66. Another indicator of risk is that Class Counsel undertook the litigation without the
27 benefit of a prior or contemporaneous governmental investigation. Many successful class actions
are assisted substantially by criminal prosecutions and guilty pleas. *See, e.g., In re Vitamins
Antitrust Litig.*, No. 99-197, 2001 WL 34312839 (D.D.C. July 16, 2001) (\$365 million class

1 recovery and 34.6% fee award in case supported by criminal prosecutions and guilty pleas); *In re*
2 *TFT-LCD (Flat Panel) [Indirect Purchaser] Antitrust Litig.*, MDL No. 1827, 2013 WL 1365900
3 (N.D. Cal. Apr. 3, 2013) (\$1.08 billion class recovery and approximately 30% fee to class
4 counsel and state attorneys general in case supported by sweeping criminal prosecutions and
5 guilty pleas). To the extent that government proceedings make class actions less risky, fee
6 awards should be higher in cases like this one, where Class Counsel spearheaded the litigation
7 without one.

8 **VIII. FEE AWARDS IN CASES WITH COMPARABLE MONETARY RECOVERIES**

9 67. In my experience, judges asked to grant fee awards in class actions want to know
10 how other courts have handled similar cases. Empirical studies, including my own study of
11 securities class actions, find that in cases with recoveries below \$100 million—the traditional
12 “mega-fund” threshold—awards in the normal, market range prevail.

13 68. In a study of all federal class actions that settled in 2006 or 2007, Professor Brian
14 Fitzpatrick confirmed that the range of fee awards mirrors the private market fairly well. He
15 found that the vast majority of fee awards (exclusive of costs) ran from 25 percent of the
16 recovery to 40 percent, and that more awards fell into the 30-35 percent range than any other.
17 Brian T. Fitzpatrick, 7 J. OF EMPIRICAL LEGAL STUDIES 811, 834 Fig. 4 (2010).

18 69. Using a variety of sources, Professors Theodore Eisenberg and Geoffrey P. Miller
19 assembled a dataset of settlements in class actions and shareholder derivative suits that covered a
20 longer period: 1993-2008. Theodore Eisenberg and Geoffrey P. Miller, *Attorneys Fees and*
21 *Expenses in Class Action Settlements: 1993–2008*, 7 J. OF EMPIRICAL LEGAL STUDIES 248
22 (2010). They reported that, across all cases, fees averaged 23 percent of recoveries and had a
23 median (half above/half below) of 24 percent. In the Ninth Circuit, both the average and the
24 median were 25 percent. *Id.* at 260. Because the Ninth Circuit chose 25 percent as the benchmark
25 rate, these findings are unsurprising.

1 70. With help from a new coauthor, Professors Eisenberg and Miller published an
2 updated study that expanded the period covered to 2013. Theodore Eisenberg, Geoffrey Miller &
3 Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937 (2017). The
4 more recent data showed that fees increased slightly. For the entire dataset, the mean and median
5 awards were 27 percent and 29 percent, respectively. In the Ninth Circuit, the corresponding
6 numbers were 26 percent and 25 percent. The authors also observed that “[f]ederal judges
7 recognize the value of empirical research in the area of class action attorneys’ fees and rely
8 extensively on those studies when assessing fee requests in particular cases.”

9 71. Here, Class Counsel have applied for fees equal to 25 percent of the recovery. In
10 cases with settlements of this size, there are hundreds or even thousands of class actions with
11 similar awards. For example, the 2019 Antitrust Annual Report finds that “for recoveries under
12 \$10 million, ... the median fees and costs awarded were 30% and 6%, respectively.” Joshua
13 Davis and Rose Kohles, 2019 ANTITRUST ANNUAL REPORT: CLASS ACTION FILINGS IN FEDERAL
14 COURT 25 (2020). The median award was 30 percent for the entire dataset of antitrust cases too.

15 **IX. LODESTAR CROSS-CHECK**

16 72. In keeping with the market-based approach that I recommend, neither the
17 Washington Supreme Court nor the Ninth Circuit has embraced the lodestar method as a means
18 of sizing fee awards from common funds. The former has rejected it entirely. The latter permits
19 lodestar cross-checks but does not mandate them. To the contrary, in the Ninth Circuit, “the
20 primary basis of the fee award remains the percentage method.” *Craft v. Cty. of San Bernardino*,
21 624 F. Supp. 2d 1113, 1123 (C.D. Cal. 2008) (quoting *Vizcaino*, 290 F.3d at 1050). *See also*
22 *Manual for Complex Litigation*, Fourth 14.121 (2004) (“the lodestar method is difficult to apply,
23 time consuming to administer, inconsistent in result, ... capable of manipulation, ... [and] creates
24 inherent incentive to prolong the litigation”).

25 73. I believe that lodestar cross-checks are undesirable. I hold this opinion, first,
26 because sophisticated clients never use the lodestar approach—not even for the purpose of cross-

1 checking fees—when they employ lawyers on straight contingency. They use the percentage
2 method exclusively, as previously explained. I can see no reason for courts to employ a fee
3 award formula that the market has rejected.

4 74. My second reason for opposing the use of lodestar cross-checks is that they
5 introduce all of the problems that percentage-based formulas are designed to avoid. By assigning
6 significant weight to hours worked, courts encourage lawyers to expend time rather than to
7 garner the largest possible recovery in the shortest span of time. In other words, lodestar cross-
8 checks penalize efficiency and reward delay, exactly the opposite of what plaintiffs want.

9 75. A third problem is that lodestar cross-checks weaken the connection between fees
10 and recoveries, the connection that lashes class counsel's interests fast to class members'
11 wellbeing. The contingent percentage approach rewards lawyers automatically and at all points
12 for putting more money in clients' pockets. The lodestar does not. To the contrary, it leaves
13 uncertain both whether a larger recovery will generate a larger fee and, more importantly, how
14 large any incremental increase will be. These effects discourage lawyers from taking risks that
15 class members would rationally want them to accept. Commentators agree that the lodestar
16 method encourages cheap settlements because it gives class counsel too weak an interest in
17 maximizing claimants' recoveries.

18 76. Finally, on the market-based approach that I endorse, lodestar cross-checks can be
19 dispensed with because the market provides its own cross-check on the reasonableness of fee
20 requests. Evidence drawn from the market provides an objective and independent standard on the
21 basis of which an assessment can be made. I see no obvious reason for courts to make a second
22 cross-check based on an inferior method.

23 **X. COMPENSATION**

24 77. I am being compensated for providing this expert opinion. I was paid a flat fee for
25 providing this report and two others in related litigations. The fee was agreed to in advance and
26 is not contingent upon the content of my opinions.

1 **XI. CONCLUSION**

2 78. For the reasons set out above, I believe that Class Counsel’s request for a fee
3 award equal to 25 percent of the gross recovery is in line with the market and with awards in
4 comparable cases and thus is reasonable.

5
6 I declare under penalty of perjury of the laws of the United States that the foregoing is true and
7 correct. Executed this 12th day of December, 2020, at Empire, Michigan.

8 *Professor Charles Silver*

9 _____
10 CHARLES SILVER

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APPENDIX I: RESUME OF PROFESSOR CHARLES SILVER

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ACADEMIC EMPLOYMENTS

School of Law, University of Texas at Austin, 1987-2015
Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure
W. James Kronzer Chair in Trial & Appellate Advocacy
Cecil D. Redford Professor
Robert W. Calvert Faculty Fellow
Graves, Dougherty, Hearon & Moody Centennial Faculty Fellow
Assistant Professor

University of Michigan Law School, Fall 2018
Visiting Professor

Harvard Law School, Fall 2011
Visiting Professor

Vanderbilt University Law School, Fall 2003
Visiting Professor

University of Michigan Law School, Fall 2018 & Fall 1994
Visiting Professor

University of Chicago, 1983-1984
Managing Editor, *Ethics: A Journal of Social, Political and Legal Philosophy*

EDUCATION

Yale Law School, JD (1987)
University of Chicago, MA (Political Science) (1981)
University of Florida, BA (Political Science) (1979)

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PUBLICATIONS

Special Projects

Books

PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (with Samuel Issacharoff, Reporter, and Robert Klonoff and Richard Nagareda, Associate Reporters) (American Law Institute 2010).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Class Action Litigation," 25 REV. LITIG. 459 (2006).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Mass Tort Litigation," 42 TORT TRIAL & INS. PRAC. L. J. 105 (2006).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Medical Malpractice Litigation," 25 REV. LITIG. 459 (2006).

PRACTICAL GUIDE FOR INSURANCE DEFENSE LAWYERS (2002) (with Ellen S. Pryor and Kent D. Syverud, Co-Reporters); published on the IADC website (2003); revised and distributed to all IADC members as a supplement to the DEF. COUNS. J. (2004).

BOOKS

MEDICAL MALPRACTICE LITIGATION: HOW IT WORKS, WHAT IT DOES, AND WHY TORT REFORM HASN'T HELPED (with Bernard S. Black, David A. Hyman, Myungho Paik, and William M. Sage) (Cato Institute, forthcoming 2019).

OVERCHARGED: WHY AMERICANS PAY TOO MUCH FOR HEALTH CARE (with David A. Hyman) (Cato Institute, 2018).

HEALTH LAW AND ECONOMICS, Vols. I and II (coedited with Ronen Avraham and David A. Hyman) (Edward Elgar 2016).

LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION, (coedited with Richard Nagareda, Robert Bone, Elizabeth Burch and Patrick Woolley) (Foundation Press, 2nd Ed. 2012) (updated annually through 2018).

PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL (with William T. Barker) (LexisNexis 2012) (updated annually through 2017).

Articles and Book Chapters by Subject Area (* indicates Peer Reviewed)

Health Care Law & Policy

1. "There is a Better Way: Give Medicaid Beneficiaries the Money," (with David A. Hyman) (under submission).

- 1 2. “Regulating Pharmaceutical Companies’ Financial Largesse,” 7:25 ISRAELI J. HEALTH
2 POLICY RES. (2018), <https://doi.org/10.1186/s13584-018-0220-5> (with Ronen
3 Avraham).*
- 4 3. “Medical Malpractice Litigation,” (with David A. Hyman) OXFORD RESEARCH
5 ENCYCLOPEDIA OF ECONOMICS AND FINANCE (2019), DOI:
6 10.1093/acrefore/9780190625979.013.365.*
- 7 4. “It Was on Fire When I Lay Down on It: Defensive Medicine, Tort Reform, and
8 Healthcare Spending,” (with David A. Hyman) OXFORD HANDBOOK OF AMERICAN
9 HEALTH LAW, I. Glenn Cohen, Allison Hoffman, and William M. Sage, eds. (2017).*
- 10 5. “Compensating Persons Injured by Medical Malpractice and Other Tortious Behavior for
11 Future Medical Expenses Under the Affordable Care Act,” (with Maxwell J. Mehlman,
12 Jay Angoff, Patrick A. Malone, and Peter H. Weinberger) 25 ANNALS OF HEALTH LAW 35
13 (2016).
- 14 6. “Double, Double, Toil and Trouble: Justice-Talk and the Future of Medical Malpractice
15 Litigation,” (with David A. Hyman) 63 DEPAUL L. REV. 574 (2014) (invited
16 symposium).
- 17 7. “Five Myths of Medical Malpractice,” (with David A. Hyman) 143:1 CHEST 222-227
18 (2013).*
- 19 8. “Health Care Quality, Patient Safety and the Culture of Medicine: ‘Denial Ain’t Just A
20 River in Egypt,’” (with David A. Hyman), 46 NEW ENGLAND L. REV. 101 (2012) (invited
21 symposium).
- 22 9. “Medical Malpractice and Compensation in Global Perspective: How Does the U.S. Do
23 It?” (coauthored with David A. Hyman) MEDICAL MALPRACTICE AND COMPENSATION IN
24 GLOBAL PERSPECTIVE (Ken Oliphant & Richard W. Wright, eds. 2013)*; originally
25 published in 87 CHICAGO-KENT L. REV. 163 (2012).
- 26 10. “Justice Has (Almost) Nothing to Do With It: Medical Malpractice and Tort Reform,” in
27 Rosamond Rhodes, Margaret P. Battin, and Anita Silvers, eds., MEDICINE AND SOCIAL
JUSTICE, Oxford University Press 531-542 (2012) (with David A. Hyman).*
11. “Medical Malpractice Litigation and Tort Reform: It’s the Incentives, Stupid,” 59
VANDERBILT L. REV. 1085 (2006) (with David A. Hyman) (invited symposium).
12. “Medical Malpractice Reform Redux: Déjà Vu All Over Again?” XII WIDENER L. J. 121
(2005) (with David A. Hyman) (invited symposium).
13. “Speak Not of Error,” REGULATION (Spring 2005) (with David A. Hyman).
14. “The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the
Problem or Part of the Solution?” 90 CORNELL L. REV. 893 (2005) (with David A.
Hyman).

- 1 15. “Believing Six Improbable Things: Medical Malpractice and ‘Legal Fear,’” 28 HARV. J.
L. AND PUB. POL. 107 (2004) (with David A. Hyman) (invited symposium).
- 2 16. “You Get What You Pay For: Result-Based Compensation for Health Care,” 58 WASH &
3 LEE L. REV. 1427 (2001) (with David A. Hyman).
- 4 17. “The Case for Result-Based Compensation in Health Care,” 29 J. L. MED. & ETHICS 170
5 (2001) (with David A. Hyman).*
- 6 **Studies of Medical Malpractice Litigation**
- 7 18. “Fictions and Facts: Medical Malpractice Litigation, Physician Supply, and Health Care
8 Spending in Texas Before and After HB 4,” 51 TEX. TECH. L. REV. 627 (2019). (with
9 David A. Hyman and Bernard Black) (invited symposium on the 15th anniversary of the
10 enactment of HB4).
- 11 19. “Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980-
12 2010,” 13 J. OF EMPIRICAL LEGAL STUDIES 183 (2016) (with Bernard S. Black, David A.
13 Hyman, and Mohammad H. Rahmati).
- 14 20. “Policy Limits, Payouts, and Blood Money: Medical Malpractice Settlements in the
15 Shadow of Insurance,” 5 U.C. IRVINE L. REV. 559 (2015) (with Bernard S. Black, David
16 A. Hyman, and Myungho Paik) (invited symposium).
- 17 21. “Does Tort Reform Affect Physician Supply? Evidence from Texas,” INT’L REV. OF L. &
18 ECON. (2015) (with Bernard S. Black, David A. Hyman, and Myungho Paik), available at
19 <http://dx.doi.org/10.1016/j.irl.2015.02.002>.*
- 20 22. “How do the Elderly Fare in Medical Malpractice Litigation, Before and After Tort
21 Reform? Evidence From Texas” (with Bernard S. Black, David A. Hyman, Myungho
22 Paik, and William M. Sage), AMER. L. & ECON. REV. (2012), doi: 10.1093/aler/ahs017.*
- 23 23. “Will Tort Reform Bend the Cost Curve? Evidence from Texas” (with Bernard S. Black,
24 David A. Hyman, Myungho Paik), 9 J. OF EMPIRICAL LEGAL STUDIES 173-216 (2012).*
- 25 24. “O’Connell Early Settlement Offers: Toward Realistic Numbers and Two-Sided Offers,”
26 7 J. OF EMPIRICAL LEGAL STUDIES 379 (2010) (with Bernard S. Black and David A.
27 Hyman).*
25. “The Effects of ‘Early Offers’ on Settlement: Evidence From Texas Medical Malpractice
Cases,” 6 J. OF EMPIRICAL LEGAL STUDIES 723 (2009) (with David A. Hyman and Bernard
S. Black).*
26. “Estimating the Effect of Damage Caps in Medical Malpractice Cases: Evidence from
Texas,” 1 J. LEGAL ANALYSIS 355 (2009) (with David A. Hyman, Bernard S. Black, and
William M. Sage) (inaugural issue).*

- 1 27. “The Impact of the 2003 Texas Medical Malpractice Damages Cap on Physician Supply
2 and Insurer Payouts: Separating Facts from Rhetoric,” 44 THE ADVOCATE (TEXAS) 25
3 (2008) (with Bernard S. Black and David A. Hyman) (invited symposium).
- 4 28. “Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims,
5 1990-2003,” 3 GENEVA PAPERS ON RISK AND INSURANCE: ISSUES AND PRACTICE 177-192
6 (2008) (with Bernard S. Black, David A. Hyman, William M. Sage and Kathryn Zeiler).*
- 7 29. “Physicians’ Insurance Limits and Malpractice Payments: Evidence from Texas Closed
8 Claims 1990-2003,” 36 J. LEGAL STUD. S9 (2007) (with Bernard S. Black, David A.
9 Hyman, William M. Sage, and Kathryn Zeiler).*
- 10 30. “Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical
11 Malpractice Cases, 1988-2003,” J. OF EMPIRICAL LEGAL STUDIES 3-68 (2007) (with
12 Bernard S. Black, David A. Hyman, William M. Sage, and Kathryn Zeiler).*
- 13 31. “Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002,” 2 J.
14 OF EMPIRICAL LEGAL STUDIES 207–259 (July 2005) (with Bernard S. Black, David A.
15 Hyman, and William S. Sage).*

12 **Empirical Studies of the Law Firms and Legal Services**

- 13 32. “Screening Plaintiffs and Selecting Defendants in Medical Malpractice Litigation:
14 Evidence from Illinois and Indiana,” 15 J. OF EMPIRICAL LEGAL STUDIES 41-79 (2018)
15 (with Mohammad Rahmati, David A. Hyman, Bernard S. Black, and Jing Liu)*
- 16 33. “Medical Malpractice Litigation and the Market for Plaintiff-Side Representation:
17 Evidence from Illinois,” 13 J. OF EMPIRICAL LEGAL STUDIES 603-636 (2016) (with David
18 A. Hyman, Mohammad Rahmati, Bernard S. Black).*
- 19 34. “The Economics of Plaintiff-Side Personal Injury Practice,” U. ILL. L. REV. 1563 (2015)
20 (with Bernard S. Black and David A. Hyman).
- 21 35. “Access to Justice in a World without Lawyers: Evidence from Texas Bodily Injury
22 Claims,” 37 FORDHAM URB. L. J. 357 (2010) (with David A. Hyman) (invited
23 symposium).
- 24 36. “Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury
25 Cases: Evidence from Texas, 1988-2004,” 10 AMER. LAW. & ECON. REV. 185 (2008)
26 (with Bernard S. Black, David A. Hyman, and William M. Sage).*

23 **Attorneys’ Fees – Empirical Studies and Policy Analyses**

- 24 37. “The Mimic-the-Market Method of Regulating Common Fund Fee Awards: A Status
25 Report on Securities Fraud Class Actions,” RESEARCH HANDBOOK ON REPRESENTATIVE
26 SHAREHOLDER LITIGATION, Sean Griffith, Jessica Erickson, David H. Webber, and Verity
27 Winship, Eds. (forthcoming 2018).
38. “Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions,” 115
COLUMBIA L. REV. 1371 (2015) (with Lynn A. Baker and Michael A. Perino).

- 1 39. "Regulation of Fee Awards in the Fifth Circuit," 67 THE ADVOCATE (TEXAS) 36 (2014)
2 (invited submission).
- 3 40. "Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment," 66
4 VANDERBILT L. REV. 1677 (2013) (with Lynn A. Baker and Michael A. Perino).
- 5 41. "The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a
6 Proposal," 63 VANDERBILT L. REV. 107 (2010) (with Geoffrey P. Miller).
- 7 42. "Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class
8 Actions," 57 DEPAUL L. REV. 471 (2008) (with Sam Dinkin) (invited symposium),
9 reprinted in L. Padmavathi, Ed., SECURITIES FRAUD: REGULATORY DIMENSIONS (2009).
- 10 43. "Reasonable Attorneys' Fees in Securities Class Actions: A Reply to Mr. Schneider," 20
11 THE NAPPA REPORT 7 (Aug. 2006).
- 12 44. "Dissent from Recommendation to Set Fees Ex Post," 25 REV. OF LITIG. 497 (2006).
- 13 45. "Due Process and the Lodestar Method: You Can't Get There From Here," 74 TUL. L.
14 REV. 1809 (2000) (invited symposium).
- 15 46. "Incoherence and Irrationality in the Law of Attorneys' Fees," 12 TEX. REV. OF LITIG.
16 301 (1993).
- 17 47. "Unloading the Lodestar: Toward a New Fee Award Procedure," 70 TEX. L. REV. 865
18 (1992).
- 19 48. "A Restitutionary Theory of Attorneys' Fees in Class Actions," 76 CORNELL L. REV. 656
20 (1991).
- 21 **Liability Insurance and Insurance Defense Ethics**
- 22 49. "Liability Insurance and Patient Safety," 68 DEPAUL L. REV. 209 (2019) (with Tom
23 Baker) (symposium issue).
- 24 50. "The Treatment of Insurers' Defense-Related Responsibilities in the Principles of the
25 Law of Liability Insurance: A Critique," 68 RUTGERS U. L. REV. 83 (2015) (with William
26 T. Barker) (symposium issue).
- 27 51. "The Basic Economics of the Duty to Defend," in D. Schwarcz and P. Siegelman, eds.,
RESEARCH HANDBOOK IN THE LAW & ECONOMICS OF INSURANCE 438-460 (2015).*
52. "Insurer Rights to Limit Costs of Independent Counsel," ABA/TIPS INSURANCE
COVERAGE LITIG. SECTION NEWSLETTER 1 (Aug. 2014) (with William T. Barker).
53. "Litigation Funding Versus Liability Insurance: What's the Difference?," 63 DEPAUL L.
REV. 617 (2014) (invited symposium).

- 1 54. “Ethical Obligations of Independent Defense Counsel,” 22:4 INSURANCE COVERAGE July-
2 August 2012) (with William T. Barker), available at
3 [http://apps.americanbar.org/litigation/committees/insurance/articles/julyaug2012-ethical-](http://apps.americanbar.org/litigation/committees/insurance/articles/julyaug2012-ethical-obligations-defense-counsel2.html)
4 [obligations-defense-counsel2.html](http://apps.americanbar.org/litigation/committees/insurance/articles/julyaug2012-ethical-obligations-defense-counsel2.html).
- 5 55. “Settlement at Policy Limits and The Duty to Settle: Evidence from Texas,” 8 J. OF
6 EMPIRICAL LEGAL STUDIES 48-84 (2011) (with Bernard S. Black and David A. Hyman).*
- 7 56. “When Should Government Regulate Lawyer-Client Relationships? The Campaign to
8 Prevent Insurers from Managing Defense Costs,” 44 ARIZ. L. REV. 787 (2002) (invited
9 symposium).
- 10 57. “Defense Lawyers’ Professional Responsibilities: Part II – Contested Coverage Cases,”
11 15 G’TOWN J. LEGAL ETHICS 29 (2001) (with Ellen S. Pryor).
- 12 58. “Defense Lawyers’ Professional Responsibilities: Part I – Excess Exposure Cases,” 78
13 TEX. L. REV. 599 (2000) (with Ellen S. Pryor).
- 14 59. “Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law
15 Governing Insurance Defense Lawyers,” 4 CONN. INS. L. J. 205 (1998) (invited
16 symposium).
- 17 60. “The Lost World: Of Politics and Getting the Law Right,” 26 HOFSTRA L. REV. 773
18 (1998) (invited symposium).
- 19 61. “Professional Liability Insurance as Insurance and as Lawyer Regulation: A Comment on
20 Davis, Institutional Choices in the Regulation of Lawyers,” 65 FORDHAM L. REV. 233
21 (1996) (invited symposium).
- 22 62. “All Clients are Equal, But Some are More Equal than Others: A Reply to Morgan and
23 Wolfram,” 6 COVERAGE 47 (1996) (with Michael Sean Quinn).
- 24 63. “Are Liability Carriers Second-Class Clients? No, But They May Be Soon-A Call to
25 Arms against the Restatement of the Law Governing Lawyers,” 6 COVERAGE 21 (1996)
26 (with Michael Sean Quinn).
- 27 64. “The Professional Responsibilities of Insurance Defense Lawyers,” 45 DUKE L. J. 255
(1995) (with Kent D. Syverud); reprinted in IX INS. L. ANTHOL. (1996) and 64 DEF. L. J.
1 (Spring 1997).
65. “Wrong Turns on the Three Way Street: Dispelling Nonsense about Insurance Defense
Lawyers,” 5-6 COVERAGE 1 (Nov./Dec.1995) (with Michael Sean Quinn).
66. “Introduction to the Symposium on Bad Faith in the Law of Contract and Insurance,” 72
TEX. L. REV. 1203 (1994) (with Ellen Smith Pryor).

1 67. “Does Insurance Defense Counsel Represent the Company or the Insured?” 72 TEX. L.
2 REV. 1583 (1994); reprinted in Practising Law Institute, INSURANCE LAW: WHAT EVERY
3 LAWYER AND BUSINESSPERSON NEEDS TO KNOW (1998).

4 68. “A Missed Misalignment of Interests: A Comment on *Syverud, The Duty to Settle*,” 77
5 VA. L. REV. 1585 (1991); reprinted in VI INS. L. ANTHOL. 857 (1992).

6 **Class Actions, Mass Actions, and Multi-District Litigations**

7 69. “What Can We Learn by Studying Lawyers’ Involvement in Multidistrict Litigation? A
8 Comment on *Williams, Lee, and Borden, Repeat Players in Federal Multidistrict*
9 *Litigation*,” 5 J. OF TORT L. 181 (2014), DOI: 10.1515/jtl-2014-0010 (invited
10 symposium).

11 70. “The Responsibilities of Lead Lawyers and Judges in Multi-District Litigations,” 79
12 FORDHAM L. REV. 1985 (2011) (invited symposium).

13 71. “The Allocation Problem in Multiple-Claimant Representations,” 14 S. CT. ECON. REV.
14 95 (2006) (with Paul Edelman and Richard Nagareda).*

15 72. “A Rejoinder to *Lester Brickman, On the Theory Class’s Theories of Asbestos*
16 *Litigation*,” 32 PEPP. L. REV. 765 (2005).

17 73. “Merging Roles: Mass Tort Lawyers as Agents and Trustees,” 31 PEPP. L. REV. 301
18 (2004) (invited symposium).

19 74. “We’re Scared To Death: Class Certification and Blackmail,” 78 N.Y.U. L. REV. 1357
20 (2003).

21 75. “The Aggregate Settlement Rule and Ideals of Client Service,” 41 S. TEX. L. REV. 227
22 (1999) (with Lynn A. Baker) (invited symposium).

23 76. “Representative Lawsuits & Class Actions,” in B. Bouckaert & G. De Geest, eds., INT’L
24 ENCY. OF L. & ECON. (1999).*

25 77. “I Cut, You Choose: The Role of Plaintiffs’ Counsel in Allocating Settlement Proceeds,”
26 84 VA. L. REV. 1465 (1998) (with Lynn A. Baker) (invited symposium).

27 78. “Mass Lawsuits and the Aggregate Settlement Rule,” 32 WAKE FOREST L. REV. 733
(1997) (with Lynn A. Baker) (invited symposium).

79. “Comparing Class Actions and Consolidations,” 10 TEX. REV. OF LITIG. 496 (1991).

80. “Justice in Settlements,” 4 SOC. PHIL. & POL. 102 (1986) (with Jules L. Coleman).*

General Legal Ethics and Civil Litigation

- 1 81. “A Private Law Defense of Zealous Representation” (in progress), available at
http://ssrn.com/abstract=2728326.
- 2 82. “The DOMA Sideshow” (in progress), available at http://ssrn.com/abstract=2584709.
- 3 83. “Fiduciaries and Fees,” 79 FORDHAM L. REV. 1833 (2011) (with Lynn A. Baker) (invited
4 symposium).
- 5 84. “Ethics and Innovation,” 79 GEORGE WASHINGTON L. REV. 754 (2011) (invited
6 symposium).
- 7 85. “In Texas, Life is Cheap,” 59 VANDERBILT L. REV. 1875 (2006) (with Frank Cross)
(invited symposium).
- 8 86. “Introduction: Civil Justice Fact and Fiction,” 80 TEX. L. REV. 1537 (2002) (with Lynn
9 A. Baker).
- 10 87. “Does Civil Justice Cost Too Much?” 80 TEX. L. REV. 2073 (2002).
- 11 88. “A Critique of *Burrow v. Arce*,” 26 WM. & MARY ENR. L. & POLICY REV. 323 (2001)
12 (invited symposium).
- 13 89. “What’s Not To Like About Being A Lawyer?” 109 YALE L. J. 1443 (2000) (with Frank
14 B. Cross) (review essay).
- 15 90. “Preliminary Thoughts on the Economics of Witness Preparation,” 30 TEX. TECH. L.
16 REV. 1383 (1999) (invited symposium).
- 17 91. “And Such Small Portions: Limited Performance Agreements and the Cost-
18 Quality/Access Trade-Off,” 11 G’TOWN J. LEGAL ETHICS 959 (1998) (with David A.
19 Hyman) (invited symposium).
- 20 92. “Bargaining Impediments and Settlement Behavior,” in D.A. Anderson, ed., DISPUTE
21 RESOLUTION: BRIDGING THE SETTLEMENT GAP (1996) (with Samuel Issacharoff and Kent
22 D. Syverud).
- 23 93. “The Legal Establishment Meets the Republican Revolution,” 37 S. TEX. L. REV. 1247
24 (1996) (invited symposium).
- 25 94. “Do We Know Enough about Legal Norms?” in D. Braybrooke, ed., SOCIAL RULES:
26 ORIGIN; CHARACTER; LOGIC: CHANGE (1996) (invited contribution).
- 27 95. “Integrating Theory and Practice into the Professional Responsibility Curriculum at the
University of Texas,” 58 LAW AND CONTEMPORARY PROBLEMS 213 (1995) (with Amon
Burton, John S. Dzienkowski, and Sanford Levinson,).
96. “Thoughts on Procedural Issues in Insurance Litigation,” VII INS. L. ANTHOL. (1994).

Legal and Moral Philosophy

- 1 97. “Elmer’s Case: A Legal Positivist Replies to Dworkin,” 6 L & PHIL. 381 (1987).*
- 2 98. “Negative Positivism and the Hard Facts of Life,” 68 THE MONIST 347 (1985).*
- 3 99. “Utilitarian Participation,” 23 SOC. SCI. INFO. 701 (1984).*

Practice-Oriented Publications

- 4
- 5 100. “Your Role in a Law Firm: Responsibilities of Senior, Junior, and Supervisory
- 6 Attorneys,” in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (3D) (Texas
- 7 Center for Legal Ethics and Professionalism 1996).
- 8 101. “Getting and Keeping Clients,” in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW
- 9 PRACTICE (3D) (Texas Center for Legal Ethics and Professionalism 1996) (with James M.
- 10 McCormack and Mitchel L. Winick).
- 11 102. “Advertising and Marketing Legal Services,” in F.W. Newton, ed., A GUIDE TO THE
- 12 BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).
- 13 103. “Responsibilities of Senior and Junior Attorneys,” in F.W. Newton, ed., A GUIDE TO THE
- 14 BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).
- 15 104. “A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney’s Fees
- 16 Provisions,” 28 CLEARINGHOUSE REV. 114 (June 1994) (with Stephen Yelenosky).

Miscellaneous

- 17 105. “Public Opinion and the Federal Judiciary: Crime, Punishment, and Demographic
- 18 Constraints,” 3 POP. RES. & POL. REV. 255 (1984) (with Robert Y. Shapiro).*

PERSONAL

19 Married to Cynthia Eppolito, PA; Daughter, Katherine; Stepson, Mabon.

20 Consults with attorneys and serves as an expert witness on subjects in his areas of

21 expertise.

22 First generation of family to attend college.

**APPENDIX II: TABLE OF FEE AWARDS IN DIRECT PURCHASER
PHARMACEUTICAL ANTITRUST CLASS ACTIONS**

Direct-Purchaser Pharmaceutical Antitrust Settlements, April 2003-April 2020

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
11/09/18	<i>Hartig Drug Company Inc. v. Senju Pharmaceutical Co. Ltd. et al</i> , No. 14-00719 (D. Del.)	\$9,000,000	33.33%	N/A	None	No
10/24/18	<i>In Re: Blood Reagents Antitrust Litigation</i> , No. 09-md-02081 (E.D. Pa.)	\$41,500,000	33.33%	N/A	None	No
09/20/18	<i>In re Lidoderm Antitrust Litigation</i> , No. 14-md-02521 (N.D. Cal.)	\$166,000,000	27.11%	33.33%	None	Yes
07/18/18	<i>In re Solodyn (Minocycline Hydrochloride) Antitrust Litigation</i> , No. 14-md-02503 (D. Mass.)	\$72,500,000	31.45%	N/A	None	No
04/18/18	<i>American Sales Company, LLC v. Pfizer, Inc.</i> , No. 4-cv-00361 (E.D. Va.)	\$94,000,000	32.69%	33.33%	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
12/19/17	<i>In re Aggrenox Antitrust Litigation</i> , No. 14-md-02516 (D. Conn.)	\$146,000,000	33.33%	33.33%	None	Yes
12/07/17	<i>In re Asacol Antitrust Litigation</i> , No. 15-cv-12730 (D. Mass.)	\$15,000,000	33.33%	N/A	None	Yes
10/23/17	<i>Castro v. Sanofi Pasteur, Inc.</i> , No. 11-cv-7178 (D.N.J.)	\$61,500,000	33.33%	N/A	None	Yes
10/05/17	<i>In re K-Dur Antitrust Litigation</i> , No. 01-cv-01652 (D.N.J.)	\$60,200,000	33.33%	N/A	None	Yes
10/15/15	<i>King Drug Company of Florence, Inc. v. Cephalon, Inc., et al.</i> , No. 06-cv-01797 (E.D. Pa.)	\$512,000,000	27.50%	N/A	None	Yes
05/20/15	<i>In re Prograf Antitrust Litig.</i> , No. 11-md-2242 (D. Mass.)	\$98,000,000	33.33%	N/A	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
01/20/15	<i>In re Prandin Direct Purchaser Antitrust Litig.</i> , No. 10-cv-12141 (E.D. Mich.)	\$19,000,000	33.33%	N/A	None	Yes
09/16/14	<i>Mylan Pharmaceuticals, Inc. v. Warner Chilcott PLC</i> , No. 12-cv-3824 (E.D. Pa.)	\$15,000,000	33.33%	N/A	None	No
08/06/14	<i>Louisiana Wholesale v. Pfizer, Inc., et al</i> , No. 02-cv-01830 (D.N.J.)	\$190,416,438	33.33%	N/A	None	Yes
06/30/14	<i>In re Skelaxin (Metaxalone) Antitrust Litigation</i> , No. 12-md-2343 (E.D. Tenn.)	\$73,000,000	33.33%	N/A	None	Yes
4/16/14	<i>In Re: Plasma-Derivative Protein Therapies Antitrust Litigation</i> , No. 09-07666 (N.D. Ill.)	\$64,000,000	33.33%	N/A	None	No

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
06/14/13	<i>American Sales Company, Inc. v. Smithkline Beecham Corporation, No. 08-cv-03149 (E.D. Pa.)</i>	\$150,000,000	33.33%	N/A	None	Yes
04/10/13	<i>Louisiana Wholesale Drug Company, Inc. v. Becton Dickinson & Company, Inc., No. 05-cv-01602 (D.N.J.)</i>	\$45,000,000	33.33%	N/A	None.	Yes
11/07/12	<i>In re Wellbutrin XL Antitrust Litigation, No. 08-cv-2431 (E.D. Pa.)</i>	\$37,500,000	33.33%	N/A	None	Yes
05/31/12	<i>Rochester Drug Co-Operative, Inc., v. Braintree Laboratories, Inc., No. 07-cv-142 (D. Del.)</i>	\$17,250,000	33.33%	N/A	None	Yes
01/12/12	<i>In re Metoprolol Succinate Antitrust Litigation, No. 06-cv-52 (D. Del.)</i>	\$20,000,000	33.33%	N/A	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
11/28/11	<i>In re DDAVP Direct Purchaser Antitrust Litigation</i> , No. 05-cv-2237 (S.D.N.Y.)	\$20,250,000	33.33%	N/A	None	Yes
11/21/11	<i>In re Wellbutrin SR Antitrust Litigation</i> , No. 04-cv-5525 (E.D. Pa.)	\$49,000,000	33.33%	N/A	None	Yes
08/11/11	<i>Meijer, Inc. v. Abbott Laboratories</i> , No. 07-cv-05985 (N.D. Cal.)	\$52,000,000	33.33%	N/A	None	Yes
01/31/11	<i>In re Nifedipine Antitrust Litigation</i> , No. 03-mc-223 (D.D.C.)	\$35,000,000	33.33%	N/A	None	Yes
01/25/11	<i>In re Oxycontin Antitrust Litigation</i> , No. 04-md-1603 (S.D.N.Y.)	\$16,000,000	33.33%	N/A	None	Yes
04/23/09	<i>In re Tricor Direct Purchaser Litigation</i> , No. 05-340 (D. Del.)	\$250,000,000	33.33%	N/A	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
04/20/09	<i>Meijer, Inc. v. Barr Pharmaceuticals, Inc.</i> , No. 05-cv-2195 (D.D.C.)	\$22,000,000	33.33%	N/A	None	Yes
11/09/05	<i>In re Remeron Direct Purchaser Antitrust Litigation</i> , No. 03-cv-00085 (D.N.J.)	\$75,000,000	33.33%	N/A	None	Yes
04/19/05	<i>In re Terazosin Hydrochloride Antitrust Litigation</i> , No. 99-md-1317 (S.D. Fla.)	\$74,572,327	32.41%	N/A	None	Yes
11/30/04	<i>North Shore Hematology-Oncology Associates, P.C. v. Bristol-Myers Squibb Co.</i> , No. 04-cv-248 (D.D.C.)	\$50,000,000	33.33%	N/A	None	No
04/09/04	<i>In re Relafen Antitrust Litigation</i> , No. 01-cv-12239 (D. Mass.)	\$175,000,000	33.33%	N/A	None	No

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
04/11/03	<i>Louisiana Wholesale Drug Co. v. Bristol-Myers Squibb Co., No. 01-cv-7951 (S.D.N.Y.)</i>	\$220,000,000	32.96%	N/A	None	Yes
			N = 33 Median = 33.33% Mean = 32.85%	3/33	0/33	26/33

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