

**Attorney Reports on the Impact of
Amchem and *Ortiz* on Choice of a Federal or State
Forum in Class Action Litigation**

*A Report to the Advisory Committee on Civil Rules
Regarding a Case-based Survey of Attorneys*

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This study was undertaken at the request of the Judicial Conference's Advisory Committee on Civil Rules and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Advisory Committee or of the Federal Judicial Center.

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Background

In 2001, the Advisory Committee on Civil Rules (“the Committee”) asked the Federal Judicial Center to conduct empirical research in an attempt to gain information that might assist the Committee’s examination of whether Federal Rule of Civil Procedure 23 should be amended to provide a different certification standard for classes certified for settlement rather than for trial and litigation. After researching class action filing rates,¹ the Center designed and conducted a survey of attorneys who had represented clients in recently terminated class action litigation.

In both state and federal courts, many class actions have been resolved by certification for settlement. In class action litigation that is characterized by multiple filings in state and federal forums, such as mass tort cases, the ability to certify cases for multistate or nationwide settlement is viewed as important to achieving a broad resolution of the litigation. In 1996, the Committee published for public comment a proposed amendment to Rule 23 that would have permitted certification of a settlement class action “even though the requirements of subdivision (b)(3) might not be met for purposes of trial.”² The Committee deferred consideration of the proposed amendment after the Supreme Court granted certiorari in *Amchem Products, Inc. v. Windsor*³ and later in *Ortiz v. Fibreboard Corp.*⁴ In those cases, the Court held that under Rule 23 a court could not certify a class for settlement unless the class met all of the Rule 23(a) criteria and one of the Rule 23(b) criteria, with the exception of trial

1. In September 2002, the Center presented to the Committee the results of a related study, also requested by the Committee, of the effect of the *Amchem* and *Ortiz* decisions on the filing of class actions in federal courts. See Bob Niemic & Tom Willging, Effects of *Amchem/Ortiz* on the Filing of Federal Class Actions: Report to the Advisory Committee on Civil Rules (2002) (available at <http://www.fjc.gov>). That study reported that the rate of filing of class actions in federal court had increased after *Amchem* and *Ortiz*. That study does not—and could not—directly answer the question whether those two decisions have had an impact on the settlement of class actions in federal court or whether there is any relationship between the Court decisions and attorney–client decisions on where to file cases. For example, those two cases may have influenced attorneys’ decisions in a limited number of specific types of cases; also, the number of federal class action filings might have increased at a slower rate than state class action filings.

2. Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 559 (1996); see also *id.* at 563–64 (Proposed Committee Note).

3. 521 U.S. 591 (1997). In *Amchem*, the Supreme Court affirmed a Third Circuit decision that vacated the order of the district court certifying a class of individuals with asbestos injury claims against a number of defendants and approving a Rule 23(b)(3) opt-out settlement. The district court had combined in one class action claimants with present asbestos injuries and future claimants (absent and unknown) who had been exposed to an asbestos product but who had not to date discovered an asbestos-related injury. The Court held that the district court’s ruling had allowed settlement of a “sprawling” class action that failed to provide future claimants the adequate representation required by Rule 23(a)(4).

4. 527 U.S. 815 (1999). In *Ortiz*, the Court reversed a Fifth Circuit decision that had affirmed an asbestos settlement with similar features to those the Court criticized in *Amchem*. The settlement in *Ortiz*, however, focused on a single manufacturer of products containing asbestos and used a mandatory “limited fund” settlement class certified under Rule 23(b)(1)(B).

manageability for a (b)(3) class. The rulings restricted the ability of federal courts to certify settlement class actions.

In *Amchem*, the Court noted the Committee's pending "settlement class" proposal and stated that, although parts of the Court's ruling were rooted in due process concerns about notice, the holding on certification standards was limited to Rule 23 "as it is currently framed."⁵ Since the Supreme Court decisions, the Committee has continued to receive proposals to amend Rule 23 to relax the certification standard for settlement classes—proposals that emphasize the importance of such class actions to achieving the broad resolution of repetitive litigation.⁶ The Committee has also continued to receive advice that the problems of such a rule amendment would outweigh any benefits that facilitating settlements might provide.⁷

As part of its examination of proposals to amend Rule 23 to provide a separate settlement class certification standard, the Committee asked the Center to assist by providing empirical information, if possible, as to the effect of *Amchem* and *Ortiz* on class action litigation in federal courts. The Center, in consultation with the Committee, designed a survey of attorneys in class actions recently terminated in federal courts. Questionnaires were designed to provide data on whether the Supreme Court decisions restricting certification of settlement classes in federal courts under existing Rule 23 influenced attorneys to file and litigate such actions in state courts. The survey also sought information on the extent to which limits on certification of settlement classes affected the number of overlapping or duplicative class actions pending simultaneously in state and federal courts.

This report is based on analyses of responses to questionnaires (copies of which can be found in the Questionnaire Appendix accompanying the full report) returned by 728 attorneys, 312 (43%) representing plaintiffs and 416 (57%) representing defendants in 621 class actions (see the Methods Appendix accompanying the full report). These class actions were either filed in federal court or removed to federal court between 1994 and 2001 and terminated between July 1, 1999, and December 31, 2002. In 107 of the 621 cases, we received responses from attorneys for both sides.⁸ The response rate was 39% of 1,851 attorneys. Attorneys were asked to report information about a specific case in which they had represented a party (the "named

5. *Amchem*, 521 U.S. at 619.

6. See, e.g., Francis McGovern, *Settlement of Mass Torts in a Federal System*, 36 Wake Forest L. Rev. 871, 878 (2001) (stating that "*Amchem* and *Ortiz* have changed the practical landscape for the global resolution of personal injury mass tort litigation by making class action settlements more expensive and, in certain circumstances, improbable"). According to Professor McGovern, a change in Rule 23 to facilitate settlement class actions for all types of cases is one way to address the problem. *Id.* at 882 (asserting that "[t]here will be efforts to facilitate class action settlements by relaxing the 23(a) prerequisites and, at the same time, strengthening 23(e) scrutiny").

7. For discussion of some of the arguments against global class action settlements and settlement class rules in the pre-*Amchem* legal environment, see generally, *Symposium, Mass Torts: Serving Up Just Desserts*, 80 Cornell L. Rev. 811 (1995).

8. All responses were used for analyses based on attorney reports (Parts 1 and 3). For analyses done at the case level (Parts 2, 4, and 5), if two responses referred to the same case, each response was given a weight of 0.5.

case”). We selected the named cases from the database used for the Center’s earlier report to the Committee on class action filing activity.

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

Unless specified as not statistically significant, all differences discussed in this report were statistically significant. By statistically significant we mean significant at the .05 level or better (i.e., the probability that the differences occurred by chance is at most 5%).

Executive Summary

Overall conclusions regarding Amchem and Ortiz factors

The Committee's primary question was whether existing Rule 23, as interpreted and applied in the *Amchem* and *Ortiz* line of cases to restrict class certification for settlement class actions, induced attorneys to file and litigate class actions in state rather than federal court. This study supports the following empirical conclusions based on attorney reports regarding specified cases:

- neither *Amchem* and *Ortiz* nor federal class certification rules were reported to have directly affected the vast majority of plaintiff attorneys' choice of forum;
- defendant attorneys reported their perceptions that federal courts' strict application of class certification rules was one factor that affected their decision to *remove* cases to federal courts, which would not be likely to avoid any effects of *Amchem* and *Ortiz*;
- in less than 10% of the cases, *Amchem* and *Ortiz* factors may have been related to attorneys' choice of forum and to how courts managed class actions;
- despite attorneys' perceptions that federal judges were less receptive than state judges to motions to certify class actions, federal and state judges were almost equally likely to certify class actions and to certify those cases for litigation and trial or for settlement;
- federal and state judges were equally likely to approve class settlements;
- federal judges were more likely than state judges to deny class certification, while state judges were more likely than federal judges to not rule on certification;
- the reported size of certified classes tended to be larger in state courts, but no direct link to *Amchem* and *Ortiz* was found and we could not directly test speculation that *Amchem* and *Ortiz* may have driven the larger classes into state court where they could be settled more easily;
- the rate at which proposed class actions were reported to have been certified appears to have declined when compared to a Federal Judicial Center pre-*Amchem* and *Ortiz* study of class actions in four federal districts;
- based on the same study, the percentage of certified class actions that were reported to have been certified for settlement appears to have increased after *Amchem* and *Ortiz*; and
- the percentage of class recoveries reported to have been allocated to attorney fees appears to have been about the same as in the previous Center study.

Summary of findings

1. Attorney reports of the effects of Amchem and Ortiz on choice of forum

(a) Plaintiff attorney reports of reasons for filing the named case in federal or state court

We presented plaintiff attorneys a range of questions and statements to find out why they filed the named case in state or federal court. Three factors were strongly related to their decisions about where to file: widely shared attorney perceptions that state or federal judges were predisposed to rule on certain claims in line with the interests of the attorney's client; attorney reports of the source of law (state or federal) for the claims; and attorney reports of "state facts," a composite measure we created, using the average of the percent of class members who resided in the state and the percent of claims-related transactions or events that attorneys reported having occurred within the state.⁹

Attorneys' decisions regarding where to file were associated with other factors, but not as strongly as with those above. The strongest group of additional factors encompassed the substantive law and the discovery rules governing the case. Those factors were also related to attorney perceptions of judicial predisposition. Plaintiff attorneys did not report that either class certification rules in general or the *Amchem* and *Ortiz* holdings in particular had any direct impact on their choice of a state or federal forum.

We also found that the filing of a class action in state or federal court was strongly associated with the location of a competing or overlapping class action.

(b) Comparison of plaintiff and defendant attorney reports of reasons for choosing to file the named case in, or remove it to, federal court

We presented a similar set of statements to defendant attorneys so they could indicate why they removed the named case, and we compared their responses to those of plaintiff attorneys who also chose a federal forum. Defendant attorneys more often than plaintiff attorneys cited their expectations that federal courts would apply class certification rules strictly and that substantive law, discovery rules, and expert evidence rules would favor their side. Aside from the importance defendant attorneys attributed to stringent class certification rules in general, *Amchem* and *Ortiz* factors

9. The portion of the "state facts" variable that deals with the location of claims-related transactions or events depends on the ability of a responding attorney to distinguish between events (such as the purchase of a product) that may have occurred both within the state of filing and in a number of other states. For further discussion of the "state facts" variable see the full text of this report at *infra* notes 19–20.

limiting federal courts' ability to certify a class for settlement did not appear to have played a role in either side's decision to select a federal forum. In general, a defendant attorney was far more likely than a plaintiff attorney to refer to the attorney's personal preferences or to client preferences as a basis for a decision to select a federal forum.

(c) Attorney reports of the effects of *Amchem* and *Ortiz* on the named case and in general

We also posed direct questions to attorneys about any effects *Amchem* and *Ortiz* may have had on their decisions about where to file or litigate the named cases and on class action litigation in general, including case management. Attorneys' responses suggest that, at most, the two decisions may have had a relationship to the attorneys' choice of forum and to case management in a small percentage of the named cases. Overall, as discussed in Parts 1(a) and (b), attorneys' statements as to why they filed cases in state or federal courts did not independently generate a conclusion that the *Amchem* and *Ortiz* decisions played an important role. Viewed in the aggregate—that is, in the context of the many factors that might have been associated with choice of forum—attorneys reported perceptions that *Amchem* and *Ortiz* factors had an impact on a small proportion of cases.

Nonetheless, attorney responses to the direct *Amchem* and *Ortiz* questions provide some support for the conclusion that the cases have had some relationship with class action certification and settlement. Our findings in that regard appear to be limited to a small proportion of the cases covered in the survey, less than 10% of which generated reports of some link with the two decisions.

Attorneys' opinions about the impact of *Amchem* and *Ortiz* indicate that they expected the two cases to have had more of an impact than their collective reports show they had in the named cases. Forty-three percent (43%) said that *Amchem* and *Ortiz* had made it more difficult in general to certify, settle, and/or maintain class actions in federal and state courts; another 5% thought the two cases had such an impact, but only in mass tort cases.

(d) Plaintiff and defendant attorney reports about any relationship between client characteristics and filing and removal decisions

We also asked plaintiff and defendant attorneys about characteristics that might have described their clients (such as place of residence, type of business, gender, race, and ethnicity) and whether, at the time of filing or removing an action, they perceived any litigation advantage or disadvantage arising out of any of those characteristics. None of the differences appeared to be related to choice of a federal or state forum. We found few important differences in reports of advantages or disadvantages based on party characteristics. The majority of attorneys reported that they perceived no advantage or disadvantage in most of their clients' characteristics.

Comparing perceptions of plaintiff attorneys who filed in state courts with those who filed in federal courts, the only salient client characteristics were connected to the defendant's type of business and the proposed class representative's local residence and reputation. The class representative's local residence appeared to be the factor with the strongest association with a plaintiff's decision to file a class action in a state court.

Comparing perceptions of plaintiff attorneys with those of defendant attorneys (regardless of the choice of forum), the only client characteristic that elicited a majority response was that plaintiff attorneys tended to see the proposed class representative's local residence as an advantage. Other client characteristics (e.g., defendant's corporate status or type of business) produced different responses from plaintiff and defendant attorneys.

2. Competing or overlapping class actions filed in other courts

A clear majority of attorneys reported the existence of other lawsuits dealing with the same subject matter as the named case in other state or federal courts. Those attorneys also indicated that about three-fourths of the other lawsuits were resolved in the same manner as the named case. Among the remaining cases, we found that when the named case was dismissed on the merits, voluntarily dismissed, or terminated by summary judgment (and not resolved as a class action), the related cases were more likely to have had a different outcome. Those data suggest that rulings on the merits of individual claims did not prevent further litigation in other courts in related cases.

3. Plaintiff and defendant attorney perceptions of state and federal judges' predispositions toward plaintiff and defendant interests

(a) Attorney perceptions of judicial predispositions

Attorneys on both sides of the litigation reported their expectations about judicial predispositions at the time they filed or removed the named case. Those impressions were often related to lawyers' judgments about the favorability of that court's rules and the substantive law applicable to their clients' claims and defenses, and to attorneys' impressions of judicial receptivity to claims like those of their clients.

About half of the plaintiff attorneys who filed cases in state courts expressed an impression that state judges were more likely than federal judges to rule in favor of interests like those of their clients. About one in four plaintiff attorneys who filed in federal court, though, expressed an expectation that federal judges were more likely than state judges to rule in favor of their clients' interests, and about 40% of plaintiff attorneys filing in federal court reported that they perceived no difference between state and federal judges in that regard.

Three out of four defendant attorneys who removed cases to federal courts reported the impression that federal judges were more likely than state judges to rule

in favor of interests like those of their clients. About 20% of attorneys perceived no difference between the two sets of judges.

(b) Substantive law, procedural rules, and judicial receptivity as sources of perceived judicial predispositions

Plaintiff attorneys were more likely to perceive judicial predispositions in favor of their clients' interests when they also reported that state substantive law and state discovery, evidence, and class action certification rules favored their clients' interests. Those plaintiff attorneys were also more likely than other plaintiff attorneys to report that state court judges were more receptive than federal judges to motions to certify a class and more receptive to their clients' claims on the merits.

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

In the next two sections we explore how those perceptions in individual named cases matched up with the aggregate of judicial rulings, procedural outcomes, and monetary recoveries and settlements in two groups of named cases: first, those removed from federal courts and, in the final section, all of the named cases.

4. Comparison of rulings by state and federal courts in removed cases

In Part 1(a) we reported that attorney perceptions of judicial predispositions toward interests like those of the attorneys' clients represented one of the strongest factors affecting choice of forum. Do these attorney perceptions about judicial predispositions have any basis in the reality of judicial rulings in the named cases viewed as a whole?

We found little relationship between the attorneys' perceptions and federal and state judicial rulings in the named cases. Federal district judges remanded to state court almost half of the cases that defendants removed to federal court, providing an opportunity to compare rulings in the two sets of courts.¹⁰ We found federal and state

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

judges about equally likely to certify cases as class actions (which happened in 22% of the remanded cases and 20% of the cases retained in federal courts). Moreover, federal and state judges were about equally likely to certify classes for trial and litigation or for settlement: Half of the certifications in each set of courts were for trial and litigation and half were for settlement.

In the attorney reports about the named cases, federal judges were more likely than state judges to issue rulings denying class certification, while state judges were more likely than federal judges to take no action regarding class certification. Neither the action or inaction of courts regarding class certification was associated with whether a case produced a monetary recovery or settlement. A ruling denying class certification usually was accompanied by explicit resolution of the individual claims of the proposed class representatives, whether the resolution was by settlement, summary judgment, or trial. The absence of a ruling on class certification was more often accompanied by voluntary dismissal of the claims.

In the named cases, we found no statistically significant differences in rulings on dispositive procedural motions in cases remanded to state courts and in cases retained in the federal courts. In certified class actions, state and federal courts were equally likely to approve a classwide settlement. In one or two instances in federal or state court the settlement had been revised before court approval; no class settlement was rejected in total.

We also found, in removed cases, a relationship (again, not necessarily a causal relationship) between attorneys' perceptions of judicial predispositions and whether the parties' class settlements included a money recovery—and, if so, how much. Attorney fees also varied in the same direction as the predisposition perceived by attorneys; that is, fees were higher when plaintiffs perceived a predisposition in their favor than when they did not perceive such a predisposition.

Despite the similarities in rulings, monetary recoveries—almost always in the form of settlements fashioned by the parties—differed in the two court systems. In removed cases that were remanded to state courts, the amount of classwide monetary recoveries and settlements was substantially larger than monetary recoveries and settlements in cases retained in federal court. The median recovery in state court was \$850,000 and in federal court was \$300,000. Those differences, however, appeared to be a product of the larger size of classes resolved in state courts (typically, 5,000 class members compared to 1,000 in federal courts). The typical recovery per class member turned out to be higher in federal court: \$517 in federal court compared to \$350 in cases remanded to state courts.

We also found a relationship between class size and attorney perception of predispositions. Attorneys were somewhat more likely to perceive federal court predispositions to favor client interests in cases with a smaller class size and to perceive favorable state court predispositions toward such interests in cases with a larger class size. These differences seem marginal, however, and applicable to a small number of cases.

5. Procedural outcomes and monetary recoveries and settlements in named cases (removed and not removed)

Looking at the total sample of all closed cases (including cases filed as original federal class actions, not just the removed cases discussed in Part 4), we found that in the majority of cases (57%) the court took no action on class certification. Courts certified 24% of the cases as class actions and denied certification in 19% of them. Of the certified cases, 58% were certified for settlement and 42% were certified for trial or litigation.

The Center's 1996 research for the Committee, focusing on class actions terminated in 1992–1994 in four federal district courts, and based on examination of court files, not attorney recollections, reported a class certification rate of 37%. The percentage of those cases certified for settlement was 39%. While the study methods were different, comparing data from the current study and the 1992–1994 study indicates that the rate of class certification as a whole most likely has not increased and appears to have declined (from 37% to 24%) in the period after *Amchem* and *Ortiz*. These two studies also indicate that the percentage of class actions certified for settlement appears to have increased (from 39% to 58%).

In the study at hand, in both state and federal courts, certified class actions generally terminated with settlements and monetary recoveries. Almost all certified class actions settled. In contrast, most cases that were never certified terminated by dismissal, summary judgment, voluntary dismissal, or settlement of class representatives' claims.

In state and federal courts combined, about one in four of the named cases included a monetary recovery or settlement for the class. The typical (i.e., median) recovery was \$800,000. Twenty-five percent (25%) of the recoveries and settlements exceeded \$5.2 million, and 25% were \$50,000 or less.

Various commentators and judges have criticized the use of coupons—especially nontransferable coupons without any market value—to settle class actions. In the study, 29 of 315 cases (9%) with a recovery included some type of coupon in the recovery; 3 of those cases (1%) involved nontransferable coupons.

Attorney fees typically were about 29% of the class recovery, which was about the same percentage as in the prior FJC study of class actions. Twenty-five percent (25%) of the cases involved fees of 36% or more, which was also similar to what we found previously.