

A PROFILE OF U.S. CLASS ACTIONS

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The U.S. Has the World's Oldest Class Action Procedure

- U.S. court rules always allowed for some sort of collective litigation
- Significant amendments in **1966** created the current U.S. class action regime
 - Significant amendments since
- **F.R.C.P. 23** specifies the requirements & procedures for federal class actions
 - All but one state have similar rules
- U.S. class action is the model for many other jurisdictions' rules
 - But sometimes the model to *reject*

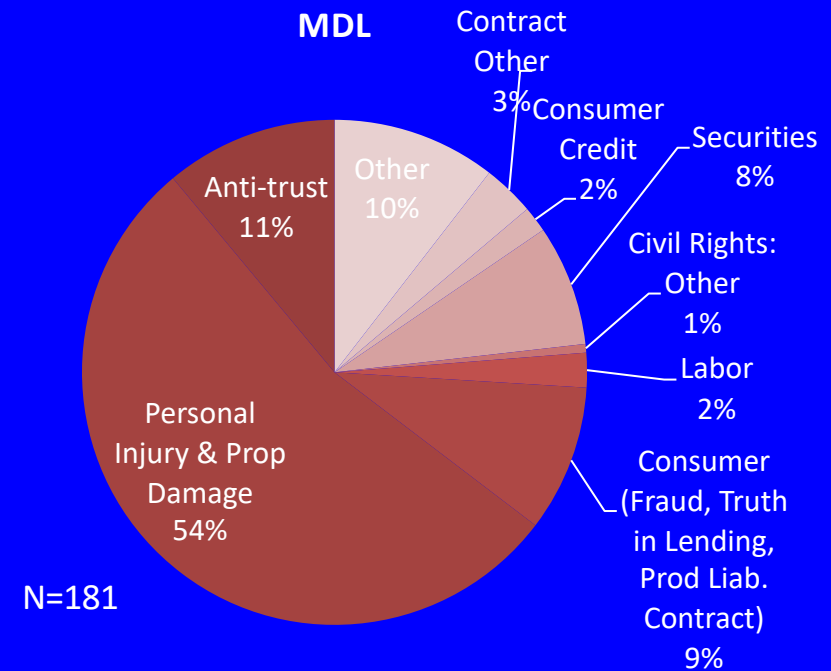
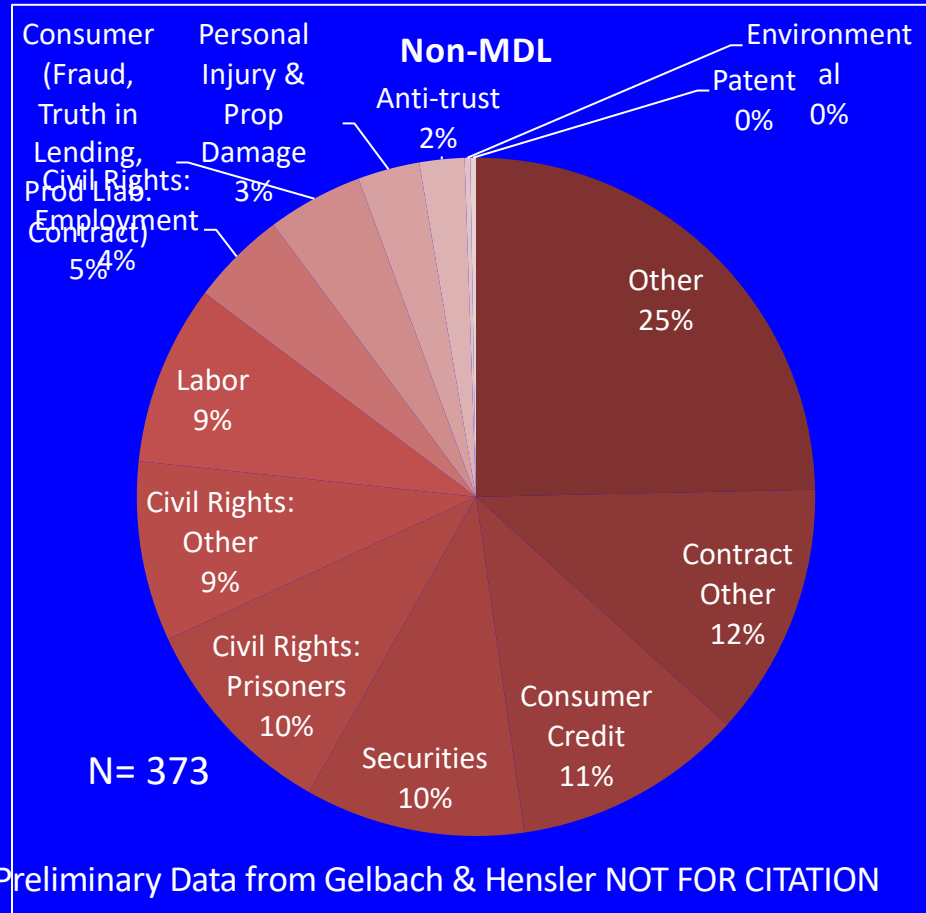
Distinctive Features of U.S. Class Actions

- Proceeding in class form requires judicial approval (“certification”)
- Anyone can come forward to represent the class who has
 - Individual standing to bring claim
 - Typical of other class members
 - Adequate (resources) to represent the class
- Judge appoints counsel for the class
- Class may obtain money damages
 - But must then satisfy “predominance” and “superiority”
- Anyone who does not want to be bound must opt-out
- Judge decides how much class counsel is paid if class prevails and all class members share those costs
- No cost-shifting if defendants prevail

U.S. Class Actions Can Be Used for Multiple Purposes (“Trans-substantive”)

- To sue a public or private party
- To obtain
 - A ruling on an issue where diverse individual rulings would be problematic
 - E.g. Interpretation of the tax code
 - Injunctive relief
 - E.g. Stop discriminating against women in promotion policies; provide adequate medical care to prisoners
 - Damages
 - E.g. For anti-trust statutory or securities violations
(but generally not for personal injury)

Substantive Claims Giving Rise to US Class Action Complaints Are Diverse



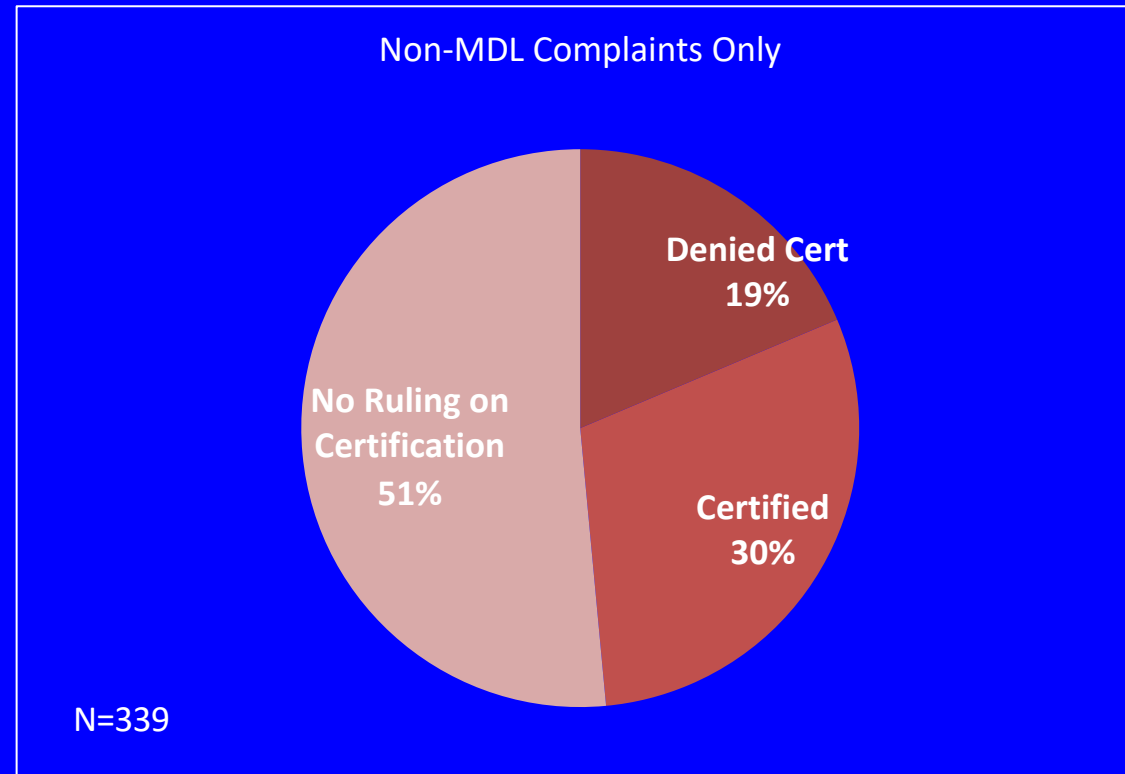
How Does a Case Become a Class Action?

- Formally,
 - Representative plaintiff(s) file a motion for class certification
 - Defendant (usually) contests
 - Judge grants or denies motion
 - Losing party may seek permission to appeal
- In practice,
 - Defendants contest pleadings, discovery follows, often motions for summary judgement
 - If claims survive pretrial motions , parties move for class certification for settlement purposes only

Interpretation of Certification Requirements Has Become Stricter Over Time

- Substantively
 - Harder to demonstrate **commonality**
 - Harder to demonstrate **predominance in cases seeking damages**
 - Harder to demonstrate adequacy of representation **in tort cases**
- Procedurally
 - Evidentiary hearing required for certification
 - Case merits may be considered
 - Judge rules on sufficiency of expert witnesses & testimony

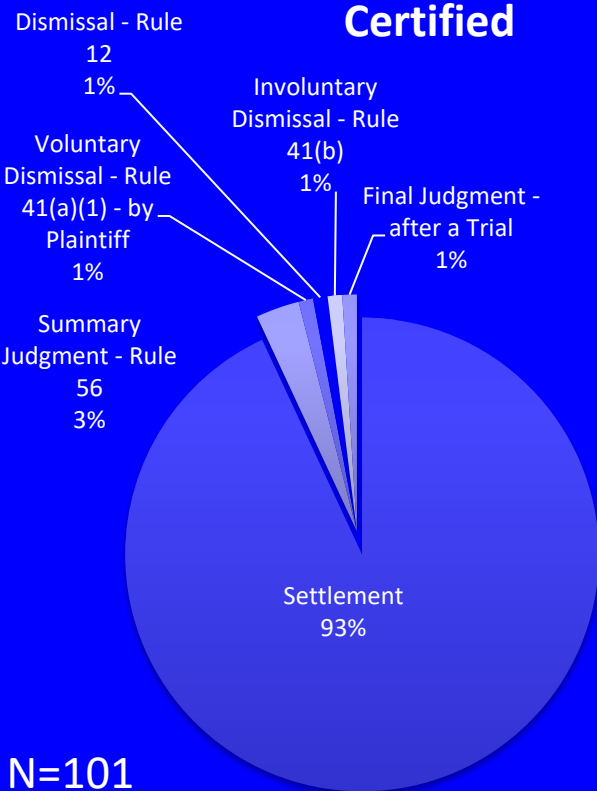
A Minority of Class Action Complaints Are Resolved In Class Form



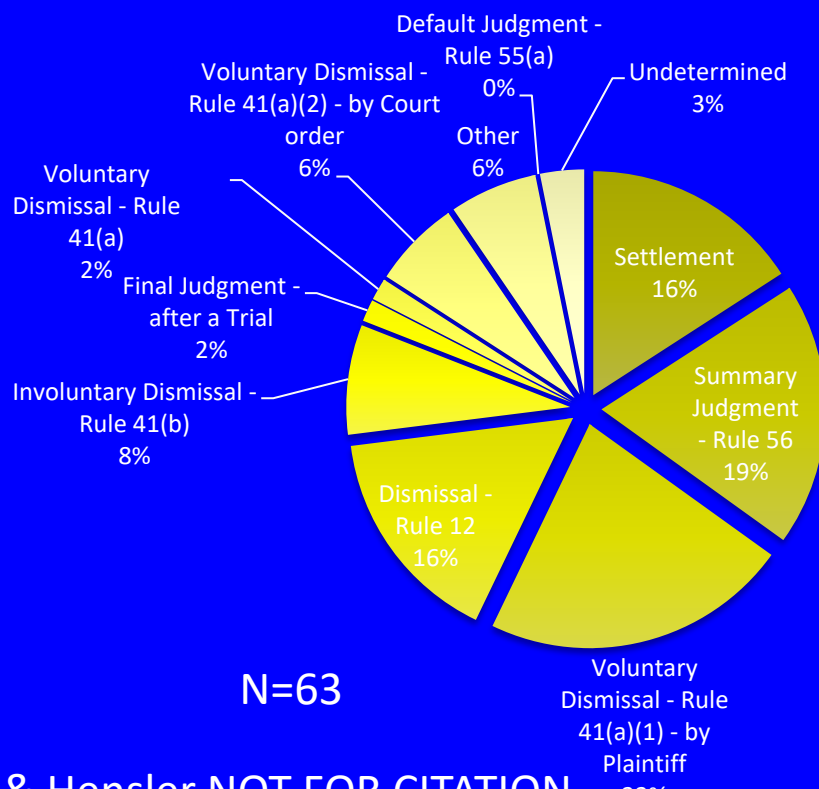
Preliminary Data from Gelbach & Hensler NOT FOR CITATION

Most Certified Class Complaints Settle, Most Non-Certified Complaints Are Dismissed or Disposed By Summary Judgment

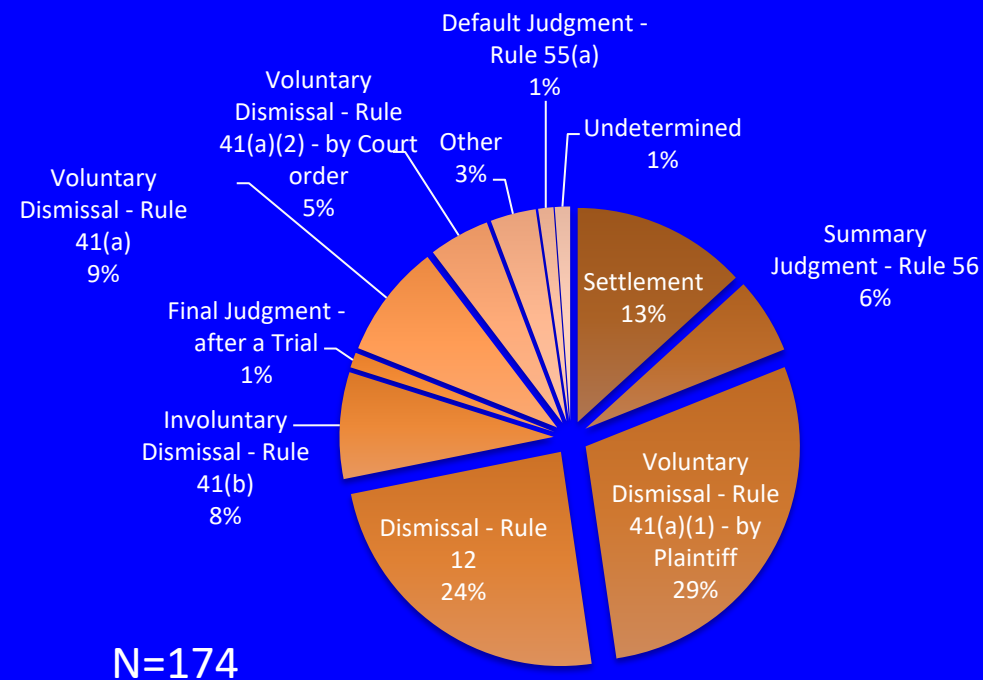
Certified



Denied certification



With no ruling on certification



What Happens When Parties Decide to Settle?

- Judge reviews settlements and grants preliminary approval for purpose of notice
- Class members receive notice of pending class action & settlement terms
- Time to “opt out”
- Class members who do not opt out may object to settlement terms, including proposed attorney fees
- Hearing on settlement fairness and adequacy
- Judge approves settlement (or not)
- Judge awards fees to attorney representing class
 - Usually ~25% of settlement fund but smaller fraction when settlements are very large

Class Action Outcomes Vary Dramatically

- Some class actions deliver large sums of money to class members
 - Compensation costs to defendants may have significant deterrent effects
- Litigation expense, including class attorney fees, may also provide useful deterrence
- Some class actions lead to changes in practices
 - In the US, may be mandated in consent decrees and monitoring
- Some class actions impose costs on defendants through *cy pres* remedies
 - Potentially deterrent
- Some class actions do not deliver very much to class members
 - And may not cost defendants very much
- Class actions may have indirect reputational effects, on market share & access to capital