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(Identifying information is confined to the cover page for anonymous review.)

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Abstract

It is frequently stated in the class action literature that many Rule 23(b)(3) class action plaintiffs recover only a fraction of their claimed losses in settlement. Class action critics blame these low recovery-loss ratios on two underlying problems: strike suits, in which the plaintiffs' claims lack merit and are settled for their nuisance value along with a payment of attorneys' fees, and sweetheart deals, in which the plaintiffs' attorneys undersell even meritorious claims in settlement in exchange for guaranteed attorneys' fees. Critics blame the functional absence of the plaintiff in Rule 23(b)(3) class actions for these phenomena: a passive plaintiff class frees unscrupulous plaintiffs' attorneys to act in their own, rather than their clients', interests. Critics propose to stop class action strike suits and sweetheart deals by giving these absent, passive clients a greater role in Rule 23(b)(3) litigation, by switching the way that plaintiffs join a case from opt out to opt in. Though this is a prominent proposal for class action reform, the workings of an opt in requirement have never been studied in an actual opt in regime. This article begins to fill that gap by investigating whether the opt in requirement of the Fair Labor Standards Act (FLSA) has stopped strike suits and sweetheart deals in cases brought under that statute, ultimately producing higher plaintiff recoveries. The article concludes that the opt in requirement has not had the effects in the FLSA context that class action reformers would hope, and closes with alternative suggestions for reform and directions for future empirical research.

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I. Introduction

It is a staple of the class action literature that many Rule 23(b)(3) class action settlements recover only a fraction of what the plaintiffs claim to have lost. Professor John Coffee, a leading class action scholar, sums up this view: "[P]rivate litigated judgments are few, cheap settlements are common, and the typical settlement recovery is below even the level of compensatory damages alleged by plaintiffs."[1] For class action critics, plaintiffs' low recoveries are evidence of two underlying problems.[2] Either the plaintiffs' claims lack merit, meaning that they cannot command a high settlement (but their lawyers can still collect a fee), or the plaintiffs' claims are meritorious, but their attorneys "sell them out," trading a relatively low recovery for a relatively high fee award. These two phenomena are sometimes called, respectively, "strike suits" and "sweetheart deals."[3] Whether or not one accepts these characterizations of Rule 23(b)(3) class action litigation,[4] they have been the subject of numerous empirical studies and are core claims of the class action literature.

At the root of these two critiques is an image of the plaintiffs' class action attorney not as a fiduciary and loyal agent of the plaintiff class, but rather as an independent, self-interested entrepreneur whose decisions are driven by a desire to maximize fees.[5] According to critics,

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[1] John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter is Not Working*, 42 Md. L. Rev. 215, 225 (1983).

[2] Throughout this article, the term "plaintiffs' recovery" refers to the settlement money that flows to the plaintiffs themselves, and not to the fees paid to the plaintiffs' attorneys.

[3] *See, e.g.,* James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 Ariz. L. Rev. 497, 502 (1997) (discussing strike suits); Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377 (2000) (discussing sweetheart deals).

[4] The strike suit characterization in particular has come under attack. *See, e.g.,* Cox, *supra* note 3 at 502; John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice,"* 30 Cardozo L. Rev. 407, 410 (2008).

[5] Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 7 (1991) ("Over the past decade a number of scholars, including most prominently Professor John Coffee, have recognized that the single most salient characteristic of class and derivative litigation is the existence of 'entrepreneurial' plaintiffs' attorneys."); Joel Seligman, *The Seventeenth Annual Corporate Law Symposium: Rethinking Private Securities*

class action attorneys can operate independently of their clients' interests because class actions are characterized by "the effective absence of the client."[6] Any person who fits the class description automatically becomes part of a Rule 23(b)(3) case unless he or she affirmatively opts out. Few class members exclude themselves, but even fewer take an active role in the litigation, leaving the plaintiffs' attorneys representing a predominantly silent, effectively absent, class, which does little or nothing to monitor or check attorney behavior.

Critics propose to stop class action strike suits and sweetheart deals by giving these absent clients a greater role in Rule 23(b)(3) litigation, by switching the default from opt out to opt in. In an opt in regime, each plaintiff would be required affirmatively to join a case at the outset rather than being included, *en masse*, by default. Critics believe that this change would check attorney behavior in two ways. First, with respect to strike suits, if a particular case lacks merit, plaintiffs will choose not to join; if a case is strong, plaintiffs will join in large numbers. Plaintiffs' attorneys will learn to predict these trends and will be "less likely to file non-meritorious suits and suits in which the likely remedies were trivial."[7] Second, with respect to sweetheart deals, the opt in requirement would produce a plaintiff class that is more engaged from the outset. These more active plaintiffs would, in turn, actively monitor their lawyers and prevent the trading of recovery for fees that characterizes sweetheart deals. Ultimately, the plaintiffs would benefit by collecting a higher percentage of their claimed losses.

Despite the popularity of the opt in proposal, and in contrast to the abundance of empirical work on class action litigation, there has been no empirical study of the workings of the opt in requirement in an actual opt in regime. This is surprising, as at least three major federal statutes, the Fair Labor Standards Act, the Equal Pay Act, and the Age Discrimination in Employment Act, have required for decades that plaintiffs opt in, and at least one state's rules of civil procedure allow judges to require plaintiffs to opt into class actions under certain circumstances.[8] This article begins to fill the gap by examining cases filed under the Fair Labor Standards Act (FLSA).

If class action reformers' predictions are accurate, then one would expect to see higher recovery-loss ratios in FLSA litigation. The opt in requirement would filter out weak claims and attorneys, actively controlled by their clients, would maximize the plaintiffs' recoveries and reject settlements that would reward themselves in disproportion to their clients. However, the data presented in this article show that plaintiffs' recovery-loss ratios in FLSA collective actions are comparable to those in Rule 23(b)(3) class actions, and that the opt in requirement is not

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Litigation, 73 U. Cin. L. Rev. 95, 97 (2004) ("In the most extreme form of this critique, the plaintiff's attorney [has been] excoriated as 'entrepreneurial,' or an 'unfaithful champion' of the plaintiff class."). Professor Coffee notes, however, that his examination of attorney behavior "was intended more as a positivist analytic construct than a normative evaluation." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 372 n.3 (2000).

[6] Coffee, *supra* note 1 at 233.

[7] Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 Law and Contemp. Probs. 137, 145 (2001) ("But when the wrongdoing was insignificant or the remedies trivial, few people would come forward. This response would reduce the *in terrorem* effect of filing a class action in such circumstances, encouraging defendants to contest non-meritorious suits. In addition, judges might decline to certify a class if only a small fraction of eligible class members opted in. Faced with a higher risk of not covering their costs to pursue a class action, plaintiffs' attorneys would be less likely to file non-meritorious suits in which the likely remedies were trivial."); Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 Ariz. L. Rev. 923, 936 (1998) ("If class members opt in at a rate that supports enforcement, well and good. If so few opt in that the litigation founders for want of support, so be it.").

[8] 29 U.S.C. § 201 *et seq.*(FLSA); 29 U.S.C. § 206(d) *et seq.* (EPA); 29 U.S.C. § 621 *et seq.* (ADEA); Pa. R.C.P. No. 1711 (2009) (Pennsylvania's rules of civil procedure).

functioning in the FLSA context in the way that class action critics would predict. FLSA opt in rates are low regardless of a case's merits, suggesting that the opt in requirement is not filtering cases as expected. The opt in requirement also does not appear to produce more effective monitoring of attorneys by clients, as attorneys' fees frequently equal or exceed the plaintiffs' recoveries.[9] These observations suggest that the opt in requirement would not be a cure-all for the Rule 23(b)(3) class action. It does not work in FLSA cases in the way that class action critics predict, and likely would not work in any Rule 23(b)(3) case that shares characteristics of FLSA litigation.[10]

This article proceeds as follows: Part II examines empirical data on recovery-loss ratios in the Rule 23(b)(3) context and explores the strike suit and sweetheart deal explanations for plaintiffs' relatively low recoveries. Part III explains the opt in proposal for reforming Rule 23(b)(3) class actions and the effects that reformers predict it will have. Part IV describes the design and structure of the FLSA and the methodology for my own study of FLSA litigation. Part V presents my data on recovery-loss ratios in FLSA cases. Part VI explores reasons for the apparent failure of the opt in requirement to produce higher FLSA recovery-loss ratios, and Part VII offers final observations on the FLSA and Rule 23(b)(3) class action reform.

II. Recovery-Loss Ratios in Rule 23(b)(3) Class Actions

The ratio between the plaintiffs' recovery and claimed losses in Rule 23(b)(3) class actions has been examined in a variety of recent empirical studies. In a 2008 study of 773 securities class action settlements, plaintiffs recovered only between 1% and 9% of their provable losses.[11] A 2003 study of close to 1,300 securities class actions found that recovery-loss ratios ranged from 0.12% to 30.69% using one method of calculating the plaintiffs' loss, and 0.22% to 51.04% using an alternative method of loss calculation.[12] A study comparing plaintiffs' recoveries and losses in 957 securities class actions filed in federal courts in 2002, 2003, 2004, and 2005 found ratios of 2.7%, 2.9%, 2.6%, and 2.5%, respectively.[13] Finally, a 2000 study of consumer and mass tort class actions found that plaintiffs were promised between 13% and 61% of their losses in settlement.[14]

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[9] The question of whether FLSA cases can accurately be characterized as strike suits or FLSA settlements as sweetheart deals is less clear, however, and is explored further in Part VI.

[10] *See* Part VII, *infra*, for a discussion of relevant shared characteristics.

[11] James D. Cox, Randall S. Thomas & Lynn Bai, *There Are Plaintiffs and . . . There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 Vand. L. Rev. 355, 375, 383 (2008).

[12] Mukesh Bajaj, Sumon C. Mazumdar & Atulya Sarin, *Empirical Analysis: Securities Class Action Settlements*, 43 Santa Clara L. Rev. 1001, 1021 (2003) (finding recovery-loss ratios between 0.12% and 30.69%, with a median ratio of 15.41% using one method of calculating loss, and between 0.22% and 51.04%, with a median ratio of 25.63% using another method of loss calculation). The existence of two methods of loss calculation points out a flaw in relying on plaintiffs' own claims of loss in calculating recovery-loss ratios. Because such claims will necessarily favor the plaintiffs, they are likely relatively optimistic (high), driving down recovery-loss ratios. However, there is no platonic measure of a plaintiff's loss in many areas of law; plaintiffs' own estimates of their losses are therefore the best data available.

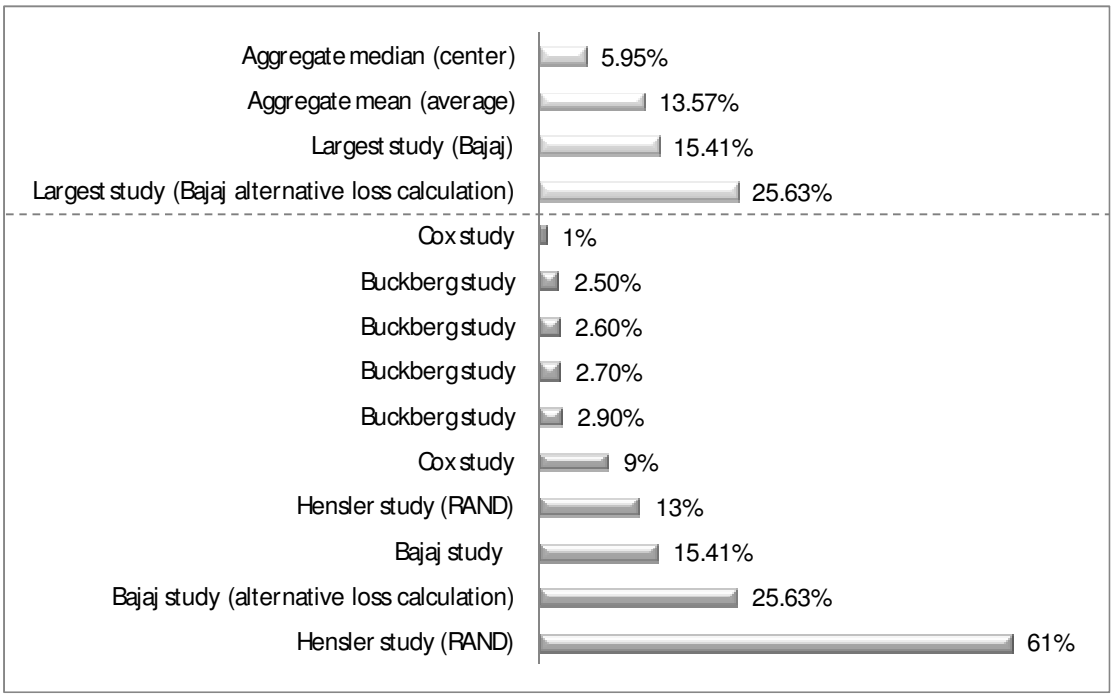
[13] John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, Columbia Law and Economics Working Paper No. 359 at 29 n.69 (Nov. 9, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503513 (cited with author's permission) (citing Elaine Buckberg, et al., Nat'l Econ. Research Assocs., *Recent Trends in Shareholder Class Action Litigation: Are WorldCom and Enron the New Standard?* 6 (July 2005)).

[14] DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 79, 427, 458-59 (RAND Institute for Civil Justice) (2000).

Chart 1 lists the recovery-loss ratios found by each of these studies, as well as the aggregate median (center) and mean (average) recovery-loss ratios for all studies taken together, and the ratio found by the study with the largest sample size.[15] Throughout this article, I draw on multiple studies of Rule 23(b)(3) class actions, each of which varies in sample size and methodology. Because of this underlying variety, it may not be appropriate to form conclusions based only on the aggregate median or mean. Instead, considering the aggregate median, mean, and the findings of the largest study together may present a more complete picture of the data.

As shown in Chart 1, the aggregate median (center) recovery-loss ratio reported by the Rule 23(b)(3) class action studies is 5.95%, while the aggregate mean (average) is 13.57%. The largest of the studies reports a recovery-loss ratio of either 15.41% or 25.63%, depending on how the plaintiffs' losses are calculated. Whichever statistic is used, the plaintiffs in these studies rarely recovered much more than a quarter on the dollar, or 25%, of the money they claimed to have lost due to the defendants' misconduct. (The only study that found a higher recovery-loss ratio – 61% – examined only three class actions.[16] Its results therefore may not be generalizable.)

Chart 1: Rule 23 Class Action Studies: Recovery-Loss Ratio



[15] The median and the mean are two ways to measure the center of a set of data points. The median is the midpoint if the data are arranged from smallest to largest, meaning that half of the data points are smaller than the median and half are larger. The mean adds all data points and divides the total by the number of points. In other words, the median is the center value while the mean is the average value. The median and mean will be exactly the same when the distribution of data points is symmetric. The mean will be higher or lower than the median if more data points are grouped at the high or low end of the distribution. A study with a large sample size may provide an alternative view of the data. In general, the larger the sample size, the more likely the mean and median are to reflect the mean and median of the population as a whole. However, just because a study is large does not mean that it is reliable, as the study's sample may not have been drawn at random, or may not be representative of the larger population in some important way. *See generally* DAVID S. MOORE & GREGORY P. MCCABE, INTRODUCTION TO THE PRACTICE OF STATISTICS 41-44, 328-32 (W.H. Freeman and Company: New York) (3d. ed. 1999).

[16] HENSLER ET AL., *supra* note 14 at 458-59.

Rule 23(b)(3) class action critics characterize this level of recovery-loss ratio as low, "below even the level of compensatory damages alleged by plaintiffs."[17] In critics' view, low ratios are explained either by the lack of merit of the plaintiffs' claims or, assuming the claims had merit, by the plaintiffs' lawyers' underselling of those claims in settlement. With respect to meritless claims, "The argument is that because low recoveries predominate, suits are hypothesized to have been brought for their nuisance value rather than for any harm actually suffered by the members of the class. Thus, . . . class members recover extremely small amounts."[18] Alternatively, critics explain low recovery-loss ratios as the product of deals in which "a substantial portion of the settlement [is] paid to the plaintiff's attorney" rather than to the plaintiffs.[19] According to an example provided by Professor Coffee, a self-interested plaintiffs' attorney in this situation would "prefer a $500,000 settlement out of which a $300,000 award of attorneys' fees would be paid, to a $1,000,000 recovery out of which only a $200,000 fee would be paid," even though the plaintiffs would recover four times as much under the second scenario.[20]

Behind both the strike suit and sweetheart deal explanations for low recoveries by Rule 23(b)(3) plaintiffs lies a view of the plaintiffs' attorney as functionally independent from his or her clients. Critics charge that a lack of affirmative involvement by Rule 23(b)(3) class members from the litigation's beginning to end liberates the class action attorney from the plaintiff class, allowing the attorney to bring weak claims and trade lower plaintiff recoveries for higher fees.

A. "The Effective Absence of the Client" in Rule 23(b)(3) Class Actions

Class actions lawsuits under Rule 23(b)(3) begin with a named plaintiff and an attorney. In some cases, the named plaintiff approaches the attorney and seeks representation. In others, an attorney identifies a possible claim and recruits a named plaintiff who holds that claim to act as his or her client.[21] Regardless of how the case is initiated, assuming it is not dismissed on a motion by the defendant, the litigation proceeds to class certification, in which the plaintiffs propose a class definition and seek to represent all class members. If the court grants certification, Fed. R. Civ. P. 23(c)(2)(B) requires that notice be sent to all class members, informing them of the litigation and their opportunity to opt out. If the case settles, class members may receive a second notice pursuant to Fed. R. Civ. P. 23(e)(1) notifying them of the opportunity to object before the court accepts the proposed settlement as fair. If they do not opt out or object, they become bound by the terms of the settlement and eligible to collect their share of the plaintiff class' recovery.[22]

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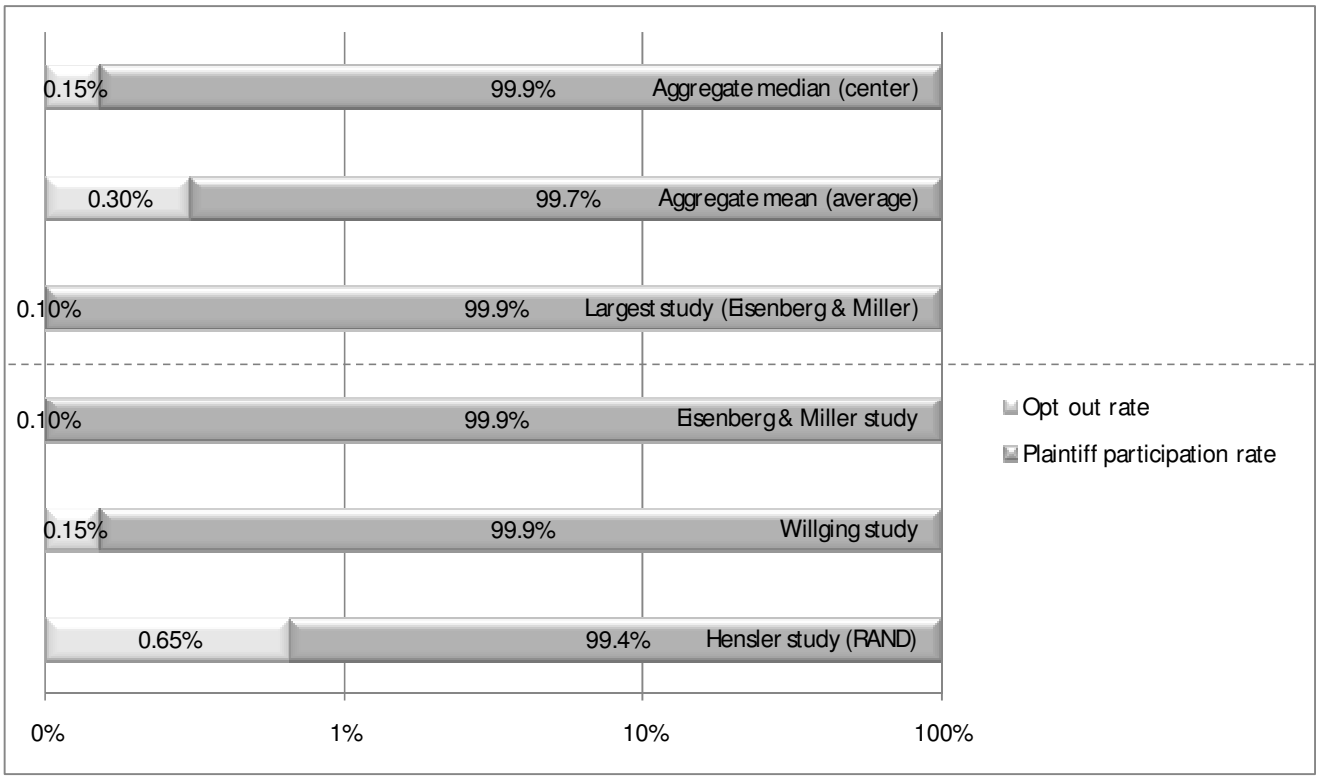
[17] Coffee, *supra* note 1 at 225.
[18] Cox, *supra* note 3 at 502, n.60.
[19] Seligman, *supra* note 5 at 97.
[20] Coffee, *supra* note 1 at 243; *id.* at 232 ("To say this is not to claim that plaintiffs' attorneys systematically subordinate the class recovery to their own fee, but it is to say that the plaintiff's attorney is subject to a serious conflict of interest—one that can distort the settlement process and reduce the deterrent effect of private litigation—whenever the determination of the fee award is not made a sufficiently direct function of the size of the recovery so as to align the interests of the private enforcer with those of the class he purports to represent."); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 Hofstra L. Rev. 129, 145 (2002) ("Lawyers have a keen interest in the size of their fees, while clients are interested primarily in the size of their recovery. To the degree lawyers dominate the lawyer-client relationship, there is a danger that they will engage in conduct that increases their fees at the expense of the client's recovery.").
[21] Macey & Miller, *supra* note 5 at 99 ("That such solicitation occurs on a regular basis is patently obvious.").
[22] Those class members who do exclude themselves have the option to file their own lawsuits, separate from the class action, but may not recover as part of any judgment awarded to or settlement collected by the class.

Critics charge that this procedure results in "the effective absence of the client," freeing plaintiffs' attorneys to act in their own interests.[23] Studies of Rule 23(b)(3) class actions have shown that vanishingly few plaintiffs do opt out. Chart 2, below, summarizes opt out rates observed in three major class action studies.[24] As Chart 2 shows, the aggregate median (center) opt out rate for the three studies combined was 0.15% and the aggregate mean (average) was 0.30%, while the largest of the three studies reported an opt out rate of 0.10%.

Chart 2: Rule 23 Class Action Studies: Plaintiff Opt Out and Participation Rates



[23] Coffee, supra note 1 at 233. Apart from the question of checking the plaintiffs' attorneys, the structure of Rule 23(b)(3) class actions also may present a problem from the perspective of plaintiff autonomy and "voice" in the litigation, for its own sake, rather than the sake of attorney control. *See generally* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. Chi. Legal F. 519 (2003); Coffee, *supra* note 5 at 419.

[24] Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, Federal Judicial Center at 52 (1996) (finding in 84 cases that the "median percentage of members who opted out was either 0.1% or 0.2% of the total membership of the class [producing a median of 0.15%] and 75% of the opt-out cases had 1.2% or fewer class members opt out"); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529, 1546 (2004) ("The median percentage of class members opting out, in the 143 cases in which the opinion reveals both the number of opt-outs and the number of class members, is a mere 0.1 percent."); Bruce I. Bertelsen, Mary S. Calfee & Gerald W. Connor, Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 Geo. L. J. 1123, 1161 (1974) (finding that in 31 of 36 cases studied, less than 10% of the class chose to exclude themselves, and in 15 of those cases, no class member opted out); HENSLER ET AL., *supra* note 14 at 325-26 (reporting in one case study 25 opt-outs out of approximately 3,800 class members, or 0.65%).

Regardless of which figure is used, these studies reveal that opt out rates in Rule 23(b)(3) class actions are exceedingly low. Critics view class members' nearly universal failure to opt out as a sign of passivity rather than an affirmative decision to stay in the litigation. As Professors Eisenberg and Miller comment, "The overwhelming inaction displayed by class members in the reported cases suggests that a class member's failure to opt-out should not readily be equated to an affirmative consent to jurisdiction. Common sense indicates that apathy, not decision, is the basis for inaction."[25] Indeed, Cass Sunstein points out in his scholarly articles and, with Richard Thaler, in his popular book, *Nudge*, that the default option can be "sticky," meaning that people may have a hard time overcoming inertia to change the status quo.[26] As Sunstein and Thaler summarize, supported by social science research in a variety of arenas:

> [M]any people will take whatever option requires the least effort, or the path of least resistance. . . [F]or a given choice, if there is a default option—an option that will obtain if the chooser does nothing—then we can expect a large number of people to end up with that option, whether or not it is good for them.[27]

In Rule 23(b)(3) cases, the default option is set at inclusion, and the path of least resistance for class members is not to opt out. Though class actions appear to have extremely high plaintiff participation rates, the vast majority of those plaintiffs have never taken any affirmative step to participate in the litigation.

In fact, a Rule 23(b)(3) class action is structured such that plaintiffs have little incentive to act and every incentive to remain passive. According to prominent class action observers Professors Jonathan Macey and Geoffrey Miller:

> Upon receiving and reading notice of the suit, the typical plaintiff in a large-scale, small-stakes class action has a choice between two courses of action. She can do nothing, in which case she will receive a check in the mail if the suit is successful and will incur no costs if the suit fails. Or she can go to the trouble of opting out of the action, in which case she will receive nothing whether or not the suit is successful. Such a decision is not hard to make. Nearly everyone who understands the nature of this choice will elect to do nothing and thereby remain part of the class action.[28]

The rational choice for the typical plaintiff, with low damages and little to lose, is to remain in the case, passively waiting for "a check in the mail."[29]

This lack of active involvement carries through to the end of the litigation as well. Though Rule 23(b)(3) class action plaintiffs have the right to comment on or object to any

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[25] Eisenberg & Miller, *supra* note 24 at 1561.

[26] *See generally* Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. Rev. 106 (2002).

[27] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 83 (Yale University Press) (2008).

[28] Macey & Miller, *supra* note 5 at 28; *see also* Cooper, *supra* note 7 at 936 ("Inertia, the complexity of class notices, and the widespread fear of any entanglement with legal proceedings will lead many reluctant class members to forgo the opportunity to opt out, and likewise will deter many willing class members from seizing the opportunity to opt in.").

[29] Those few plaintiffs who do choose to opt out might be those with the highest individual claims and the greatest incentive to engage with the case. Their withdrawal from the class action leaves behind only those plaintiffs with small claims and little reason or inclination to participate actively in the litigation or to monitor their attorneys. John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 Ind. L. J. 625, 633 (1987).

proposed settlement, studies of objections filed and appearances by class members at settlement fairness hearings have found that the incidence of any form of objecting behavior is "infrequent" and "trivial."[30] Moreover, even when class members could put money directly into their pockets by taking action, studies show that they do not. A 2000 study by the RAND Institute for Civil Justice of Rule 23(b)(3) consumer and mass tort class actions found that while plaintiffs were promised between 13% and 61% of their losses in settlement, when class members were required to file a claim for their settlement monies, "the fraction of compensation funds actually disbursed to class members was modest to negligible."[31]

Thus, critics blame "the effective absence of the client" for the attorney behavior that leads to strike suits and sweetheart deals and, ultimately, to low plaintiff recoveries in Rule 23 (b)(3) class actions. According to Professor Coffee, "the parties can find a variety of means by which to trade a low settlement for a high attorney's fee, once the client becomes only a distant bystander to the litigation."[32]

III. The Opt In Proposal for Class Action Reform

A prominent reform proposal in response to this rather dismal portrayal of Rule 23(b)(3) litigation has been to change the way that plaintiffs enter a class action from opt out to opt in, to give the absent clients a greater role in the litigation. A brief history of the Rule 23(b)(3) opt out class action is useful in understanding this proposed reform.

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[30] Willging et al., *supra* note 24 at 57; Eisenberg & Miller, *supra* note 24 at 1546 ("The median percentage of class members objecting is zero in the 205 cases with the necessary data. Opt-out and objector percentages are thus trivial.").

[31] HENSLER ET AL., *supra* note 14 at 427; *see also* Coffee, *supra* note 13 at 21; Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 Vand. L. Rev. 179, 205 (2009); James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 Stan. L. Rev. 411, 412 (2005).

[32] Coffee, *supra* note 1 at 232-33; Koniak & Cohen, *supra* note 20 at 146 ("[C]lient monitoring of lawyer performance is effectively unavailable in almost all class actions."). Not only do absent class members fail to monitor their attorneys, but arguably, neither does the lead plaintiff, who, though nominally the representative of the absent class, is at times recruited by the attorney in the first place and is therefore essentially "captured." Further, though Rules 23(e) and 23(h) require court approval of all class action settlements, including an assessment of the settlement's fairness to absent class members, commentators have long complained that many courts "rubber stamp" settlements to which the parties have agreed. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1348 (1995); Koniak & Cohen, *supra* note 20 at 149-54 (discussing pressures on judges to approve settlement agreements); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045, 1120 (1995) ("[O]ne must search long and hard to find any court opinion that has disapproved a class settlement on the ground that it was collusive. Thus, the 'absence of collusion' standard [for court approval of class action settlement agreements] is meaningless as now applied."). Research has confirmed these complaints: a study in the Second Circuit has shown, for example, that even district courts that were specifically admonished by the appellate court to monitor attorneys' fee awards closely and keep fees in check did not achieve much of a reduction of fee awards. Theodore Eisenberg, Geoffrey Miller & Michael A. Perino, *A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions After* Goldberger v. Integrated Resources, Inc., 29 Wash. U. J. L. & Pol'y 5, 18-19 (2009) (studying 717 securities class action fee awards in district courts in the Second Circuit Court of Appeals before and after appeals court decision admonishing district court judges to scrutinize fee awards more closely and finding that fee awards decreased from the 28.35% - 30% range only to the 26.03% - 27.25% range).

When the Federal Rules of Civil Procedure were first promulgated in 1938, Rule 23 permitted three categories of class action: "true," "hybrid," and "spurious."[33] In the spurious class action, only those plaintiffs who intervened in the case (or opted in, in other words) before a trial on the merits would be bound by and able to recover under the judgment.[34] The landscape changed in 1966, when the opt in spurious class action was replaced by today's Rule 23(b)(3), in which class members would be presumed to participate, be bound by the judgment unless they opted out, and would be informed of the litigation and the opportunity to exclude themselves by a court-supervised notice process.

Class action critics today want to change the landscape again, to switch the default back to some semblance of the intervention/ opt in spurious model. This proposal has surfaced regularly in the literature and in public debate over class action reform. As early as 1972, the first major study of class action litigation after the 1966 creation of Rule 23(b)(3) proposed that courts "either (1) require individuals to affirmatively 'opt in' by a specified date and thus become class members, or (2) allow individuals to become class members through their failure to request exclusion but require such class members to file a proof of claim by a specified date in order to benefit from any ultimate recovery."[35] The Advisory Committee on Civil Rules again considered the opt in reform during their deliberations in 1996,[36] and the opt in proposal has appeared in various forms in law review articles and public discourse until the present day.[37]

Reformers believe that the opt in proposal would address both strike suits and sweetheart deals – ultimately producing higher plaintiff recoveries – by controlling attorney behavior. First, the number of plaintiffs who opt in would act as a check on an attorney's ability to bring non-meritorious strike suits. Potential plaintiffs would assess the merits of a case and choose to join only those strong cases that would result in a high recovery. Attorneys would learn to file only meritorious cases, because non-meritorious cases would draw such low plaintiff

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[33] The "true" class action comprised claims with common questions of law or fact. This form of action allowed parties whose claims would otherwise be subject to mandatory joinder, but whose numbers made joinder impracticable, to proceed collectively, and the result was binding on absent parties. The "hybrid" class action comprised claims that, while not all concerning the same questions of law or fact, all related to specific property. Judgment in hybrid class actions was also binding on absent class members.

[34] *See generally* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356 (1968); Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 Ariz. L. Rev. 687, 696 n.41 (1997). This sort of action was called "spurious" because it was not in any true sense a class action, but rather a mechanism for the permissive joinder of parties.

[35] American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure*, 32 (1972).

[36] Patrick E. Higginbotham, *Report of the Advisory Committee on Civil Rules*, 35 (May 17, 1996) ("This draft would have collapsed the categorical distinctions now observed between subdivision (b) (1), (b) (2), and (b) (3) classes; authorized the court to permit or deny opting out of any class action; created an opt-in class provision; specifically governed notice requirements for (b)(1) and (b)(2) classes; and made many other changes, many of them independently significant.").

[37] *See, e.g.,* American College of Trial Lawyers, *supra* note 25 at 32-34; Cooper, *supra* note 7 at 935-37; HENSLER ET AL., *supra* note 14 at 476; Testimony of Alfred Cortese, San Francisco, CA 11 (Jan. 17, 1997), reprinted in 3 Working Papers of the Advisory Committee on Civil Rules (1997) at 280 and 4 Working Papers at 387; Paul Niemeyer, Speech to the National Press Club (May 20, 1998), quoted by Hensler & Rowe, *supra* note 7 at 145 n.26; Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 130-32 (2003); John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. Ill. L. Rev. 903 (2005); John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 Notre Dame L. Rev. 1419, 1446 (2003). Professors Coffee, Issacharoff, and Miller also discuss the advantages of the opt in structure. *See* Coffee (2009), *supra* note 13 at 56-68; Issacharoff & Miller, *supra* note 31 at 202-08.

participation that they would not be worth the investment of attorney resources and time.[38] Second, the opt in requirement would produce a plaintiff class that would be more engaged from the outset than Rule 23(b)(3) plaintiffs, who participate in class action litigation merely by default. These active opt in plaintiffs would closely monitor their attorneys and prevent them from trading low plaintiff recoveries for guaranteed attorneys' fees, the sort of fee-driven behavior that characterizes sweetheart deals. [39]

If these predictions are accurate, one would expect to see higher recovery-loss ratios in cases filed under the FLSA – an opt in regime – than the 25% ratio observed in Rule 23(b)(3) class actions. The only cases filed would be those that are meritorious; the plaintiffs in each would be able to demand high recoveries; and their attorneys would not negotiate those recoveries away in favor of fees. The remainder of this article closely examines the workings of the Fair Labor Standards Act's opt in requirement, exploring whether these predictions are borne out by the data.

IV. Fair Labor Standards Act Case Study

A. The Design and Structure of the FLSA

The FLSA's opt in requirement developed against the backdrop, and under the influence, of Rule 23. The FLSA was enacted only one month after the 1938 version of Rule 23. In addition to its core substantive wage and hour regulations, the statute created its own group action mechanism, allowing plaintiffs to bring a FLSA claim on behalf of themselves and other employees similarly situated, or through a designated agent or representative who represented the plaintiff class.

There was confusion from the outset about the extent to which FLSA group claims would be governed by the FLSA itself or by Rule 23. In response, many courts essentially converted FLSA actions into Rule 23 spurious class actions, "limit[ing] participation in FLSA actions to named plaintiffs, intervenors, and consenters who joined the action before the trial on the merits."[40] For some time, claims under the FLSA and Rule 23 proceeded similarly, with courts treating FLSA claims as spurious Rule 23 class actions, with an opt in requirement.

In 1947, Congress amended the FLSA with the Portal-to-Portal Act, which revised the statute's group action mechanism.[41] Each individual FLSA plaintiff was now required

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[38] Hensler & Rowe, *supra* note 7 at 145; Cooper, *supra* note 7 at 936.

[39] Another set of proposals has advocated limiting class action plaintiffs' ability to opt out. Though approaching the problem from a different perspective, this proposal is in fact quite similar to the opt in proposal: the common goal is to bring plaintiffs into the litigation and keep them there, to allow them to police their attorneys and participate more meaningfully in the lawsuit. *See, e.g.,* Coffee, *supra* note 5 at 419; Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149 (2003) (discussing mandatory classing).

[40] Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 Buff. L. Rev. 53, 168-69 (1991).

[41] In addition to abolishing the FLSA's agent/representative group action mechanism, the Portal-to-Portal Act banned so-called "portal pay claims," in which workers claimed wages under the FLSA for the time they spent traveling from the entrance of their workplace to their actual work station. For workers employed in sprawling industrial complexes, this travel time was sometimes significant, and portal pay litigation had boomed in the years prior to 1947. The Portal-to-Portal Act was Congress' response to this boom, which it perceived as an extremely aggressive litigation campaign by unions, using the FLSA's agent/representative option for group litigation. *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 173 (1989) ("In enacting the Portal-to-Portal Act of 1947, Congress made certain changes in these procedures. In part responding to excessive litigation spawned by plaintiffs lacking a

affirmatively to opt into a FLSA collective action by "giv[ing] his consent in writing to become such a party and [filing] such consent . . . with the court."[42] The Portal-to-Portal Act therefore codified what courts had been doing in practice since 1938: treating FLSA group claims as opt in spurious class actions under Rule 23.

When the Federal Rules of Civil Procedure were amended in 1966 to replace the opt in spurious class action with the present-day Rule 23(b)(3) opt out class action, the Advisory Committee made clear that the changes did not affect opt in FLSA collective actions. Since 1966, therefore, the FLSA opt in collective action has proceeded along a different path from the Rule 23(b)(3) opt out class action.

Today's FLSA retains the opt in mechanism created by the Portal-to-Portal Act, requiring each individual plaintiff to file a consent form indicating his or her decision to participate in the litigation. Though the statute is silent on the mechanics of group representation, courts have constructed a two-step "certification" process for FLSA collective actions. The original plaintiffs file a complaint on behalf of themselves and all others similarly situated. The plaintiffs then move for conditional collective action certification. If the court grants conditional certification, it orders the defendants to produce the names and addresses of all workers who fit the collective action definition and permits plaintiffs to issue court-approved notice of the opportunity to opt in. The court sets a deadline by which new plaintiffs must file their consent forms in order to join the case. Finally, after discovery closes, the defendant may move for decertification, arguing that the plaintiffs are not, in fact, similarly situated or that insufficient plaintiffs have opted in to justify collective action treatment.[43]

The FLSA's opt in requirement is therefore essentially an enactment of the opt in reform proposed by Rule 23(b)(3) class action critics, a modern-day example of the pre-Rule 23(b)(3) spurious class action. Collective action lawsuits under the FLSA can therefore serve as a case study of the effects of the opt in requirement on strike suits and sweetheart deals and, ultimately, on the percentage of the plaintiffs' losses that they are able to recover.

B. Case Study Methodology

My study of the FLSA's opt in requirement uses as its data set FLSA cases filed in the U.S. District Court for the Southern District of Florida between 2003 and 2008. I chose the Southern District of Florida because, as shown in Chart 3, it has been the primary site for FLSA case filings over the past five years, accounting for, in various years, between a quarter (25%) and a third (33.33%) of all FLSA cases filed in federal court nationwide.[44]

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personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added."). However, Professor Linder argues that Congress was mistaken, that the agent/representative option was rarely actually used. Linder, *supra* note 40 at 170-72 (describing the Portal-to-Portal Act as "clearly designed as an attack on union-organized litigation and Congress as responding to the "the [FLSA] class action that never was").

[42] 29 U.S.C. §§ 251-262; 29 U.S.C. § 216(b).

[43] *See generally Hoffman-LaRoche*, 493 U.S. 165. Though *Hoffman-LaRoche* was brought under the Age Discrimination in Employment Act (ADEA), ADEA and FLSA cases use the same court-created collective action certification procedure and the same opt in requirement at 29 U.S.C. § 216(b).

[44] Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, *2003-2008 Annual Reports of the Director*, Table C-2, available at http://www.uscourts.gov/judbususc/judbus.html, last visited January 25, 2010; *see also* Denise Martin et al., Nat'l Econ. Research Assocs., *Class Certification in Wage and Hour Litigation: What Can We Learn from Statistics?* 3 (Nov. 9, 2009) (finding that 45% of FLSA cases in 2007 and 2008 filed in U.S. district courts were filed in Florida). Though I do not know the extent to which the Southern District's

Chart 3: FLSA Cases Filed in the Southern District of Florida and Nationwide (2003-2008)

Year	**FLSA cases filed** (S.D. Fla.)	**FLSA cases filed** (nationwide)	**Percentage of FLSA cases filed in the S.D. Fla.**
2003	903	4,055	22%
2004	1,040	3,426	30%
2005	1,234	3,464	36%
2006	1,197	4,389	27%
2007	1,378	6,786	20%
2008	1,154	5,302	22%
Total:	6,906	27,422	25%

Using FLSA data from the Southern District, I examined three variables: the ratio between the plaintiffs' recovery and their claimed losses in settled FLSA collective actions, the rate at which plaintiffs opted into FLSA collective actions, and the ratio between the plaintiffs' attorneys' fees and the plaintiffs' recovery in settled FLSA collective actions. I employed the following methodology. Using the online Public Access to Court Electronic Records (PACER) database for the Southern District, I identified 7,259 FLSA cases that were filed in all divisions of the District in the years 2003 through 2008. I then identified and removed 208 duplicate records that were created when a case was closed and later reopened within the study period. Finally, I identified and removed 145 cases that were still in litigation as of August 15, 2009, producing a data set of 6,906 unique closed cases. From this set, I took a random sample of 364 cases, or just over 5%. I reviewed each of these 364 cases individually and identified 250 that were filed as collective actions, rather than individual lawsuits. These 250 closed collective actions provide the basis for my study.[45]

V. Recovery-Loss Ratios in FLSA Collective Actions

To examine recovery-loss ratios in FLSA settlements – the key variable studied in the class action context – I reviewed each of the 250 FLSA collective actions in my sample and identified 218 that ended in settlement before trial. (See Table 1 in the Appendix.) Of these

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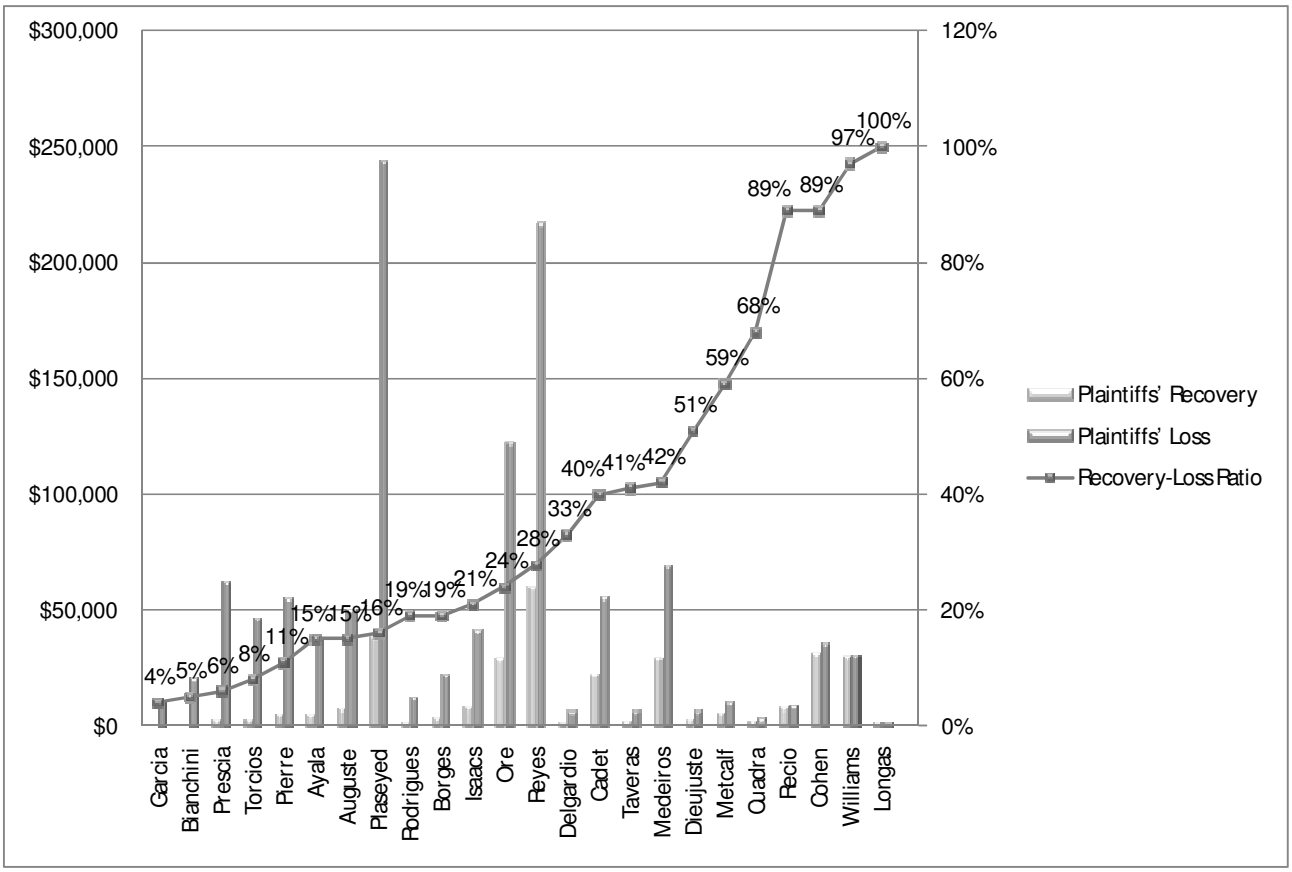
FLSA docket is unique compared to the FLSA dockets of other federal district courts, because the FLSA is a federal statute, one can expect some consistency in FLSA litigation characteristics in courts across the country.

[45] The following information on each case is stored in PACER: case number; case name; cause; the dates the case was filed, closed, and, if applicable, reopened and reclosed; the nature of suit; the court division in which the case was filed; the presiding judge; the magistrates, if any, to whom the case was referred for discovery, disposition, or settlement; the party that made a jury demand; and case flags used by the clerk's office. To obtain additional information on each case, I reviewed the complaint, statement of claim, motions filed, and settlement, dismissal, or judgment documents. I also tracked or calculated the following: whether the case was filed as a collective action; the number of days a case had been open; the name of the plaintiffs' lawyer(s); the number of original plaintiffs; whether the plaintiffs made minimum wage, overtime, and/or retaliation allegations; whether the case was granted collective action status; the length of the opt in period; the manner of notice; the number of plaintiffs who opted into the case; the way in which each case concluded (arbitration, default, dismissed, Rule 68 offer of judgment, settlement, summary judgment, and trial); the amount recovered; the plaintiffs' initial statement of their losses; the plaintiffs' recovery (total and average per plaintiff); the attorneys' fee award; the ratio of the plaintiffs' recovery to their losses; and the ratio of the attorneys' fees to the plaintiffs' recovery.

settled collective actions, data on both the plaintiffs' initial estimates of their losses and their ultimate recovery was available in twenty-five cases.[46] My findings on recovery-loss ratios are shown in Table 2 in the Appendix. Chart 4, below, illustrates these figures graphically, showing for each case the plaintiffs' recovery, their claimed losses, and the recovery-loss ratio. According to these data, plaintiffs recovered between 4% and 100% of their claimed losses, with a median (center) of 28% and a mean (average) of 38%.

Chart 4: Recovery-Loss Ratios in Settled FLSA Collective Actions[47]



In the Rule 23(b)(3) context, critics argue that a recovery-loss ratio of approximately 25%, or a quarter of recovery for each dollar of loss claimed, is an indication of strike suit behavior or sweetheart deals: that the plaintiffs' claims lack merit or that the plaintiffs' attorneys are settling for less than their clients' claimed losses in order to extract attorneys' fees. The

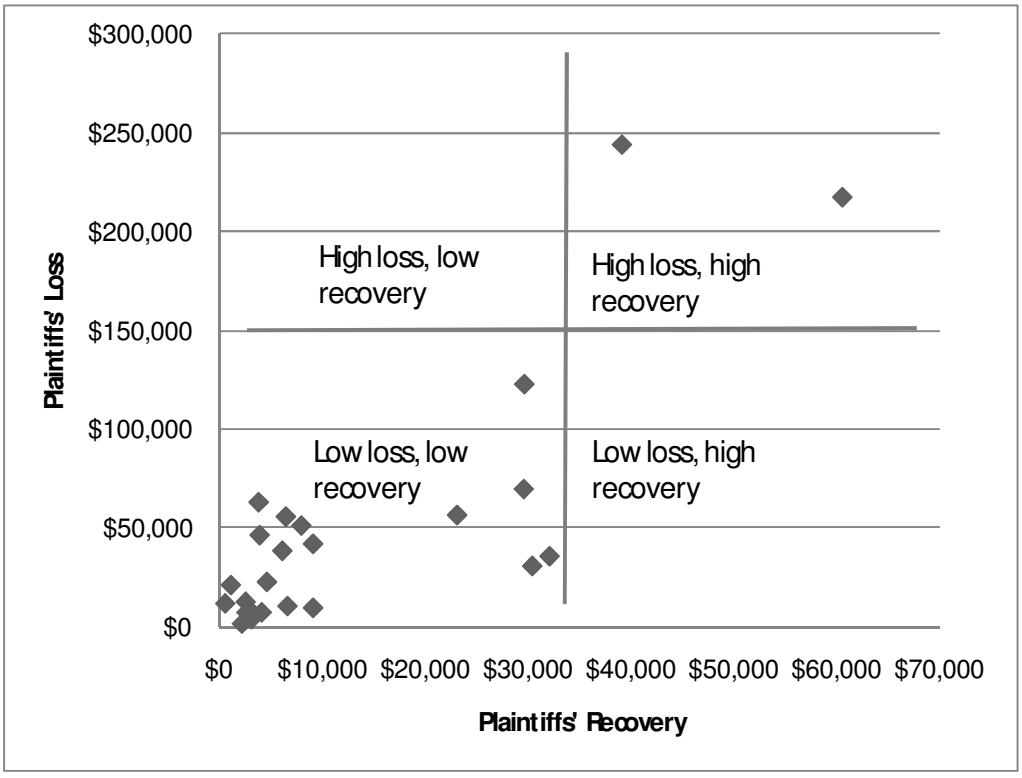
[46] Plaintiffs' estimates of their losses are found in the complaint, in the settlement agreement, or in the "statement of claim" required by some Southern District of Florida judges to be filed at the outset of FLSA cases. In the cases for which complete data was not available, the plaintiffs did not estimate their losses in any document, or the parties filed a sealed settlement agreement (or did not file one at all), or both. I acknowledge that the twenty-five cases for which I have data might differ from the 193 cases for which I do not have data in substantive ways that could undermine my conclusions. Moreover, as with Rule 23(b)(3) class action recovery-loss ratios, the value of this data is somewhat limited by the necessity of using plaintiffs' own estimates of the size of their losses, which are likely skewed high in the plaintiffs' favor.

[47] Chart 4 excludes *Johnson, et al v. Senior Health Care, et al*, in which the settlement agreement reported a recovery-loss ratio but not the underlying recovery and loss figures. *See* note 93, *infra*.

median and mean recovery-loss ratios of 28% and 38% in my FLSA data set are generally comparable to this 25% figure from the Rule 23(b)(3) context. Class action critics also peg their assessment of plaintiff recoveries as "low" to the plaintiffs' claimed compensatory damages.[48] In the FLSA context, the plaintiffs' total damage claims are usually twice their compensatory damages, or actual lost wages, because the FLSA allows plaintiffs to seek double, or liquidated, damages.[49] Therefore, if a FLSA plaintiff's overall recovery-loss ratio is below 50%, he or she would not recover any liquidated damages and only a portion of his or her actual lost wages. The 28% - 38% recovery-loss ratio found in my FLSA study would therefore appear to be "below even the level of compensatory damages alleged by plaintiffs," an indication in Rule 23(b)(3) cases of problematic settlements, according to critics.

In addition, Chart 5 plots plaintiffs' recoveries against their losses in each of the twenty-five cases, showing that the cases cluster in the low loss, low recovery quadrant of the chart. While there could be other explanations for this phenomenon,[50] this clustering would seem to echo the findings of Rule 23(b)(3) class action critics that "small settlement cases appear to exhibit the characteristics commonly associated with strike suits: small cash settlements that represent a small percentage of [the plaintiffs'] damages."[51]

Chart 5: Plaintiffs' Loss Versus Plaintiffs' Recovery



[48] *Coffee*, supra note 1 at 225.
[49] 29 U.S.C. § 216(b).
[50] As explained further in Part VI.A, the opt in requirement itself results in few opt in plaintiffs, and therefore relatively low total plaintiff recoveries.
[51] Cox et al., *supra* note 11 at 383.

Thus, recovery-loss ratios in my FLSA data set do not appear to respond to the opt in requirement in the way that class action reformers would predict. Recoveries are generally small, as are plaintiffs' losses, and the 28% - 38% ratio of the two is comparable to the 25% ratio found in the Rule 23(b)(3) class action context.

VI. Why is the Opt In Requirement Failing to Produce Higher Recovery-Loss Ratios in FLSA Collective Actions?

The opt in requirement could be failing to produce higher recovery-loss ratios in FLSA collective actions for at least two reasons. First, the opt in requirement does not seem to be performing the filtering function that class action critics envision. Second, the plaintiffs who join FLSA cases via the opt in requirement do not seem able to monitor or control their attorneys sufficiently to prevent the trading of recoveries for fees.

A. The Failure of the Opt In Requirement as a Merits Filter

In determining whether an opt in requirement is effectively filtering out non-meritorious cases, one must first identify an appropriate benchmark. What sort of opt in rate would class action reformers accept as a proxy for a meritorious case? Here, it seems safe to assume that reformers would prefer an opt in rate as close to 100% as possible. If the opt in rate is a stand-in for the strength of a case and a signal to plaintiffs' lawyers that a case is worth pursuing, then an indication that this screening mechanism is functioning as predicted would be near-100% opt in rates in the cases that are actually filed.[52]

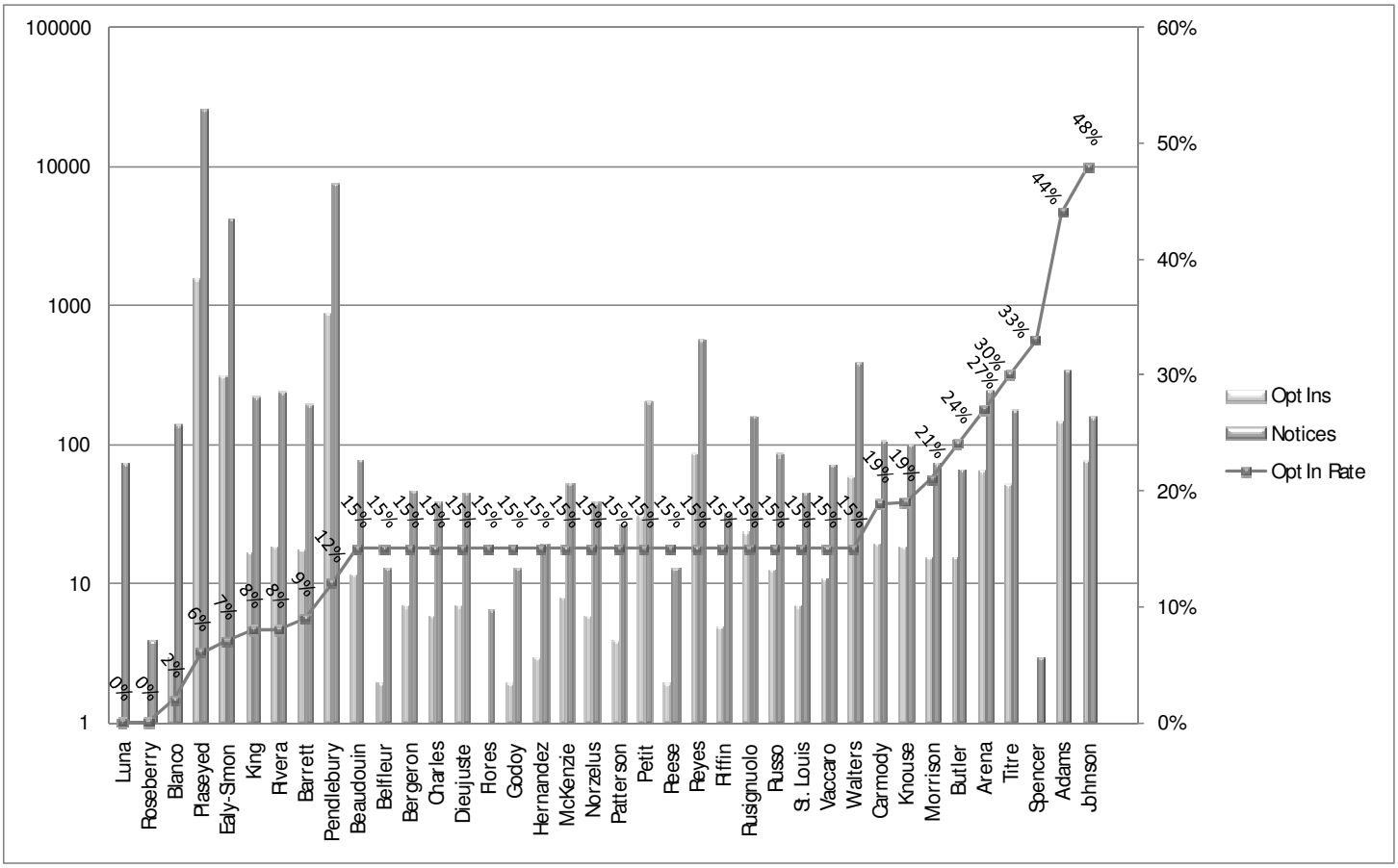
To calculate the rate at which plaintiffs opted into the FLSA cases in my study, I screened each of the 250 collective actions in my data set to find those in which collective action certification was granted, notice was issued, and potential plaintiffs had the full court-ordered period to opt in before the case was settled or otherwise concluded. Identifying these particular cases, which I call "complete" collective actions, was necessary to avoid examining cases that were terminated during the opt in period, thereby cutting off plaintiffs' opportunity to join and skewing the data. Of the 250 cases, only three, or 1.2%, were complete collective actions. In order to identify more complete collective actions than just these three, I went back to the full data set of 6,906 unique cases. Multiplying the same 1.2% figure from my sample by 6,906, I predicted that approximately fifty-seven cases would be complete collective actions. I then reviewed randomized groups of cases, 200 at a time, from the 6,906-case set until I had identified fifty-seven complete collective actions.

Next, I compared the number of notices that were sent to potential plaintiffs in each of the fifty-seven cases with the number of plaintiffs who actually opted in. Each case docket reported the number of plaintiffs who opted in; I gathered data on the number of notices sent, i.e. the number of potential plaintiffs, by contacting the plaintiffs' lawyers in each of the fifty-seven cases. I was able to gather data from the plaintiffs' attorneys in thirty-eight of the fifty-seven cases.

[52] Switching the focus to the Rule 23(b)(3) context, for example, one can assume that class action reformers would not be bothered by the 99.9% of class members who do not opt out if those plaintiffs could be assumed to be making an affirmative judgment about the merits of the class action and choosing to remain in the litigation rather than "participating" merely by remaining passive.

My analysis shows that plaintiff opt in rates ranged from 0% to 48%, with a median (center) of 15% and a mean (average) of 16%. My findings are shown in Table 3 in the Appendix. Chart 6, below, illustrates these figures graphically, showing for each of the thirty-eight cases the number of notices sent, the number of plaintiffs who opted in, and the resulting opt in rate.

Chart 6: Opt in Rates in Complete FLSA Collective Actions



The 15% - 16% opt in rate observed by my study squares with anecdotal descriptions of opt in rates offered by plaintiffs' attorneys in the Southern District of Florida. One highly experienced FLSA attorney reported opt in rates between 5% and 90% in the thirty or so cases he had handled in the past decade, with the average opt in rate falling between 13% and 25%. Another veteran FLSA attorney who practices in the Southern District commented that the typical opt in rate is between 10% and 20%, but often even lower.[53] Industry publications have also reported lawyers' estimates of opt in rates ranging from 15% to 30%.[54] Finally, the one analysis of FLSA opt in rates that I have located in the academic literature echoes my Southern

[53] Interviews by author, October 9, 2009 and December 23, 2009.

[54] Victoria Roberts, *Attorneys Discuss Strategies for Bringing, Defending FLSA Collective Action Lawsuits*, Daily Lab. Rep. (BNA), Aug. 13, 2002, at C-1 (reporting estimated opt in rates of 15% - 30% in FLSA collective actions); Victoria Roberts, *Attorneys Explore Reasons for Surge in Wage and Hour Lawsuits, Offer Strategies*, Daily Labor Rep. (BNA), Dec. 12, 2002, at C-1 (reporting estimated opt in rate of 20%).

District of Florida findings: a 2008 study of twenty-one FLSA collective actions filed in federal courts around the country calculated the average (mean) opt in rate to be 15.71%.[55]

If in the eyes of class action critics the benchmark opt in rate for a meritorious case would be close to 100%, it would appear from the FLSA's 15% - 16% opt n rate that many FLSA cases lack merit, and that the opt in requirement is not effectively signaling to plaintiffs' attorneys which cases to bring. However, it does not seem plausible that *every* FLSA case in my data set is actually a strike suit.[56] Though I do not attempt to identify which cases are meritorious and which lack merit, it is safe to assume that some fall into each category. With respect to the cases that lack merit, attorneys might be aware that the case will yield an opt in rate of only 15% - 16%, but might ignore the signals and proceed anyway with what class action critics would label a strike suit. Alternatively, attorneys might not believe that plaintiff opt in rates function as an effective proxy for the merits. As a result, their case filing decisions, for both meritorious and non-meritorious cases, would not be driven by the expected opt in rate, defying the expectations of class action critics. My FLSA data suggest that this scenario is likely accurate.

Class action reformers seem to assume that the only factor in a potential plaintiff's opt in decision is the strength of the merits. Statements by class action critics that "[l]arge numbers of class members would come forward . . . when there was a widely shared perception that the alleged wrongdoing was significant and that the potential remedies were worth pursuing" express an assumption akin to, "If you build it, [they] will come."[57] Though the merits might be one factor considered by potential FLSA plaintiffs in deciding whether to opt in, it is likely that their decision-making process is much more complex, and that, as in Rule 23(b)(3) class actions, a variety of forces keep potential plaintiffs passive.

As an initial matter, the same apathy or inertia described by Professors Sunstein and Thaler that keeps Rule 23(b)(3) class members from opting out probably also keeps potential FLSA plaintiffs from opting in. In the Rule 23(b)(3) context, a class member who is apathetic or

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[55] Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in Federal Courts*, 29 Berkeley J. Emp. & Lab. L. 269, 292-94 (2008). Though Professors Issacharoff and Miller state that "[e]vidence from reported cases suggests that participation rates under [the FLSA, Age Discrimination in Employment Act, and Equal Pay Act] are around fifty percent," they cite the opt in rates in only two reported FLSA cases to support this proposition. Issacharoff & Miller, *supra* note 31 at 204 n.71.

[56] Opinions on whether or not most FLSA cases are meritorious tend to be dictated by the alignment of the speaker with the plaintiffs' or defense bar. Plaintiffs' lawyers contend that recent FLSA litigation has merit: because of the economic downturn, employers are squeezed, and they, in turn, squeeze their employees, committing FLSA violations that result in legitimate lawsuits to vindicate those workers' rights. Roberts, *supra* note 54 at C-1. Members of the defense bar, in contrast, see FLSA litigation as generally meritless, driven by plaintiffs' attorneys intent on lining their pockets. These criticisms are remarkably similar to criticisms of plaintiffs' attorneys in the Rule 23(b)(3) context. *The Wage and Hour Minefield: Some Words of Wisdom For Employers; Interview with Sherril M. Colombo, Michael C. Schmidt, and George A. Voegele, Jr.*, 15 Metropolitan Corporate Counsel 11, 14 (November 2007) ("Colombo: I am seeing a flood of lawsuits in the Southern District of Florida, and at least half of them are overtime-related cases. I attribute this to the attorney fee provision in the FLSA, which is certainly an incentive for lawyers to bring these types of claims, even if the amounts at issue are small."); Simon J. Nadel, *As Overtime Suits Renew FLSA Debate, Attorneys Advise Learning the Wage Laws*, 3 Class Action Litig. Rep. (BNA) 514 (Aug. 9, 2002) (quoting representative from public policy advocacy organization as saying "For attorneys who land such a [FLSA] case . . . that's a pretty good pay day.").

[57] Hensler & Rowe, *supra* note 7 at 145; FIELD OF DREAMS (Universal Pictures 1989). In the movie "Field of Dreams," an Iowa corn farmer hears a voice saying, "If you build it, he will come." He interprets this as an instruction to build a baseball diamond in his corn field and a promise that, if he does, ghost members of the 1919 Chicago White Sox will come to play. Unlike the farmer's ghost baseball players, however, "[l]arge numbers of class members" do not "come forward" in FLSA collective actions.

inertia-bound is nevertheless included in the litigation. In FLSA cases, the default is the opposite, and those potential plaintiffs who do not take action are excluded. These potential plaintiffs have not asserted an opinion about the merits, but have merely chosen the "option requires the least effort, or the path of least resistance,"[58] resulting in a decision (or non-decision) not to opt in.

Yet before a potential plaintiff ever gets the chance to react to an opt in notice with inertia or apathy, he or she must receive, read, and understand the notice in the first place. My data suggest that some plaintiffs' attorneys in FLSA cases are foregoing notice entirely. Even though the majority of FLSA cases in this study were filed as collective actions (250 of the 364 sample, or 68.68%), in only twenty-eight of the 250 cases, or 11%, did the plaintiffs actually make a motion for collective action certification and request permission to send notice to additional potential plaintiffs. The remaining 222 cases were litigated and/or settled on behalf of only the named plaintiffs, or on behalf of the named plaintiffs and those few additional plaintiffs who had opted in, presumably having heard of the litigation through informal channels such as word of mouth.[59]

Even if notice does issue, if it is made by mail, which in the cases listed in Table 3 was by far the most common form of notice delivery, potential FLSA plaintiffs may be particularly unlikely to receive it. FLSA plaintiffs, suing for their unpaid minimum or overtime wages, are, by definition, low wage earners. Low wage earners, as a class, move frequently, and so may not receive a notice mailed to their last known address as maintained by their employer.[60] This problem is magnified when the plaintiffs are transnational migrants, such as farmworkers and other seasonal employees who return to their countries of origin during the off-season. Attorneys in the United States who represent migrant farmworkers, for example, report that, excluding obviously incomplete or incorrect addresses provided by employers, up to 35% of the notices they send to potential plaintiffs' homes in Mexico are returned as undeliverable.[61] Though some commentators have suggested that the advent of the internet and email, and the possibility of an electronic notice process, could ease the difficulties associated with notice delivery, the familiar problem of the "digital divide" might mean that electronically-delivered notices would not reach low-wage FLSA plaintiffs.[62]

FLSA plaintiffs, as a group, may also be less likely to be able to read and understand the complicated legal language of an opt in notice, as low-wage workers complete fewer years of

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[58] THALER & SUNSTEIN, *supra* note 27 at 83.

[59] An additional barrier to notice might be courts' denials of plaintiffs' requests for collective action certification and notice. There were insufficient motions for collective action certification in my data set to study this question. However, plaintiffs' attorneys in the Southern District of Florida commented in interviews that some judges delay ruling on collective action motions until nearly the end of the case, when the parties are already close to settlement, functionally thwarting the notice process. Interview by author, December 21, 2009; *see also* Daniel C. Lopez, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 Hastings L.J. 275, 308 (2009) (observing that FLSA collective actions "are only fully certified in two narrow instances: single-location production plants or a group of employees with nearly identical job classifications").

[60] Linder, *supra* note 40 at 175 (noting that the "peripatetic living conditions" of many FLSA plaintiffs "frequently disable them from opting in to [collective] actions"); Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 Minn. L. Rev. 1317, 1326 (2008) (noting that "the rate of relocation is highest among people with the lowest income").

[61] Interview by author, January 4, 2010.

[62] John C. Coffee, Jr., communication with author by email, January 26, 2010.

schooling on average and are less likely than other workers to speak and read English fluently.[63] Moreover, many people who receive an unsolicited notice from a court about a legal proceeding may be, at best, confused, and, at worst, frightened. "[S]ensible people do not sign legal documents they have not requested and send them to a court or lawyers they do not know and with whom they have never spoken."[64] The problem of a lack of understanding may be exacerbated when courts set very short time periods in which potential opt in plaintiffs must decipher or translate the notice, consult an attorney or other advisor, call the plaintiffs' counsel, and decide whether to join a FLSA collective action. For example, courts allowed potential opt in plaintiffs thirty or fewer days to make this decision in one-third of the cases listed in Table 3.

Yet even if potential plaintiffs do receive, understand, and overcome their apathy or inertia vis-à-vis a FLSA opt in notice, they *still* might make the rational choice not to join. Potential FLSA plaintiffs may decide, quite reasonably, not to opt into a FLSA collective action because as a class, they are highly vulnerable to a defendant's retaliation: they are reliant on their jobs; they are easily replaceable if fired and aware of this fungibility; and many would be required to sue their current employer. Translated into the language of behavioral economics, "loss aversion helps produce . . . a strong desire to stick with your current holdings. If you are reluctant to give up what you have because you do not want to incur losses, then you will turn down trades you might otherwise have made."[65]

First, FLSA plaintiffs may lack the skills, schooling, and training needed to compete for a new job if they are fired, and may therefore be disinclined to risk their current employment by filing a lawsuit. Studies of the characteristics of litigious workers support this point, finding that a complainant's education, salary, and seniority have a positive effect on whether a worker filed a charge with the National Labor Relations Board or the Equal Employment Opportunity Commission.[66] A FLSA plaintiff suing for the minimum wage is, by definition, at the bottom of the wage-earning scale. The picture does not improve substantially for plaintiffs in FLSA overtime cases. A review of the 250 collective actions in my data set reveals minimum wage and overtime plaintiffs who were employed in low-wage jobs as painters, restaurant workers, car wash workers, landscapers, and construction laborers. These workers are likely highly reliant on their jobs, as any given worker may not be able to compete effectively for new employment if fired.

Second, FLSA plaintiffs, by virtue of the same lack of skills, training, and education, are fungible. They can be easily replaced by other workers, a fact that employers may emphasize through threats. A 2004 study of working conditions in the U.S. meat and poultry industries by Human Rights Watch, for example, quoted a worker describing such threats:

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[63] Bureau of Labor Statistics, *Characteristics of Minimum Wage Workers*, Table 6 (2008), available at http://www.bls.gov/cps/minwage2008.htm, last visited January 12, 2010 (reporting that 26% of hourly workers over 16 years old who made the minimum wage or below did not have a high school diploma); Randolph Capps et al., *A Profile of the Low-Wage Immigrant Workforce* 1 (Urban Institute) (November 2003), available at http://www.urban.org/publications/310880.html, last visited January 12, 2010 ("Immigrants are 11 percent of all U.S. residents, but 14 percent of all workers and 20 percent of low-wage workers . . . Nearly two-thirds of low-wage immigrant workers do not speak English proficiently, and most of these workers have had little formal education.").

[64] Becker & Strauss, *supra* note 60 at 1328.

[65] THALER & SUNSTEIN, *supra* note 27 at 34.

[66] Michele E. Hoyman & Lamont E. Stallworth, *Who Files Suits and Why: An Empirical Portrait of the Litigious Worker*, 1981 U. Ill. L. Rev. 115, 127 (1981); s*ee also* Susan J. Pannell, *Lawyers in Demand for Wage-and-Hour Lawsuits*, 43 American Association for Justice Trial News & Trends 12 (December 2007) (quoting a prominent plaintiffs' attorney that "[t]he opt-in rate tends to decrease the farther down the employment scale the worker is . . . because lower-ranking workers are more likely to fear job loss and other forms of retaliation").

> Tyson always gets rid of workers who protest or who speak up for others. When they jumped from thirty-two chickens a minute to forty-two, a lot of people protested. The company came right out and asked who the leaders were. Then they fired them. They told us "If you don't like it, there's the door. *There's another eight hundred applicants waiting to take your job*.[67]

FLSA plaintiffs also may know of other workers who have lost their jobs in retaliation for protesting unlawful wages. FLSA caselaw is replete with retaliation lawsuits,[68] and there are doubtless many more retaliation stories that are never the subject of litigation, but nonetheless exert a powerful silencing effect on potential FLSA plaintiffs.[69] These workers' acute knowledge of their own expendability may leave them with no choice but *not* to opt into a FLSA lawsuit.

Third, FLSA plaintiffs, with the exception of those who have left their jobs, are required to sue their present employers who, in an at-will employment environment, hold extreme power over their employees. The fact that FLSA plaintiffs are often in an ongoing employment relationship with the defendants whom they are suing increases their vulnerability to retaliation and decreases the likelihood that, given the choice, they will opt into a FLSA lawsuit.[70] The situation may be even worse for those potential FLSA plaintiffs who are undocumented or who hold temporary employment visas issued in the name of their employer.[71] For these workers, the potential cost of suing is not only the loss of a job and the associated income, but loss of their legal status in and removal from the United States. The opt in requirement deprives these

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[67] Human Rights Watch, *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants* 80 (2004) (emphasis added).

[68] *See, e.g.,* Laura Wides-Munoz, *Guest Farmworkers Say Visa System Means Abuse*, THE NEWS-PRESS (Fort Myers, FL), June 3, 2007, at Metro, p. 7 (describing lawsuit in which twenty workers initially joined, but sixteen withdrew due to fear of retaliation); *see also Recinos-Recinos v. Express Forestry, Inc.*, 2006 U.S. Dist. LEXIS 2510 (E.D. La. Jan. 23, 2006) (granting protective order prohibiting defendants from contacting potential opt in plaintiffs in FLSA collective action upon evidence that defendants' agents had visited workers' families at their homes in El Salvador and threatened them).

[69] David Weil & Amanda Pyle, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 83 (2002) (noting that "being fired is widely perceived to be a consequence of exercising certain workplace rights"). The same Human Rights Watch report, for example, describes a memo issued by a manager at a poultry processing plant in Arkansas in response to rumors that workers were going to protest their wages and working conditions. The memo promised explicitly, "If myself or any of the other management team members hear you say this or another employee tells us about this and it can be backed up, you will no longer work here." Human Rights Watch, *Blood, Sweat, and Fear*, *supra* note 67 at 80.

[70] Weil & Pyle, *supra* note 69 at 83 (noting that "many employee complaints related to minimum wage and/or overtime under the FLSA are filed *after* a worker has been fired by an employer, often for other causes (thereby lowering the cost of complaining at that point)"). Professors Issacharoff and Miller are therefore off the mark when they assert that FLSA litigation's workplace setting "tend[s] to increase participation rates." Issacharoff & Miller, *supra* note 31 at 204-05. As explained at note 55, *supra*, the data on which the authors rely to support their observations about high FLSA participation rates comes from only two cases, likely skewing their conclusions.

[71] A 2008 report by the U.S. Department of Homeland Security estimated the number of "unauthorized immigrants," ages eighteen or over, in the U.S. population to be 8.6 million, large numbers of whom are employed as low-wage workers. Michael Hoefer, Nancy Rytina & Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States*, U.S. Department of Homeland Security, Office of Immigration Statistics (January 2008) at 5; U.S. Bureau of Labor Statistics, *Foreign-Born Workers: Labor Force Characteristics in 2008*, USDL 09-0303 (March 26, 2009) (summarizing demographic data). Foreign workers may also be employed in low-wage jobs in the United States with temporary "guestworker" visas under the H-2A and H-2B programs. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1101(a)(15)(H)(ii)(b).

plaintiffs of anonymity and deniability: workers must affirmatively identify themselves as plaintiffs to their employers, and cannot make the excuse that they were included *en masse*, as in a Rule 23(b)(3) class action lawsuit, through no action of their own.[72]

Thus, the opt in rates in FLSA cases might be low, but they would not appear to be a proxy for the merits of the case, and attorneys' decisions to bring cases that produce few opt in plaintiffs may not be appropriately characterized as strike suit behavior. FLSA plaintiffs face the same apathy and inertia that would beset potential plaintiffs in any form of group litigation, and may not ever receive or understand notice of their right to opt into a FLSA collective action. Their status as low-wage workers and their ongoing relationship with the employer whom they are suing probably also contribute to a decision not to opt in.[73] This is a much more complex picture of plaintiff behavior than the simple merits-based decision that class action critics imagine plaintiffs making in an opt in regime. Because plaintiffs' opt in decisions do not appear to be a comment on the merits of the FLSA cases they are invited to join, these same decisions cannot be expected to act as a check on attorneys' case filing decisions, and the opt in requirement seems to have failed to filter cases in the way that class action critics expect.

B. The Failure of the Opt In Requirement to Produce Effective Attorney Control

Just as the FLSA's opt in requirement does not filter cases based on the merits, it also does not seem to produce effective attorney control by active clients, as attorneys appear to be accepting settlements that compensate them in disproportion to their clients. Whether the plaintiffs are attempting to monitor their attorneys and failing, or whether they are failing to monitor at all, the opt in requirement does not seem to result in lower fees and higher recoveries, and may actually drive up fee-recovery ratios.

In the Rule 23(b)(3) class action context, critics often point to the ratio of the plaintiffs' attorneys' fees to the plaintiffs' recovery in identifying sweetheart deals. One study found fee-recovery ratios ranging from 7% to a whopping 1050%, producing a median (center) of 57%.[74] Other studies have found fee-recovery ratios of approximately one-third, while still others have

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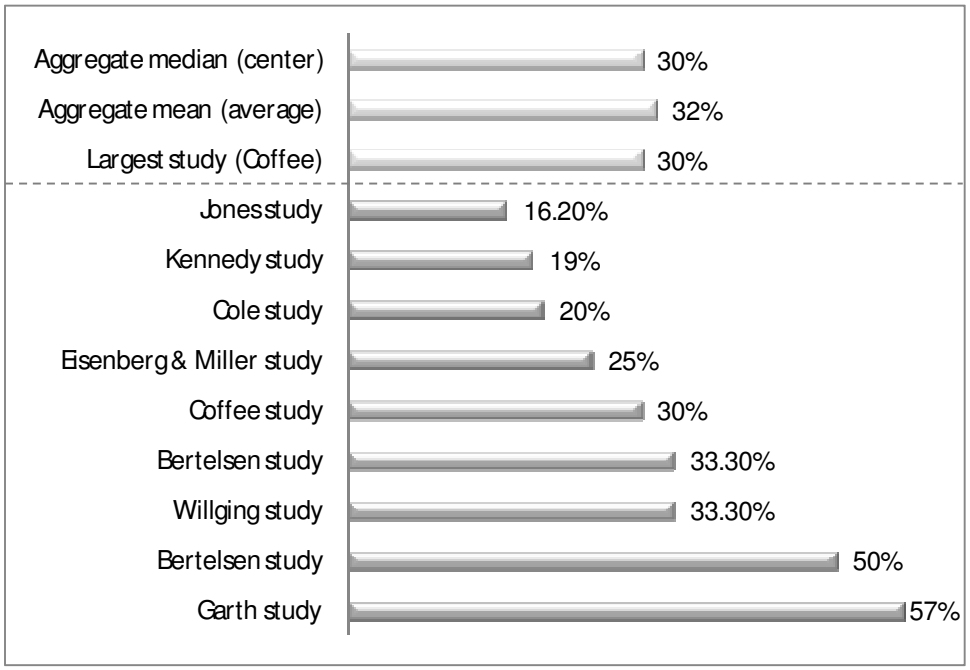
[72] Of course, the FLSA does protect against retaliation at 29 U.S.C. § 215(a)(3), allowing plaintiffs who suffer retaliation to bring a claim for damages. However, these protections are triggered only after a worker has suffered a demotion, transfer, or termination in retaliation for making a FLSA claim. The availability of a claim for damages is therefore cold comfort to many low-wage workers who are facing the decision whether to opt into a FLSA collective action. *See Mitchell v. Roma*, 265 F.2d 633, 637 (3d Cir. 1959) ("The statutory prohibition against retaliation provides little comfort to an employee faced with the possibility of subtle pressures by an employer, which pressures may be so difficult to prove when seeking to enforce the prohibition."); *Jones v. American Window Cleaning Corp.*, 210 F.Supp. 921, 922 (E.D. Va. 1962) ("Difficulties were encountered by reason of the [Portal-to-Portal Act's] requirements as to written consent or written request. Repercussions against the employees filing a written consent in court or a written request to sue with the Secretary of Labor were bound to occur."); *see also Doe v. Advanced Textile Corp.*, 214 F.3d 1058, 1071 (9th Cir. 2000) (noting ineffectiveness of FLSA's "post hoc" retaliation protections).

[73] These observations are not evidence of "paternalism," as one commentator has suggested, but rather the realities of low-wage work and workers in the United States labor market. Redish, *supra* note 37 at 101.

[74] Bryant Garth, Ilene H. Nagel & S. Jay Plagler, *The Institution of the Private Attorney General: Perspectives From an Empirical Study of Class Action Litigation*, 61 S. Cal. L. Rev. 353, 371-74 (1988) (finding fee-recovery ratios in 14 cases ranging from 7% to 1050%, producing a median of 57%).

found ratios ranging from 5% to 50%.[75] As shown in Chart 7, these studies' aggregate median (center) recovery ratio is 30%, and the aggregate mean, or average, is 32%. The largest of the studies also reports a fee-recovery ratio of 30%. Put another way, for every dollar the defendants paid to the plaintiffs in settling these cases, they paid between 30 and 32 cents to the attorneys in fees.

Chart 7: Rule 23 Class Action Studies: Fee-Recovery Ratios



These median and mean figures do not appear overly objectionable, and are slightly lower than the "benchmark" of one-third (33.33%) that is commonly used by judges for assessing attorneys' fee proposals and weeding out those that compensate the plaintiffs' attorneys excessively.[76] It is likely the fee-recovery ratios at the high end of the spectrum – the

[75] Willging et al., *supra* note 24 at 69, Figure 68 (noting in 68 class actions that the fee-recovery ratio "infrequently exceeded the 33.3% contingency fee rate"); Eisenberg & Miller, *supra* note 24 at 1546, Table 1, 1553 (finding that the median "fee as a percent of recovery" for 159 class actions was 25%); John E. Kennedy, *Securities Class and Derivative Actions in the United States District Court for the Northern District of Texas: An Empirical Study*, 14 Hous. L. Rev. 769, 819 (1977) (finding that attorneys' fees in 13 settlements "generally constituted from 5% to 33% of the recovery," producing a median of 19%); Thomas M. Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U. L. Rev. 542, 567 (1980) (reporting fee-recovery ratios in 13 cases up to 40.2% with an average (mean) of 16.2%); Bertelsen et al., *supra* note 24 at 1164-65 (finding that the fee-recovery ratio did not exceed 33.3% in 9 of 11 cases and exceeded 50% in the remaining 2 cases); Coffee, *supra* note 13 at 25 n.59 (collecting studies showing fee-recovery percentages between 10% and 30% and up to 32%). For a much earlier analysis of fee-recovery ratios, see Douglas G. Cole, *Counsel Fees in Stockholders' Derivative and Class Actions – Hornstein Revisited*, 6 U. Rich. L. Rev. 259, 273 (1972) (describing a 1939 study of 54 securities class actions that found fee-recovery ratios "ranging between 20% and 33.3% with the resultant average being slightly over 20%").

[76] HENSLER ET AL., *supra* note 14 at 435-36.

1050% ratio, for example – that drive critics' characterizations of Rule 23(b)(3) class action settlements as "sweetheart deals."[77]

How, then, do attorneys' fees and plaintiffs' recoveries compare in opt in FLSA litigation? Of the 218 settled FLSA collective actions in my sample, data on both attorneys' fees and the plaintiffs' recovery was available in fifty-seven cases. Table 4 in the Appendix lists fee-recovery ratios for each of these cases, showing that attorneys' fees represented 0% of the plaintiffs' recovery at the low end and 2786% at the high end, with a median (center) of 100% and a mean (average) of 205%. In other words, for every dollar the defendants paid to the plaintiffs in settling these FLSA collective actions, they paid between $1.00 and $2.05 to the attorneys in fees. Even if the case with the 2786% fee-recovery ratio[78] is deemed an outlier and removed, the median falls only to 99%, while the mean falls to 159%, or between $0.99 and $1.59 paid to the attorneys for every dollar paid to the plaintiffs in settlement. Chart 4a in the Appendix presents these figures in graphical form, showing the attorneys' fees, the plaintiffs' recovery, and the fee-recovery ratio. These fee-recovery ratios, in which the attorneys are recovering an amount equal to or more than the plaintiffs' recovery, would seem to undermine class action critics' contention that an opt in requirement would produce active plaintiffs able to police the trading of recoveries for fees, ultimately producing higher plaintiff recoveries.

The data do not reveal whether the plaintiffs in these FLSA collective actions attempted but failed to monitor attorney behavior, or did not make the attempt at all. The high cost of monitoring may dissuade many FLSA plaintiffs from making the attempt in the first place. Legal work can be opaque and difficult to assess for a non-lawyer. Lawyers may not have the time or inclination to explain their strategic choices in great depth to their clients. As a result, even if an especially motivated plaintiff were to try to monitor his or her attorneys, he or she would have to expend significant time, energy, and resources.

This problem of monitoring to ensure an attorney's fidelity, and its associated costs, is known in economic terms as an "agency cost."[79] Whenever a principal entrusts an agent to act on his or her behalf, there is a risk that the agent will act according to his or her own, rather than the principal's, interests. Of course, if the principal's and agent's interests were exactly the same, agency costs would be no issue, as a self-interested agent would automatically act in the interests of his or her principal. The greater the misalignment of the two sets of interests, the more relevant the problem of agency costs becomes. Monitoring is one option for ensuring that that the agent is not collecting profits that should belong to the principal, but monitoring itself is costly. As Professors Koniak and Cohen explain in the Rule 23(b)(3) context:

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[77] Rule 23(b)(3) class actions that are handled by nonprofit organizations may present a different profile with respect to attorneys' fees. *See, e.g.,* Garth et al., *supra* note 74 at 374 (labeling two types of private attorneys general the "legal mercenary" and the "social advocate"). This article does not distinguish among Rule 23(b)(3) class actions or FLSA collective actions on the basis of the type of entity that represented the plaintiffs. In any case, of the 250 FLSA collective actions examined in my data set, in only two were the plaintiffs represented by nonprofit organizations, Florida Legal Services, Inc. and the Partnership for Civil Justice. Given this extremely small sample, it would not be possible to draw conclusions about attorney behavior based on the nature of the entity representing the plaintiffs. This is perhaps an area for further research. It is interesting to note, however, that Professor Coffee predicts that the phenomenon of sweetheart deals "eventually will appear in those fields of law now dominated by the 'ideological' private attorney general," typified by the nonprofit "cause" lawyer. Coffee, *supra* note 1 at 236.

[78] *Walsh v. Auction Warehouse, et al*., Case No. 9:03-cv-81032-JCP (S.D. Fla.).

[79] Macey & Miller, *supra* note 5 at 12-13 (defining "the agency relationship as 'a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent.' In such cases . . . the interests of the agent are likely to deviate from those of the principal. This deviation of interests may not serve either principal or agent ex ante, and both, accordingly, may expend resources to overcome it.").

> In ordinary lawyer-client relationships, clients can deal with the agency problem in two ways: by a contract between the lawyer and client that limits the lawyer's fee or ties it to the client's recovery, or by monitoring the lawyer's performance carefully as the representation proceeds. These solutions, imperfect enough in the ordinary client setting (especially when clients are unsophisticated individuals), are even more ineffective in the class action setting: The reason is that absent class members, by definition the majority of the class, neither contract with the lawyer, nor ... monitor the lawyers' actions. Class representatives, chosen and controlled by class counsel, are in no position to make restrictive fee contracts with class counsel. . . Thus, client monitoring of lawyer performance is effectively unavailable in almost all class actions.[80]

The high fee-recovery ratios found in the FLSA collective actions in my study suggest that that agency costs are not limited to Rule 23(b)(3) cases, but persist in FLSA cases despite the opt in requirement. The opt in requirement does not appear to align attorneys' interest in fees with clients' interest in recovery or to produce more effective, or less costly, monitoring.

In fact, the opt in requirement itself may be making plaintiff recoveries lower and fee-recovery ratios higher than they otherwise would be. In a FLSA collective action, the plaintiffs are responsible for the cost of issuing notice to potential opt in plaintiffs. In reality, this cost is borne by the plaintiffs' attorneys, who seek reimbursement when the litigation ends. However, as shown in Part VI.A, even when notice issues, relatively few plaintiffs opt in. As a result, a rational plaintiffs' attorney might decide not to invest time and resources in the notice process, which may be futile, and instead to represent only those original plaintiffs who filed the complaint and any additional plaintiffs who learn of the litigation through informal channels. This calculation is likely reflected in the fact that, of the 250 cases in my FLSA data set that were captioned "collective action" when filed, the plaintiffs actually moved for collective action certification and requested permission to issue notice in only twenty-eight cases, or 11%.

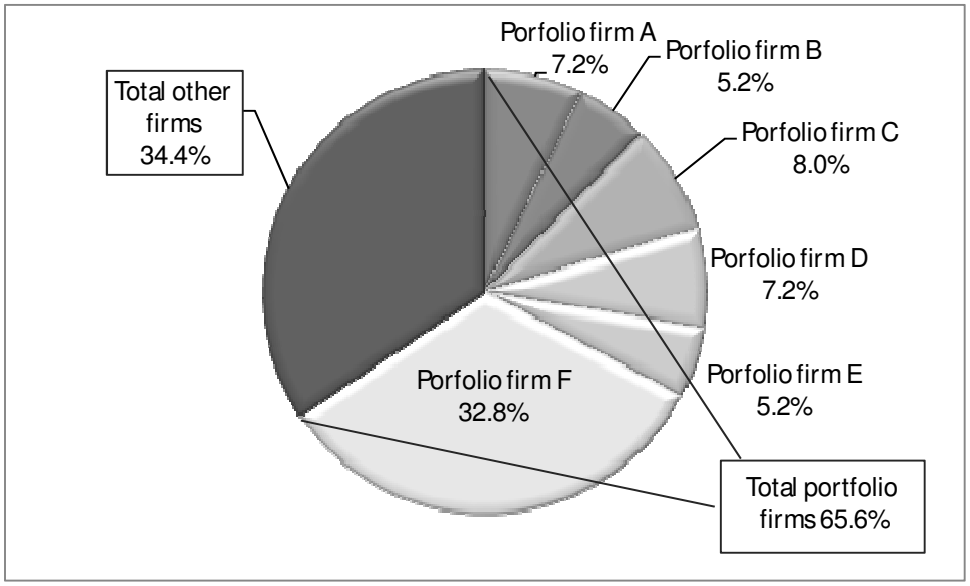
Because notice is costly and generally ineffective at building the size of a case, plaintiffs' attorneys have a disincentive to pursue it. They have an incentive instead to keep cases small, to settle them quickly, to recover their investment of fees and costs, and to move on to the next case. By creating these incentives, the FLSA's opt in requirement may drive plaintiffs' attorneys to adopt a high volume "portfolio" approach, taking on numerous small cases and settling them quickly rather than investing in fewer, larger, longer-lasting cases. Small total plaintiff recoveries may then result not only from fee-trading in sweetheart deals, as class action critics suggest, but also from attorneys' decisions to keep recoveries small by foregoing notice. In the Rule 23(b)(3) context, Professor Coffee identified this type of high volume, portfolio approach as a setting in which low settlements might occur. According to Coffee, when group litigation is characterized by consolidation of cases in a single forum and plaintiffs are represented by a small group of "repeat players," "the preconditions for [implicit] collusion between defendants and a favored plaintiffs' counsel" may be met.[81]

Chart 8 suggests that plaintiffs' attorneys in my FLSA data set may be adopting this sort of portfolio approach. Fifty-nine plaintiffs' firms handled the 250 collective actions in my

[80] Koniak & Cohen, *supra* note 20 at 129 (internal punctuation omitted).
[81] Coffee, *supra* note 32 at 1366-67.

sample. Six of those firms handled more than ten collective actions each, accounting for approximately 66%, or 164 cases, of the 250 total cases.[82]

Chart 8: FLSA Collective Actions Handled by Portfolio Firms, Other Firms



Moreover, fee-recovery ratios in these small cases will likely be relatively high, because there is probably some fee "floor" below which plaintiffs' attorneys operating on a contingency basis cannot go. At minimum, plaintiffs' attorneys negotiating a settlement would seek to recover their out-of-pocket costs, even if they are not able to win full reimbursement for all of their time. To the extent that this minimum figure remains constant across cases, the lower the plaintiffs' total recovery – due to fee-trading, to small class size, or both – the higher the fee-recovery ratio becomes. Attorneys' need to recover some minimum fee amount, to keep the proverbial lights on, may therefore drive them to maximize their fees at the settlement table at the expense of the plaintiffs' recovery, even if both fee and recovery figures are low absolute figures.

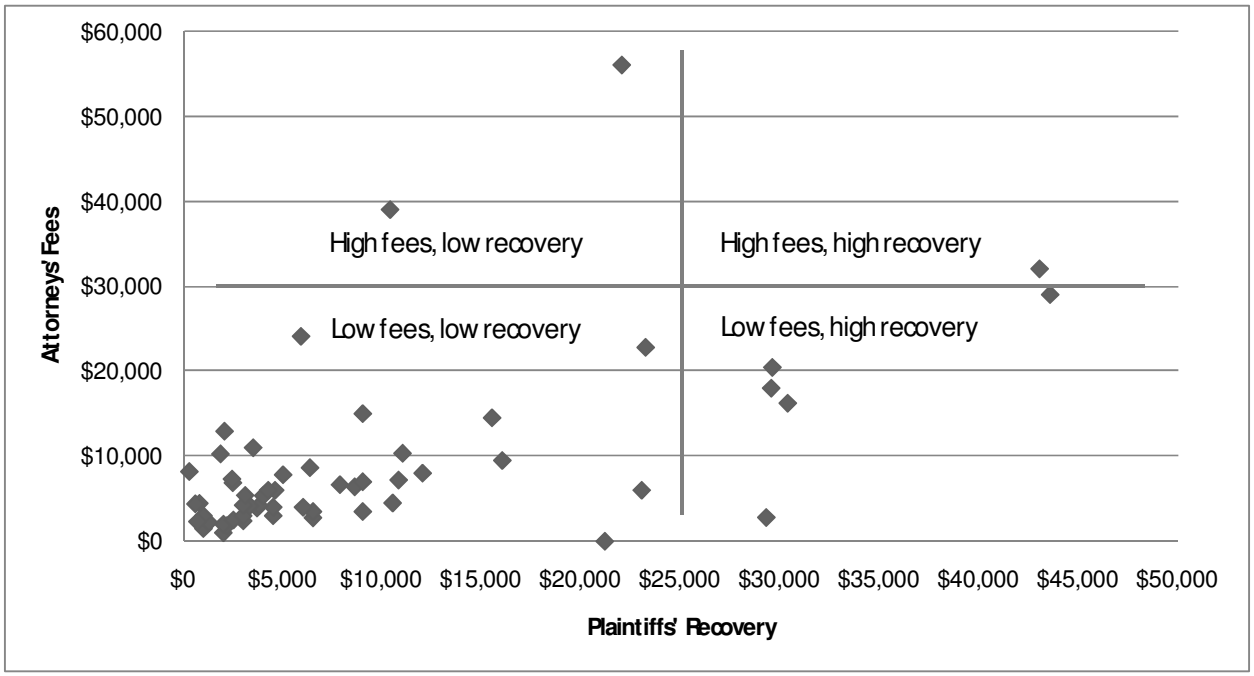
Chart 9, which plots attorneys' fees against the plaintiffs' recovery in each of the settled FLSA collective actions, reveals that the great majority of settlements – forty-eight of the fifty-seven cases, or 84% – are clustered in the "low fees, low recovery" quadrant.[83] These forty-eight settlements have a median (center) fee-recovery ratio of 103% and a mean (average) of 223%. (Excluding *Walsh*, the median becomes 100% and the mean becomes 168%.) This

[82] Portfolio Firm A handled 18 cases; Portfolio Firm B handled 13 cases; Portfolio Firm C handled 20 cases; Portfolio Firm D handled 18 cases; Portfolio Firm E handled 13 cases; and Portfolio Firm F handled 82 cases. Because the goal of this article is not to single out particular firms as "bad actors," but rather to explore the workings of the FLSA opt in requirement, I have omitted the actual firm names.

[83] The plaintiffs collected $16,000 or less in total recovery in forty-five of the forty-eight cases. The plaintiffs' attorneys recovered less than $25,000 in all forty-eight of these cases, and $16,000 or less in forty-five of the forty-eight. The low absolute values of these figures may run contrary to the image sketched by Rule 23(b)(3) class action critics of the unscrupulous plaintiffs' attorney bent only on lining his or her own pockets with large fee awards. However, it is not the absolute size of the fee award that is relevant to this analysis, but rather the ratio of the attorneys' fees to the plaintiffs' recovery, which is between 99% and 159% in my FLSA data set.

clustering, combined with high fee-recovery ratios, supports the theory that attorneys are maximizing their fees at the settlement table even in cases that generate low absolute fees and recoveries, pursuing a high volume, small case, low total recovery portfolio strategy.

Chart 9: Attorneys' Fees Versus Plaintiffs' Recovery[84]



Thus, one conclusion that seems relatively certain is that the opt in requirement does not function in the context of sweetheart deals as Rule 23(b)(3) class action critics would expect. Class action critics would likely judge the recovery-loss ratios found by my study as low and the fee-recovery ratios as high. This suggests that the opt in requirement may not be producing effective monitoring of attorneys by plaintiffs. It is also likely that the FLSA's opt in requirement, rather than controlling fee-recovery ratios, contributes to the ratios' large size by limiting the number of plaintiffs who participate in FLSA cases. Plaintiffs' attorneys may then choose to forego notice, and its associated high cost, and instead adopt a high volume portfolio approach in which they keep cases small and settle them quickly for relatively low amounts. Combined with the fact that plaintiffs' attorneys may have a minimum fee that they cannot waive, these relatively low FLSA recoveries produce the fee-recovery ratios of 99% to 159% found in this study.[85]

[84] Chart 9 omits *Adams, et al v. ABN Amro, Inc., et al.*, Case No. 0:05-cv-61865-WPD (S.D. Fla.) because the plaintiffs' recovery, $987,963.41, and attorneys' fees, $402,036.59, data points do not fit on the chart due to their size. If *Adams* did appear on the chart, it would fall within the "high fees, high recovery" quadrant.

[85] There is also evidence that, as in Rule 23(b)(3) class actions, there is little court monitoring of settlements and fee awards in FLSA collective actions. This is so even though the Eleventh Circuit, of which the Southern District of Florida is a part, has held that the parties must submit any FLSA settlement agreement to the court for a fairness determination. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982) ("When employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness."). This requirement is designed to prevent plaintiffs from functionally waiving their FLSA rights by agreeing to a rock-bottom settlement, and to check the sort of sweetheart deals that worry class action critics. However, my review of FLSA case dockets

VII. Conclusion

In its title, this article asks whether an opt in requirement would stop strike suits and sweetheart deals in Rule 23(b)(3) class actions. Put another way, are class action critics correct in predicting that requiring plaintiffs to opt in would result in more meritorious claims filed, less attorney self-dealing at the settlement table, and ultimately greater plaintiff recoveries?[86] The answer suggested by my study of the opt in requirement of the Fair Labor Standards Act appears to be "no." Recovery-loss ratios in FLSA collective actions are comparable to those identified in studies of Rule 23(b)(3) litigation. The opt in requirement does not act as an accurate proxy for the merits of a case, and therefore does not seem to influence attorneys' case filing decisions. Nor does the opt in requirement reduce fee-recovery ratios, and may actually drive them up. It would not be appropriate, however, on the basis of this study, to claim that plaintiffs' attorneys in FLSA cases are actually engaging in strike suit or sweetheart deal behavior. While the data on recovery-loss ratios, opt in rates, and fee-recovery ratios may appear at first glance to support such labels, a closer look reveals a more complicated picture, with the opt in requirement itself likely playing a role in keeping plaintiffs' recoveries and participation low and driving up attorneys' fees in relation to plaintiffs' recoveries.

In fact, the story of the FLSA's opt in requirement might appropriately be read as a cautionary tale. Not only does the requirement *not* accomplish the goals of class action critics, but it may cause real harm to the plaintiffs (whose interests the critics seem motivated to protect) by creating serious disincentives for them to pursue even meritorious claims and contributing to low total plaintiff recoveries in the cases that are filed. The opt in requirement may even undermine the basic principle that private individuals can enforce laws as private attorneys general.[87] The low recoveries achieved in cases brought under the FLSA, which was designed to be enforced by private attorneys general,[88] may not achieve either compensation for the victims

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has revealed that parties sometimes circumvent this requirement by filing a "stipulation of voluntary dismissal" with the court, without submitting their settlement agreement, making it impossible for the court to decide on fairness. *See, e.g., Lipscomb v. Bochner, Inc.*, Case No. 07-cv-20500, docket entry 29 at 2 (S.D. Fla. May 31, 2007) (stating that a "confidential settlement agreement was negotiated on behalf of all of the parties, the terms of which reflect a reasonable compromise of the parties' many disputed issues" and that the agreement satisfied the requirements of *Lynn's Food Stores*); *Alfasi v. Lydian Data Services, LLC*, Case No. 05-cv-60758, docket entry 17 (S.D. Fla. Sept. 1, 2005) (stating, in a Joint Stipulation of Voluntary Dismissal With Prejudice, only that "the parties have reached an amicable resolution of this matter"). The judges in these cases did not appear to object to this practice. When the parties do submit a proposed settlement agreement, it is more often than not approved without question by the court, leaving the parties' agreement to stand. *But see Silva v. Grant*, 547 F. Supp.2d 1299 (S.D. Fla. 2008) (engaging in a searching review of the parties' settlement agreement and the plaintiffs' attorneys' fees).

[86] In his seminal article on public law litigation, Professor Abram Chayes asked the same question in a different way: "And in the absence of a particular client, capable of concretely defining his own interest, can we rely on the assumptions of the adversary system as a guide to the conduct and duty of the lawyer?" Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1291 (1976).

[87] Coffee, *supra* note 1 at 215 (noting that "our society places extensive reliance [on private attorneys general] to enforce . . . a host of . . . statutory policies").

[88] *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 709 (1945) ("The private-public character of this right is further borne out by an examination of the enforcement provisions of the Act. Although the difficulties of enforcement under the Act were recognized, the Administrator was given limited enforcement powers. Criminal prosecution was available only for willful violations -- difficult to prove. The Administrator's civil remedy lay by way of suit for an injunction, which by its nature tends to be prospective in operation. No power was vested in the Administrator to bring an action at law to obtain payment of minimum wages left unpaid and to recover damages arising from delay in payment. Sole right to bring such suit was vested in the employee under § 16 (b). Although this right to sue is compensatory, it is nevertheless an enforcement provision.").

of wrongdoing or deterrence of the wrongdoers from future bad action – the twin goals of private attorney general litigation.[89]

In any case, further research remains to determine the extent to which these phenomena are unique to the FLSA as compared to other opt in statutes. Studies of opt in collective actions under the federal Equal Pay Act and Age Discrimination in Employment Act and state law opt in class actions would provide additional windows into the workings of the opt in requirement in actual opt in regimes.

Further research is also required to determine how well the FLSA would predict the workings of an opt in requirement in various other types of case. Would an opt in requirement function as in the FLSA in Title VII, securities, and mass tort class actions, for example? My study suggests that, whatever the claim type, plaintiffs who are in an ongoing relationship, which the plaintiffs would like to preserve, with the defendants whom they are suing would likely be subject to the same pressures against participation that face potential FLSA opt in plaintiffs. In the Rule 23(b)(3) context, such plaintiffs might include those in Title VII or other employment class actions.[90] Likewise, plaintiffs who are particularly economically vulnerable, perhaps those who have suffered significant losses due to personal injury in a Rule 23(b)(3) mass tort class action, or who would be vulnerable to public scrutiny or opprobrium if they joined a lawsuit, might share potential FLSA plaintiffs' aversion to participation.[91] By contrast, the relatively more powerful and secure plaintiffs in Rule 23(b)(3) securities class actions might not be subject to the same vulnerabilities as FLSA plaintiffs, and the conclusions drawn from the FLSA might not be as applicable.

One possible area for additional inquiry into these questions would be to compare the rate at which plaintiffs in various types of Rule 23(b)(3) class action file damages claim forms at the end of a case. Such claim-filing procedures function essentially as a mini-opt in requirement within a larger opt out Rule 23(b)(3) case. Research suggests that claim-filing rates in Rule 23(b)(3) consumer, mass tort, and securities class actions are typically low.[92] However, distinguishing among these claim types – more accurately, among plaintiff types – might reveal interesting differences in claim filing rates, suggesting a possible differential impact across claim- and plaintiff-types if an opt in requirement were enacted in the context of Rule 23(b)(3).

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[89] For an explanation of the compensation and deterrence goals of private attorney general class actions, see Coffee, *supra* note 1 at 220 and Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 Colum. L. Rev. 299, 300 (1980) ("These goals [of private attorney general class actions] . . . have yet to be realized after thirteen years of experience with the rule.").

[90] Note, *Developments – Class Actions*, 89 Harv. L. Rev. 1318, 1443 n.262 (1976) ("In cases in which the defendant has some implicit leverage over class members – such as an employer would have over employee class members in a Title VII action – requiring the absentee to opt in can effectively decimate the class."). Another relevant future research project could be a comparison of opt in rates in FLSA, EPA, and ADEA cases (all employment litigation) by plaintiffs who remain employed by the defendant and those who are former employees. This would help isolate the variables, including an ongoing relationship between the parties, that may suppress plaintiff participation in an opt in regime. In addition, a comparative study of group litigation in countries where opt in is already the default rule might be fruitful. *See, e.g.,* Antonio Gidi, *Class Actions in Brazil - A Model for Civil Law Countries*, 51 Am. J. Comp. L. 311, 338 n.63 (2003) (discussing opt in regimes in France, Japan, and Scotland); Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 Annals 7, 16 (2009); Coffee, *supra* note 13 at 57-58.

[91] Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2186 (1989) (noting that in desegregation cases, a "lone plaintiff was extremely vulnerable to the pressure of intimidation by state and local officials, and it was not above those officials to bring such pressure to bear").

[92] HENSLER ET AL., *supra* note 14 at 427 (examining consumer and mass tort class actions); Coffee, *supra* note 13 at 21; Issacharoff & Miller, *supra* note 31 at 205 (discussing securities class actions); Cox & Thomas, *supra* note 31 at 412 (same).

This may, in turn, suggest different reforms to Rule 23(b)(3) class actions depending on the claim type or plaintiff type at issue.

In short, the analysis presented in this article of recovery-loss ratios, opt in rates, and fee-recovery ratios in FLSA collective actions supports a preliminary conclusion that the "plaintiff" lever may be the wrong one to push, through an opt in requirement, to accomplish Rule 23(b)(3) class action reform. Potential plaintiffs simply do not appear to make opt in decisions based solely on the merits or to monitor their attorneys effectively once they have joined a FLSA collective action. If class action critics seek to regulate what they see as self-interested attorney behavior in the form of strike suits and sweetheart deals, reforms that target those behaviors directly would likely be both more appropriate and more effective.

Appendix

Table 1: FLSA Collective Actions by Disposition

Disposition	**Number of Cases**	**Percent**
Arbitration	1	0.4%
Default judgment for plaintiffs	8	3.2%
Dismissed	18	7.2%
Plaintiffs accepted offer of judgment pursuant to Fed. R. Civ. P. 68	2	0.8%
Settlement	218	87.2%
Summary judgment for defendants	2	0.8%
Trial	1	0.4%
Total:	250	100. 0%

Table 2: Recovery-Loss Ratios in Settled FLSA Collective Actions

Case Number (N=25)	**Case Name**	**Plaintiffs' Recovery**	**Plaintiffs' Loss**	**Recovery-Loss Ratio**
1:08-cv-21869-DLG	*Garcia v. MG Bus Service & Tours, Inc. et al*	$450.00	$12,300.00	4%
2:07-cv-14334-KMM	*Bianchini v. El Dorado Financial, Inc. et al*	$1,000.00	$21,600.00	5%
0:07-cv-60540-WJZ	*Prescia et al v. Mancini Ventures, LLC et al*	$3,690.00	$63,395.00	6%
1:07-cv-22561-ASG	*Torcios v. Esther's 103 Inc. et al*	$3,800.00	$46,800.00	8%
9:06-cv-80791-KAM	*Pierre v. Shiv Shakti Donut, et al*	$6,350.00	$56,160.00	11%
1:08-cv-20019-JEM	*Ayala v. Capform, Inc. et al*	$6,000.00	$38,880.00	15%
1:06-cv-20884-PAS	*Auguste v. Choice Hotels Int'l, et al*	$7,854.00	$51,660.00	15%
0:05-cv-60099-WPD	*Plaseyed, et al v. PCA National,LLC*	$39,050.07	$244,062.93	16%
0:08-cv-60102-CMA	*Rodrigues v. AF of Fort Lauderdale, Corp et al*	$2,437.50	$13,096.80	19%
0:08-cv-61728-JJO	*Borges v. The Keiser School, Inc.*	$4,500.00	$23,165.68	19%
0:08-cv-61792-FAM	*Isaacs v. Gold Coast Tire Holdings, Inc. et al*	$9,000.00	$42,400.00	21%
1:07-cv-22068-FAM	*Ore v. U.S. Security Associates, Inc.*	$29,554.24	$123,060.00	24%
1:04-cv-21861-ASG	*Reyes, et al v. Carnival Corporation*	$60,500.00	$217,500.00	28%
0:08-cv-60945-JIC	*Delgardio v. Foremost Plumbing, Inc. et al*	$2,500.00	$7,680.00	33%

0:05-cv-60871-MGC	*Johnson, et al v. Senior Health Care, et al*			39%[93]
2:08-cv-14150-DLG	*Cadet v. Pedersen Lathing & Plastering, Inc. et al*	$23,000.00	$56,940.00	40%
1:08-cv-21171-PCH	*Taveras v. Bayus Security Services, Inc. et al*	$3,100.00	$7,552.00	41%
1:07-cv-22232-WMH	*Medeiros v. Kanaan Racing,Inc et al*	$29,500.00	$70,092.66	42%
9:08-cv-81375-WJZ	*Dieujuste v. Quality Sod of the Palm Beaches, Inc. et al*	$4,000.00	$7,800.00	51%
0:07-cv-61777-JAL	*Metcalf v. iBill, LLC*	$6,500.00	$10,946.89	59%
1:07-cv-23082-MGC	*Cuadra v. BLU System Corporation et al*	$3,000.00	$4,389.00	68%
1:06-cv-22971-JLK	*Recio et al v. Altex, Inc. et al*	$9,000.00	$10,065.00	89%
0:07-cv-61690-WJZ	*Cohen v. Allied Steel Buildings, Inc. et al*	$32,000.00	$36,152.23	89%
0:06-cv-60021-DLG	*Williams v. Modern Concrete, LLC*	$30,330.70	$31,200.00	97%
1:07-cv-21476-CMA	*Longas v. NIDO LLC et al*	$2,063.00	$2,063.00	100%
			Median (center):	28%
			Mean (average):	38%

Table 3: Opt In Rates in Complete FLSA Collective Actions

Case Number (N=38)	**Case Name**	**Opt In Period (days)** [94]	**Form of Notice**	**Notices** [95]	**Opt Ins**	**Opt In Rate**
1:05-cv-20310-JEM	*Luna, et al v. Hereford Grill*	30	Mail	75	0	0%
0:03-cv-61234-WJZ	*Roseberry, et al v. Answer Group, Inc.*	30	Mail	4	0	0%
1:05-cv-21887-TK	*Blanco, et al v. Federal Detective, et al*	60	Mail	140	3	2%
0:05-cv-60099-WPD	*Plaseyed, et al v. PCA National,LLC*	30	Mail	25499	1560	6%
2:05-cv-14059-KMM	*Ealy-Simon, et al v. Liberty Medical, et al*	30	Mail	4229	311	7%
1:07-cv-21824-DLG	*King et al v. CVS/Caremark Corp. et al*	45	Mail	225	17	8%
0:07-cv-61134-WPD	*Rivera v. Gennaro's Produce, Inc. et al*	90	Mail	246	19	8%
0:03-cv-62091-WPD	*Barrett, et al v. Capital Acquisitions*	90	Mail	200	18	9%
9:04-cv-80521-KAM	*Pendlebury, et al v. Starbucks Coffee, et al*	60	Mail	7500	900	12%
0:03-cv-61534-CMA	*Bergeron, et al v. Watson Trucking, et al*	60	Mail	48	7	15%
1:07-cv-22000-UU	*Walters et al v. American Coach Lines of Miami, Inc.*	60	Mail	393	60	15%
0:06-cv-61299-PAS	*Beaudouin v. S.W. Bach & Company*		Mail	80*	12	15%*
9:03-cv-80908-WPD	*Belfleur, et al v. Mignano Lawn Care, et al*	90	Mail	13*	2	15%*
9:03-cv-80378-JCP	*Charles, et al v. Prime Management Gro*		Mail	40*	6	15%*

[93] In *Johnson*, the recovery and loss figures themselves were not available, but the parties' settlement agreement states that the plaintiffs recovered "approximately 39% of the full amount of their wages and liquidated damages." Docket entry 209 at 9.

[94] The length of the opt in period is listed when this information was available in the court's conditional collective action certification order.

[95] The opt in rates marked with an asterisk are estimates provided by the plaintiffs' attorneys. In these cases, the case files were in storage or otherwise inaccessible, so the attorneys could not provide the exact number of notices that were sent to potential opt in plaintiffs.

9:07-cv-80272-KAM	*Dieujuste v. R. J. Electric, Inc. et al*	60	Mail	47*	7	15%*
1:06-cv-22055-JLK	*Flores, et al v. Park West Parking, et al*	60	Mail	7*	1	15%*
0:07-cv-61010-WJZ	*Godoy v. New River Pizza, Inc. et al*		Mail	13*	2	15%*
9:06-cv-80380-KLR	*Hernandez, et al v. TFC USA, Corp., et al*	60	Mail	20*	3	15%*
0:08-cv-61378-ASG	*McKenzie v. Lindstrom Air Conditioning, Inc. et al*		Mail	53*	8	15%*
9:04-cv-80178-KAM	*Norzelus, et al v. Republic Services*	90	Mail	40*	6	15%*
9:07-cv-80240-DTKH	*Patterson v. Palm Beach County School Board*	60	Mail	27*	4	15%*
0:07-cv-61391-WPD	*Petit et al v. ABC Cutting Contractors, Inc.*		Mail	207*	31	15%*
9:06-cv-80505-JCP	*Reese v. Kimberly Credit Coun, et al*		Mail	13*	2	15%*
1:04-cv-21861-ASG	*Reyes, et al v. Carnival Corporation*	120	Mail	580*	87	15%*
9:06-cv-80551-DMM	*Riffin, et al v. Rapcon Incorporated, et al*	25	Mail	33*	5	15%*
9:06-cv-80645-DTKH	*Rusignuolo v. McLane Suneast, Inc., et al*	30	Mail	160*	24	15%*
9:08-cv-80004-KLR	*Russo v. Cold Air Distributors Warehouse of Florida, Inc.*		Mail	87*	13	15%*
9:06-cv-80707-WPD	*St. Louis, et al v. Express Car Wash*	30	Mail	47*	7	15%*
9:07-cv-81013-KAM	*Vaccaro v. Candidates On Demand Group, Inc.*	60	Mail	73*	11	15%*
0:08-cv-61254-UU	*Titre v. Essia et al*	105	Mail & posting	353*	53	15%*
2:05-cv-14295-KAM	*Carmody, et al v. Florida Center*	45	Mail	106	20	19%
0:03-cv-61177-AMS	*Knouse, et al v. Florida Power*	120	Mail	100	19	19%
0:05-cv-61757-WPD	*Morrison, et al v. Quality Transport*	60	Mail	75	16	21%
9:06-cv-80604-DMM	*Butler, et al v. Oak Street Mortgage*	60	Mail	68	16	24%
2:07-cv-14156-FJL	*Arena et al v. Mortgage U.S., Inc. et al*	30	Mail	249	67	27%
0:05-cv-60292-DLG	*Spencer, et al v. Regional Acceptance, et al*		Mail	3	1	33%
0:05-cv-61865-WPD	*Adams, et al v. ABN Amro, Inc., et al*	30	Mail	339	149	44%
0:05-cv-60871-MGC	*Johnson, et al v. Senior Health Care, et al*		Mail	161	77	48%
					Median (center):	15%
					Mean (average):	16%

Table 4: Fee-Recovery Ratios in Settled FLSA Collective Actions

Case Number (N=57)	**Case Name**	**Attorneys' Fees**	**Plaintiffs' Recovery**	**Fee-Recovery Ratio**
2:07-cv-14382-KMM	*Tolentino-Hernandez et al v. Becerra*	$ -	$ 21,148.05	0%
9:08-cv-80883-DTKH	*Montoya v. Physicians Surgical Group, L.L.C. et al*	$ 2,800.00	$ 29,250.00	10%
2:08-cv-14150-DLG	*Cadet v. Pedersen Lathing & Plastering, Inc. et al*	$ 6,000.00	$ 23,000.00	26%
0:08-cv-61792-FAM	*Isaacs v. Gold Coast Tire Holdings, Inc. et al*	$ 3,500.00	$ 9,000.00	39%
0:05-cv-61865-WPD	*Adams, et al v. ABN Amro, Inc., et al*	$ 402,036.59	$ 987,963.41	41%
9:05-cv-81153-DTKH	*Seibert v. Harbor Title, L.C.*	$ 2,750.00	$ 6,500.00	42%
0:07-cv-61486-UU	*Ulloa v. National Art Landscape & Design, Inc.*	$ 4,500.00	$ 10,500.00	43%
9:07-cv-80935-DTKH	*Graham v. Citi Trends, Inc.*	$ 1,000.00	$ 2,000.00	50%

0:06-cv-60021-DLG	*Williams v. Modern Concrete, LLC*	$ 16,225.90	$ 30,330.70	53%
0:07-cv-61777-JAL	*Metcalf v. iBill, LLC*	$ 3,500.00	$ 6,500.00	54%
9:06-cv-80306-JCP	*Wilches v. Streamline Construct, et al*	$ 9,500.00	$ 16,000.00	59%
1:07-cv-22232-WMH	*Medeiros v. Kanaan Racing,Inc et al*	$ 18,000.00	$ 29,500.00	61%
1:08-cv-20019-JEM	*Ayala v. Capform, Inc. et al*	$ 4,000.00	$ 6,000.00	67%
2:07-cv-14124-DLG	*Marion v. Prestige Tax, Inc. et al*	$ 8,000.00	$ 12,000.00	67%
0:06-cv-61505-WJZ	*Haddock, et al v. Holland America Line, et al*	$ 29,000.00	$ 43,500.00	67%
1:07-cv-21513-WMH	*Santiago v. Elbar, Inc. et al*	$ 7,200.00	$ 10,800.00	67%
9:08-cv-81580-KLR	*Sierra v. The Pep Boys- Manny, Moe & Jack Inc*	$ 3,000.00	$ 4,500.00	67%
1:07-cv-22068-FAM	*Ore v. U.S. Security Associates, Inc.*	$ 20,445.76	$ 29,554.24	69%
0:07-cv-61561-MGC	*Castro v. Gold Coast Beverage Distributors, Inc.*	$ 6,400.00	$ 8,600.00	74%
1:03-cv-20124-JAL	*Monzon, et al v. Amaralto Concrete*	$ 32,028.51	$ 42,971.49	75%
9:08-cv-80558-KLR	*Ojeda v. WHM, LLC*	$ 7,000.00	$ 9,000.00	78%
1:07-cv-23082-MGC	*Cuadra v. BLU System Corporation et al*	$ 2,400.00	$ 3,000.00	80%
9:08-cv-80277-KLR	*Benitez et al v. Mahood Cleaning Services,Inc. et al*	$ 1,829.52	$ 2,170.50	84%
1:06-cv-20884-PAS	*Auguste v. Choice Hotels Int'l, et al*	$ 6,646.00	$ 7,854.00	85%
0:08-cv-61728-JJO	*Borges v. The Keiser School, Inc.*	$ 4,000.00	$ 4,500.00	89%
0:06-cv-61541-UU	*Francois v. Atlantic Roofing of Florida II, Inc., et al.*	$ 14,513.00	$ 15,487.00	94%
0:06-cv-61401-PAS	*Swaby v. Carevacations Caribb*	$ 10,350.00	$ 11,000.00	94%
0:07-cv-61134-WPD	*Rivera v. Gennaro's Produce, Inc. et al*	$ 22,800.10	$ 23,199.90	98%
0:08-cv-60945-JIC	*Delgardio v. Foremost Plumbing, Inc. et al*	$ 2,500.00	$ 2,500.00	100%
1:06-cv-22465-MGC	*Hodgson v. Corporate Protection, et al*	$ 3,000.00	$ 3,000.00	100%
0:06-cv-61408-DTKH	*Keane v. Knights Towing, Inc.*	$ 2,000.00	$ 2,000.00	100%
0:07-cv-60540-WJZ	*Prescia et al v. Mancini Ventures, LLC et al*	$ 3,910.00	$ 3,690.00	106%
1:07-cv-22561-ASG	*Torcios v. Esther's 103 Inc. et al*	$ 4,200.00	$ 3,800.00	111%
9:07-cv-80922-DMM	*Dorcinvil v. Mar-A-Lago Club, LLC et al*	$ 4,175.00	$ 3,325.00	126%
0:08-cv-61239-UU	*Moss v. Baby Borrow Rental Corp. et al*	$ 6,000.00	$ 4,600.00	130%
9:08-cv-81375-WJZ	*Dieujuste v. Quality Sod of the Palm Beaches, Inc.*	$ 5,350.00	$ 4,000.00	134%
9:06-cv-80791-KAM	*Pierre v. Shiv Shakti Donut, et al*	$ 8,650.00	$ 6,350.00	136%
0:06-cv-61809-JIC	*Burns v. Carevacations Carribean Ports Medical Inc.,*	$ 6,000.00	$ 4,250.00	141%
1:05-cv-21763-BLG	*Murillo v. Intercontinental H*	$ 4,250.00	$ 3,000.00	142%
2:07-cv-14334-KMM	*Bianchini v. El Dorado Financial, Inc. et al*	$ 1,500.00	$ 1,000.00	150%
9:05-cv-80440-JCP	*Smith, et al v. Mobile Transactions, et al*	$ 7,815.00	$ 5,000.00	156%
1:06-cv-20260-CMM	*Gonzalez v. Qualender Food Corp., et al*	$ 15,000.00	$ 9,000.00	167%
1:08-cv-21171-PCH	*Taveras v. Bayus Security Services, Inc. et al*	$ 5,400.00	$ 3,100.00	174%
9:08-cv-80447-KLR	*Martinez v. Wellington Granite & Marble,Inc. et al*	$ 2,235.50	$ 1,265.00	177%
0:07-cv-60099-WPD	*Alexandre v. Gold Coast Beverage Distributors, Inc.*	$ 56,000.00	$ 22,000.00	255%
1:07-cv-21289-KMM	*Richardson v. TB Isle Resort LP, et al*	$ 6,875.00	$ 2,478.80	277%
0:08-cv-60102-CMA	*Rodrigues v. AF of Fort Lauderdale, Corp et al*	$ 7,312.50	$ 2,437.50	300%
9:07-cv-80689-WPD	*Tima v. Premier Beveral Company, LLC.*	$ 3,000.00	$ 1,000.00	300%
9:07-cv-81024-DTKH	*Lima v. Hometown Pest Control, Inc. et al*	$ 11,000.00	$ 3,500.00	314%
9:07-cv-80250-DTKH	*Estiverne Reserve v. Federal Express Corporation*	$ 2,300.00	$ 700.00	329%

9:07-cv-80140-DTKH	*Phillips v. Palm Beach County Fire Rescue Dept.*	$ 39,000.00	$ 10,373.75	376%
9:07-cv-80032-DTKH	*Joseph v. Boca Raton Community Hospital Inc.*	$ 24,100.00	$ 5,900.00	408%
9:03-cv-80577-JCP	*Benhomme v. Kids To Kidz, Inc, et al*	$ 10,275.00	$ 1,859.97	552%
1:03-cv-21789-PCH	*Sanchez v. South Beach Group*	$ 4,450.00	$ 800.00	556%
1:07-cv-21476-CMA	*Longas v. NIDO LLC et al*	$ 12,937.00	$ 2,063.00	627%
0:06-cv-60895-WPD	*Dejean v. Jay Krishna Enterpri, et al*	$ 4,400.00	$ 600.00	733%
9:03-cv-81032-JCP	*Walsh v. Auction Warehouse, et al*	$ 8,200.00	$ 294.38	2786%
			Median (center):	100%
			Mean (average):	205%
			Median – without *Walsh*	99%
			Mean – without *Walsh*	159%

Chart 4a: Fee-Recovery Ratios in Settled FLSA Collective Actions