

Class Actions: Any Relief in Sight?

Miles N. Ruthberg

National Chair, Litigation Department

Latham & Watkins

Surge in Class Actions

- Began with 1966 Amendments to Rule 23
- Accelerated in 1990s
- To some extent, natural result of mass society
- But fueled considerably by large plaintiffs' fee awards

The Frankenstein Monster

"The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action."

Lumbard, C.J., dissenting in *Eisen v. Carlisle & Jacquelin* (2d Cir. 1968).

The Frankenstein Monster

Class Actions are a Frankenstein monster for corporate defendants because:

- 1) aggregation creates claims that otherwise would not exist
 - e.g., \$70 (named plaintiff damages) in *Eisen*
- 2) large exposure coerces settlement without regard to merits

Frankenstein

The Bright Side

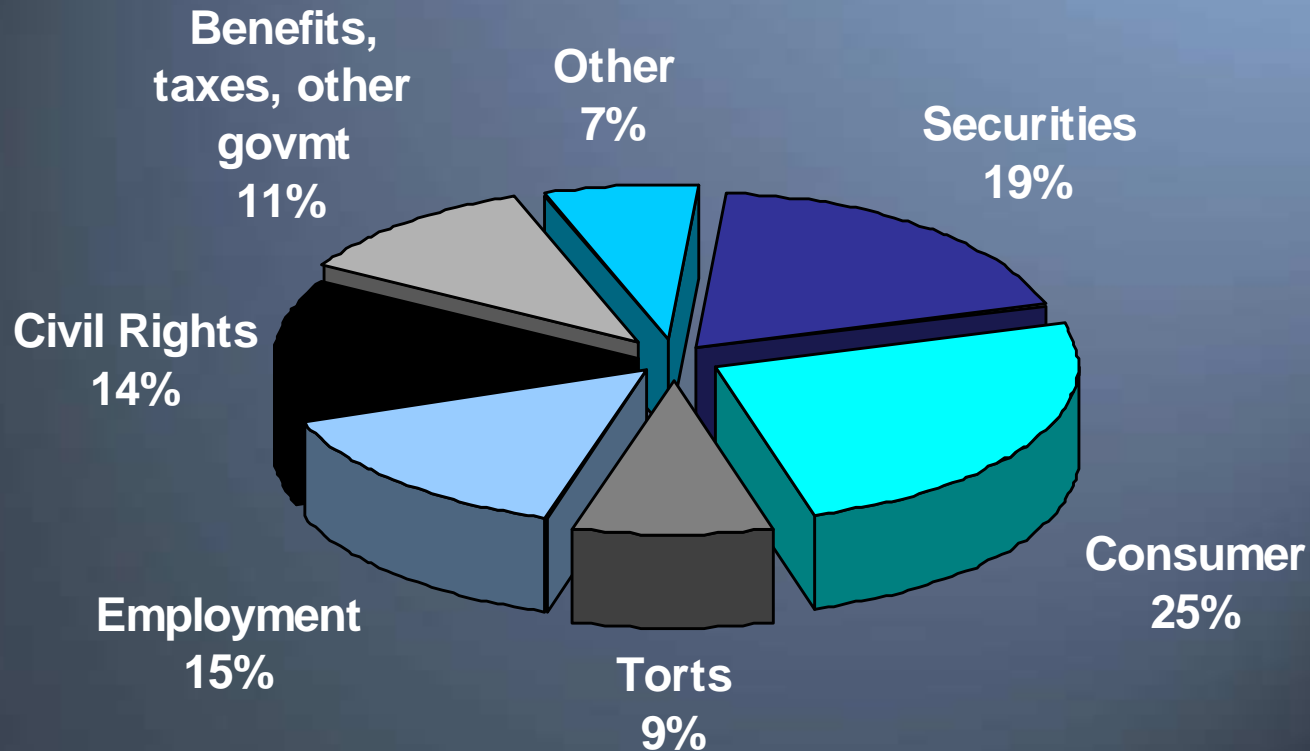
Class actions also can bring closure:

- Settlement classes can resolve massive claim volumes
- Litigation classes usually are opposed, but occasionally are supported by defendants as a closure device

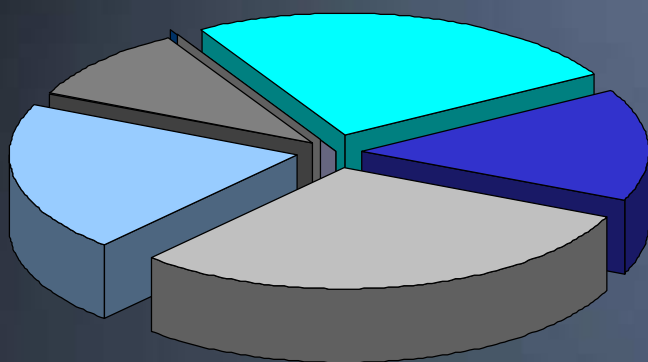
But, on balance, the surge in class actions has imposed great burdens on corporate defendants

Class Actions: Nature of Claims 1995-96

Reported Judicial Decisions (n=1020)

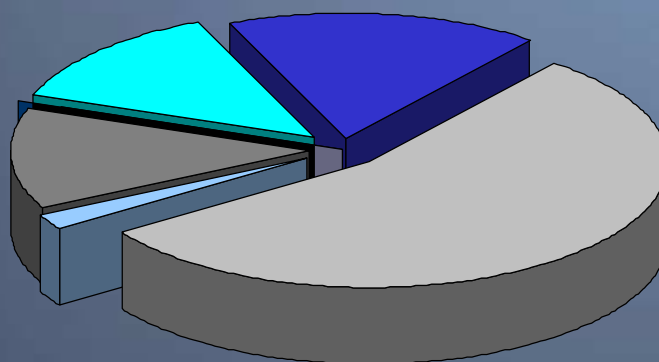


Cases Against Corporate Defendants 1995-96 Reported Decisions



Federal Cases

(n=461)



State Cases

(n=150)

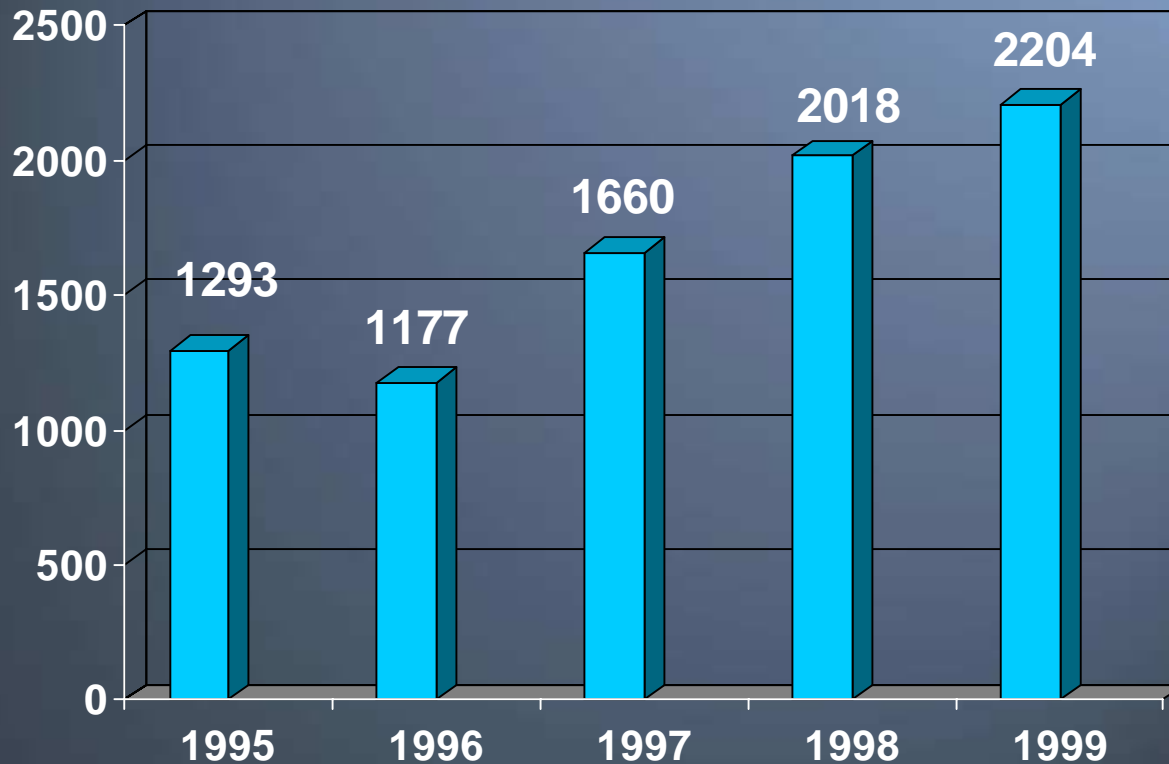


Quantifying the Surge

- RAND Study:
 - "Dearth of statistical information"
 - "class action litigation has increased dramatically, imposing new costs for business and new burdens for courts"
 - "surge in damage class actions in the past several years, particularly in state courts and in the consumer area"

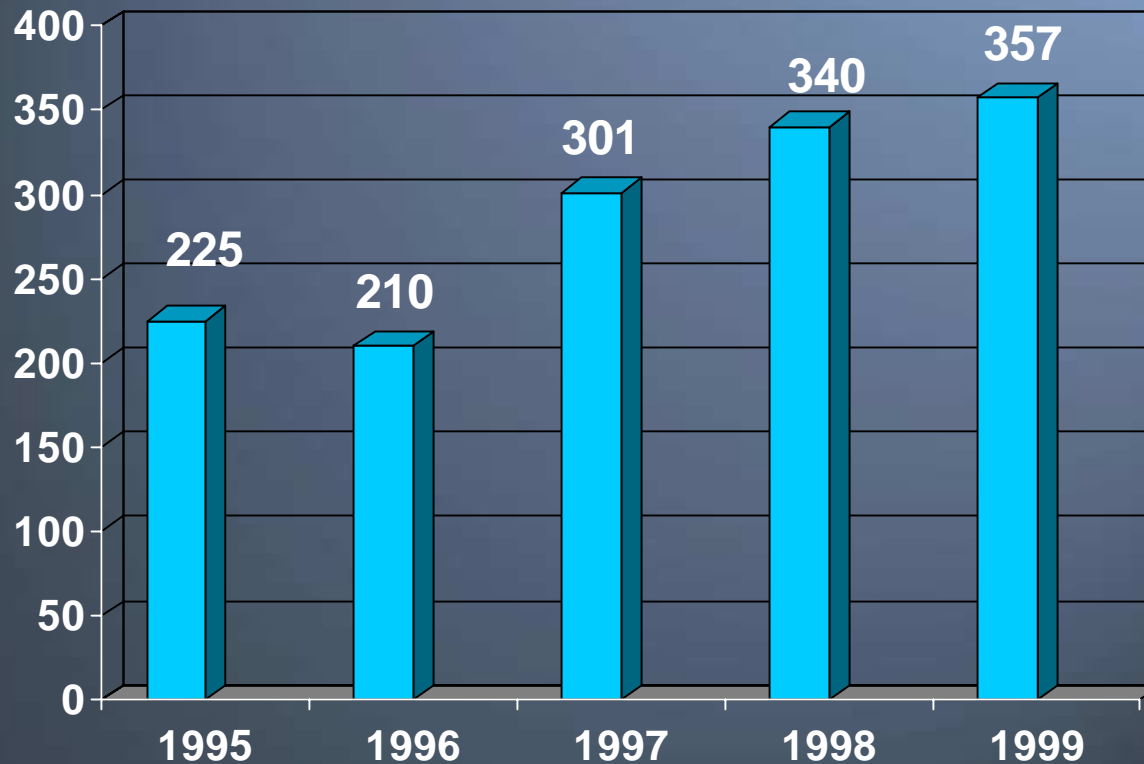
U.S. District Courts: Class Action Cases 1995-99

Total Cases



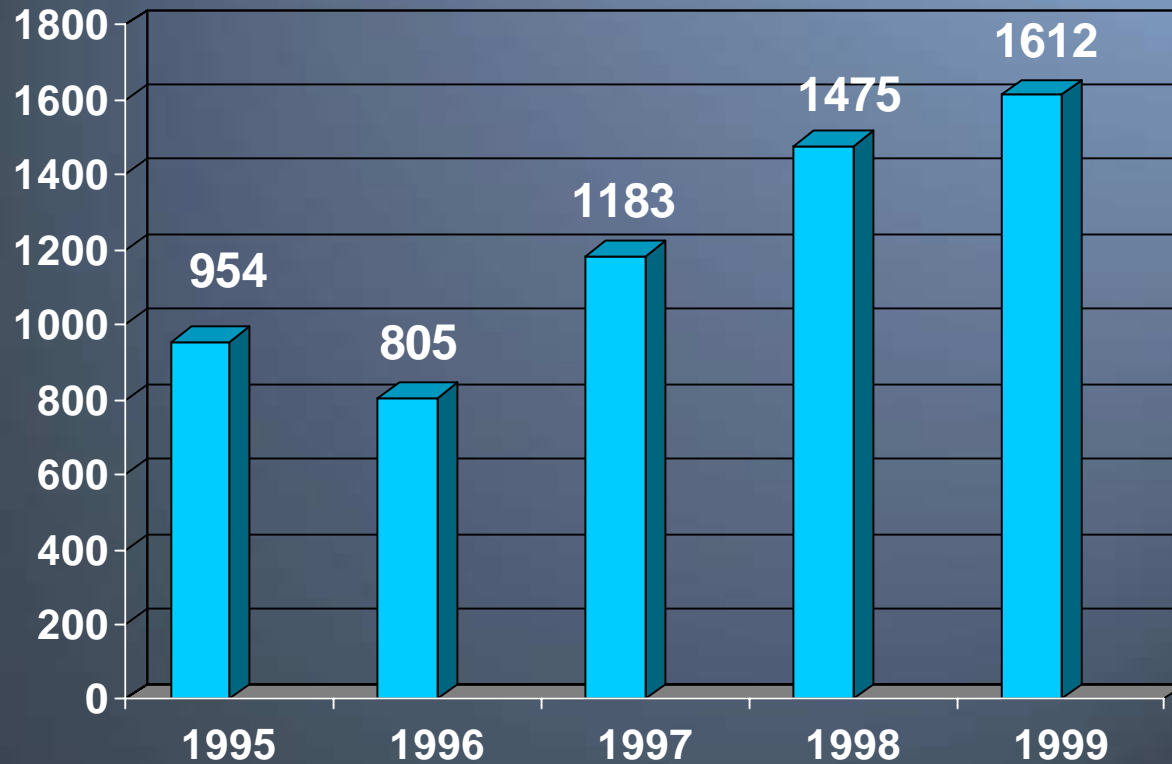
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Tort Actions



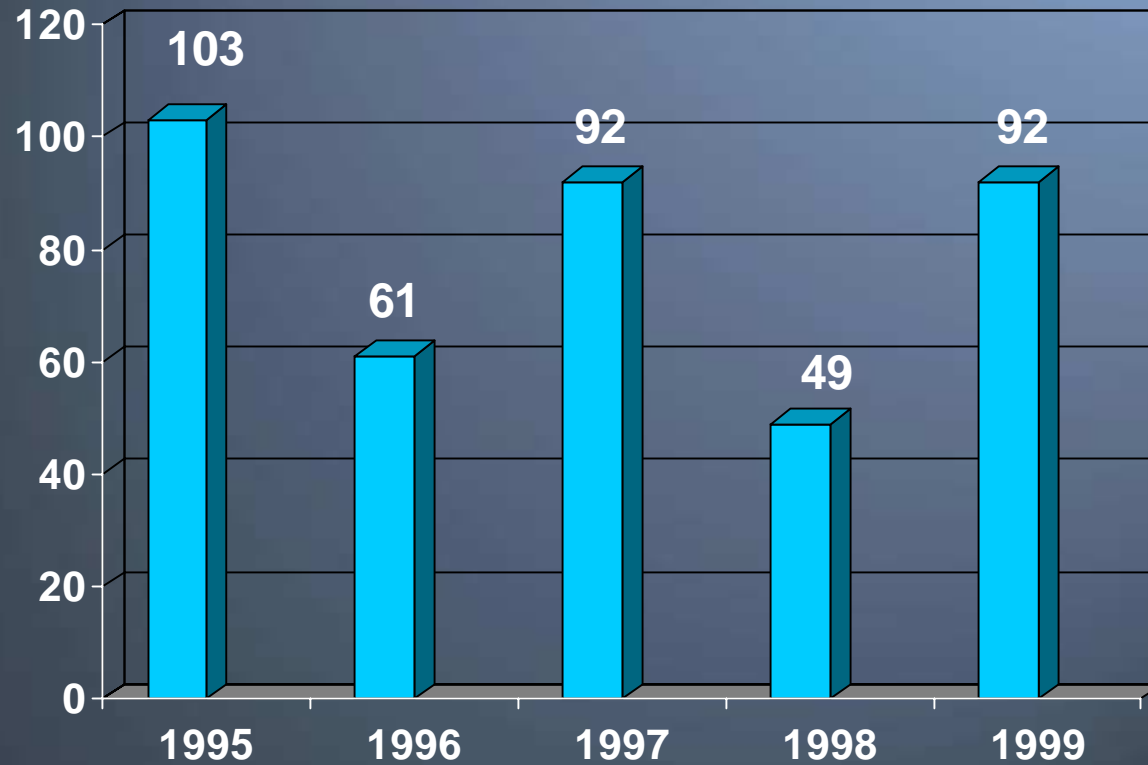
U.S. District Courts: Class Action Cases 1995-99

Actions Under Statutes



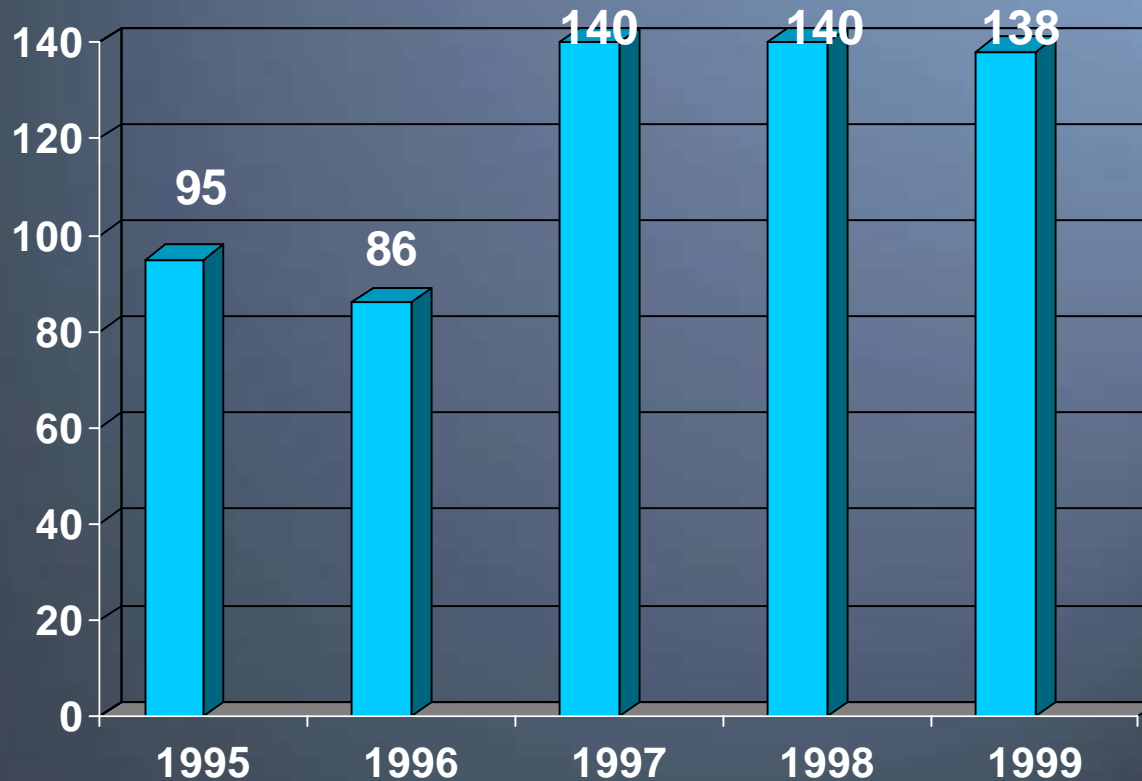
U.S. District Courts: Class Action Cases 1995-99

Antitrust



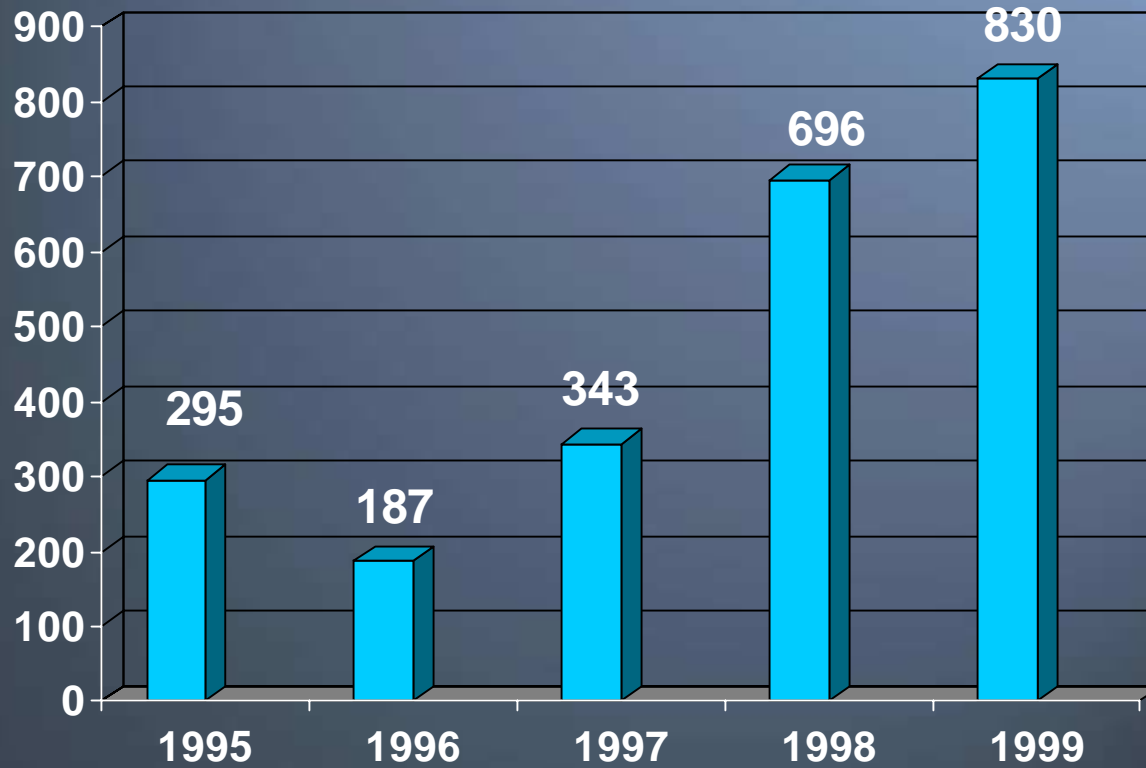
U.S. District Courts: Class Action Cases 1995-99

Labor Laws



U.S. District Courts: Class Action Cases 1995-99

Securities, Commodities and Exchange



State Court Uses/Abuses

- RAND "found evidence" of plaintiffs' forum-shopping for favorable state court venues
 - e.g., consumer class actions in Alabama
 - e.g., mass tort class actions in Louisiana
- Estimated 60 percent of class actions filed in state court
- Increased use of state courts for nationwide classes

Avenues of Relief

- Courts
- Rules Committee
- Congress
- Self-Help

Relief by Courts?

- Supreme Court already has responded (*Amchem; Ortiz*):
 - has confirmed restrictions on mass tort class actions
 - allows settlement classes, but
 - i) imposes strict judicial oversight,
 - ii) restricts use in mass tort context, and
 - iii) restricts use whenever litigation claim could not be certified
 - heightened emphasis on class cohesion, adequacy of representation
- Federal and state courts still reacting
- Has accelerated trend toward state court filings
- Lower federal courts starting to scrutinize fee awards and settlements more closely
- Further changes likely to be incremental rather than doctrinal

Relief by Rules Committee?

- Extensive Rule 23 amendments proposed in 1996, but only one amendment adopted:
 - Rule 23(f) – interlocutory appeals re class certification
 - Potentially good for both sides, but not heavily used yet
- Further amendments unlikely in near future, except perhaps Rule 23(e) re supervision of settlements

Relief by Congress?

- Securities Legislation Already Passed:
 - Private Securities Litigation Reform Act of 1995
 - has increased dismissals at pleading stage
 - but securities litigation has increased, not decreased
 - Securities Litigation Uniform Standards Act of 1998
 - moved most securities class action litigation to federal courts
- Pending legislation (uphill?)
 - Interstate Class Action Jurisdiction Act (would shift most class actions to federal court)
 - Asbestos Compensation Act (would prohibit asbestos class actions)
- No immediate prospects for broad Rule 23 reform

Self-Help

- Litigation Prevention
- Advance preparation for litigation and media relations
 - otherwise, plaintiffs have a potentially insurmountable headstart
 - recent increases in plaintiffs' coordination and resources
- Front-End Loading on Litigation Evaluation
 - Developing a Game Plan
 - Use of Expert Consultants
- Early Coordination with Co-Defendants

Self-Help

- Early Exploration of Settlement
- Maximizing Potential Insurance Coverage
- Winning Dismissal or Summary Judgment Motions
- Opposing or Supporting Class Certification
- Excluding Plaintiffs' Experts (*Daubert*, etc.)

Questions for Discussion

- What are the substantive areas in which class actions are likely to increase? decrease?
- How bad is state court for class actions? How likely is passage of the Interstate Class Action Jurisdiction Act?
- Is there any hope for federal legislative reform of federal class actions? federal or state protection against monstrous class awards?
- Do you support amending Rule 23 to authorize settlement classes more broadly than litigation classes? Why or why not? What problems have you encountered in settling class actions?
- What can be done to counteract the increasing resources and coordination of the plaintiffs' class action bar?

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