INSURANCE PREMIUM DOUBLE ROUNDING LITIGATION:[1] *MARTINEZ v. ALLSTATE*[2] AND *SENDEJO v. FARMERS*[3]

PROLOGUE

In May 1995, former Texas Department of Insurance (TDI) General Counsel D. J. Powers, then working as a solo practitioner in Austin, received a call from Dallas attorney John Cracken seeking Powers' help in exploring a new area of litigation. Cracken, a personal injury attorney described by the *San Antonio Express-News* as having "a reputation for aggressive if not audacious litigation,"[4] reportedly had seen his caseload and earnings threatened by recently enacted Texas tort reform.[5] He had watched the progress of a class action suit handled by an attorney he admired and wound up liking both the action and the outcomes involved in this sort of litigation. In pursuit of a new line of work, Cracken thought that there might be good "small claims" class action cases within either the utilities or insurance arenas and hired Powers at $150 per hour as one of his consultants to see if there were any potential for a consumer class action against the insurance industry.[6] Other consultants were concurrently investigating possible utility-related class action litigation.

Powers was eminently qualified for this role. Before his stint as general counsel from November 1993 through January 1995, he was a staff attorney with the Office of Public Insurance Counsel (OPIC), the state agency that represents the interests of consumers in matters involving insurers and regulatory agencies. Generally regarded as an advocate for consumers and insureds during his tenure at OPIC and TDI, Powers had felt his time at the agency was coming to a close with the election of Republican George W. Bush as Governor of Texas. After the election, Powers worked furiously on passing controversial rules that would prohibit redlining, the practice of refusing to write insurance policies—or overcharging for their premiums—in underprivileged areas. With the appointment of Elton Bomer as commissioner for the TDI, regarded by many observers as more conservative than the incumbent commissioner, Powers felt that the new administration would quickly terminate him.

The day before Bomer took over, Powers resigned. He subsequently went into private practice but saw an opportunity to continue his work on redlining when Cracken contacted him for assistance. As part of the research he undertook for Cracken, Powers set up computer spreadsheets that he could use to replicate the rating process used by insurance companies. His idea was to see if there were any difference between the unlawful premiums for purchasers in certain geographical areas and those premiums charged for a set of actual policies. However, Powers' spreadsheets contained an apparent minor bug: When compared to the sample policy declarations, the calculations for two insurers—Allstate and Farmers—were occasionally off by a dollar. Oddly, this anomaly did not occur all the time. Moreover, the discrepancy never occurred in State Farm's calculations, the state's biggest auto insurer.

Around July 1995, Powers believed he had figured out the source of the problem. In Texas, insurance companies writing private passenger motor vehicle policies are required to round off premiums to whole dollars. *Texas Automobile Rules and Rating Manual* Rule 9.B specifies how to perform the rounding:

> Round the premium for each peril, coverage and exposure for which a separate premium is calculated, to the nearest whole dollar. Round a premium involving $.50 or over to the next higher whole dollar: e.g. 100.50 = 101.00, but 100.49 = 100.

The rule comes from the days when it was to everyone's advantage (consumers and insurers) to use whole dollar amounts in accounting and check writing.[7] In the early 1960s, the predecessor to the Insurance Services Offices, the National Bureau of Casualty Underwriters (NBCU), adopted a proposed uniform rule for "whole-dollar rounding" whose purposes included the simplification of premium payments by policy holders and the reduction of the number of characters needed on the insurance companies' punch cards for their data processing.[8] In 1964, the predecessor to TDI, the Texas State Board of Insurance (TSBI), adopted a similar rule that tracked the proposed NBCU uniform rule almost verbatim. The rounding was the standard ".50 to .99 round-up and .01 to .49 round-down" rule,[9] and in theory its effect was neutral over the long run because about half the premiums are rounded up and about half are rounded down.

However, the situation becomes somewhat more complicated—and the results surprising—when premiums are charged for terms of less than a year. In Texas, there was also a regulation that prescribed how semiannual (or monthly or quarterly) premium payments were to be computed after the annual premium was calculated. *Texas Automobile Rules and Rating Manual* Rule 7.B specified:

> Policy terms less than one year. Compute the premium on a pro rata basis of the annual premium. The premium for the 6 month, 3 month, and 1 month

> policies shall be 50 percent, 25 percent, and 8 1/3 [percent] respectively of the annual premium for coverage afforded.

Powers says that he finally realized that Allstate and Farmers did the rounding process twice, once when the annual premium was calculated *and again* after making the pro rata computation for a six-month or shorter term. The rules appeared to be somewhat confusing in terms of their plain-language interpretation. Does the whole-dollar rounding rule apply to annual premiums only? Does it apply to policy terms of less than one year? When would the rounding take place for other than annual policies? On first glance, when the rounding happened should not matter as long as the insurer was consistent, because 50 percent of the time it would go up and 50 percent of the time it would go down. However, when—and how often—the premiums are rounded indeed *does* make a difference, albeit a small one, for some policy calculations.

Essentially, there seemed to be two different ways passenger auto insurance policy semiannual premiums were being calculated in Texas. All premiums, regardless of method, were first calculated on an annual basis. "Single rounding" can be defined as the insurer first determining the six-month pro rata share of this original annual premium and then rounding the pro rata share. Here, the only rounding that takes place is performed just after the annual premium is divided by two (for a six-month policy). However, "double rounding" occurs when the original annual premium is first rounded, then the six-month pro rata share of this now-rounded annual premium is determined, *and* then the pro rata share is rounded again to generate the final billing. Under this scenario, the annual premium is rounded and the six-month share is also rounded. Arguably, the Texas insurance rules seemed to permit either scheme. But for one out of four policies written—depending on whether the amount of the annual calculation is odd or even whole dollars and whether the residual cents are over or under the .49/.50 line—double rounding can give the insurer an extra dollar at the six-month interval (and a yearly windfall of two dollars) as compared to what would happen if single rounding were used.

Tables 10.1 and 10.2 show different coverages that represent groupings of the four possible annual premium types: those with odd or even whole dollars and those whose decimal portions would either be rounded up or down. The first table illustrates how State Farm and most other auto insurers in Texas were calculating their coverages (rounding only just before billing on the six-month policy) and the second shows how Allstate and Farmers were doing their calculations (rounding both the annual premium and the six-month premium).

As can be seen, the six-month premium for coverage #2 in Table 10.2 is a dollar over what it would have been if only single rounding had been used. However, the other three six-month coverages are unchanged regardless of rounding

Table 10.1

Single Rounding Only After Semiannual Premium Calculated

Coverage Example Number	Original Annual Premium	Annual Premium Used for Pro Rata Calculation	Pro Rata Semiannual Premiums	Rounded Semiannual Premiums	Total Yearly Amounts Paid in Premiums	Difference from Original Annual Premium
#1	$1000.48	$1000.48	$500.24	$500.00	$1000.00	–$.48
#2	$1000.52	$1000.52	$500.26	$500.00	$1000.00	–$.52
#3	$1001.48	$1001.48	$500.74	$501.00	$1002.00	+$.52
#4	$1001.52	$1001.52	$500.76	$501.00	$1002.00	+$.48
Total	$4004.00			$2002.00	$4004.00	$.00

Table 10.2

Double Rounding at Annual Premium and After Semiannual Premium Calculated

Coverage Example Number	Original Annual Premium	Rounded Annual Premium Used for Pro Rata Calculation	Pro Rata Semiannual Premiums	Rounded Semiannual Premiums	Total Yearly Amounts Paid in Premiums	Difference from Original Annual Premium
#1	$1000.48	$1000.00	$500.00	$500.00	$1000.00	–$.48
#2	$1000.52	$1001.00	$500.50	$501.00	$1002.00	+$1.48
#3	$1001.48	$1001.00	$500.50	$501.00	$1002.00	+$.52
#4	$1001.52	$1002.00	$501.00	$501.00	$1002.00	+$.48
Total	$4004.00			$2003.00	$4006.00	+$2.00

method. This situation yields an additional $2 a year in premiums collected annually on one out of every four coverages (assuming a random distribution for annual premiums with odd-even whole-dollar amounts and decimal portions above and below 49/50 cents). Viewed another way, the practice of double rounding would allow an insurer to collect an extra dollar on 25 percent of all coverages on six-month policies by rounding up 75 percent of the time rather than 50 percent of the time. It should be remembered that the rounding takes place on each *individual coverage* type (liability, uninsured motorist, medical payments, collision, etc.; up to about seven in all) in the calculation of a total auto policy premium, so that in a worst-case scenario conceivably as much as $14 extra could be paid per year by a particularly unlucky policy holder who purchased all seven coverage types (or about $3.50 for the average fully insured policy holder, given the mathematical frequency of occurrence of 25 percent).[10] Cracken and Powers later claimed that on a per-motor-vehicle basis, the *average* consumer would be overcharged about $3.00 per year.[11] Interestingly, this mathematical quirk is not a problem if the term of the policy is monthly or quarterly instead of semiannually.

Powers says that it was not until July 10, 1995, that the double-rounding practice became clear to him as it applied to Allstate and Farmers' policies and the effect on premiums collected.[12] He subsequently confirmed his suspicions with staff members at TDI and OPIC and then relayed the information to Cracken, who immediately saw the potential for a major class action.

THE LITIGATION BEGINS

Cracken and Powers next consulted a number of former TSBI members and TDI commissioners, and both current and former staffers for TSBI, TDI, and OPIC about possible interpretations of the Texas manual's Rules 7 and 9. In early August 1995, one of Powers' contacts at OPIC requested that Allstate explain its method for calculating premiums on a sample declaration sheet. The response confirmed the use of the double-rounding method. The stage was now set for suits against Allstate and Farmers, the only insurance company groups in Texas that appear to have employed double rounding in the mid-1990s. (It is possible that some smaller companies also used the same method (though neither the defense nor the plaintiffs have ever publicly identified any) or that some insurers might have double rounded in prior years.)

Cracken engaged Crystal City, Texas, attorney Joe Luna to survey local residents in order to find someone who was insured by either of the two future defendants.[13] Tiny Crystal City is the county seat of sparsely populated Zavala County,[14] which is located on the Mexican border in southwest Texas. This area is one of the poorest parts of Texas,[15] with less than 1 percent of all Texas motor vehicle policy holders, and was reported, perhaps apocryphally, to be so "plaintiff-friendly" that railroads had torn up their tracks within the county lines to prevent lawsuits.[16] In late August 1995, Luna identified Armando Martinez and Maria Sifuentes as Allstate policy holders and helped sign them on as potential plaintiffs in the anticipated litigation against that insurer.[17] Other plaintiffs were signed up for the suit against Farmers.

Just days before the effective date of new Texas rules on venue and forum choice,[18] Cracken filed two separate but identical suits on August 28 and 30, 1995.[19] One suit named Northbrook, Illinois, corporations Allstate Insurance Company and Allstate Indemnity Company as defendants, and the other named Travis County's Texas Farmers Insurance Company and another Farmer's company, Mid-Century Insurance Company.[20] The matter was assigned to District Judge Amado Abascal III and Rene Barrientos was hired as local counsel.[21] These cases were the first commercial class actions Cracken's firm had ever filed.[22]

The litigation was soon being touted as being worth more than $100 million, based on the supposed ten years of double rounding[23] and the reported number of coverages sold by the two defendants,[24] whose combined sales accounted for three out of every ten Texas auto insurance policies.[25] The original petition alleged both breach of contract (failure to charge the lawful rate for private passenger motor vehicle insurance policies)[26] and "money had and received" (an equitable action alleging that one entity, the insurance company, possesses moneys that in good conscience and equity belong to the policy holders and would be unjustly enriched if allowed to retain such moneys). As the litigation progressed, a cause of action under the Texas Deceptive Trade Practices Act (DTPA) was added, and in addition to the recovery of the $100 million in overcharges, plaintiffs also sought treble damages under the DTPA and statutory attorney fees recoverable under Tex. Civ. Prac. and Rem. Code § 38.001 *et seq*.

A key concern of the defendants was the state court venue in Zavala County. One way out was to have the matter heard by a federal judge in one of the cities where the U.S. district courts in Texas are located. But in order to remove the case to a federal court, the defendants would have to show that the parties were citizens of different states and that the amount of money being sought exceeded the statutorily set minimum of $75,000. This task was more difficult than it might seem. Though Cracken had claimed that Farmers and Allstate had illegally overcharged Texas policy holders $57 million and $52 million, respectively,[27] the U.S. Supreme Court has repeatedly held that individual class members' claims for compensation cannot be aggregated to satisfy the federal statutory minimum.[28] Even in a worst-case scenario, no individual class members' claims of overcharging came even close to $75,000. Nevertheless, in October 1995 Allstate (which was an Illinois corporation) was successful in convincing a U.S. Magistrate-Judge for the Western District of Texas that removal of its case to U.S. district court was appropriate under diversity of citizenship jurisdiction. Allstate argued that the Fifth Circuit Court of Appeals had held that a claim for punitive damages in a class action arose from a single course of action, and so a classwide claim for a large-enough punitive award could be used to satisfy the jurisdiction's $75,000 requirement.[29] The plaintiffs had not made any explicit claims for punitive damages, but Allstate argued that any claims of fraud and breach of contract naturally embraced a real potential for a punitive award by a jury. A similar argument was also advanced by Allstate for using the plaintiffs' request for attorney fees to satisfy the amount-in-controversy requirement. Farmers was unable to make similar claims for federal diversity of citizenship jurisdiction because both Texas Farmers Insurance Company and Mid-Century Insurance Company were headquartered in Travis County, Texas. As it turned out, Allstate's respite from a Texas state court was short-lived. Federal District Judge Fred Biery saw things differently from the magistrate-judge, and on February 13, 1996, he remanded the matter to the Zavala County trial court for further processing.

The litigation began in earnest when the two defendants were both in Zavala County before Judge Abascal. Cracken revealed that he had a “war chest” with a total of $4 million in funds to finance the suit and identify potential plaintiffs;[30] that he was willing to commit another $1 million to litigate the case;[31] and that more than a half-dozen lawyers and a dozen nonlawyers were working full-time on the matter.[32] Furthermore, during the course of the litigation he assembled an impressive set of legal consultants that included University of Texas professors Samuel Issacharoff and Charles Silver, attorney Alan Dershowitz, Columbia professor John Coffee, New York University professor Geoffrey Miller, and Harvard professor Arthur Miller.[33] Notwithstanding any involvement in the case by the law professors, Powers, local counsel, or other attorneys, it was clear from the start that the plaintiffs’ attack was led and financed by Cracken and his firm of Cracken & Harkey.[34] On the defense side, Farmers was represented by Thomas T. Rogers and Harold R. Loftin, Jr. of Austin’s Small Craig & Werkenthin; Allstate picked Roger Higgins and Robert B. Wellenberger of Dallas’ Thompson Coe Cousins & Irons as trial counsel.

In March 1996, the defendants moved to dismiss the case in favor of having TDI handle the matter, but the plaintiffs countered with a motion for class certification on March 25, thus sparking statewide interest in the proceedings. By the end of the month, newspapers across the state had begun to report on this hard-fought battle over the use of a class action to recover small-value consumer claims.

PRIMARY ISSUES OF THE LITIGATION

The arguments of the parties to the two suits—advanced both in the courtroom and in the public arena—and of consumer advocacy groups, newspapers, and state agencies, revolved around four central themes:

- Was the practice of double rounding unauthorized and did it violate state law?
- Was this a matter that should be left to TDI to resolve?
- Was Zavala County the proper forum?
- Was the litigation merely a method of enriching attorneys with little benefit to policy holders, or was it an effective way to protect the interests of relatively powerless consumers?

These questions were intertwined, and all were still being hotly debated at the time of the eventual settlement.

Double Rounding and Insurance Regulations

The defendants asserted that not only was double rounding within the meaning of the *Manual* rules, but the companies were both permitted and required to calculate their premiums in this way. Robert Pike, chief corporate counsel for Allstate, argued that instructions from TDI clearly upheld the practice of double rounding:

> We're in the unique position of believing, with the support of all the correspondence with the department, that we have done exactly what we have been told to do by regulators in Texas.[35]

Defendants pointed to correspondence between Allstate and TDI employee Grover S. Corum in 1985 as requiring them to round the annual and six-month premiums[36] and to a 1981 letter from department employee Wilburn Fischer that stated:

> Rule 9. provides that a policy may be issued for a six month period at 50% of the annual rates or premiums. This office has consistently ruled that the annual premium is figured in the normal fashion, rounded to the nearest dollar (.50 or over). Then a 6 month policy would be figured at 50% of the annual rounder [sic] premium, and then rounded again.[37]

Pike also claimed that the agency's interpretations came after Allstate had told state regulators, as far back as the 1970s, that double rounding would result in overbilling.[38]

The plaintiffs attacked these "authorizations" in a number of ways. First, the 1981 letter specifically allowing double rounding was incorrect and had no official standing; second, the 1985 letters that supposedly authorized the insurers to double round, according to the plaintiffs, actually authorized them to round only the six-month premium. As to the assertion that the insurance regulators directed the defendants otherwise, Powers was quoted as saying:

> . . . that is just not true.
>
> The question is whether you should round two times or one time. The letter they have says you're supposed to round the six-month premium. That is all it says. It is so clear. I cannot fathom why they say they were told to double round.[39]

Plaintiffs also asserted that Corum, the one-time head of TDI's auto insurance division, would testify that since he came to TDI in 1981, the rules clearly prohibited double rounding and that he never told Allstate or any other company to double round. Moreover, plaintiffs argued, any affidavits of former TSBI staff members who assert double rounding is the correct method are suspect because, they alleged, TSBI was known at the time for its reluctance to enforce legislatively enacted laws and rules and for the industry's undue influence upon its rulings. Even if the insurance companies were given authorization by low-level staffers, plaintiffs felt that the test was not whether insurers were misinformed by state regulators but rather whether they acted in accord with the applicable rules: "It's no defense to the violation of law that they got bum advice from a bureaucrat," said Cracken in one news article.[40] Moreover, even if the double rounding could be characterized as an innocent mistake, the overcharges collected should rightfully be returned to the policy holders.

The plaintiffs attacked arguments that double rounding was part of official policy on the grounds that only these two companies (and not other major insurers such as State Farm) employed the practice.[41] In response, the defendants pointed out that in all the states where they write insurance, only in Texas did they double round (thus lending credence to the argument of specific TDI authorization),[42] and moreover there was evidence that Allstate and Farmers were *not* the only major Texas insurers using the double-rounding method.[43]

Class counsel argued that because double rounding was not authorized by official TSBI/TDI policy, it constituted a breach of contract between the insureds and the defendants of an implied term to charge only a lawful rate for the coverage. Defendants countered that even if this were the case, class member claims for coverages purchased prior to August 31, 1991, were barred by the statute of limitations. Plaintiffs responded that statutes of limitations were not applicable because even with the exercise of reasonable care, the insureds did not and could not discover the overcharging until the underlying lawsuit was filed. Defendants dismissed this assertion of the "discovery rule" exception (i.e., for the clock to be permitted to tick away on a statute of limitations, there has to be actual or implied knowledge of the offending act) by contending that the class members could conceivably have determined the methods for premium calculations at any time from the public record.

The plaintiffs argued that the double-rounding method used by the defendants allowed an insurer to collect an extra dollar on one out of four rate-regulated, private passenger motor vehicle coverages they sold for a six-month period. In actuality, class counsel claimed, the Texas insurance rounding rules were supposed to be "revenue neutral" so that the result in the aggregate would closely approximate what would have been the result had no rounding taken place. Fairness and equity required that any application of rounding rules to individual policies would result in half of all policies going up and half going down (with a net effect of zero).

The defendants retorted that the concept of revenue neutrality was a fiction and had never been a part of TSBI/TDI policy. They argued that even if double rounding caused any one person to pay a bit more than he or she would have otherwise, there was no windfall to the insurance companies since the rates were set on the aggregate amount of premiums collected from *all* policy holders.[44] Moreover, since March 1992, insurers had been able to charge rates within a "flex band" over or under the standard benchmark rate, and according to the defendants any overcharging would have been within the permitted band.[45]

Administrative Remedies

Which authority should decide questions regarding double rounding? If the insurers were found to have violated state law, which authority should order any remedies, refunds, or penalties? The defendants asserted that the Texas Legislature had conferred upon TDI the exclusive power and authority to regulate premiums:

> The Board shall have the sole and exclusive power and authority and it shall be its duty to determine, fix, and promulgate just, reasonable and adequate rates of premium. . . .[46]

and that the legislature had also authorized TDI to issue uniform rules:

> The State Board of Insurance may prescribe, promulgate, adopt, approve, amend, or repeal the standard and uniform manual rules, rating plan . . . for motor vehicle insurance . . . under the procedures specified in this article.[47]

Plaintiffs saw the matter differently. They contended that policy holders were not seeking rule-making but rather were looking for rate enforcement, a matter unquestionably within the court's jurisdiction.[48] The class counsel's position was that TDI might decide what happens in the future with regard to rule revisions and policies but it had no power to determine the contractual obligations of the parties to an insurance contract after the fact.

Choice of Venue

Defendants strenuously argued that the matter—if it had to be heard in a trial court at all—should be moved to another location. As they saw it, proper venue would be at the state capital in Austin and not in Crystal City because the lawsuit involved issues that were within the sole discretion and jurisdiction of a state agency. Moreover, defendants claimed to have little connection to Zavala County because their policy billings were generated elsewhere and only a handful of policy holders lived there. In addition, they said, Zavala County was an inappropriate site for a trial that would litigate issues affecting millions of Texans. The remoteness of Zavala County was a concern as well because parties, witnesses, and counsel were spread all over the state.

Plaintiffs characterized the litigation as involving only contracts between private parties and not involving any state agency as a named defendant. Thus, they argued, venue would be permissible in Zavala County even if it was somewhat inconvenient to the defendants; to hold otherwise would mean that "only consumers who live in big cities with big airports can recover when cheated by a big insurance company."[49]

Costs and Benefits of the Litigation

The defendants charged that the case was lawyer-driven and would provide only a few dollars per plaintiff while enriching their attorneys:

> Mr. Powers and other attorneys seek multi-million-dollar damages through a class-action lawsuit that would provide—if successful—multi-million-dollar fees for plaintiffs' counsel and, at best, a few dollars per plaintiff. [50]

Plaintiffs countered that it was the insurance companies who would be getting an unconscionable windfall if their practice of double rounding, characterized by the plaintiffs as tantamount to stealing a tiny amount from millions of policy holders at a time, were allowed to continue. Cracken called the use of double rounding "analogous to a bad banker who writes a computer software program that siphons six dollars a year from each account and builds a million-dollar account on the Cayman Islands."[51]

In response to the contention that the litigation was lawyer-driven, Cracken claimed that such suits are exactly what is needed to protect consumers from predatory practices:

> Entrepreneurial litigation is litigation where the trial lawyer discovers a massive wrong and spends a lot of time and money righting that wrong for a 25 percent to 30 percent share of the total recovery. . . Entrepreneurial litigation is vital to society because in absence of it, companies who do business with millions of consumers can tweak the math in calculating consumers' bills and build a huge cache of illegal cash. . . It ensures that someone is looking over the shoulder of big business as they deal with millions of consumers. [52]

EARLY DAYS IN THE LITIGATION

As the lawsuit progressed, TDI's past and current actions became increasingly germane to both the plaintiffs' claims and the defenses asserted by the two insurers. During the hiatus that occurred when the Allstate matter was in federal court, Cracken met with TDI's general counsel and discussed his findings and opinions on double-rounding practices and its effects on revenues. By the end of March, TDI Commissioner Bomer had ordered a review of the rounding rules and publicly stated that he had been made aware of the double-rounding practice only recently through a meeting with Cracken.[53] By early April, Bomer indicated that the agency did not currently endorse the practice of double rounding, although he admitted that there had been some confusion previously:

> There certainly is a difference of opinion at the department as to what the correct procedure should be. I've seen letters from the department telling them to double-round, but the staff's intent all along has been to single-round, and I believe single-round is correct.[54]
>
> Some [TDI staff members] have interpreted it one way. Some of them have interpreted it another way.[55]

From the time the public first learned of the suits, newspaper editorials, consumer advocacy groups, and industry spokespersons had much to say about the appropriateness of the lawsuits. The Consumers Union was outraged over the practice of double rounding and asserted that though the rounding rules might be complicated, they ought not to be confusing for insurance company attorneys or their actuaries. Rob Schneider, a senior staff attorney for the Consumers Union, asserted that, "The rules of common sense tell you you don't calculate in a way that allows you to gain a benefit."[56] Moreover, Schneider felt that even if the insurance companies thought they were complying with the law, they should return any overcharges:

> We are becoming aware, more and more, of companies overcharging by small amounts. But when you take those small dollar amounts over hundreds or thousands of people over a period of years, we are talking about real money.
>
> What is important is that the people get the money that is owed to them back.[57]

Schneider also thought that the companies should be punished so they and others would not have incentives to do anything like this again.[58]

On April 9, Judge Abascal denied defendants' various motions to dismiss the case for want of jurisdiction, to send the matter to TDI for resolution, or to transfer the case to another venue. He held that the matter could be adjudicated adequately in the courts, and though he did not rule on the substantive nature of the complaint, he wrote that "Defendants' evidence failed to fairly address double rounding and failed to support [their] contention that TDI 'advised and directed' [insurers] to double round."[59] Most critically, he also held that TDI did not provide an administrative remedy to the dispute, thus leaving the courts as the primary avenue to redress the situation.[60] The judge subsequently ordered that a class certification hearing would be held May 30, referred the matter to mediation, and told the parties to suggest three potential mediators. Two weeks later, defendants moved to have their denied motions regarding venue, jurisdiction, administrative remedies, and abatement reheard.

During April and May, newspapers across Texas commented on what they perceived to be the right way to address the issue:

- The *Fort Worth Star-Telegram* condemned the suit as the product of “creative lawyers” who filed in a “remote, sparsely populated, and plaintiff-friendly county.” Moreover, the paper editorialized that the defendants had rounded in a matter required of them by the state regulatory agency and that the issue should properly be handled by TDI.[61]
- The *Austin American-Statesman* thought that while companies could have been fairer by not rounding twice, costs to policy holders overall would be great (but benefit to individuals small) if the suit forced the insurers to repay.[62]
- The *Dallas Morning News* wondered in whose interests the regulators were operating when they supposedly told the insurers to round twice; this “apparent complicity” was a major reason why the lawsuits seemed to have little merit. However, whether or not the insurers violated the law was for the court to decide.[63] A subsequent editorial thought that the proper venue for the dispute was a TDI administrative court, while the suit in Zavala County “could end up embarrassing Texas as a whole.”[64]
- The *San Antonio Express-News* raised concerns about the suit’s “drawing more ugly national attention as the latest episode in ‘Texas Justice.’” It questioned Powers’ role in the lawsuit, given his prior employment with the state insurance department. It also asked whether a giant corporate defendant could get a fair trial in a small county in south Texas. Even with a win, the editorial predicted, plaintiffs would get little more than enough to buy three bags of groceries while Cracken would make a fortune. TDI should be hearing this case, not a south Texas court.[65]

Other commentators expressed more pointed views. The *Wall Street Journal’s* Max Boot thought that the case was the “latest and most monstrous example” of class action suits where the “lawyers reap millions and the plaintiffs pennies;”[66] and the *Houston Business Journal* thought that while most consumers would not bother to file for a refund that might total a few dollars, they would wind up seeing their premiums increased for the defendants’ litigation expenses and settlement costs.[67]

A different angle was advanced by a consumer interest group. In an op-ed piece in the *Austin American-Statesman,* the acting director of the Southwest Regional Office of the Consumers Union, Reggie James, and senior staff attorney Schneider characterized the practice of overcharging as a “theft” that would be prohibitively expensive for the average consumer to recover through an individual suit. They said the litigation showed “why class action suits are a bulwark of consumer protection and how much consumers would lose if they were restricted."[68] The Consumers Union asserted that in many overcharging cases the regulatory system fails, and noted that in this particular case no regulator caught the overbilling. Class action settlements, though sometimes resulting in poor outcomes for victims and millions for the plaintiffs' lawyers, could force companies to return ill-gotten gains, penalize them for their improper activities, prohibit them from engaging in similar behavior, and "send a clear signal to unscrupulous businesses that they cannot profit from their illicit actions."[69]

As the media commentary continued, the Zavala County litigation moved forward. One of the three mediators suggested by the plaintiffs was Kenneth R. Feinberg, an attorney who had participated as a special master and mediator in numerous complex cases (including Agent Orange and silicone breast implant litigation). The defendants agreed to ask Feinberg to oversee the court-ordered alternative dispute resolution process, and in early May Judge Abascal appointed him as mediator.[70]

TDI and the Rounding Rules

Ever since the Zavala County case gained statewide publicity, public attention had been focused on questions regarding what state insurance regulators had advised the defendants in the past and what they would do about it now. On May 3, TDI's public information office issued a press release containing Commissioner Bomer's analysis of the history of the double-rounding interpretation and set forth his decision not to pursue punitive or corrective action against the insurers:

> "The existing rounding rules are confusing and unclear, particularly with respect to car insurance," Bomer said. "Information has now come to my attention that before 1991, former TDI Auto Section staff managers and technicians consistently advised companies to double-round. TDI staff today believes, as I do, that single rounding is the only correct procedure.
>
> "However, this interpretation in favor of single rounding never has been communicated to the industry. The current rounding rules were not amended, and staff acknowledges that questions about them simply have not arisen in recent years. It would be unfair, therefore, for the Department to take enforcement against any company for double rounding."[71]

This statement was welcomed by the defendants, derided by the Consumers Union, and dismissed as irrelevant by the plaintiffs. When Bomer released his statement that the insurers had been misinformed, Schneider stated that "Commissioner Bomer's decision amounts to a $100 million giveaway to Allstate and Farmers out of the pockets of their customers."[72]

In a May 7 letter, Bomer requested that the defendants stop double rounding in anticipation of the adoption of single-rounding rules. But he also reiterated his decision that it would be unfair to take enforcement action:[73]

> I have also indicated my belief that it would be unfair for this Department to take enforcement action against your company for past practices. However, TDI's information indicates that you and Farmers are the only major insurers in the State of Texas who use double rounding. I believe this to be wrong. This is not fair to those consumers who pay a different premium. [74]

Cracken applauded the demand for immediate cessation and the anticipated rule change that would prevent double rounding, and Bomer's reluctance to pursue any enforcement actions: "The commissioner is exactly correct in doing everything within his power to prevent double-rounding in the future, but leaving the issue of past overcharges to the court system."[75]

The official change in policy would not come until the fall (because of necessary rulemaking and other administrative procedures), but the commissioner requested that the defendants voluntarily cease double rounding immediately and not wait for a formal rule amendment. Schneider said that the request was a step in the right direction but that it would not solve the problem of getting the ill-gotten gains of the past returned to the consumers.[76] Within a few days, however, executives from both companies demurred to the request, stating that there were technical reasons why they would be unable to accommodate TDI immediately and indicating that because they had been correctly applying the rules and had calculated premiums consistent with TDI direction all along, they would wait for a formal change or at least until they had a chance to meet directly with the commissioner.[77]

The defendants' hesitation in immediately curtailing the practice drew criticism. On May 11, an editorial in the *Austin American-Statesman* opined that

> Allstate and Farmers, two large insurers, stand to make millions of dollars by ignoring Bomer's plea until such time as the new rule takes effect, probably later this year. But they are making that money at the cost of their reputations.
>
> Other insurers calculate premiums by rounding to the nearest dollar only once. Farmers and Allstate should do the same.[78]

The Class Is Certified

In May, Cracken announced that he had plans to begin airing commercials in the Fort Worth-Dallas and Austin markets to let potential class members know that "there's going to be a hearing and that they do not need to take any action at this time. We want to let them know they shouldn't be anxious; that their rights will not be prejudiced if they wait."[79] Cracken said the ads would state that customers of Allstate and Farmers would learn more about becoming a party to the lawsuit if the case were certified as a class action.[80] Defendants moved to block these commercials as prejudicial, unprecedented, extremely odd, and as improper communication to potential but uncertified class members. In response, Cracken hired noted constitutional law attorney Alan Dershowitz (reportedly at $600 per hour) to argue that the move to block the ads violated the policy holders' First Amendment rights. After a May 16 hearing about the ads that included Dershowitz's presenting his arguments by phone, Judge Abascal ruled in favor of the plaintiffs and the ads began airing the next day. The 30-second ads notified potential claimants that there would be a certification hearing at the end of month and ran for two weeks at Cracken's expense (at a cost of about $200,000[81]). The Texas State Bar Advertising Review Committee determined that the commercials were not prohibited ads for clients and the Texas Supreme Court also refused the defendants' last-minute efforts to prevent them from being televised.

On May 30, the defendants' joint motions for rehearing on the April 9 jurisdiction, venue, and abatement orders were overruled, and the hearing on class certification took place.[82] The day-long hearing included testimony on the behalf of plaintiffs from noted procedural expert Professor Arthur R. Miller and from Professor Geoffrey Miller. Judge Abascal did not immediately rule on the matter.

Before learning of the judge's decision on certification, the defendants presented a motion on June 7 for leave to file a petition for writs of mandamus and prohibition with Texas's Fourth District Court of Appeals in regard to Judge Abascal's denial of their motions to dismiss on jurisdictional, venue, and abatement grounds. But one week later Judge Abascal denied them such leave. Undaunted, they filed a similar joint petition on June 17 with the Texas Supreme Court for leave to file writs of mandamus and prohibition. On the same day that the supreme court petition was filed, the parties met with mediator Feinberg for the first time.

Two days later, Judge Abascal issued his order certifying the plaintiffs' proposed class and defining it to include anyone who purchased at least one six-month private passenger motor vehicle insurance policy from either defendant between June 11, 1986, and June 11, 1996 (an estimated 4 million purchasers). As previously promised by the defendants, the certification decision was quickly appealed to the Fourth Judicial District in San Antonio[83] under their right of interlocutory appeal.[84]

The defendants' appeal of the certification had a significant impact on the litigation. The trial court deferred formal notice of certification to class members until the court of appeals ruled on the defendants' request to overrule the order to certify the class.[85]

On June 27, TDI held public hearings on a clarified rounding rule[86] and, four days later, formally adopted single-rounding rules for auto insurance that would go into effect on November 1, 1996.[87] Insurers were given the right to "optionally apply" the amendments to policies issued from July 31 to November 1.[88] Simultaneously, TDI disclosed that on July 28 the defendants had entered into an agreement with the department to refund or credit all overages from double rounding charged on or after the May 7 informal, nonbinding TDI request. The agreement also restated Bomer's position that for almost 20 years before 1991 the agency and its predecessor interpreted the rules in a manner consistent with double rounding and that the insurers could have reasonably relied upon this advice.[89] Cracken and the Consumers Union reiterated that the agreement only affected future rounding practices; in their views, overages before May 1996 still needed to be addressed.[90]

While the defendants were appealing the certification order, Cracken contemplated a second round of commercials. A 30-second ad scheduled to be broadcast starting August 19 would inform insureds that a lawsuit was pending over the double-rounding issue and also that as the litigation moved forward (conceivably after a ruling for the plaintiffs from the court of appeals), the policy holders would get more information on how to become part of the lawsuit.[91] Defendants again blasted the ads as deceitful, dishonest, and misleading, but on August 12, the Fourth District Court of Appeals refused their request to block the commercials. Plaintiffs' counsel paid $501,000 to run the TV spots until August 30 in nearly all the state's major markets (San Antonio, Houston, Dallas, El Paso, the panhandle, and east and west Texas).[92] Class counsel characterized the TV advertisements, including the ones aired in May, simply as an attempt to combat the defendants' own "media campaign" to "secure editorials and opinion editorials in Texas daily newspapers advancing the Farmers and Allstate groups' false and misleading message. . . ."[93]

In a key victory for the plaintiffs, on August 19 the Texas Supreme Court refused to hear the defendants' requests to dismiss the case on jurisdictional grounds (class certification was not an issue in this appeal). Defendants had asked that the matter be pursued through the insurance regulatory agency and not through the courts. The last procedural chance for the insurers to prevent the case from proceeding to trial as scheduled occurred in late August when the defendants filed briefs on the pending interlocutory appeal of the class certification order.

MOVEMENT TOWARDS SETTLEMENT

Thirteen days of court-ordered mediation conducted by Feinberg took place from June 17 to September 25, 1996.[94] During the mediation process defendants provided confidential computer data to the plaintiffs that enabled them to estimate more accurately the size of the alleged overcharge.

As mediation began, the parties weighed the risks of continued litigation. The defendants' interlocutory appeals of certification at least had a chance of a favorable ruling, but they were concerned about the lack of a subsequent right of appeal to the Texas Supreme Court because the court of appeals was ruling only on an interlocutory decision, not a final one. Also, Texas law was somewhat unsettled on the standards for certification; few class actions ever reach an adjudicated outcome such as a trial verdict or a summary judgment dismissal, and few certifications had resulted in an appellate decision. The defendants were also concerned about the possibility of a "monster" verdict from Zavala County jurors, especially after what they felt was a media blitz by the Cracken team. There was also the matter of the continuing effect on the defendants' current business and public image; after all, the allegations were focused on just these two insurers.

On the other hand, TDI's public statements that the defendants had operated under the color of authority were persuasive and had arguably diminished the value of the case for Cracken. Moreover, premium data provided by the insurers during the mediation process appeared to halve the potential total damages that were claimed at the onset of the litigation. The case was also gaining a lot of national media attention as an example of the worst aspects of class actions, and the attention was increasingly focused on the aggressive prosecution of the case. The plaintiffs also recognized that the interlocutory appeal of the underlying class certification order concurrently under consideration by the state court of appeals might result in a defendant victory on this critical issue, place an expensive burden on the plaintiffs to prove damages for each individual policy holder, or bar all claims before the period set forth in the applicable statute of limitation.

All these factors amounted to a hotly contested—and presumably costly—litigation, and both sides badly wanted to settle. On August 30, 1996, the parties executed a Final Term Sheet that itemized the material terms of a proposed settlement; additional details of settlement were subsequently negotiated with the help of Feinberg. Word of the settlement spread and it soon was labeled as "unsatisfactory" by Reggie James, who said that it reflected poorly on regulators, insurance companies, and attorneys.[95] The Consumers Union felt that the insurers should not have used a "math gimmick" to take in millions of extra dollars, that TDI should have uncovered the practice and done more to compensate consumers (and less to influence the outcome of the lawsuit), and that the settlement overcompensated the plaintiffs' lawyers and undercompensated consumers. The Consumers Union commended the TDI commissioner's actions in preventing future double rounding and the work of the plaintiffs' attorneys in uncovering the overcharge.

Despite these criticisms, on October 4 Judge Abascal preliminarily approved the settlement after a hearing lasting a few hours. He scheduled the final fairness hearing for December 13, 1996.[96]

Details of the Agreement

The parties' agreement contained a conditional class certification for settlement purposes only and covered "All persons who purchased and paid for six-month, rate-regulated, private-passenger motor vehicle insurance policies sold by [Farmers and Allstate] in the State of Texas between August 28, 1985 and October 4, 1996. . . ."[97]

Notice of the proposed settlement was to be made at the defendants' expense as part of the distribution process. Opt-outs were given until December 4, 1996, to serve notice of intent upon the defendants' claims administrators and could use any "reasonable written form" to give such notice.[98] Listings of all class members opting out were to be filed with the court by December 9, 1996. Class members not requesting exclusion were allowed to object to any term or condition in the settlement agreement provided they filed and served such objections by December 4, 1996. These objectors and their attorneys were required to fill out a lengthy questionnaire about the nature of their objections and their relationship with their counsel (or clients) and to submit themselves to depositions.[99] This last provision was inserted into the agreement at the class counsel's request and was reportedly designed by Issacharoff and Silver to discourage nonmeritorious or spurious objections to the settlement or fee request.

Calculation of the Settlement Fund and Method of Distribution

Originally the case was promoted as worth over $100 million, but the accuracy of this estimate depended on statutes of limitations, the estimation of the size of the policy holder class, and a statistical calculation of the frequency of overcharging. Based on data provided by the insurers during the settlement process, plaintiffs and defendants came up with different estimates of what the amount of overcharging might be. Two periods were at issue: the total time from August 28, 1985, to October 4, 1996 (the certified class period), and an alternative projection for August 28, 1991, to October 4, 1996, based on the assumption that claims from policies purchased before the arguable boundaries of the statute of limitations (i.e., four years before the initial filing of the suit) might be barred. The Proposed Settlement Agreement noted that plaintiffs' evaluation placed the total amount of overcharges for both companies at $50 million for the longer period and $24 million for the shorter.[100] Without admitting that the amounts in question were indeed recoverable overcharges, defendants estimated the totals for both companies to be either $36 million or $18 million.[101]

A compromise was reached using a midpoint figure of $42 million for the ten-year class and then by reducing this amount by 15 percent to account for the plaintiffs' potential risks in litigation. The result of $35.7 million was labeled the total settlement fund and was to be made available by the defendants to class members who qualified for payment.

Three subgroups were created. The total settlement fund was to be distributed to each in proportion to their size (estimated from the defendants' data) as follows:

- Group 1 claimants were current policy holders with the defendants (as of October 4, 1996), estimated to constitute 1,426,230 total policies. Group 1 would receive 31.35 percent of the total settlement fund.
- Group 2 claimants were former policy holders who terminated coverage sometime within the year before October 4, 1996 (estimated to constitute 239,221 total policies). Group 2 would receive 5.26 percent of the total settlement fund.
- Group 3 claimants, the largest category, were former Allstate and Farmers policy holders who left the company up to ten years earlier (but before October 4, 1995); they were estimated to constitute 2,883,471 total policies. Group 3 would receive 63.39 percent of the total settlement fund.

In the Proposed Settlement Agreement, Farmers estimated that it had 771,230 Group 1 policy holders; 152,221 former customers in Group 2; and 1,583,471 in Group 3. Allstate estimated policy holders in Groups 1, 2, and 3 at 655,000, 87,000, and 1,300,000, respectively.[102]

Part of the reasoning behind the three-group subdivision of the class was that those with whom the defendants possessed a current business relationship (Group 1) might be most reliably contacted by first class mail. Also, the U.S. Postal Service would forward first class mail for up to a year after notification of a change of address, thus covering Group 2 members.

Because the case's interlocutory appeal was still under consideration when settlement was reached, no notice had been given of the original certification. Under the agreement, the defendants were responsible for the costs of notice of the proposed settlement. Defendants also shouldered the costs of mailing and processing Groups 1, 2, and 3 members' checks or credits. Notice of the settlement class certification was to be sent to Group 1 and Group 2 members by first class mail within 30 days following preliminary approval. Mailing notice and checks to the current and recently terminated insureds (Groups 1 and 2) was estimated to cost about $900,000.[103] Group 3 members were to be notified by quarter-page advertisements in two consecutive Sunday editions of the 20 Texas daily newspapers with the largest circulations; the first publication was to take place within seven days of the Group 1 and 2 notice mailing. At the time of the preliminary settlement, defendants estimated that they would spend $110,000 to publish the notice to Group 3 in the Sunday editions.[104] The notice process anticipated for publicizing the settlement would be the first formal announcement to current and former policy holders that they were members of a class.

The total settlement fund included any amounts to be paid to the class counsel for fees, and as a result, the amount of fees awarded directly affected the size of the individual checks or credits. Proposed expenses to be recovered by class counsel would be paid in addition to the total settlement fund (so plaintiffs' costs would not affect individuals' refunds). A flat rate refund was to be given to qualifying class members after fees were deducted, and so was not to be based on the number of coverages any one individual had purchased over the years, nor on the number of groups to which a policy holder might conceivably belong.[105] Using a sample attorney fee award percentage of 28.99 percent, the Proposed Settlement Agreement estimated a net recovery to each class member of $5.57 (see Table 10.3).

Refunds would be made to Group 1 claimants either by credits toward their current policies or by checks, and to Group 2 by checks sent by first-class mail to their last known addresses.[106] Group 1 and 2 members did not need to request payments because the checks or credits would be issued automatically to anyone who did not opt out. Verified written reports of this distribution were to be

Table 10.3

Projected Settlement Distribution

Group	Estimated Number of Policies	Fund Allocation	Projected Attorney Fees	Net Funds	Net Recovery (Net Funds / Number of Policies)
1	1,426,230	$11,193,072	$3,244,872	$7,948,200	$5.57
2	239,221	$1,877,410	$544,261	$1,333,149	$5.57
3	2,883,471	$22,629,519	$6,560,297	$16,069,221	$5.57
Total	4,548,922	$35,700,001	$10,349,430	$25,350,570	$5.57

filed with the trial court 210 days after the effective date of the settlement[107] reporting the number of Groups 1 and 2 members paid, the amount of their net recovery, the total amount of payments made, and the outstanding balance of the groups' net funds. Any balance remaining in these net funds was to be paid to the Texas Chapter of the American Red Cross 30 days after the reports were submitted.

A different procedure was to be used for Group 3, the class members who were no longer with the defendants and who had ended their coverage more than a year before. These class members had to request a claim form by letter. After receipt of the claim form, they were required to properly complete and file the form by July 7, 1997. If the claim were accepted, the defendants would issue claimants a check for the net recovery amount.[108] A report similar to that used for Groups 1 and 2 was also to be filed with the court, but the balance of the net funds for Group 3 on the date of the report was to be retained by the defendants.[109] The court held that "such Tex. R. Civ. P. 42 notice by mail and publication shall be effective to inform millions of class members of their rights and obligations" under the settlement.[110]

The Preliminary Order found that the proposed agreement appeared fair because it

> (a) Provides a high level of recovery to settlement classes relative to their estimated actual damages;
>
> (b) Reasonably discounts the claims alleged by the settlement classes in light of the risks, uncertainties and delays associated with further prosecution of their claims; and
>
> (c) Provides a substantial cash recovery to the settlement classes.
>
> Further, the Court preliminarily finds that Plaintiffs' discovery of Defendants' subject methods of whole-dollar rounding and resulting prosecution of the claims made the basis of these lawsuits proved instrumental in the [TDI] adoption of amended [rules taking effect November 1, 1996].[111]

Calculation of Fees and Reimbursable Costs

Class counsel asserted that they had invested over 14,000 hours in the matter[112] and estimated their expenses to exceed $2.6 million through the end of November 1996 (plus projected additional expenses of more than $1.1 million to bring the litigation to a close).[113] However, the initial request was for $10,349,430 in fees and just $1,612,407 in costs.

To determine an appropriate fee in a class action, Texas trial courts have the discretion to choose between a percentage of the common fund or a lodestar of a reasonable hourly rate adjusted by a multiplier (for factors such as the risk involved, the quality of the work, and the result).[114] While the trial courts had discretion over the amount of fees and costs, the defendants had agreed not to oppose the class counsel's requests as long as the fees did not exceed 28.99 percent of the $35.7 million total settlement fund and the reimbursable out-of-pocket expenses did not exceed $1,612,407.[115] These upper bounds were indeed what the court ordered in its preliminary approval of the settlement; the Preliminary Order approving the settlement awarded these exact figures.[116] Each of the defendants was to bear an equal amount of the attorney fees although Farmers would contribute $271,941 of the expenses and Allstate would pay $1,340,366.[117] The difference in these contributions was a matter determined privately between the two insurers.

The court found these awards to be reasonable in light of the total benefits made available to the class, the "millions of dollars in reduced, future premium charges," the $2 million or more the defendants might have to pay for the costs of notice and distribution of refund checks, and the $1.6 million in costs reimbursed to class counsel (out of the more than $2.5 million alleged to have been incurred).[118] Moreover, the court also found the award to be reasonable because the fee was at or below the prevailing rates paid to attorneys in common-fund class actions as well as the prevailing market rates for contingency-fee work in complex individual-client cases.

FINAL APPROVAL OF DISTRIBUTION AND FEES

Events Leading Up to the Fairness Hearing

In the interim between the preliminary and final settlement approvals, Lynne Liberato of Haynes Boone in Houston was appointed as a Special Master[119] to review the adequacy and reasonableness of the proposed settlement, the reasonableness of the fees and expense requests, and any objections filed. Liberato's fees were capped at $75,000 and were to be primarily paid out of the unallocated funds of the net recovery for Groups 1 and 2 before any distribution of the remainder to the Red Cross. Opt-outs were reported to be negligible and certainly were below the 10-percent threshold that would have allowed the defendants to terminate the settlement agreement. Allstate alone, for example, had only 1581 policy holders eventually opting out of a potential class of 695,406 Group 1 and 2 claimants (a 0.23 percent opt-out rate).[120]

The Parties Argue in Favor of Approval

The next step was to get Judge Abascal to put a final stamp of approval on the settlement and the fee arrangement. A Final Judgment approving fees in the amount proposed in the settlement agreement was justified on the basis of the

$35.7 million made available by the defendants as part of the total settlement fund, the $1,612,407 in out-of-pocket expenses that would be paid directly to class counsel and not taken out of the fund, and the nearly $3 million (or more) that was being made available by the defendants to cover the costs of notice and claims administration.[121] Moreover, the parties also argued that the fee was reasonable in light of the litigation's effect on prompting TDI to amend its regulations to clearly forbid double rounding. The plaintiffs estimated this benefit to be worth $31 million based upon assumptions that the defendants would have continued double rounding on current Group 1 members remaining with the defendants for the next decade.[122] When all of the above justifications are summed, plaintiffs asserted that the benefits to the class exceeded $71 million.[123]

The plaintiffs' request of $10,349,430 in fees as a proportion of the "settlement" differed depending on what figure was regarded as the size of the class benefit. According to the plaintiffs, the $10 million alternatively represented:

- 28.99 percent of the $35.7 million total settlement fund
- 15 percent or less of the total of the $31 million in estimated future savings, $35.7 million in the total settlement fund, $2.1 million in costs of notice borne solely by the defendants, $968,000 in costs of distribution borne solely by the defendants, and $1.6 million in reimbursed out-of-pocket expense
- 27 percent or less of the $35.7 million in the total settlement fund, $2.1 million in costs of notice borne solely by the defendants, and $968,000 in costs of distribution borne solely by the defendants.[124]

The class counsel asserted that "a fee based on a percentage of the benefits conferred upon the [class] is, thus, consistent with both the decisive trend in the Federal Courts and the uniform view of every major class-action legal scholar."[125] Class counsel described the proposed fee percent of 28.99 percent as being less than the going market rate:

> While plaintiffs' lawyers in Texas frequently contract for contingent fees of forty percent (40 percent), a one-third (1/3) contingency fee represents a clear, minimum benchmark established by a number of appellate court decisions. Thirty percent (30 percent) to thirty-three percent (33 percent) are commonplace common-fund, percentage-fee awards.
>
> The class-action experts upon whom Class Counsel rely in this litigation agree with Judge Posner that percentage fees awarded from a common fund in a class action should mirror the contingent-fee market. In fact, the evidence is mounting that on a national basis fee awards in class-action cases are approaching an average one-third (1/3) contingent-fee, representative of the clear, minimum contingent fee paid in individual cases. . . .[126]

Moreover, these percentages would be even smaller if $1.185 million in claimed unreimbursed expenses (that the plaintiffs claimed would normally to be paid by a client out of the recovery in a standard contingency-fee case) were included as well in the class benefit calculations.[127] As an alternative to a percentage calculation, a lodestar was proposed for the purpose of comparison. Depending on whether the unreimbursed expenses were included, class counsel's "hourly rate" would be in the range of $650 to $735 an hour for a lodestar multiplier of 2.5:1 to 3:1 (derived from a $250 per hour base).[128]

The settlement and fees were argued by the plaintiffs to be further justified by both the intensity of the proceedings and the return to the class members. Class counsel felt that they had aggressively litigated the suits.[129] Arthur Miller, appearing for the class counsel, attested to their thoroughness:

> Having been involved in numerous class actions, either on a consulting basis or on an actual representation basis for many, many years . . . [t]his case stands, in my mind, as sort of an incredible example of plaintiffs' class counsel being prepared to the nines, I would say to the elevens. I cannot personally think of stones left unturned and avenues not pursued and activities not engaged in. There was literally nothing left undone by these lawyers, and everything that was done by these lawyers was done with great skill, with great backup, and with great documentation.[130]

And litigation experts hired by the plaintiffs looked favorably upon the proposed settlement:

> Arthur Miller calls the proposed settlement "remarkable." John Coffee, one of the nation's leading experts on class-action practice and procedure, states, "this is a heroic settlement which is off the charts of the overall national data." Charles Silver, perhaps the leading expert on Texas class actions, calls the settlement "an extraordinarily good result."[131]

However, not everyone thought the proposed settlement was outstanding. A *Wall Street Journal* editorial decried the fact that the $5.50 net recovery would be "enough to buy a celebratory meal at McDonald's [while the] plaintiffs' counsel, meanwhile, are likely to get $10.3 million."[132] The editorial also characterized the settlement as "even more of a 'rip-off' than is obvious at first glance" because the Group 3 claimants would have to write in for compensation: "Few are expected to bother, for obvious reasons."[133]

Concerned with the possibility of a less-than-100 percent claiming rate for those consumers who would not be contacted directly, Bomer asked state Attorney General Dan Morales to intervene in the suit to make the settlement fairer. A petition for intervention was filed by the State of Texas on December 4 seeking to ensure that the proposed settlement was "reasonable and fair and . . . in the best interests of class members and potential class members and in the public interest."[134] On December 13, it was announced that the state's intervention resulted in a $2 million separate settlement to be used by the attorney general's Consumer Protection Division for additional consumer education programs.[135] Allstate, Farmers, and the law firm of Cracken & Harkey would each contribute a third of the settlement amount to this fund.[136] Morales stated that the purpose was to obtain some compensation for the Group 3 members who might not complete the claiming process:

> Our separate agreement is an effort to sweeten the pot for all consumers . . . . It is much smarter and of more value to arm Texans with consumer information so that they may protect themselves in their daily transactions. Prevention is the key.
>
> Additional efforts to try to locate this third group would be cost-prohibitive, unproductive and not result in meaningful personal compensation for the consumers.[137]

Final Orders

Judge Abascal appears to have agreed with the parties' arguments. After a daylong fairness hearing on December 13, he gave the settlement final approval on December 18, 1996. The settlement class certified consisted of:

> All persons who purchased and paid for one (1) or more six-month, rate-regulated, private-passenger motor vehicle insurance policies sold by [defendants] in the State of Texas between August 28, 1985 and October 4, 1996, specifically excluding [the judge, class counsel, and the directors and officers of the defendants].[138]

Generally, aspects of the settlement agreement and provisions of the preliminary approval were continued in place with a few exceptions. Most notably, the total estimates of the class size in each of the subgroups was revised downward, although the attorney fee award and total fund remained at about the same levels. These adjustments meant that the individual net recovery to class members increased somewhat to $5.75, as can be seen in Table 10.4.

Each class member would be eligible for only one payment of $5.75 no matter how many insurance policies or coverages he or she had purchased over the 11-year period. Group 1 and 2 members were required to receive a credit or check for the net recovery amount within 30 days of the effective date of the settlement.[139] Because no appeal of the settlement was ever made, the effective date of 30 days after final approval was January 17, 1997. Group 3 members were to be paid within 30 days after the defendants received a properly completed and timely valid claim form or, at the latest, within 30 days of the effective date.[140]

Table 10.4

Final Settlement Group Counts, Allocations, Fees, and Net Recoveries

Group	Policy Holders	Fund Allocation	Attorney Fees	Net Funds	Net Recovery (Net Funds/ Policy Holders)
		All Defendants			
1	1,402,603	$11,383,739	$3,317,772	$8,064,967	$5.75
2	215,743	$1,726,802	$486,279	$1,240,523	$5.75
3	2,783,471	$22,550,337	$6,545,379	$16,004,958	$5.75
Total	4,401,817	$35,659,878	$10,349,430	$25,310,448	$5.75
		Allstate			
1	634,027[a]	$5,376,625	$1,730,970[b]	$3,645,655[c]	$5.75[d]
2	61,389[a]	$520,586	$167,599[b]	$352,987[c]	$5.75[d]
3	1,200,000[a]	$10,176,145	$3,276,145[b]	$6,900,000[c]	$5.75[d]
Total	1,895,416	$16,073,357	$5,174,715	$10,898,642	$5.75
		Farmers			
1	768,576[e]	$6,006,114	$1,586,802[f]	$4,419,312[g]	$5.75[h]
2	154,354[e]	$1,206,215	$318,679[f]	$887,536[g]	$5.75[h]
3	1,583,471[e]	$12,374,192	$3,269,234[f]	$9,104,958[g]	$5.75[h]
Total	2,506,401	$1,958,521	$5,174,715	$14,411,806	$5.75

[a]Final Judgment at 3.

[b]Final Judgment at 10. Attorney fees have been apportioned by group type as per the Proposed Settlement Agreement at 19–20.

[c]Final Judgment at 7.

[d]*Id.*

[e]*Id.* at 3.

[f]*Id.* at 10; see note 141.

[g]*Id.* at 7.

[h]*Id.*

The court further ruled that each defendant had to pay class counsel $5,174,715 in attorney fees and assessed expenses of $1.52 million against Allstate and $85,000 against Farmers.[141] An incentive award of $15,000 was granted to each of the six named plaintiffs in the two suits and was to be paid by the defendants through the class counsel (each defendant was responsible for only the plaintiffs in its respective actions).[142]

The Final Judgment dismissed the matter with prejudice and released the defendants from all claims arising out of the double-rounding method. Such claims might include any violation or failure to comply with the agreement between the defendants and TDI to refund or credit all overages resulting from double rounding taking place on or after TDI's May 7 informal, nonbinding request to do so in anticipation of formal adoption of a single-rounding rule. All claims by class members opting out were dismissed without prejudice.

The court retained jurisdiction over the settlement to "effectuate the fair and orderly administration of the settlement."[143] A verified report of the distribution of the settlement funds was to be filed with the court within 210 days after the effective date, but as this report was being written, no such report had been filed. This delay was apparently stipulated to by the parties after final approval had been granted.[144]

When the terms of the Final Judgment were released, along with the method of distributing the refunds and the amount of attorney fees, both TDI and the Consumers Union were concerned that the "best interests of the affected policy holders" were still not being addressed.[145] Bomer said that his actuaries projected only $10 million would be paid out under the terms of the agreement because not all affected consumers were to be contacted. Because any unpaid amounts of the Group 3 reimbursement pool would go back to the defendants, $1 of attorney fees might be needed to get $1 of recovery. Using the upcoming holidays as a motif for his reproof to the class counsel and the defendants, James criticized the settlement:

> Everybody involved should get lumps of coal and switches in their stockings. . . It is clear that no one was looking out for the best interests of the affected policy holders.[146]

Quoted in the same news story, Cracken viewed the result differently, indicating that consumers received the opportunity to recover $36 million in past overcharges and avoided $30 million in future double rounding.[147]

EPILOGUE

Although a verified report has not yet been filed with the court, correspondence between the defendants and TDI indicates how the funds have been distributed. As more information became available, the defendants made a number of slight revisions to their original calculations of the number of policy holders in each group. In August 1997, Allstate estimated that the number entitled to an automatic refund, exclusive of any opt-outs, was 624,855 and 70,551 for Groups 1 and 2, respectively (695,406 total).[148] In December 1997, Farmers estimated that there were 768,576 and 154,354 Group 1 and 2 members, respectively (922,930 total).[149] These numbers sum to a potential automatic liability for the two defendants of $9,305,432 (1,618,336 members of Groups 1 and 2 each receiving $5.75), a figure in line with the $9,305,490 net fund allocation for these groups in the Final Order. However, not all of this amount would actually be paid out for various reasons—opt-outs, mail returned for Group 1 and 2 members who did not give a forwarding address, checks received but not cashed, payments still in process, and other explanations. Using our best available data, we estimate that $8,911,769.75 was actually paid out to 1,549,873 class members in Groups 1 and 2. However, it is justifiable to assume that the overwhelming proportion of Group 1 and 2 class members have received or will eventually receive a check or credit.[150] Any funds allocated to Groups 1 and 2 that do not reach the intended recipients would first be used to pay the fees and expenses of the Special Master and thereafter turned over to the Texas Chapter of the American Red Cross.[151] We estimate that after deduction of the $75,000 Special Master fees and expenses, $318,720.25 will be remitted to the charity.

The situation with Group 3 is entirely different. While there is no doubt that the estimation of the size of a class of former policy holders who may have purchased coverage any time in a previous decade (but who, by definition, no longer maintain a business relationship with the defendants) is highly problematic, one would hope that claims made against Group 3 funds would be in the neighborhood of the original estimates. In the Proposed Settlement Agreement, Group 3 was estimated to consist of 1,583,471 former policy holders with Farmers and 1.3 million former policy holders with Allstate.[152] Class counsel's fee petition used this combined potential of 2,883,471 claimants to justify $6,560,297 of the $10.34 million in attorney fees.[153] By the time of the Final Judgment, there was some downward revision in the size of Group 3 to about 2.78 million. Exactly how many of the nearly 2.8 million class members in Group 3 became aware of the settlement from the ads in two Sunday editions of their local newspaper or other means, took the time to write for a copy of the claim form, received the form, correctly filled it out, and returned the form to the defendants for processing and the issuance of a check? Our best estimate, using correspondence supplied by the TDI under its open records laws, is that *fewer than 350 claim forms* were received by the defendants by the time of the cutoff date for a likely payout of *less than $2,000*.[154] This figure should be compared to the $16 million estimated Group 3 net recovery set forth in the Proposed Settlement Agreement and represents a successful claiming rate of around 0.01 percent. Unlike the allocations for Groups 1 and 2, there was no mechanism in place for redirecting the unclaimed compensation; as per the Final Judgment, all Group 3 funds not distributed to class members would be retained by the defendants.

Key Events	**Date**
D. J. Powers discovers double rounding in his analysis of auto insurance rating	July 10, 1995
Complaint filed	August 28–30, 1995

Allstate removes the suit against it to U.S. district court	October 20, 1995
Federal district court remands Allstate matter to Zavala County	February 13, 1996
Plaintiffs move for class certification	March 25, 1996
Judge Abascal denies defendants' requests to dismiss case and to send issue to TDI or to transfer venue	April 9, 1996
Allstate joins Farmers in refusing to stop double rounding immediately	May 9, 1996
Certification hearing	May 30, 1996
Fourth Judicial District Court of Appeals denies leave to file petition for writs of mandamus and prohibition	June 14, 1996
Defendants petition the Texas Supreme Court for writs of mandamus and prohibition to compel Judge Abascal to vacate the orders denying motions to dismiss on jurisdictional, venue, and abatement grounds	June 17, 1996
Parties meet with mediator for the first time	June 17, 1996
Certification order	June 19, 1996
Texas Supreme Court refuses to dismiss case on jurisdictional grounds	August 19, 1996
Settlement announced; agreement given preliminary approval	October 4, 1996
Distribution of notice of certification and settlement begun	October 1996
Amended Rule 7 goes into effect and prohibits double rounding for all policies issued thereafter	November 1, 1996
Opt-out deadline and objection deadline	December 4, 1996
State of Texas files petition for intervention	December 4, 1996
Separate agreement announced by Texas Attorney General Dan Morales for a $2 million settlement to be paid equally by Allstate, Farmers, and Cracken & Harkey	December 13, 1996
Fairness hearing	December 13, 1996
Final judgment	December 18, 1996
Effective date for settlement provisions (30 days after settlement was given final approval as no appeal was filed)	January 17, 1997

Date by which defendants were to have issued checks or credits to Group 1 and Group 2 class members	February 15, 1997
Cutoff for Group 3 claim forms to be received by defendants	July 7, 1997
Date by which defendants were to have filed a verified written report pursuant to the agreement	August 15, 1997

NOTES

[1]As part of our research on this litigation, we interviewed a plaintiffs' attorney, attorneys for the defendants, staff members of the Texas Department of Insurance, and representatives of a consumer interest group. We were unable to speak to the judge in this case prior to publication. We also reviewed the pleadings and papers filed in the case as well as other documents including newspaper and magazine articles, correspondence, press releases, and internet web site postings.

[2]*Martinez v. Allstate Insurance Co.*, No. 95-08-09169-CV (Tex. Dist. Ct. Zavala County filed Aug. 28, 1995).

[3]*Sendejo v. Texas Farmers Insurance Co.,* No. 95-08-09165-CV (Tex. Dist. Ct. Zavala County filed Aug. 30, 1995).

[4]John MacCormack, "Suits Attack Auto Insurance Rounding Practice," *San Antonio Express-News*, Apr. 2, 1996, at 8B; Max Boot, "A Texas-Sized Class Action Fraud," *Wall Street Journal*, May 22, 1996, at A23.

[5]"Personal Injury: For a Texas Lawyer, Misfortune's Big Bucks May Take a Big Dive," *Wall Street Journal*, Oct. 3, 1995, at A1; Homer Jones, "Lawsuits, Texas Style," *Texas Business*, Oct. 1996, at 46.

[6]Defendants characterized the association as "a concerted entrepreneurial scheme between [Cracken], [Powers], and others to manufacture a 'regulatory' class action lawsuit against insurance companies." Brief of Appellant Allstate (Aug. 22, 1996) at 4, *Martinez*.

[7]A similar desire during the 1960s and 1970s to reduce the number of characters needed in mainframe computer processing (when data storage space was relatively expensive) has now led to the so-called Year 2000 Millennium Bug. See, e.g., May Lucy, "Millennium Bug Zeroes In on Computers," *Cincinnati Enquirer*, Dec. 23, 1996, available on the internet at http://Enquirer.com/Editions/1996/12/23/loc-computer2000.html.

[8]Plaintiffs' Seventh Amended Original Petition and Formal DTPA Notice and Demand (June 28, 1996) at 5–6, *Martinez* (hereinafter Plaintiffs' 7th Amended Petition).

[9]Prior to the 1970s, the rule in Texas was to round down when the remainder was $.50.

[10]"Allstate Disputes Bilking Claims," *El Paso Times*, Apr. 4, 1996.

[11]Consolidated Brief in Support of Class Counsel's Application for (1) Attorney's Fee and (2) Reimbursement for Certain Out-Of-Pocket Expenses (Dec. 6, 1996) at 4, Nos. 95-08-09169-CV, 95-08-09165-CV (hereinafter Brief for Fee and Expenses; unless otherwise noted future references to court documents pertain to joint filings for the *Martinez* and *Sendejo* cases).

[12]Class Counsel's Application for (1) Attorney's Fee and (2) Reimbursement for Certain Out-Of-Pocket Expenses (Dec. 3, 1996) at 8 (hereinafter Application for Fee and Expenses).

[13]Brief of Appellant Allstate at 9–10; Jones, *supra* note 5.

[14]Zavala County's population of about 12,200 yields a density of 9.4 inhabitants per square mile compared to the overall rate for Texas of 64.9. U.S. Census Bureau, *Land Area, Population, and Density for States and Counties: 1990*, available on the internet at the U.S. Census Bureau home page, http://www.census.gov/population/censusdata/90den_stco.txt (Feb. 20, 1998).

[15]Based on the 1990 Census, 50.4 percent of Zavala County citizens live at or under the poverty level, a rate met or exceeded by only two others of the 254 counties in Texas. U.S. Census Bureau, *County Income and Poverty Estimates, 1990 Census Estimates: Texas 1989*, available on the internet at http://www.census.gov/hhes/www/saipe/90data/tab48_89.html (Feb. 20, 1998).

[16]"The place is a well-known romping ground for trial lawyers in search of plaintiff-friendly rulings." Editorial, "Insurance: Class-Action Suit Threatens to Embarrass Texas," *Dallas Morning News*, May 30, 1996, at 22A.

[17]The defendants asserted that the solicitation of these clients on Cracken's behalf was improper and in violation of Rule 7.03 of the Texas Disciplinary Rules of Professional Conduct. Brief of Appellant Allstate at 42 (citing the Affidavit of Professor Michael Quinn of the University of Texas College of Law). However, Judge Abascal found that the allegation was not supported by the record. Order Regarding Class Certification (June 19, 1996) at 14, *Sendejo*.

[18]Before September 1, 1995, former Texas. Civ. Prac. & Rem. Code § 15.001 provided that venue was proper "in the county in which all or part of the cause of action accrued, or in the county of defendant's resident, if the defendant is a natural person." Former Tex. Civ. Prac. & Rem. Code § 15.036 provided that venue in a suit against a corporation was the county where its principal office is situated or in the county where the plaintiff resided when all or part of the cause of action arose (provided the corporation has an agency or representative in the county). Senate Bill 32, passed as part of a tort-reform package in the 1995 Texas legislative session, established the principal place of business for a corporate defendant to be where the firm's decisionmakers conduct daily affairs (and abolished the use of "agent or representative" venue) and allowed transfers of venue for the convenience of the parties to the lawsuit. Texas Acts 1995, 74th Leg., ch. 138, § 1 (codified at Tex. Civ. Prac. & Rem. Code § 15.002). Arguably, had the matter been filed after September 1, Tex. Civ. Prac. & Rem. Code § 15.002(a)(3) would have controlled and venue might have been proper in the counties of the principal offices of the defendants (Travis County for Farmers and Dallas County for Allstate) though venue might still have been permissible in Zavala County.

[19]Two cases were filed in Zavala County District Court: *Martinez*, No. 95-08-09169-CV and *Sendejo*, No. 95-08-09165-CV. These two cases were developed by the lead plaintiffs' counsel in lockstep, and the defenses tendered by Allstate and Farmers were highly coordinated. For the purposes of this description, the two cases are discussed as one because generally there were no material differences in the issues involved or their progress through the courts. There was a short-lived removal of the Allstate matter to federal court early in the suit, but after remand the cases were essentially litigated as one.

[20]Defendants Allstate Insurance Company and Allstate Indemnity Company are hereinafter collectively referred to as "Allstate" while defendants Texas Farmers Insurance Company and Mid-Century Insurance Company are hereinafter collectively referred to as "Farmers."

[21]According to Max Boot of the *Wall Street Journal*, Barrientos went to high school with Judge Abascal and had been previously hired as local counsel to represent out-of-state investors in a fraud suit against Prudential (also before Judge Abascal); the case resulted in a $20 million settlement offer. "A Texas-Sized Class Action Fraud," *Wall Street Journal*, May 22, 1996.

[22]"Personal Injury: For a Texas Lawyer, Misfortune's Big Bucks May Take a Big Dive," *supra* note 5.

[23]Juan B. Elizondo, Jr., "Judge Keeps Overcharge Case In Court," *Greenville Herald-Banner*, Apr. 11, 1996.

[24]At the time, Farmers insured about 1.2 million drivers in Texas and Allstate insured about 560,000. Terrence Stutz, "Insurance Chief Bans Practice of Double Rounding," *Dallas Morning News*, Aug. 1, 1996, at 21A.

[25]Allstate and Farmers (and their subsidiaries) insure nearly 30 percent of the state's private autos. John MacCormack, "Suits Attack Auto Insurance Rounding Practice," *San Antonio Express-News*, Apr. 2, 1996, at 8B.

[26]Plaintiffs alleged that Tex. Ins. Code Ann. art. 5.101 (since March 1, 1992) and Tex. Ins. Code Ann. arts. 5.01, 5.03, and 5.96 (prior to March 1, 1992) compelled insurance companies to strictly conform with the *Texas Automobile Rules and Rating Manual*. *Manual* Rules 7 and 9 cover the disputed references to rounding.

[27]MacCormack, *supra* note 4.

[28]See, e.g., *Zahn v. International Paper Co.,* 414 U.S. 291 (1983).

[29]*Watson v. Shell Oil Co.,* 979 F.2d 1014 (5th Cir. 1992).

[30]Class Counsel Fee Sharing Agreement (Feb. 16, 1996) at 6 n.4.

[31]MacCormack, *supra* note 4.

[32]Stuart Eskenazi, "Dershowitz Takes on Insurers in Case Likely to Enrich Lawyers," *Austin American-Statesman*, May 16, 1996, at A1.

[33]"We hired the best class-action experts in America to assist in our presentation to the court and they said this was a textbook class action." John MacCormack, "Insurance Firms Face Class Action," *San Antonio Express-News*, June 28, 1996, quoting John Cracken.

[34]At the time of the Final Judgment approving the settlement and dismissing the case, the court appointed the following attorneys as class counsel: Timothy Patton and Daniel V. Pozza of Pozza & Patton, San Antonio; Fidel Rodriguez, Jr., of San Antonio; Pieter M. Schenkkan and Robert J. Hearon, Jr., of Graves Dougherty Hearon & Moody, Austin; Rene R. Barrientos of San Antonio; James R. Snell of Houston; John R. W. Cracken and John D. Harkey, Jr., of Cracken & Harkey, Dallas; Samuel Issacharoff and Charles Silver of the University of Texas Law School, Austin; Gavin H. McInnis of Jacobson Guglielmi & McInnis, Houston; and D. J. Powers, Austin. Final Judgment (Dec. 18, 1996) at 4–6, *Martinez;* Final Judgment (Dec. 18, 1996) at 4–6, *Sendejo.*

[35]MacCormack, *supra* note 4.

[36]Susanne Sceafane, "Texas Auto Overcharges Prompt Suit," *National Underwriter,* Apr. 15, 1996, at 4.

A November 6, 1985 letter from the TSBI staffer Grover S. Corum to Allstate, in response to an insured's inquiry, pointed out that "all premiums other than Towing & Labor are to be rounded. The U/M premium was not rounded." In a November 22, 1985 letter, Allstate responded by explaining its understanding as to how they would calculate the Uninsured Motorist premium: "The annual premium is divided in half and the actual amount is charged. [In this case], the annual cost is $21.00. Therefore, the six-month cost is $10.50. We do not round up to the next dollar as this would be an over charge." Corum wrote back on December 4, 1985 and told Allstate, "I would suggest a review of Rule 7 of the Texas Automobile Manual. I do not see any exception for U/M Coverage." (Copies of letters on file with the authors).

[37]Letter from Wilburn Fischer, Automobile Office, Casualty Division, Texas State Board of Insurance, to J. M. Rowley, Jr., J. M. Rowley Agency (Oct. 15, 1981).

[38]Juan B. Elizondo, Jr., "Insurance Commission Proposes Change to 'Rounding' Rule," *Abilene Reporter-News*, Apr. 3, 1996; Juan B. Elizondo, "Insurance Overcharge Case Still in Court," *Harlingen Valley Star*, Apr. 11, 1996.

[39]Sceafane, *supra* note 36.

[40]"Allstate, Farmers Told to Change Formula," *Jacksonville Daily Progress*, May 8, 1996, quoting John Cracken.

[41]Plaintiffs' 7th Amended Petition at 11 n.17, 15 n.2.

[42]Sceafane, *supra* note 36.

[43]"[Commissioner Bomer] could not say whether there were smaller companies using the same method." "Judge Says Insurance Suit Class Action," *Houston Chronicle*, June 28, 1996, Business, at 2; Joint Petition for Writ of Mandamus and/or Writ of Prohibition and Brief in Support (June 17, 1996) at 12.

[44]In rate-regulated jurisdictions such as Texas, insurance companies have their premiums set by state agencies at levels that are adequate to earn a reasonable profit and encourage long-term stability. The defendants argued that any additional moneys received by the insurers would have been offset by the state imposing a corresponding reduction in the rates the companies would have been able to charge consumers.

[45]Defendant's First Amended Motion to Transfer Venue, and Subject Thereto, Motions to Dismiss, Plea in Abatement and Answer (Apr. 23, 1996) at 9–10, *Martinez.*

[46]Tex. Ins. Code Ann. art. 5.01. Statutory and regulatory references to the "Board" (State Board), the Commissioner, or the Department of Insurance are interchangeable. Tex. Ins. Code Ann. art. 1.01A.

[47]Tex. Ins. Code Ann art. 5.96.

[48]Plaintiffs' Consolidated Rule 42 Reply Brief (May 3, 1996) at 8–11.

[49]*Id.* at 51. As a matter of law, venue does not determine who can recover from a lawsuit.

[50]Statement of Allstate, quoted in Sceafane, *supra* note 36.

[51]Carlos Sanchez, "Insurer Policies Disputed," *Fort Worth Star-Telegram*, Apr. 11, 1996, at 1.

[52]Eskenazi, *supra* note 32.

[53]MacCormack, *supra* note 4.

[54]*Id.*

[55]Elizondo, *supra* note 38.

[56]Juan B. Elizondo, Jr., "Two Insurers Accused of Over-Billing," *Midland Reporter-Telegram,* Apr. 3, 1996, at 5C.

[57]Sceafane, *supra* note 36.

[58]Terrence Stutz, "Allstate, Farmers Accused of Overcharging," *Dallas Morning News*, Mar. 30, 1996, at 1F.

[59]Juan B. Elizondo, Jr., "Insurance Overcharge Case Still in Court," *supra* note 38.

[60]Sanchez, *supra* note 51.

[61]Editorial, "Insurance Catch-22," *Fort Worth Star-Telegram*, Apr. 15, 1996, at 20.

[62]Editorial, "Insurance 'Rounding,'" *Austin American-Statesman,* May 8, 1996, at A14.

[63]Editorial, "'Double Rounding' of Premiums Gouges Consumers," *Dallas Morning News*, May 10, 1996, at 34A.

[64]Editorial, "Insurance: Class-Action Suit Threatens to Embarrass Texas," *supra* note 16.

[65]Editorial, "'Texas Justice' Or Legal Shenanigans?" *San Antonio Express-News*, May 21, 1996, at 6B.

[66]Boot, *supra* note 4.

[67]Editorial, "Taking Pity on Insurance Companies," *Houston Business Journal*, May 31, 1996.

[68]Rob Schneider and Reggie James, "Public Forum, Class Action Suits an Efficient Tool in Quest for Fairness," *Austin American-Statesman*, Apr. 24, 1996.

[69]*Id*.

[70]Plaintiffs' Application for Preliminary Approval of Proposed (1) Settlement Classes and (2) Settlement (Oct. 4, 1996) at 11 (hereinafter Application for Preliminary Approval).

[71]Texas Department of Insurance, Press Release, "Proposed Rounding Rules to Be Revised," May 3, 1996; Stuart Eskenazi, "Insurance Chief Accused of Wrecking Consumer Suit," *Austin American-Statesman*, May 4, 1996, at 1.

[72]Terrence Stutz, "Insurers Reportedly Misinformed," *Dallas Morning News*, May 4, 1996, at 35A.

[73]Letter from Commissioner Elton Bomer, Texas Department of Insurance, to John Hageman, President, Texas Farmer's Insurance Company (May 7, 1996).

[74]Letter from Commissioner Elton Bomer, Texas Department of Insurance to Jerry D. Choate, Chairman of the Board and Chief Executive Officer, Allstate Insurance Group (May 7, 1996).

[75]"Allstate, Farmers Told to Change Formula," *Jacksonville Daily Progress*, *supra* note 41.

[76]Stuart Eskenazi, "Insurers Told to Stop 'Double-Rounding,'" *Austin American-Statesman,* May 8, 1996, at B1.

[77]Stuart Eskenazi, "Allstate Will Double-Round," *Austin American-Statesman*, May 10, 1996, at B10; Carlos Sanchez, "Change Your Figuring Method, Insurance Chief Tells 2 Firms," *Fort Worth Star-Telegram*, May 8, 1996, at B1. Terrence Stutz, "Insurers Seek Rate Increase," *Dallas Morning News*, May 14, 1996, at 15A.

[78]Editorial, "Stop Double Rounding," *Austin American-Statesman*, May 11, 1996, at A10.

[79]Carlos Sanchez, "Simpson-Team Lawyer Enters Insurance Suit," *Fort Worth Star-Telegram*, May 15, 1996, at C12.

[80]"Dershowitz Argues Insurance Suit," *McAllen Monitor*, May 16, 1996.

[81]Eskenazi, *supra* note 32; Notice of Intent to Publish Quarterly Consumer Update and Motion for Leave to Print Mailing Labels (Aug. 16, 1996) at 7 n.2 (hereinafter Notice of Intent to Publish).

[82]Texas Rule of Civil Procedure 42 is patterned after Fed. R. Civ. P. 23 and federal decisions and authorities are persuasive. See, e.g., *Ball v. Farm and Home Savings Association*, 747 S.W.2d 420 (Tex. Civ. App. 1988); *R.S.R. Corp. v. Hayes*, 673 S.W.2d 928 (Tex. Civ. App. 1984).

[83]*Allstate Insurance Co. v. Martinez,* No. 04-96-00597-CV (Tex. Ct. App. 4th Dist. 1996); *Texas Farmers Insurance Co. v. Sendejo,* No. 04-96-00598-CV (Tex. Ct. App. 4th Dist. 1996).

[84]Tex. Civ. Prac. & Rem. Code § 51.014(3). Note that state rules in Texas and other states contradict the general rule against interlocutory appeal in federal court.

[85]Order Regarding Class Certification at 19–20. Under Texas law, notice of certification is postponed during an interlocutory appeal of certification; the reasoning is that should the certification be overturned or modified, the putative class members would be confused by the premature announcement of the establishment of the class.

[86]Adoption of Amendments to the Texas Automobile Rules and Rating Manual Relating to Rate and Premium Calculation, Commissioner's Order No. 96-0841 (Tex. Dep't Ins. July 31, 1996).

[87]*Id*. "These rules will provide uniformity in premium computation and foster fairness and consistency in the market." Insurance Commissioner Elton Bomer, quoted in Texas Department of Insurance Press Release, "Bomer Implements New Rounding Provisions," July 31, 1996.

[88]Commissioner's Bulletin No. B-0056-96, Automobile Series Letter No. 699 (Tex. Dep't Ins. Aug. 21, 1996).

[89]Official Order of the Commissioner of Insurance of the State of Texas, No. 96-0832 (Tex. Dep't Ins. July 29, 1996).

[90]Carlos Sanchez, "Farmers, Allstate Alter Premium Calculations," *Fort Worth Star-Telegram*, Aug. 1, 1996, at C3.

[91]"The 30-second ad features a woman unloading groceries in her kitchen. She says the companies shouldn't be allowed to keep any money they over-collected. 'For most people, it's less than $50, but that will feed my family for a week. And if they overcharged me, they shouldn't get to keep my money.'" "Motorists Publicize Suit with Ad," *Houston Chronicle*, Aug. 13, 1996, Business, at 3.

[92]"Insurance Plaintiffs Release New TV Ad," *San Antonio Express-News*, Aug. 13, 1996.

[93]Notice of Intent to Publish at 3.

[94]Plaintiffs' Application for Preliminary Approval of Proposed (1) Settlement Classes and (2) Settlement (Oct. 4, 1996) at 11 (hereinafter Application for Preliminary Approval).

[95]Consumers Union, Southwest Regional Office, Press Release, "Consumers Union Criticizes Rounding Settlement," (Sept. 15, 1996).

[96]Preliminary Order Approving Proposed (1) Settlement Classes and (2) Settlement (Oct. 4, 1996) (hereinafter Preliminary Order of Approval).

[97]*Id.* at 12–13.

[98]*Id.* at 17; Proposed Settlement Agreement (Oct. 4, 1996) at 37.

[99]Standing Order on Proposed Settlement Agreement (Nov. 7, 1996) at 12–15.

[100]Proposed Settlement Agreement at 14–15. The plaintiffs' estimated figures changed somewhat to $46,253,736 and $29,207,940 by the time of the fee application. Application for Fee and Expenses at 11.

[101]Proposed Settlement Agreement at 15–16.

[102]*Id.* at 13–14.

[103]Preliminary Order of Approval at 26–27.

[104]*Id.*

[105]Proposed Settlement Agreement at 26–27.

[106]*Id.* at 20–24.

[107]The date upon which the Final Judgment in the case became final.

[108]Proposed Settlement Agreement at 36, 39. A procedure was also established for adjudicating any disputed claims.

[109]*Id.* at 25–26.

[110]Standing Order on Proposed Settlement Agreement at 21.

[111]Preliminary Order of Approval at 23–24.

[112]Plaintiffs' attorneys claimed they spent 14,082 hours. Application for Fee and Expenses at 28.

[113]*Id*. at 16. Of what the $1.1 million in plaintiffs' anticipated expenses after settlement would have consisted was not explained by the class counsel.

[114]See, e.g., *General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996).

[115]Proposed Settlement Agreement at 30–32.

[116]Preliminary Order of Approval at 27–28.

[117]Proposed Settlement Agreement at 31–32.

[118]Preliminary Order of Approval at 25–27.

[119]Rule 171 of the Texas Rules of Civil Procedure authorizes such appointment.

[120]Letter from Larry F. York, Baker & Botts, to C. H. Mah, Associate Commissioner for Technical Analysis, Texas Department of Insurance (Aug. 15, 1997).

[121]Application for Fee and Expenses at 27–29.

[122]Application for Preliminary Approval at 27–28; Application for Fee and Expenses at 21–22.

[123]Application for Fee and Expenses at 23–24.

[124]*Id*. at 14–17.

[125]Brief for Fee and Expenses at 21.

[126]*Id*. at 32–33 (footnotes omitted).

[127]Application for Fee and Expenses at 26–27.

[128]*Id*. at 27–28.

[129]*Id*. at 14–17. The class counsel's estimates of defendants' costs of notice and distribution significantly differ from those set out in the Preliminary Order of Approval.

[130]Statement of Arthur R. Miller (Nov. 20, 1996), quoted in Brief for Fee and Expenses at 11.

[131]Brief for Fee and Expenses at 14 (footnotes omitted).

[132]Editorial, "Taken for a Ride," *Wall Street Journal*, Oct. 23, 1996.

[133]*Id.*

[134]Petition in Intervention of State of Texas (Dec. 4, 1996) at 3 (hereinafter Petition in Intervention).

[135]Texas Office of the Attorney General, Press Release, "Morales Negotiates Separate Agreement in 'Double Rounding' Insurance Case," Dec. 13, 1996.

[136]*Id.*

[137]*Id.*

[138]Final Judgment at 2, *Martinez;* Final Judgment at 2, *Sendejo*.

[139]Final Judgment at 8.

[140]Final Judgment at 8–9.

[141]Final Judgment at 10. In comparison, we have been informed by the defendants that their own estimated outside legal expenses related to this litigation were $950,000 in fees and $448,000 in costs for Allstate and $2.3 million in fees and $789,000 in costs for Farmers. We do not have an estimate of the in-house legal expenses incurred by the defendants.

[142]Final Judgment at 13.

[143]Final Judgment at 14.

[144]Telephone call from the authors to the Office of the Clerk of the Court, Zavala County (Feb. 20, 1998).

[145]Terrence Stutz, "Judge Approves Settlement in Suit Against Insurers," *Dallas Morning News*, Dec. 19, 1996, at 35A.

[146]*Id.*

[147]*Id.*

[148]Letter from Larry F. York, *supra* note 120. There was some shift in Allstate's estimated counts for Group 1 and 2 members from the numbers used in the Final Order but the total for the two groups remained roughly the same.

[149]Texas Farmers Insurance Company and Mid-Century Insurance Company of Texas, *Report to Texas Department of Insurance, Reporting Period: November '97* (1997).

[150]For example, as of mid-August 1997, Allstate had sent out checks out to nearly 100 percent of their estimated number of Group 1 and 2 members. Letter from Larry F. York, *supra* note 120.

[151]Final Judgment at 9.

[152]Proposed Settlement Agreement at 13–14.

[153]*Id.* at 20.

[154]As of mid-August 1997, 117 members of Group 3 had returned claim forms to Allstate and as of December 1, 1997, 164 Group 3 claims had been submitted to Farmers. Letter from Larry F. York, *supra* note 120; Texas Farmers Insurance Company and Mid-Century Insurance Company of Texas, *supra* note 149. We use estimated upper bounds of 350 claimants and $2000 payout to account for an unknown amount of forms received and processed by Allstate after mid-August 1997 and Farmers after November 1997.