

# **Litigation Cost Survey of Major Companies**

Statement Submitted by  
Lawyers for Civil Justice  
Civil Justice Reform Group  
U.S. Chamber Institute for Legal Reform

For Presentation to  
*Committee on Rules of Practice and Procedure*  
*Judicial Conference of the United States*

2010 Conference on Civil Litigation  
Duke Law School  
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Rule 1 of the Federal Rules of Civil Procedure frames the purpose of the Rules: “the just, speedy and inexpensive determination of every action and proceeding.” Every day, corporate and defense counsel must confront the fact that although well-intentioned, the Rules are falling far short of this goal. The reality is that the high transaction costs of litigation, and in particular the costs of discovery, threaten to exceed the amount at issue in all but the largest cases.

Unfortunately, few empirical studies document the costs and utility of discovery. Companies hesitate to provide litigation data to researchers because of significant concerns about confidentiality coupled with the difficulty and costs of retrieving and providing data in the formats and for the time periods sought. The resulting lack of empirical data leaves the important question of litigation transaction costs to be addressed primarily through anecdotes – which can be compelling but also easily dismissed.

To help inform the debate on litigation transaction costs at the 2010 Conference on Civil Litigation, the accompanying Litigation Cost Survey of Major Companies was developed by organizations whose member companies are concerned about the impact of litigation costs on their ability to compete in a global economy. The survey sought detailed information about long-term litigation cost trends, U.S. and non-U.S. legal transaction costs, and legal fees and discovery costs in “major” closed cases (defined as cases with litigation costs greater than \$250,000). A key undertaking in developing the survey was to alleviate concerns about confidentiality and the difficulty of responding in order to encourage corporate participation and obtain sufficient empirical data to draw reasonable conclusions for consideration by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. (The survey development, design and methodology are further described at Appendix 1, pp. 2-4.) The survey was mailed to all Fortune 200 companies in December 2009 and made available online in January 2010. Almost 20 percent of the Fortune 200 companies responded to all or a portion of the survey, representing a broad cross-section of industries (14 of 19 industry sectors) and company size (responses from all quartiles of the Fortune 200). Larger companies responded at a slightly higher rate.

The survey confirms empirically what corporate counsel have long known anecdotally – the transaction costs of litigation against large companies, especially discovery, are so high that the mandate of Rule 1 (“the just, speedy, and inexpensive determination of every action and proceeding”) is simply not being met.

### **Key Survey Findings**

#### **Litigation costs continue to rise and are consuming an increasing percentage of corporate revenue.**

Litigation transaction costs on average and as a percent of revenue have risen substantially over the past nine years. The amounts of judgments and settlements are not included in these figures.

- The average outside litigation cost per respondent was nearly \$115 million in 2008, up 73 percent from \$66 million in 2000. This represents an average increase of 9 percent each year.
- For the 20 companies providing data on this issue for the full survey period, average outside litigation costs were \$140 million in 2008, an increase of 112 percent from \$66 million in 2000.

- Between 2000 and 2008, average annual litigation costs as a percent of revenues increased 78 percent for the 14 companies providing data on average litigation costs as a percent of revenues for the full survey period.
- Increases in hourly rates do not appear to be driving the increase in litigation costs, as the available data show relatively little change in outside legal fees over time.

**The U.S. litigation system imposes a much greater cost burden on companies than systems outside the United States.** As a percent of revenue, multi-national company respondents to the survey spend a disproportionate amount on litigation in the United States relative to their expenditures in foreign jurisdictions. Depending on the year, relative U.S. costs were between four and nine times higher than non-U.S. costs (as a percent of revenue). This disparity will inevitably influence decisions by corporations about where to invest their resources. Global competition for foreign investment is increasing, and the changing dynamics of the global economy are affecting the United States' ability to remain a leader in this area.<sup>1</sup> The International Trade Administration at the U.S. Department of Commerce has found that "many foreign investors view the U.S. legal environment as a liability when investing in the United States."<sup>2</sup> If U.S. litigation costs are significantly higher than other countries, and the situation is left unchecked as economic differences between countries narrow, the United States will be unable to compete effectively in the global marketplace.<sup>3</sup>

**Inefficient and expensive discovery does not aid the fact finder.** The ratio of pages discovered to pages entered as exhibits is as high as 1000/1. In 2008, on average, 4,980,441 pages of documents were produced in discovery in major cases that went to trial – but only 4,772 exhibit pages actually were marked.

Whatever marginal utility may exist in undertaking such broad discovery pales in light of the costs. While only some of the survey respondents were able to provide data on a per case basis, for the period 2006-2008, the average company paid average discovery costs per case of \$621,880 to \$2,993,567. Companies at the high end during the same time periods reported average per-case discovery costs ranging from \$2,354,868 to \$9,759,900. The study did not segregate just those cases in which e-

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<sup>1</sup>While the U.S. is still a leader in attracting foreign direct investment, its global share of FDI declined from 31 percent in 1980 to 13 percent in 2006. International Trade Administration, U.S. Department of Commerce, *Assessing Trends and Policies of Foreign Direct Investment in the United States* 6 (2008), available at <http://www.trade.gov/publications/abstracts/trends-policies-fdi-2008.asp>.

<sup>2</sup> *Id.* at 7.

<sup>3</sup> See Robert E. Litan, *In Their Eyes: How Foreign Investors View and React to the U.S. Legal System* 4 (2007), available at <http://www.instituteforlegalreform.com/issues/docload.cfm?docid=1059>; see also International Trade Administration, U.S. Department of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment* (2008), available at [http://www.commerce.gov/NewsRoom/PressReleases\\_FactSheets/index.htm?ssYear=2008&ssMonth=10](http://www.commerce.gov/NewsRoom/PressReleases_FactSheets/index.htm?ssYear=2008&ssMonth=10) (considering concerns about the impact of the U.S. legal system on foreign investment and recommending steps to address them).

discovery occurred, but estimates in other reports confirm the high cost of discovery in cases in which e-discovery is pursued.<sup>4</sup>

Reform is clearly needed. A discovery system that requires the production of a field full of “haystacks” of information merely on the hope that the proverbial “needle” might exist and without any requirement for any showing that it actually does exist, creates a suffocating burden on the producing party. Despite this, courts almost never allocate costs to equalize the burden of discovery.

**Companies are spending billions of dollars yearly on litigation.** Litigation transaction costs, independent of judgments awarded in disputes or settlements reached between parties, constitute a significant economic cost of doing business in the United States.<sup>5</sup> Among the 36 survey participants who responded to this question, the total aggregate spend on litigation in 2008 was \$4.1 billion.

There is no doubt that a significant driver of the higher U.S. costs is the procedural and discovery costs associated with our justice system. Various studies find that roughly 60 percent of U.S. tort costs are consumed in transaction costs, with only 40 percent benefiting the actual claimant.<sup>6</sup> These studies

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<sup>4</sup> See Institute for the Advancement of the American Legal System, *Electronic Discovery: A View from the Front Lines* 3-4, 25 (2008) (e-discovery costs are about \$3.5 million for a typical mid-size lawsuit). See also *Oracle Corp. v. SAP AG*, 2008 U.S. Dist. Lexis 88319, at \*4-5 (N.D. Cal. 2008) (court refuses to order discovery of 165 document custodians at cost of \$16.5 million, apart from other discovery costs from searches of centralized repositories and targeted searches, not to mention lay and expert depositions and interrogatories); *In re Fannie Mae Securities Litigation*, 552 F.3d 814, 817 (D.C. Cir. 2009) (“The total amount [nonparty agency] spent on the individual defendants’ discovery requests eventually reached over \$6 million, more than 9 percent of the agency’s entire annual budget”.); *Medtronic v. Michelson*, 229 F.R.D. 550, 557-8 (W.D. Tenn. 2003) (costs of privilege review \$16.5 million to \$70 million); *Murphy Oil USA v. Fluor Daniel, Inc.*, 2002 WL 246439, \*2 (E.D. La. 2002) (in deciding a motion to compel and cost shift, court considered costs to produce ESI which included over \$6.2 million for vendor restoration of backup email tapes).

<sup>5</sup> The U.S. tort system cost \$260 billion in 2004, or \$886 per person. Tillinghast Towers-Perrin, *U.S. Tort Costs and Cross-Border Perspectives: 2005 Update* 3 (2006), available at [http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200603/2005\\_Tort.pdf](http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200603/2005_Tort.pdf). U.S. tort costs exceed those of other industrialized nations by a substantial margin when measured by a ratio to economic output (measured by GDP). *Id.* at 4. The U.S. had a 2.2% ratio of tort costs to GDP, compared with Germany (1.1%), Japan (0.8%) and the U.K. (0.7%). *Id.* Aside from Italy (1.7%), the other countries examined have tort costs (relative to economic output) comparable to levels observed in the U.S. in the 1950s and 1960s. *Id.* 6 tbl.3 (U.S. tort costs as a ratio to GDP were 0.62% in 1950, 1.03% in 1960s, and 1.34 % in 1970).

<sup>6</sup> See A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 Harv. L. Rev. 1437, 1470 (2010), citing Tillinghast-Towers Perrin, *U.S. Tort Costs: 2003 Update* 17 (2003), available at [http://www.towersperrin.com/tillinghast/publications/reports/2003\\_Tort\\_Costs\\_Update/Tort\\_Costs\\_Trends\\_2003\\_Update.pdf](http://www.towersperrin.com/tillinghast/publications/reports/2003_Tort_Costs_Update/Tort_Costs_Trends_2003_Update.pdf) (tort claimants receive 46 cents of every dollar paid by defendants); James S. Kakalik & Nicholas M. Pace, *Costs and Compensation Paid in Tort Litigation* ix tbl.S.3 (1986) (tort claimants generally receive 46 cents to 47 cents per dollar of tort system expenditures); James S. Kakalik et al., *Costs of Asbestos Litigation* vii tbl.S.2 (1983) (finding that asbestos claimants obtain 37 cents of every dollar paid by defendants); Stephen J. Carroll et al., *Asbestos Litigation* 104 (2005) (asbestos claimants obtain 42 cents of every dollar paid by defendants); Patricia M. Danzon, *Liability for Medical Malpractice*, in 1 Handbook of Health Economics 1339, 1369 (A.J. Culyer & J.P. Newhouse eds., 2000) (medical malpractice claimants receive 40 cents for every dollar of defendants’ liability insurance payments); Peter Huber, *Liability: The Legal Revolution and Its Consequence* 151 (1988) (medical malpractice claimants and product liability claimants receive 40 cents for every dollar paid by defendants for liability insurance); Joni Hersch & W. Kip Viscusi, *Tort Liability Litigation Costs for Commercial Claims*, 9 Am. L. &

suggest that “for each dollar that an accident victim receives in a settlement or judgment, it is reasonable to assume that a dollar of legal and administrative expenses is incurred,” law professors A. Mitchell Polinsky and Steven Shavell write in the current issue of the Harvard Law Review. “In other words, for society to use the tort system to transfer money to victims is analogous to a person using an ATM at which a withdrawal of \$100 results in a service fee of \$100.”<sup>7</sup>

Clearly, the U.S. costs and processes are both higher than necessary (and higher than elsewhere) and demonstrate an unacceptable level of inefficiency.

**The survey’s results are conservative estimates.** Although the survey was designed to identify overall litigation costs, companies define and capture litigation costs differently and preserve this information for different periods of time. As a result, in some cases significant discovery-related litigation costs were unavailable or underreported, leading to the determination that the survey results are quite conservative:

- The survey does not reflect the embedded costs of corporate investments in information technology and additional expenditures to preserve records in anticipation of discovery, or executive and employee time spent on document production or depositions. The survey findings reflect the *marginal* costs of litigation, costs directly identified with or allocated to litigated cases.
- It is difficult to separate certain legal fees from discovery costs, so it is likely that some of the legal fees reported should be more appropriately classified as discovery costs.
- The magnitude of the discovery costs reported suggests that discovery costs may often induce settlement – but settlements paid to avoid discovery expenses in weak or frivolous cases are not captured by the survey.
- In cases in which parties actually engage in extensive document discovery, the average per case cost of discovery, and e-discovery especially, will be substantially higher. Other reports indicate that in medium sized cases involving e-discovery, the estimated cost of just attorney time and vendor bills incurred in searching, retrieving, reviewing, and producing electronic information can average \$3.5 million.<sup>8</sup>

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Econ. Rev. 330, 359 tbl.5 (2007) (plaintiffs in Texas tort litigation receive 57 cents for every dollar paid by defendants).

<sup>7</sup> *Id.* The authors further stated that “[s]ome of these studies do not take into account the administrative costs of insurers, the value of the time spent by litigants, or the operating costs of the judicial system, and therefore overestimate the amount obtained by victims per dollar of total litigation-related expenditures.” *Id.*

<sup>8</sup> See *Electronic Discovery: A View from the Front Lines*, *supra* n. 4, at 3-4, 25 (electronic discovery costs about \$3.5 million in typical mid-size case); See also *Oracle*, 2008 U.S. Dist. Lexis 88319 at \*4-5 (court refuses to order discovery of 165 document custodians at cost of \$16.5 million, apart from other discovery costs from searches of centralized repositories and targeted searches, not to mention lay and expert depositions and interrogatories); *In re Fannie Mae*, 552 F.3d at 817 ( “The total amount [nonparty agency] spent on the individual defendants’ discovery requests eventually reached over \$6 million, more than 9 percent of the agency’s entire annual budget”.); *Michelson*, 229 F.R.D. at 557-8 (costs of privilege review \$16.5 million to \$70 million); *Murphy Oil*,

**This survey represents the experiences of large companies in the Fortune 200, rather than a broad cross-section of business or other litigants.** As a result, it will allow the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to gain a better understanding of the costs of litigation (and discovery in particular) for large organizations, frequent defendants in modern litigation.

The results of this survey are different from those derived from a recent survey of trial attorneys conducted by the Federal Judicial Center (FJC).<sup>9</sup> The FJC survey suggests that in the majority of cases, attorneys perceive the discovery process as reasonable, not unduly burdensome, and not likely to influence settlement.<sup>10</sup> In addition, the FJC survey suggests that the e-discovery process has not led to disproportionate costs.<sup>11</sup> Those conclusions may make sense for the groups of litigants and cases represented in the FJC survey, but they do not accurately reflect the litigation experience of large corporations. The FJC surveyed a broad group of attorneys selected from recently closed cases. The sample included many solo practitioners from small firms,<sup>12</sup> and roughly one-third of closed cases were classified as “Civil Rights” cases.<sup>13</sup> By contrast, the Litigation Cost Survey surveyed Fortune 200 companies. Large organizations in asymmetrical litigation face disproportionately burdensome discovery costs, in particular in the case of e-discovery.

The Litigation Cost Survey also provides meaningful data that previously was not available in other surveys of corporations due to the difficulty inherent in polling corporations regarding these costs. We believe the Survey data constitute a key foundation for further, in-depth exploration of internal and external litigations costs, while also demonstrating the existence of pervasive flaws in the system and supporting the case for complete reevaluation of the Civil Procedural Rules.

### ***Recommendations for Reform***

We support many of the recommendations for reform presented in the White Paper: Reshaping the Rules of Civil Procedure for the 21<sup>st</sup> Century, which has been submitted to the 2010 Litigation Review Conference by Lawyers for Civil Justice, DRI —The Voice of the Defense Bar, the Federation of Defense & Corporate Counsel, and the International Association of Defense Counsel.

Despite the history of many amendments to the Federal Rules of Civil Procedure, the White Paper demonstrates that fundamental reforms are needed to improve the administration of justice in the federal courts. Developed with broad input from experienced corporate and defense counsel, the White Paper builds on the findings of the American College of Trial Lawyers and the University of Denver IAALS

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2002 WL 246439 at \*2 (in deciding a motion to compel and cost shift, court considered costs to produce ESI which included over \$6.2 million for vendor restoration of backup email tapes).

<sup>9</sup> Emery G. Lee III & Thomas J. Williging, *Federal Judicial Center, National Case-Based Civil Rules Survey, Preliminary Report to the Advisory Committee on Civil Rules* (2009).

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *See id.* at 35-40.

<sup>12</sup> *Id.* at 79 tbl.B-1.

<sup>13</sup> *Id.* at 81 tbl.B-4.

Report's conclusion that "although the civil justice system is not broken, it is in serious need of repair."  
The White Paper recommends reform in the following areas:

**Pleadings** – The White Paper recommends promulgating a pleading standard to include more than mere notice pleading, and demonstrates from a historical perspective the need for pleading standards appropriate to modern litigation in the information age.

**Limited Discovery** - The White Paper proposes a rule that focuses the scope of discovery where it should be focused – on the claims and defenses in the action. It also requires that discovery requests must be in proportion to the stakes and needs of the litigation and that specific categories of electronically stored information are presumed not to be discoverable in most cases. By emphasizing proportionality in discovery and placing limits on the extent of e-discovery, it strikes at the heart of current practices which fuel runaway discovery costs.

**Preservation** – The Rules should be amended to permit spoliation sanctions only where willful conduct was carried out for the purpose of depriving another party of the use of the destroyed evidence and the destruction results in actual prejudice to the other party. Clear standards must be included governing the preservation of information even prior to commencement of litigation in order to counteract inconsistent case law on this subject, including some cases suggesting sanctions for negligent preservation.

**Cost Allocation** - The purpose of discovery is to permit parties to access information that will enable fact finders to determine the outcome of civil litigation. Having rules that encourage the parties to police themselves and to focus on the most efficient means of obtaining the truly critical evidence is the best way to achieve that purpose. Therefore, the Rules should be amended to require that each party pay the costs of the discovery it seeks, which will encourage each party to manage its own discovery expenses by shifting the cost-benefit decision onto the requesting party – the best cost avoider.

In conclusion, we commend the Rules Committee for its attention to concerns about the administration of justice in U.S. courts and for undertaking its review of the Federal Rules of Civil Procedure to further the "just, speedy and inexpensive determination of every action and proceeding." We look forward to continuing participation in the Committee's very important work.

Respectfully submitted,

Civil Justice Reform Group  
Lawyers for Civil Justice  
U.S. Chamber Institute for Legal Reform

# APPENDIX 1

## Litigation Cost Survey of Major Companies

Survey Formulated by  
Lawyers for Civil Justice  
Civil Justice Reform Group  
U.S. Chamber Institute for Legal Reform

For Presentation to  
*Advisory Committee on Civil Rules*  
*Standing Committee on the Rules of Practice and Procedure*  
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Survey Administered and Data Compiled by  
Searle Center on Law, Regulation, and Economic Growth



## ***Introduction and Summary***

Prior to this study, there was little empirical data on the litigation costs faced by companies or how the discovery process contributes toward costs and the related cost trends. This study is designed to add concrete data to the body of knowledge in an effort to provide further insight into these issues in anticipation of the 2010 Civil Litigation Conference sponsored by the *Advisory Committee on Civil Rules* at the request of the *Standing Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States*.

The U.S. Chamber Institute for Legal Reform, Civil Justice Reform Group, and Lawyers for Civil Justice undertook a joint project designed to survey Fortune 200 companies regarding their litigation costs to assist the Committees and the 2010 Civil Litigation Conference. Their goal was to foster the exchange of empirical data by encouraging sufficient corporate participation through addressing concerns about compromising confidentiality (a major impediment in prior survey efforts) and the significant resources required to compile the data. This report discusses this survey of Fortune 200 companies which was designed by the three organizations and administered by the Searle Center on Law, Regulation, and Economic Growth at Northwestern University School of Law.<sup>1</sup> To the best of our knowledge, this is the first survey of litigation costs of major companies with a response rate that provides an empirical basis to make reasonable conclusions.<sup>2</sup>

The survey demonstrates that (1) as of 2008 litigation costs average almost 0.6 percent of revenue, and costs have grown over the past nine years; (2) multi-national companies spend a disproportionate amount in litigation expenses in the U.S. relative to foreign jurisdictions; (3) discovery costs comprise at least one-fourth of total outside legal fees; (4) courts appear to almost never order cost shifting as a means to equalize the impact and cost of discovery; and (5) documents produced in litigation as a percentage of documents actually used at trial suggests that discovery does not appear to be an efficient tool for assisting the finder of fact.

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<sup>1</sup> AustinTrends, a consulting firm specializing in survey administration, assisted in the design of the online survey instrument and administration of the survey.

<sup>2</sup> The Federal Judicial Center, for example, also conducted a survey on discovery costs. Participants were a broad group of attorneys selected from recently closed cases instead of the actual litigants. The sample included many solo practitioners from small firms, and roughly one-third of closed cases were classified as “Civil Rights” cases.

## ***Methodology***

A full template of the survey and the cover letter which accompanied it is attached in Appendix 1-A. This Report will not discuss all survey questions in detail, but highlight the most relevant and reliable findings.<sup>3</sup>

The survey has five parts:

1. Descriptive Information
2. Long-Term Litigation Cost Trends (Excluding Judgments and Settlements, 2000-2008)
3. U.S. Litigation Costs versus Non-U.S. Litigations Costs (as % of Revenue; 2004-2008)
4. Aggregate Data for “Major” Cases Closed (2004-2008) (Litigation Costs > \$250k)
5. Document Discovery (2004-2008): Individual “Major” Cases (Litigation Costs>\$250k)

Part 1 asks for predominant industry and quintile ranking within the Fortune 200. Parts 2 and 3 capture total domestic and foreign litigation costs as a percent of domestic and foreign revenue between 2000 and 2008. In order to focus on litigation “transaction” costs, litigation costs are defined to *exclude* settlements and damage awards. Parts 4 and 5 restrict the analysis to cases which had litigation costs in excess of \$250,000. Part 4 asks about litigation costs for recently closed cases, while Part 5 asks specifically about document discovery in cases that either proceeded to trial or were closed shortly before trial.

Based on comments received from the respondents, those who took the survey did so thoughtfully. As expected, the response rate drops for Parts 4 and 5 because the data become harder for respondents to collect, particularly in the earlier years. In the event a respondent was unable to provide data or had cautions about data reported, it was often noted and explained (e.g., “current document management system dates back to 2005 only;” “we do not separately track document discovery costs;” “[d]ata provided in this section is solely from the parent company and all but two of its subsidiaries”). In addition, the Searle Center and AustinTrends fielded a number of phone calls for clarification purposes. Verbatim comments from respondents are available upon request to the Searle Center.

## ***Survey Design***

The survey was proposed and initially formulated by a committee of individuals representing members of Lawyers for Civil Justice, the Civil Justice Reform Group, and the U.S. Chamber Institute for Legal Reform.

The survey design was influenced by the perception that concerns regarding confidentiality significantly impacted the response rate of prior survey efforts (particularly as it relates to

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<sup>3</sup>A more detailed description of responses, with tables and graphs, is available from the Searle Center. Please send requests to [searlecenter@law.northwestern.edu](mailto:searlecenter@law.northwestern.edu).

litigation costs per case and settlement information). Consequently, it was important that the survey design include provisions that would facilitate meaningful responses but also protect respondents' confidential information. For these reasons, the respondents answered questions via a secure website.<sup>4</sup> In addition, to further protect confidentiality, some of the respondents' characteristics were requested only at an aggregate level. Respondents were asked to choose their "predominant" industry from twenty-five categories and to report in which quartile of the Fortune 200 they fell in 2009. As an added protection, the survey asked respondents for litigation costs as a percentage of revenues instead of collecting exact revenues.

The survey was beta tested with four companies that provided feedback on potential ambiguity in questions and likely availability of data, as well as potential unanticipated barriers or excessive costs that might be incurred in attempting to respond to the survey. The beta group assessed the costs involved in compiling of the data (which required significant time investment) and suggested changes designed to foster increased participation by the targeted companies. Following this beta testing, the survey questions were submitted to the Searle Center and the format was finalized.

The Searle Center hired AustinTrends to develop a secure web-based survey instrument capable of processing the tremendous amount of information that respondents would be providing.

## ***Response Rate and Representativeness***

The survey was distributed to all Fortune 200 companies (as of 2009) in the United States. Respondents answered the survey via the internet, but initial solicitations were made via mail. The December 2009 cover letter and original survey may be found in Appendix 1-A.

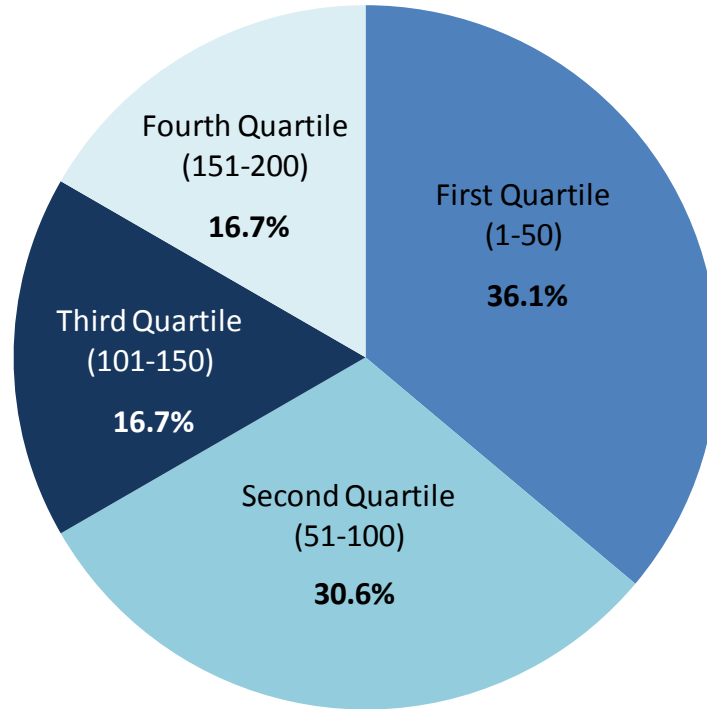
Out of 200 companies that received the survey, 37 responded to at least portions of the survey. The response rate was therefore 18.5 percent. This rate is roughly standard for surveys administered over the web or through the mail. Given the confidentiality concerns and the significant investment of time required in responding, the response rate is actually quite good. Comparison of responders to the underlying population will further suggest that the responders are fairly representative of the Fortune 200.

In terms of breadth of business interests, respondents are representative of the Fortune 200. Of course, because the survey focused on the largest U.S. companies, it only aspires to inform the analysis of U.S litigation costs from the perspective of these companies. Although not fully inclusive of all segments of all Fortune 200 companies (for example, only one Food and Beverage industry response was included), the number and scope of the respondents do appear to meaningfully reflect the breadth of business interests included in the Fortune 200. Companies in the top half of the Fortune 200 comprise 67 percent of the responders (see Figure 1). Therefore, larger companies responded at a slightly higher rate. To prevent firm size and complexity from skewing the results, many of the survey findings are denominated by total revenue.

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<sup>4</sup> For complete details on the web-based survey, please contact the Searle Center.

**Figure 1**  
**Survey Participants by Ranking in the Fortune 200**  
**(N = 36\*)**



\* 37 companies responded but one participating company was not in the Fortune 200

The data are broken down by industry type (see Figure 2). Of the 19 Fortune 200 industry categories, 14 were represented. The insurance and health care industries are overrepresented in the study population. Insurance comprises 7 percent of the Fortune 200 (based on number of companies), but 16.2 percent of responders. Health care comprises 6.5 percent of the Fortune 200, but 16.2 percent of responders. Food and beverage are underrepresented (10.5 percent of the Fortune 200 versus 2.7 percent of responders). The rest of the responders, broken down by industry, are, qualitatively at least, fairly representative of the Fortune 200. After breaking out the results below to examine whether industry composition could affect the results, we concluded that industry composition does not have a meaningful effect on the validity of the results.

**Figure 2**  
**Predominant Industry of Survey Participants**

	Participant Percent	Fortune 200 Percent
Oil & Gas	16.2%	15.5%
Health Care	16.2%	6.5%
Insurance	13.5%	7.0%
Industrial Goods & Services	10.8%	12.5%
Technology	10.8%	6.5%
Retail	5.4%	8.5%
Automobiles & Parts	5.4%	5.0%
Personal & Household Goods	5.4%	2.0%
Food & Beverage	2.7%	10.5%
Banks	2.7%	5.5%
Telecommunications	2.7%	5.0%
Travel & Leisure	2.7%	2.0%
Professional Services	2.7%	2.0%
Chemicals	2.7%	1.5%
Media	0.0%	3.5%
Other	0.0%	2.5%
Construction & Materials	0.0%	2.0%
Basic Resources	0.0%	1.5%
Conglomerate	0.0%	0.5%
<b>Total</b>	<b>100.0%</b>	<b>100.0%</b>

In sum, the data are fairly representative of Fortune 200 companies, with two main caveats. First, the Food and Beverage industry, as a percentage of the Fortune 200, is substantially under-represented in the survey. Second, the respondents are slightly skewed toward larger companies.

Even if the responding companies are basically the same in most observable characteristics as the surveyed population, another factor that may affect the results is the differential abilities and incentives of companies to complete the survey. However, because the responders represent a good cross-section of industries (14 of 19) and firm size (all four quartiles) within the Fortune 200, it is more likely that the results reported are close to representative of the true population of Fortune 200 companies.

Though there is reason to believe that the survey respondents are generally representative of the Fortune 200, the value of this survey does not rely upon respondents comprising a representative sample. This survey presents data on litigation costs for a group of large companies. Even if these companies are not perfectly representative of the Fortune 200 or of all corporate litigants,

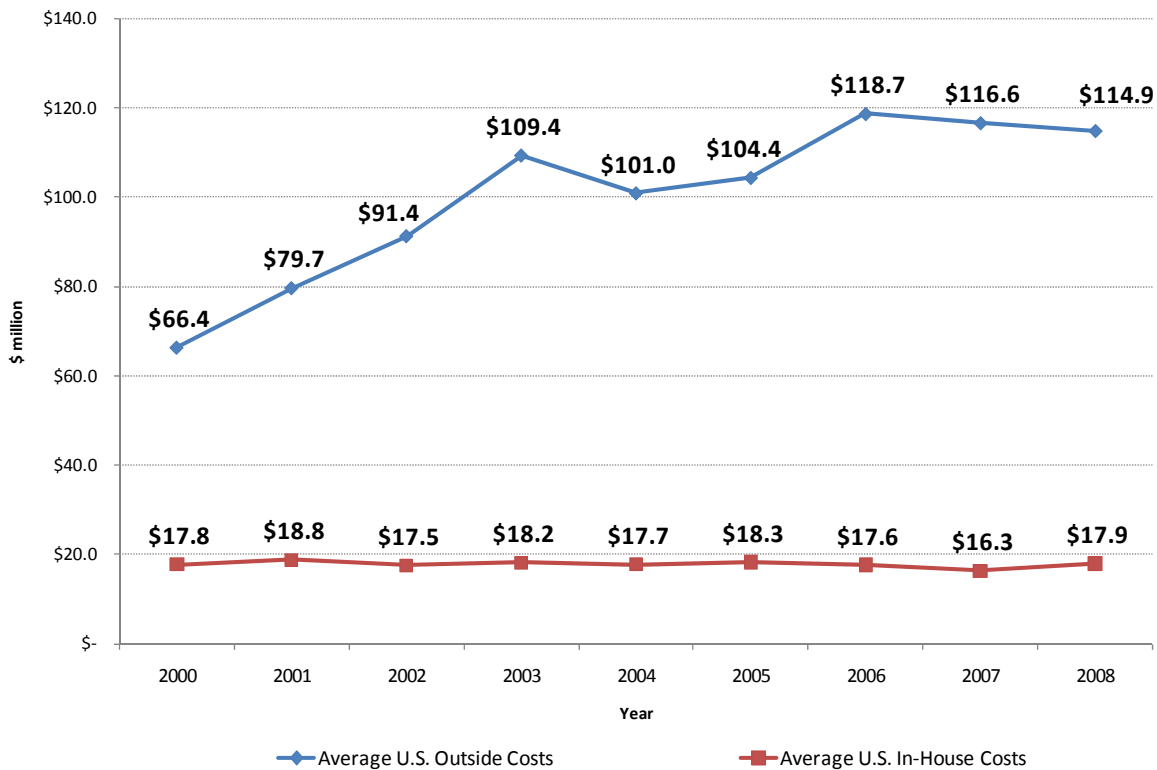
the high litigation costs (and trends showing increasing costs) faced by these companies are relevant in considering the costs to society of the legal system overall and are an example of costs that some large companies incur.

## The Findings

### 1. Litigation Cost Trends (*Excluding Judgments and Settlements*)

Figure 3 details total aggregate litigation costs for the sample, broken apart by “outside” litigation costs and “in-house” costs. As of 2008, the average respondent reported nearly \$115 million total annual litigation costs (which exclude awards and settlements), having risen from \$66 million in 2000. This trend was strongly statistically significant ( $p$ -value < 0.01).<sup>5</sup>

**Figure 3**  
**Comparison of U.S. Outside & In-House**  
**Average Total Litigation Costs**  
**2000 - 2008**



<sup>5</sup> To account for the unbalanced nature of the response rate over time, a regression with a time trend and company fixed-effects was run.

On average, litigation costs have grown nine percent per year. As can be seen in Figure 4, this result is not driven by a few outliers; costs for both the smallest and largest spenders on litigation have grown over time. Of course, one concern could be that legal fees grew in this time period, and that this accounts for much of the cost growth. It is doubtful that this explanation can fully explain the results. First, because in-house counsel costs are fairly flat since 2000, the rise in outside litigation costs is more compelling. Second, legal fees per case, at least for “major cases,” have not changed much over time.<sup>6</sup>

**Figure 4**  
**Total U.S. Outside Litigation Costs**  
**2000 - 2008**

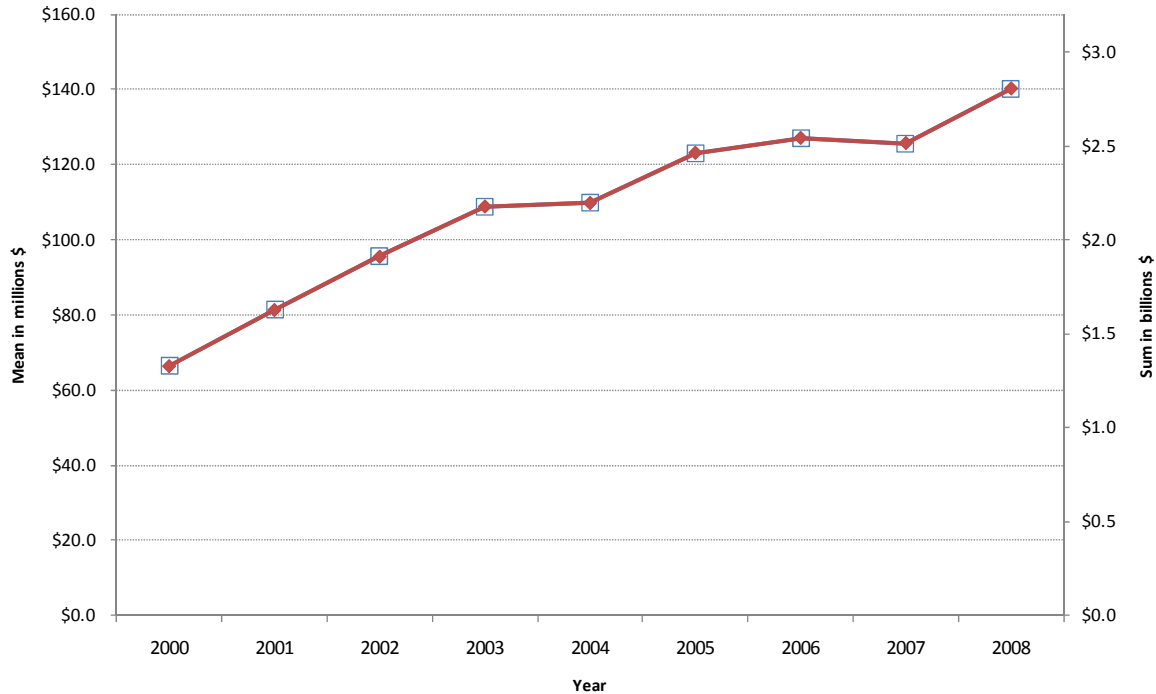
Year	N	Sum	Maximum	Minimum	Mean
2000	20	\$1,327,913,463	\$447,700,000	\$1,492,521	\$66,395,673
2001	22	\$1,753,395,333	\$494,700,000	\$2,306,000	\$79,699,788
2002	23	\$2,101,237,164	\$538,400,000	\$2,890,000	\$91,358,138
2003	25	\$2,735,244,420	\$532,700,000	\$3,134,000	\$109,409,777
2004	31	\$3,129,617,963	\$567,000,000	\$6,873,907	\$100,955,418
2005	34	\$3,549,206,310	\$633,600,000	\$2,332,588	\$104,388,421
2006	34	\$4,035,615,220	\$599,700,000	\$3,900,000	\$118,694,565
2007	35	\$4,082,450,738	\$634,152,833	\$3,602,388	\$116,641,450
2008	36	\$4,136,723,158	\$598,100,000	\$3,100,000	\$114,908,977

One important concern with interpreting this trend is that the response rate improved beginning in 2004 (moving from 20 companies in 2000 to 31 companies in 2004 and 36 companies in 2008). To verify that the trend observed is not driven by compositional effects, Figure 5 presents results for average total litigation costs per company using the subset of 20 companies that responded for all years. The results look quite similar to that of the full sample presented in Figure 3. The average litigation costs for these firms increased from \$66 million in 2000 to \$140 million in 2008, while the total litigation costs of these twenty companies grew from \$1.3 billion in 2000 to \$2.75 billion in 2008.

---

<sup>6</sup> One question would be whether the volume of litigation faced by respondents grew in this time period, which could account for an increase in litigation costs. The survey asked only for the number of major cases closed each year. Two companies reported a large number of major cases closed, though the companies did not report unusually high litigation costs. Excluding these companies, the average number of “major closed cases” reported by respondents remained roughly stable between 2004 and 2008 (increasing from roughly 18 major cases closed per company to 24).

**Figure 5**  
**Total U.S. Outside Litigation Costs**  
**20 Companies with Consistent Reporting**  
**2000 - 2008**



In short, it is very likely that a time trend existed over this period because the subsample of the 20 firms that reported data for all years shows a similar pattern to that described above for all responders. The subsample of 20 responders was still somewhat representative of the Fortune 200, with eleven industries included.

One critique of these results is that litigation costs may expand naturally as businesses expand. To address this concern, Figures 6 through 8 consider litigation costs as a percent of total revenue.

Figure 6 reports litigation costs as a percent of revenue for the full sample. Two companies reported unusually high litigation costs as a percent of revenue (about four to five times the average of their peers) so Figure 6 also reports results excluding them from the analysis. The trend toward higher litigation costs is evident in either case and quite comparable to that seen in the aggregate numbers in Figure 3. The trend (excluding the outliers) was also statistically significant (p-value < 0.01).<sup>7</sup>

<sup>7</sup> Again, a regression was run with firm fixed-effects.



**Figure 6**  
**Average Total Litigation Costs as a Percent of U.S. Revenues**  
**2000 - 2008**

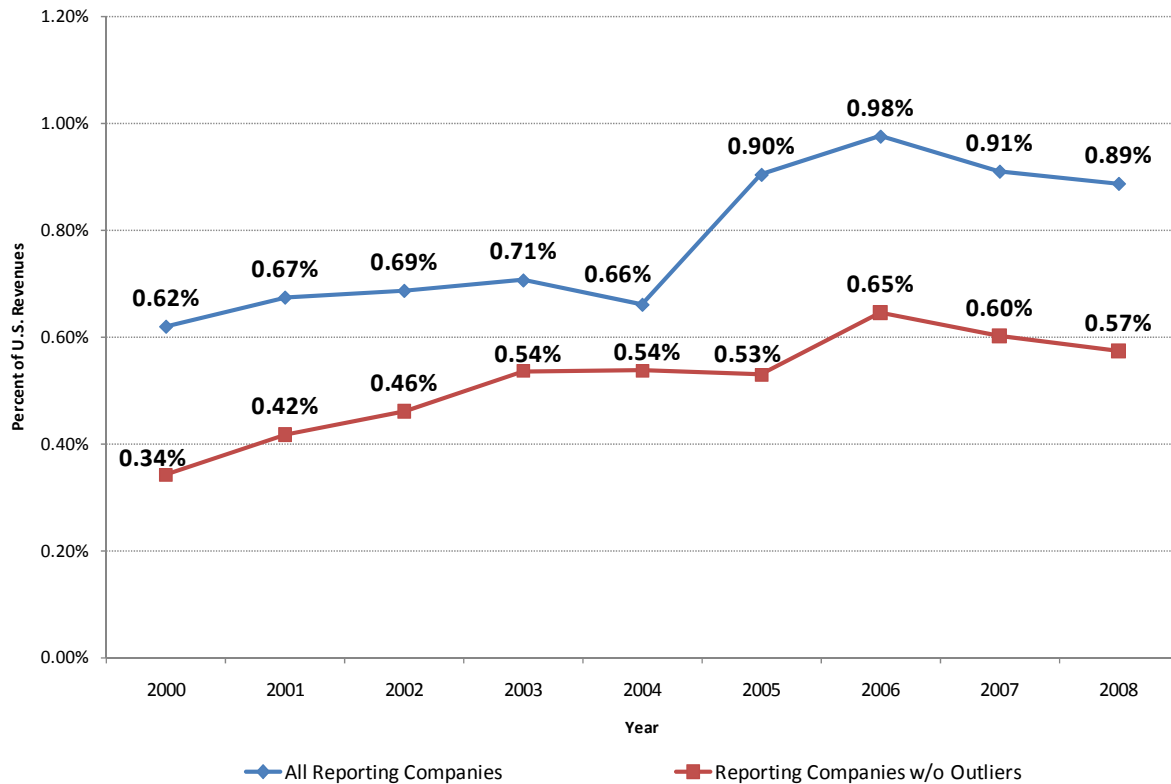
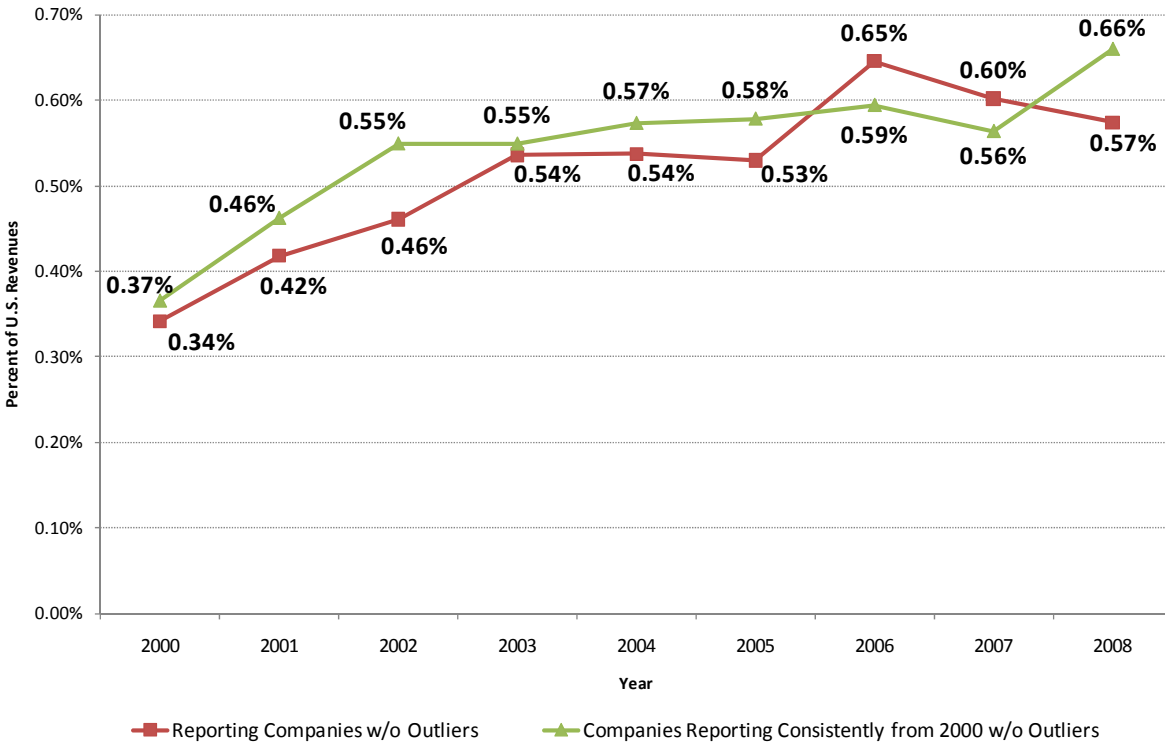


Figure 7 reports results for the full sample excluding outliers and the subset of firms that reported each year relative to the full sample excluding outliers. The trend lines are quite similar, confirming that the results are not driven by changes in composition of responders over time.

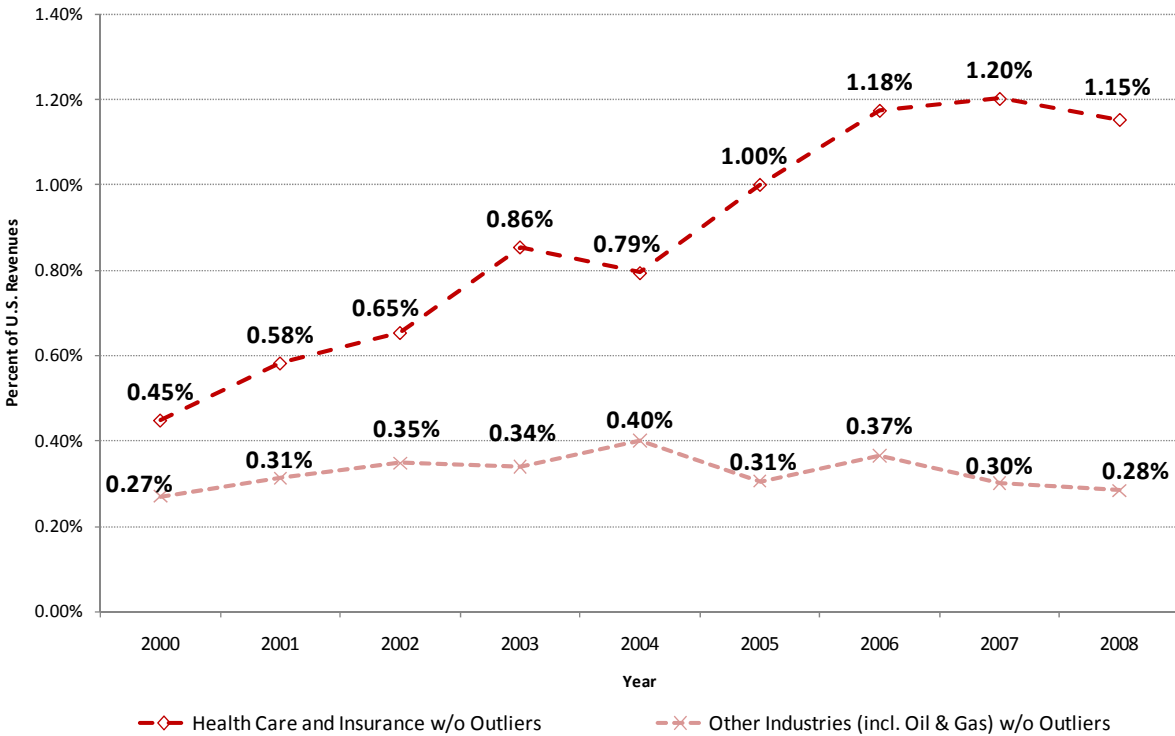
**Figure 7**  
**Average Total Litigation Costs as a Percent of U.S. Revenues**  
**All Companies versus Consistent Responders**  
**2000 - 2008**



Further refining the analysis to compare the Insurance and Health Care industries to all others, Figure 8 shows that litigation costs as a percent of revenue among the Insurance and Health Care industries (comprising 30 percent of responders)--were different from the rest of the responders. These industries report average litigation costs over the sample time frame of 0.87 percent of revenue. By contrast, all other industries report an average of 0.33 percent of revenue.<sup>8</sup> Thus, the Insurance and Health Care industries have higher average litigation costs as a percent of revenue and the average is almost three times that of the remaining industries. However, it is unlikely the results are driven solely by these industries, though they may be skewed higher because these industries are somewhat overrepresented.

<sup>8</sup> The means were statistically different with a p-value < 0.01.

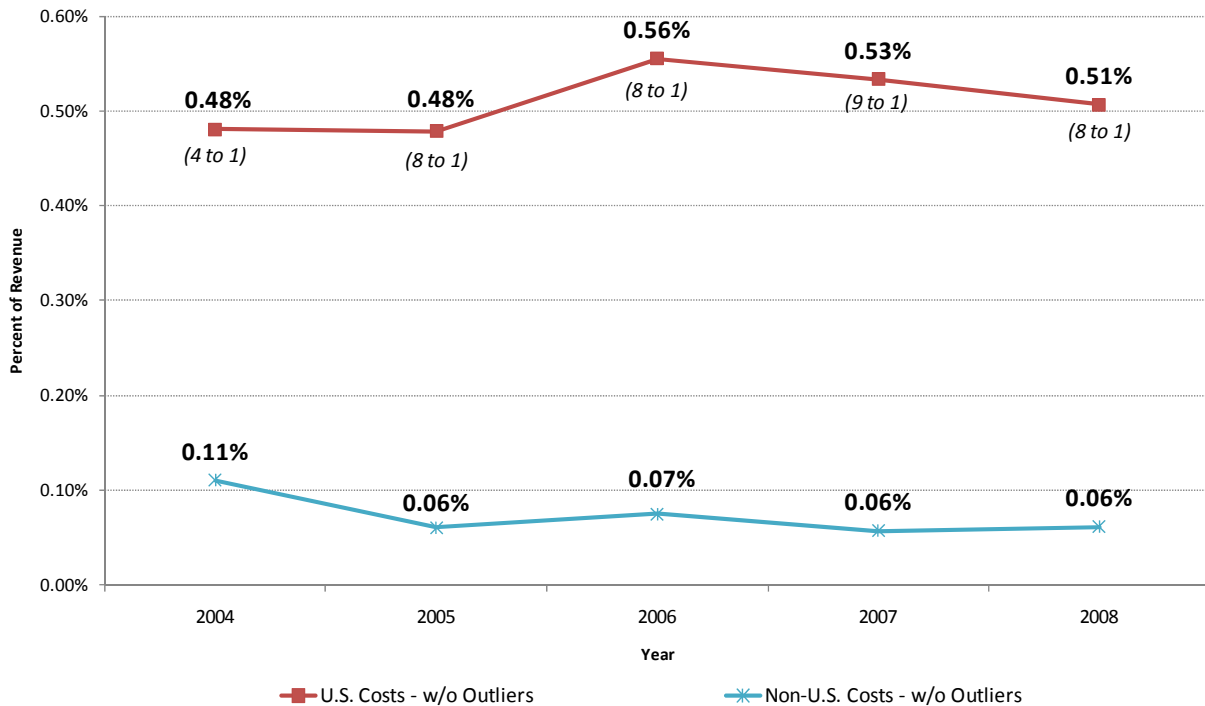
**Figure 8**  
**Average Total Litigation Costs as a Percent of U.S. Revenues**  
**Comparison of Health Care and Insurance with Other Industries**  
**2000 - 2008**



**2. U.S. litigation costs versus non-U.S. litigation costs.**

The survey further requested litigation costs from foreign jurisdictions as a percent of foreign revenue. The response rate dropped by over half in this case because many companies do not keep separate track of non-U.S. litigation expenses (and, indeed, some companies do not have any foreign operations). For those that reported, however, non-U.S. litigation costs as a percent of non-U.S. revenue was almost negligible (see Figure 9). Indeed, depending on the year, relative U.S. litigation costs were between four and nine times higher than non-U.S. costs (as a percent of revenue). In short, it appears that as a percent of revenue, U.S. litigation is much more costly to respondents than is their foreign litigation.

**Figure 9**  
**U.S. Litigation Costs as a Percent of U.S. Revenues and**  
**Non-U.S. Litigation Costs as a Percent of Non-U.S. Revenues**  
**2004 - 2008**



A reasonable question is whether there is an explanation for these differences that has nothing to do with civil procedure. For example, one explanation is that U.S. companies pay U.S. lawyers significantly higher than lawyers charge in other countries. Another possibility is that the country in which the corporation is based will naturally draw more litigation. The first explanation is unlikely. Fortune 200 companies' local counsel in foreign jurisdictions usually are similar to those employed in the U.S. and indeed are often the same law firm. The second explanation also seems unlikely as shareholder derivative suits and the like (which are focused on the companies' home venue) comprise a small portion of litigation volume. More likely, we concluded, these differences represent more costly litigation in the U.S. civil justice system, and that U.S. jurisdictions provide a draw for litigants choosing between different court systems.

**3. Discovery costs for “Major” cases closed (2004-2008) (Litigation Costs > \$250k)**

In order to identify whether discovery costs or outside legal fees are the source of high litigation costs in U.S. courts, the survey further collected information on actual discovery costs from 2004-2008 versus outside legal fees in “Major Cases Closed.” Major Cases Closed are defined to be cases in which a final settlement or judgment has been reached and total outside litigation

transaction costs (not including settlement or judgment) exceeded \$250,000. The data collected had to be defined in this fashion to avoid skewing the results with data on cases in progress that would not represent total case cost or that would include a multitude of minor cases (e.g. the asbestos unimpaired docket). Further, most companies had to look into individual cases to separate attorney's fees from discovery costs. The \$250,000 cutoff was chosen to reduce the universe of cases that had to be examined, thereby reducing substantially the costs of collecting information. The beta testers confirmed that this level would capture a large portion of litigation expenses while substantially reducing the reporting costs.

Because the response rate varied considerably by year (a function of the availability and reliability of data as well as the substantial costs of collecting this information) results are reported in tabular form. Figures 10 and 11 detail average outside legal fees and total discovery costs per major closed case reported since 2004.

While many respondents were unable to segregate "discovery" costs from total outside litigation transaction costs, the data produced leads to the clear conclusion that discovery costs are a significant portion of total litigation costs. The best response rate was for the most recent year, 2008, in which 30 and 20 companies responded to questions about total outside attorney costs and total discovery costs for closed cases respectively.

**Figure 10**  
**Outside Legal Fees per Case of Major Cases Closed\***  
**2004 - 2008**

	2004	2005	2006	2007	2008
	<i>Average Company's Average Legal Fees per Case of Major Cases Closed</i>				
N (Companies)	24	26	26	29	30
Sum	\$43,742,766	\$42,125,232	\$49,125,663	\$51,795,765	\$60,577,443
Maximum	\$7,200,000	\$5,854,561	\$5,572,314	\$8,775,147	\$11,184,929
Minimum	\$437,986	\$303,200	\$253,750	\$276,555	\$352,324
<b>Mean (by Company by Case)</b>	<b>\$1,822,615</b>	<b>\$1,620,201</b>	<b>\$1,889,449</b>	<b>\$1,786,061</b>	<b>\$2,019,248</b>

\*Excludes two companies reporting unusually high numbers of cases.

**Figure 11**  
**Discovery Costs per Case of Major Cases Closed\***  
**2004 - 2008**

	2004	2005	2006	2007	2008
	<i>Average Company's Average Discovery Costs per Case of Major Cases Closed</i>				
N (Companies)	15	18	4	4	20
Sum	\$7,332,698	\$7,269,077	\$11,974,268	\$6,348,082	\$12,437,592
Maximum	\$2,000,000	\$1,877,627	\$9,759,900	\$5,006,200	\$2,354,868
Minimum	\$0	\$112,076	\$299	\$208,000	\$134,237
<b>Mean (by Company by Case)</b>	<b>\$488,847</b>	<b>\$403,838</b>	<b>\$2,993,567</b>	<b>\$1,587,021</b>	<b>\$621,880</b>

\*Excludes two companies reporting unusually high numbers of cases.

In 2008, average discovery costs were as high as \$2.4 million and the average discovery cost over all reporting companies was well in excess of \$600,000. By comparison, average outside legal fees per case were \$2.0 million. Total discovery costs for attorney review alone were roughly one-fourth of the total outside legal fees. The estimates presented here are likely the lower bounds and consequently understate of discovery costs, because many discovery costs may go unmeasured and unreported. First, the fixed costs of maintaining a corporate infrastructure to satisfy broad discovery requests (and in particular e-discovery requests) are not reflected in these responses. These would include technology and systems infrastructure implemented to issue preservation notices, preserve data and collect data for use in litigation. Second, executive and employee time devoted to the discovery process (producing documents or depositions) is also not accounted for. Third, responders probably could not fully separate legal fees paid from the discovery process—some legal fees are undoubtedly attributable to the discovery process itself.

Unfortunately, the problems companies encountered in collecting this data and the necessity of limiting the cases to a cost cutoff of \$250,000 means that litigation cost trends cannot be reported separately for discovery costs as was done for total litigation costs in the previous section. However, the response rate for average outside legal fees is a fair bit better. There is relatively little change in outside legal fees over time, beginning at \$1.8 million per case in 2004, remaining at \$1.8 million in 2007 and increasing \$2.0 million in 2008. The standard errors for these are large and prevent a strong inference. On its face, however, the result suggests that significant growth in litigation costs is not directly attributable to a growth in outside legal fees.

High costs of discovery are a significant litigation expense, and are likely partially responsible for the disproportionately large amount of litigation spending associated with the U.S. legal system. Notably, the prospect of high litigation costs may induce settlements in many cases that the corporation may have otherwise chosen to litigate. Settlements induced by discovery costs are not reflected in the numbers presented here because they were not included as litigation costs, although clearly some portion of settlements are likely ascribable as discovery cost avoidance, and a settlement to avoid discovery costs may bring the case in under the \$250,000 cutoff.

Discovery costs also will otherwise discourage companies from bringing meritorious claims due to the disproportionate costs of maintaining these actions.

#### **4. Cost-shifting in e-discovery**

Responding companies were able to identify, on average, 8.75 e-discovery disputes per year. However, out of over 743 e-discovery disputes reported between 2004 and 2009, there was only *one* case where cost shifting was utilized to resolve a dispute. Thus, it can be concluded that cost-shifting in e-discovery cases is rare in major cases involving large companies, and therefore unlikely to be either an effective deterrent to unwarranted e-discovery requests or a balance against intrusive and costly requests.

#### **5. Ratio of discovered documents to exhibit pages in actual cases**

Respondents were asked to identify the pages produced in discovery in major cases that went to trial. In 2008, for example, 4,980,441 pages of documents were produced on average in discovery in major cases that went to trial. However, the average number of exhibit pages totaled 4,772, or 0.10 percent of pages produced. This reflects a ratio of 1,044 to 1— and could suggest that document discovery may be an inefficient resource for the finder of fact.

## *Conclusion*

The survey undertaken here is unique in providing a reasonable quantification of litigation costs faced by large companies. The response rate and representativeness of the survey were better than could be expected when the extraordinary costs of compliance and the concerns around confidentiality are considered. The data allow us to make some conclusions. First, litigation costs on average and as a percent of revenue have trended up over the past nine years. This result holds even after limiting the trend to the twenty companies reporting data in all years. Second, after accounting for revenue, multi-national companies spend a greatly disproportionate percentage of their revenues in litigation expenses in the U.S. relative to foreign jurisdictions. The response rate for foreign costs and revenues was one-half the overall response rate. Nonetheless, the vast difference between foreign and domestic costs is telling. Third, a substantial portion of that differential may be attributable to the discovery process, which makes up at least one-fourth of outside legal fees. Fourth, the e-discovery cost-shifting almost never seems to occur in major cases with large companies. Fifth, the ratio of pages discovered to exhibit pages is over one-thousand to one.

In contrast to other existing studies, the value of this study is that it is the first to provide hard data instead of anecdotal reports on the high litigation costs faced by major companies. As such, it provides insights that the Advisory Committee on Civil Rules and the Standing Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States can take into consideration when considering whether any rules changes may be required to better achieve the goals of FRCP 1, and if so, how those changes should be designed.



## APPENDIX 1-A

# Litigation Cost Survey of Major Companies

Survey Formulated by  
Lawyers for Civil Justice  
Civil Justice Reform Group  
U.S. Chamber Institute for Legal Reform

For Presentation to  
*Advisory Committee on Civil Rules*  
*Standing Committee on the Rules of Practice and Procedure*  
*Judicial Conference of the United States*

2010 Civil Litigation Conference  
Duke Law School  
May 10-11, 2010

Survey Administered and Data Compiled by  
Searle Center on Law, Regulation, and Economic Growth

## **APPENDIX 1-A**

# **Litigation Cost Survey of Major Companies**

December 2009 Cover Letter

Exxon Mobil Corporation  
5959 Las Colinas Boulevard  
Irving, Texas 75039-2298

Charles W. Matthews, Jr.  
Vice President and General Counsel



Date

Address Block

Re: Revision of the Federal Rules of Civil Procedure – High Importance, Time Sensitive, and Response Requested

Dear Addressee,

You are likely aware that the Federal Judicial Conference Rules Committee is undertaking a multi-year review of the Federal Rules of Civil Procedure. The impetus for the Rules Committee's undertaking was a report published earlier this year by the American College of Trial Lawyers (ACTL) in conjunction with the Institute for the Advancement of the American Legal System (IAALS). The report articulated 29 'principles' to guide the reformulation of procedural rules at the federal and state levels. Key among these principles was replacing notice pleading with fact pleading and narrowing the scope of pretrial discovery (<http://www.actl.com>). The breadth of inquiry the Committee is undertaking and the extent of potential revision are the most extensive since enactment of the federal rules in 1938. This project presents an unprecedented opportunity to revise the federal rules so that they fulfill the mandate of Federal Rule 1 to "secure the just, speedy, and inexpensive determination of every action and proceeding". We need your leadership to ensure that your company responds to the enclosed Northwestern Law School Searle Center survey (Searle Survey).

The Rules Committee has asked litigants to provide data that will inform its undertaking. The Searle Survey seeks empirical information that can only come from corporate parties. Unless we participate, our interests and concerns will not be addressed. Unless a significant number of companies participate, the data will lack credibility. The Rules Committee rarely receives hard empirical data from real consumers of the courts, but when such data has been provided, they have expressed great appreciation and interest - and they have responded. We will be grateful for your participation.

The Rules Project will begin with a conference at Duke University in May 2010 at which various stakeholders will present their views on the effectiveness of the current rules. The purpose of the Searle Survey is to give representatives of the corporate community objective,

empirical data to present at the Duke conference and to assist the Rules Committee in its multi-year task of study, hearings, and revisions. The corporate community will have to remain involved throughout the project, but the most important task at the moment is to help lay a foundation for change by providing the litigation data requested in the enclosed Searle Survey. We all receive many surveys, but few offer the potential for reforming the American system of civil litigation. Gathering the requested information will take time and a commitment of resources, but the potential return is worth the effort.

The Searle Center has experience in handling sensitive information. It has systems in place to keep information confidential. The data collection process will be blind; the response instrument does not include the name of your company. As the Survey is being sent to the Fortune 200 companies, responses will represent a broad cross-section of industries. The data will be aggregated, and responding companies will not be identified.

We will appreciate it if you would do the following:

- Complete the enclosed response form indicating your company's willingness to participate.
- Identify a point person responsible for completing the survey.
- Begin the process of collecting data using the enclosed survey so that you complete the survey by mid-February at the latest.
- In early December, your point person will receive an email with a link to the confidential, dedicated website to use for submitting data.

A confidential help desk will be provided to help with any questions about the survey.

We also encourage your participation in an IAALS Survey, which is being sent separately. The IAALS Survey seeks important opinion information about various aspects of the legal system. The IAALS survey should take no more than 30 minutes.

Bringing the costs of litigation, especially the cost of pretrial discovery, under reasonable control in ways that enhance justice for all litigants, is critically important to our system of civil justice. We hope you give the Searle Survey and the IAALS Survey very high priority.

Thank you in advance for your anticipated leadership and support.

**Exxon Mobil Corporation**



Charles Matthews  
Vice President & General Counsel

**3M**



Marshall I. Smith  
Senior Vice President Legal Affairs & General Counsel

ACE Group Management & Holdings Limited



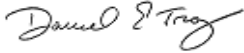
Robert F. Cusumano  
General Counsel

Eli Lilly & Company



Robert A. Armitage  
Senior Vice President and General Counsel

GlaxoSmithKline



Daniel Troy  
Sr. Vice President & General Counsel

Kirkland & Ellis



Thomas A. Gottschalk  
Of Counsel

PepsiCo, Inc.



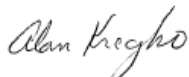
Larry D. Thompson  
Sr. Vice President Govt Affairs, General Counsel & Secretary

State Farm Insurance Cos.



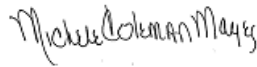
Jeffrey W. Jackson  
Senior Vice President & General Counsel

The Hartford




Alan Kreczko  
Executive Vice President & General Counsel

Allstate Insurance Company



Michele Coleman Mayes  
Sr. Vice President & General Counsel

Ford Motor Company



David G. Leitch  
Group Vice President and General Counsel

Johnson & Johnson



Russell C. Deyo  
Vice President & General counsel

Microsoft Corporation



Brad Smith  
Sr. Vice President, General Counsel & Corporate Secretary

Shell Oil Company



William Lowrey  
Sr. Vice President, General Counsel & Corporate Secretary

The Dow Chemical Company



Charles J. Kalil  
Executive Vice President, General Counsel & Corporate Secretary

**APPENDIX 1-A**

**Litigation Cost Survey  
of Major Companies**

General Counsel Response Form

**Searle Civil Justice Institute**

**LITIGATION COST SURVEY**

**GENERAL COUNSEL RESPONSE FORM**

TO: SEARLE CIVIL JUSTICE INSTITUTE

FAX TO: 312-503-1800\*

FROM: [MAIL MERGED NAME OF GC]  
[Mail merged name of company]

---

\_\_\_\_\_ [Company] agrees to participate in the Litigation Cost Data Survey and to devote the resources necessary to complete the survey as accurately as reasonably possible. I understand that the survey must be completed by February 15, 2010.

\_\_\_\_\_ I regret that [Company] cannot participate in the survey. Explanation for not participating:

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I have designated the following individual to be responsible for overseeing our completion of the survey:

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

e-mail: \_\_\_\_\_

\* As an alternative to replying via fax, please feel free to e-mail the requested information or a scanned response form to: [searlelitigationsurvey@law.northwestern.edu](mailto:searlelitigationsurvey@law.northwestern.edu)

For questions about completing the survey, please call the Searle Civil Justice Institute Litigation Survey hotline at 312-503-3854.

## **APPENDIX 1-A**

# **Litigation Cost Survey of Major Companies**

Email Template





Your unique password (which is case sensitive) is: **XXXXXXXX**

If you have any questions about the survey, you can call (312-503-3854) or email the Searle Center at [searlelitigationsurvey@law.northwestern.edu](mailto:searlelitigationsurvey@law.northwestern.edu) for assistance. For your convenience, the support phone number and email address are also posted on the lower-left of every survey page.

The deadline for completion of the Litigation Cost Survey is February 15, 2010.

Thank you for your participation in this important project.

Tom

**Thomas O. Jukam, Ph.D.**  
**President**  
**AustinTrends**  
**7101 Highway 71 West - Suite 213**  
**Austin, Texas 78735**  
**Office: 512-288-8501**  
**Cell: 512-626-3343**  
**Fax: 512-288-8502**

**APPENDIX 1-A**

**Litigation Cost Survey  
of Major Companies**

Original Survey

## **Searle Civil Justice Institute**

# **LITIGATION COST SURVEY**

Litigation Cost Data are collected for the sole purpose of reporting aggregate data to the Committee on Rules and Practice of the Judicial Conference of the United States. Data are collected in cooperation with U.S. Chamber Institute for Legal Reform, Civil Justice Reform Group, and Lawyers for Civil Justice.

**CONFIDENTIALITY IS PARAMOUNT:** All data will be collected through a blind on-line submission to a secure website. The Searle Civil Justice Institute is developing the secure website with the assistance of a survey research company that has extensive experience with collecting, analyzing, and managing extremely confidential survey data used in litigation and other sensitive contexts. The online survey software system used in this survey employs a security system that prevents the discovery and compromising of sensitive data. This survey software system has been used by government agencies and hundreds of universities. This process will protect the identity of the submitting company as well as maintain confidentiality of individual company data. To be clear, submitted data will not be traceable back to the submitting company. Individual company data will not be released or made public in any form.

This copy of the survey is provided as guidance for your data collection team prior to the availability of the on-line instrument. The on-line survey instrument will be e-mailed to the designated point person by December 15, 2009.

**DEADLINE:** Data must be submitted by February 15, 2010

### **Instructions**

The Survey has five parts:

1. Descriptive Information
2. Long-Term Litigation Cost Trends (*Excluding Judgments and Settlements*)
3. U.S. Legal Transaction Costs v. Non-U.S. Costs (2004-2008)
4. Aggregate Data for “Major” Cases Closed (2004-2008) ( Litigation Costs > \$250k)
5. Document Discovery (2004-2008): Individual “Major” Cases (Litigation Costs > \$250k)

Please respond as thoroughly as possible to each and every question. In limited instances, the survey asks for a reasoned estimate if hard data are not available. The survey attempts to restrict such estimation to those circumstances in which companies are not likely to be able to segregate or reproduce hard data due to the form in which most companies maintain litigation cost data, but where there is sufficient knowledge and experience to be able to make a reasoned estimate. If your answer is an estimate, please identify the estimate by checking the box in the on-line survey instrument. If you cannot respond to a query for all issues or all years, please respond to those portions and for those years for which you do have adequate data. Blank cells should be populated with “N/A.”

### **Questions**

Please call the Searle Center at 312-503-3854 if you have any questions regarding the survey.

### **Submission Instructions**

Detailed submission instructions will be provided with the on-line survey.

**PART 1: Descriptive Information**

What is your predominate industry? [List of industries on website; include conglomerate as a possible answer.]

Please indicate where your company falls in the Fortune 200 by quartile:

[[link](#) to Fortune for reference; click on first, second, third, or fourth quartile or not in Fortune 200]

**PART 2: Long-Term Litigation Cost Trends (*Excluding Judgments and Settlements*):**

For each year 2000 through 2008 for which you have reasonably reliable cost data:

- a. Total U.S. Outside Litigation Costs (defined as all outside litigation-related costs such as counsel fees, experts, document production, deposition transcripts, travel, investigation, etc.);
- b. Total U.S. In-House Litigation Costs; and
- c. Total combined Outside and In-House Litigation Costs as a percentage of U.S. Revenues

Year	U.S. Outside Litigation Costs	U.S. In-House Litigation Costs	Combined Outside and In-House Litigation Costs as a Percentage of U.S. Revenue
2000			
2001			
2002			
2003			
2004			
2005			
2006			
2007			
2008			

**PART 3: U.S. Legal Transaction Costs v. Non-U.S. Costs (2004-2008)**

Including all global parents, subsidiaries, and affiliated entities:

- a. U.S. Litigation Costs as a Percentage of U.S. Revenues; and
- b. Non-U.S. Litigation Costs as a Percentage of Non-U.S. Revenues

	% = U.S. Litigation Cost./U.S. Revenues	% = Non-U.S. Lit. Costs/Non-U.S. Revenues
2004		
2005		
2006		
2007		
2008		

**PART 4: Aggregate Data for “Major” Cases Closed (2004-2008) (Litigation Costs > \$250k)**

This Part concerns MAJOR CASES CLOSED per year. [“Major” cases are defined as closed cases in which outside litigation transaction costs (outside counsel fees, outside experts, outside expenses, outside document production costs, depositions, etc., NOT including settlement or judgment amounts) exceeded \$250,000.] The cost data requested for a closed case in a particular year includes all litigation costs devoted to the case, regardless of the year in which the costs were incurred.

The average total amount spent per case in outside litigation transaction costs (EXCLUDING settlement or judgment amounts) each year for the following [[hyperlink](#): (please note that “Average” in this context means the total outside litigation transaction costs [as defined above] from the start of the case for all major cases closed during the year divided by the number of major cases closed during the year, for each type of cost listed below, and “median” means the value in the middle position in a list of values that is arranged in ascending or descending order)]:

- a. Average and Median Outside Legal Fees per case;
- b. Average Discovery Costs per Case (if a dollar figure is not reasonably available from hard data, please provide your best estimate and indicate that it is an estimate);
- c. Average Document Discovery Costs per Case (including location, retrieval, identification, privilege review, reproduction, log creation, production, and disputes related thereto, etc., including e-discovery) (provide an estimate if a hard number is not reasonably available and indicate such is an estimate);

	Number of Major Cases Closed	Average Outside Legal Fees	Median Outside Legal Fees	Average Discovery Costs	Average Document Discovery Costs
2004					
2005					
2006					
2007					
2008					

Part 4 is continued on the next page.

- d. Average and median amount paid or received in settlement or judgment, INCLUDING cases in which no amount was paid or received (including in the denominator all cases that were settled or resulted in judgment, regardless of whether any amount was paid or received);
- e. Average and median amount paid or received in settlement or judgment, EXCLUDING those cases in which no settlement or judgment amount was paid or received (including in the denominator only those cases in which some amount was paid or received in settlement or judgment);

	ALL MAJOR CASES	ALL MAJOR CASES	ALL MAJOR CASES	MAJOR CASES WITH SETTLEMENT OR JUDGMENT	MAJOR CASES WITH SETTLEMENT OR JUDGMENT	MAJOR CASES WITH SETTLEMENT OR JUDGMENT
	# cases	Average Settlement or Judgment	Median Settlement or Judgment	# cases	Average Settlement or Judgment	Median Settlement or Judgment
2004						
2005						
2006						
2007						
2008						

- f. Number of major cases resolved on dispositive motion;
- g. For major cases closed each year, approximate average number of months from filing to disposition;
- h. For major cases closed each year, estimated number of cases in which there was an e-discovery dispute;
- i. For major cases closed each year, estimated number of cases in which a partial or fully dispositive motion remained unresolved for 6 months or more; and
- j. For major cases closed each year, number of cases in which costs incurred for e-discovery were shifted from one party to another and, if possible, the number of such cases in which costs were required to be paid by a non-corporate party.

	# Resolved Dispositive Motion	Avg. Months Filing to Disposition	# with e-discovery dispute	Unresolved Motion for > 6 months	e-discovery cost shifting	e-discovery cost shifting to non-corporate party
2004						
2005						
2006						
2007						
2008						

**PART 5: Document Discovery (2004-2008): Individual “Major” Cases (Litigation Costs > \$250k)**

Categories of Cases: (1) cases that went to trial (by year of first day of trial) and (2) cases that were resolved shortly before trial or reached the stage of a final pretrial order being entered that required listing or identification of exhibits (by year of date of resolution).

By year that a specific case went to trial or was settled, please provide the following information for every major case:

- a. Discovery Pages: Number of pages of documents and electronic page equivalents\*\* that you produced in discovery; and
- b. Exhibit Pages: Number of pages of documents or electronic page equivalents\*\* that were offered as exhibits for cases that went to trial or on the exhibit list for cases that were resolved shortly before trial.

**MAJOR CASES THAT WENT TO TRIAL**

	Total Litigation Costs (excluding settlement and judgments)	Discovery Pages by Case	Exhibit Pages by Case
2004			
NEW ROW FOR EACH 2004 CASE			
2005			
NEW ROW FOR EACH 2005 CASE			
2006			
NEW ROW FOR EACH 2006 CASE			
2007			
NEW ROW FOR EACH 2007 CASE			
2008			
NEW ROW FOR EACH 2008 CASE			

**MAJOR CASES RESOLVED SHORTLY BEFORE TRIAL**

	Total Litigation Costs (excluding settlement and judgments)	Discovery Pages by Case	Exhibit Pages by Case
2004			
NEW ROW FOR EACH 2004 CASE			
2005			
NEW ROW FOR EACH 2005 CASE			
2006			
NEW ROW FOR EACH 2006 CASE			
2007			
NEW ROW FOR EACH 2007 CASE			
2008			
NEW ROW FOR EACH 2008 CASE			

\* “Major” cases are defined as closed cases in which outside litigation transaction costs (outside counsel fees, outside experts, outside expenses, outside document production costs, depositions, etc., NOT including settlement or judgment amounts) exceeded \$250,000.

\*\* For documents in electronic form, if the specific number of pages is not reasonably available, please provide the electronic page equivalent by using a conversion rate of 1 gigabyte = 12,000 documents = 60,000 pages [or 5 pages per document]