

LJN

EXCERPTS
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**National Institute of Corrections
Large Jail Network**

LJN Exchange

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Inmate Litigation: Results of a National Survey

Over the summer of 2001, I conducted a survey of jail and prison systems about experiences with civil litigation brought by inmates. I recently incorporated some of the results of that survey in a comprehensive look at non-class action federal civil rights litigation brought by inmates (see Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555 (2003), available at <http://www.law.harvard.edu/faculty/schlanger/>). Here I report in a more focused way on those results. (There is not room here for comprehensive analysis, but I hope to publish a fuller discussion in the fall. The survey instrument itself, along with other relevant information, is available at the same website.)

I distributed the survey to all 50 state prison systems and all the members of the Large Jail Network. I received responses from over half the agencies in each category, an acceptable if not stellar response rate. The results reported here are for 27 state prison systems and 44 large jails (defined, for my purposes, as jails with an inmate count over 1,000 at midyear 1999). The sample demonstrates good regional coverage and no major skew as far as size of inmate population. It's worth noting, however, that the prison surveys were completed largely by lawyers, and the jail surveys largely by high-ranking corrections officials (superintendents, sheriffs, and their second and third in commands, judging by the job titles). This may be important for proper interpretation of the results.

Amount of Litigation

One of the key questions about inmate litigation is just how often correctional agencies and their staff are sued. The answer, it turns out (unsurprisingly) varies by agency—but it varies even more by the type of agency: jail or prison. That is, although the surveys evidence a good deal of variation among large jails and among prisons, there is even more difference between the categories.

by
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The survey asked, “About how many individual inmate lawsuits . . . are filed against your jurisdiction/facility in a year?” While nearly all the prison responses reported that their prison systems become defendants in inmate lawsuits dozens, even hundreds of times each year, jail surveys reported far less litigation. Nearly 90% of the large jails that reported their number of inmate lawsuits per year reported fewer than 50. Part of the explanation is that jails are smaller than prison systems, but even controlling for size, jails are sued less than prisons. I used the answers and each agency’s average daily population as reported to the Bureau of Justice Statistics to compute a litigation rate—annual lawsuits per 1,000 inmates—for each survey participant. Among the prison sample, the average annual litigation rate was 27 per 1000 inmates, but for large jails the corresponding figure was just 7. Table 1, below, more fully sets out the distribution of litigation rates across the responding agencies. The last column of Table 1 demonstrates that the jails with the highest rate of litigation per inmate reported about the same amount of litigation as the median prison system.

	10th percentile	25th percentile	50th percentile	75th percentile	90th percentile
Large jails (n = 44)	2	3	5	9	18
Prisons (n = 27)	6	12	19	38	71

Interestingly, the results from a similar question about class actions (which covered 3 years, instead of 1 year) suggest that class actions follow a very different pattern. The median class action litigation rate—that is, the number of class actions per inmate per year—reported by prison agencies was under 0.5 per 10,000 inmates; for large jails, it was nearly twice as high.

Topics of Litigation

Individual and class action litigation. The survey asked participants to check off each topic about which their agencies had been sued over the past 3 years. The reported topics of lawsuits will not be terribly surprising to any experienced observer. In Table 2, page 3, each column sets out the percentage of facilities that reported at least one individual or class action lawsuit on a given topic, followed by the rank of that topic’s incidence in that column. (The topics are listed in their rank order for individual actions against large jails; blanks indicate that no survey response listed the topic.)

While there are no major surprises in the table, the first-place ranking of medical care lawsuits in each column is important. It’s also worth pointing out that among large jails, crowding and suicide cases rank only seventh—somewhat lower than I, at least, would have predicted. Also, the differences between jails and prisons are notable. In particular, in non-class action cases, claims about religion rank far higher in prisons than in large jails (first, compared to twelfth), as do claims about disciplinary procedures (fourth, compared to

**Table 2. Litigation topics—individual and class action lawsuits.
Percentage and (rank) of responding agencies with any litigation on topic.**

	Large Jail		Prison	
	Individual (n = 44)	Class action (n = 13)	Individual (n = 27)	Class action (n = 14)
Medical care	91% (1)	14% (1)	89% (1)	26% (1)
Use of force	80% (2)		89% (1)	19% (3)
Personal injury	70% (3)		81% (4)	
Loss or damage to property	66% (4)		81% (4)	
Inmate-on-inmate violence	64% (5)	5% (4)	63% (12)	4% (17)
Law library services	41% (6)		78% (8)	11% (6)
Crowding	36% (7)	7% (3)	52% (16)	22% (2)
Suicide prevention	36% (7)		33% (22)	11% (6)
Sanitation/living conditions	32% (9)		59% (13)	4% (17)
Food services/nutrition/diet	30% (10)	2% (6)	78% (8)	
Disciplinary procedures	27% (11)	2% (6)	81% (4)	7% (13)
Sex (w/officer)	25% (12)	2% (6)	56% (15)	7% (13)
Religious programs or policies	25% (12)		89% (1)	15% (4)
Other	25% (12)		33% (22)	
Search policies	20% (15)	9% (2)	37% (20)	4% (17)
Disciplinary segregation	20% (15)		48% (17)	11% (6)
Visiting, mail, phone	18% (17)	2% (6)	81% (4)	4% (17)
Totality of conditions	18% (17)		48% (17)	11% (6)
Administrative segregation	16% (19)		67% (10)	11% (6)
Security staffing	11% (20)	5% (4)	26% (25)	11% (6)
Recreation	11% (20)		37% (20)	7% (13)
Access to lawyers	11% (20)		44% (19)	11% (6)
Race discrimination	9% (23)	2% (6)	67% (10)	4% (17)
Protective custody	9% (23)		59% (13)	7% (13)
Counseling	9% (23)		33% (22)	15% (4)
Other library services	5% (26)	2% (6)	7% (28)	
Gender equity	2% (27)		22% (26)	4% (17)
Fire safety			11% (27)	

eleventh), visiting, mail, and phone privileges (fourth, compared to seventeenth), administrative segregation (tenth, compared to nineteenth), race discrimination (tenth, compared to twenty-third), and protective custody (thirteenth, compared to twenty-third). All of these differences make sense in light of the longer period of time inmates spend in prisons. Note that because prisons are sued more often, even the low-ranking subjects are still fairly common as topics for lawsuits among prison systems, though not among large jails. As for the class-action litigation, the surveys reported many fewer such cases, but with topics that recur in similar patterns, except that crowding ranks noticeably higher.

Table 3. Court order topics—percentage of agencies reporting each court order topic and (rank)

(Percentages based on total number of agencies reporting any court order)

	Large Jail		Prison	
	Current orders, as of 2001, (n = 19)	Lifted orders, 1996 - 2001 (n = 9)	Current orders, as of 2001, (n = 18)	Lifted orders, 1996 - 2001 (n = 20)
Crowding	74% (1)	67% (1)	44% (3)	40% (3)
Medical care	68% (2)	22% (2)	56% (1)	65% (1)
Disciplinary procedures	37% (3)		33% (5)	30% (8)
Security staffing	37% (3)			20% (12)
Law library services	32% (5)	11% (3)	44% (3)	20% (12)
Use of force	32% (5)		22% (9)	20% (12)
Administrative segregation	26% (7)		28% (7)	30% (8)
Sanitation/living conditions	26% (7)	11% (3)	22% (9)	40% (3)
Food services/nutrition/diet	26% (7)	11% (3)	11% (17)	35% (5)
Recreation	26% (7)	11% (3)	11% (17)	25% (10)
Religious programs or policies	21% (11)		50% (2)	20% (12)
Visiting, mail, phone	21% (11)		33% (5)	35% (5)
Disciplinary segregation	21% (11)		17% (12)	20% (12)
Counseling	21% (11)	11% (3)	17% (12)	20% (12)
Suicide prevention	21% (11)		6% (21)	15% (19)
Access to lawyers	16% (16)		22% (9)	20% (12)
Search policies	16% (16)		17% (12)	10% (23)
Totality of conditions	16% (16)	11% (3)	17% (12)	45% (2)
Sex (w/officer)	16% (16)		11% (17)	5% (25)
Protective custody	16% (16)		6% (21)	20% (12)
Other	11% (21)		28% (7)	
Inmate-on-inmate violence	11% (21)			15% (19)
Fire safety	5% (23)		17% (12)	25% (10)
Other library services	5% (23)	11% (3)	6% (21)	15% (19)
Loss or damage to property	5% (23)			10% (23)
Race discrimination	5% (23)			5% (25)
Gender equity			11% (17)	15% (19)
Personal injury				5% (25)

Court order litigation. At some point since the 1970s many—even most—corrections agencies have been regulated by the terms of a court order. The survey results suggest that the topics of these orders are somewhat different than the topics of lawsuits more generally. Table 3 shows topics of court orders, dividing them into orders still operative at the time of the survey and those lifted between 1996 and 2001. It suggests that among both jail and prisons, crowding in particular is far more common as a topic of court orders than of non-order litigation (that is, crowding ranks far higher in this table than in Table 2). Disciplinary procedures and security staffing are also more prominent in Table 3 than in Table 2.

Litigation Outcomes

Individual lawsuits. The survey asked whether agencies had, over the past 3 years, settled any inmate case “for more than token damages,” and whether they had lost any trials in an inmate case in the same period of time. Again, experiences varied.

	A. No settlements		B. Settlements	
	1. No trial losses	2. Trial losses	1. No trial losses	2. Trial losses
Large jails (n = 44)	42%	8%	44%	6%
Prisons (n = 27)	25%	4%	17%	54%

Table 4 sets out the full results. The agencies grouped in the first two columns (headed “A. No Settlements”) reported that over the prior 3 years, they had not settled even a single individual inmate case. Those in the first column (headed “1. No trial losses”) had also not lost any cases at trial, while those in the second column had lost at least one case at trial. The last two columns (headed “B. Settlements”) are set up similarly and complete the picture.

The difference between the jail and prison samples appears very large. First, more of the prison systems (71%) than the large jails (50%) reported settling cases. This may simply be a function of the greater amount of litigation faced by prison agencies, already discussed. More dramatic, however, is the trial-loss differential between large jails and prisons: 58% of prison systems reported losing at least one trial (see A2 + B2, or 4% + 54%), compared to just 14% of jails (8% + 6%). It seems doubtful that the explanation for this differential is that

	Large jails (n = 32)	Prisons (n = 31)
Medical care	11	16
Use of force	11	13
Inmate-on-inmate violence	6	9
Sex (with officer or staff)	6	8
Personal injury	4	12
Overdetention	4	1
Suicide	3	4
Loss or damage to property	3	3
False arrest/imprisonment	3	2
Disciplinary procedures	2	4
Search policies	0	3

jails win their cases more often than prisons—rather, I suspect that jails are more reluctant to go to trial at all. Similarly, the fact that 44% of large jails have settled cases without experiencing any trial losses at all supports the reputed disinclination of jail administrators/ lawyers to take cases to trial.

Table 5, page 5, summarizes the topics of the settlements and trial losses; it lists each topic that appeared more than once in either the jail or prison samples.

As far as the amount of money paid out in settlements, the survey respondents provided less information. Of 27 prison systems, six (6) reported no non-token losses or settlements; only 11 additional systems provided any information on the amount of damages. Of 44 large jails, 18 reported no non-token losses or settlements; only 14 additional agencies provided any information on the amount of damages. Each group had one outlier agency. (A very large prison system reported about \$30 million in damages paid out over 3 years, and a very large jail system reported about \$7 million in damages in the same period.) Excluding those outliers, the experience reported even by those who characterized their losses as “non-token” was of more modest damages, with large jails experiencing much larger annual losses than prisons. Table 6 provides details:

	10th percentile	25th percentile	50th percentile	75th percentile	90th percentile
Large jails (n = 14)	\$10,000	\$25,000	\$66,667	\$250,000	\$633,333
Prisons (n = 11)	\$4,703	\$12,417	\$35,508	\$87,657	\$130,063

Class actions. The results for similar questions about class actions are also interesting. Most strikingly, all but one jail that participated in class action litigation over 3 years had also settled at least one class action case (though none had experienced a class action trial loss), whereas fewer than half the prison systems that participated in class action litigation either settled or lost a class action case. This suggests that although class actions are less common among jails, they may be more consequential.

The results also confirmed that the stakes in class action litigation are quite high compared to those of individual cases. Those few jurisdictions that reported the amounts they paid out for damages or attorneys’ fees in class action settlements listed dollar amounts in the hundreds of thousands or even millions.

	Jurisdictions with court orders	Jurisdictions with recent terminations of court orders
Large jails (n = 44)	41%	15%
Prison (n = 27)	67%	73%

Court orders. The survey asked, “Does your facility/jurisdiction currently have any court orders (including consent decrees or other settlement agreements) governing any aspect of operations?” and “Has your facility/jurisdiction had any court orders governing any aspect of operations lifted . . . since 1996?” Court orders turned out to be very common, as the first column of Table 7, page 6, demonstrates, and more so among prison systems—41% of jail responses and 67% of prison responses reported current court orders as of 2001. (Note,

Table 8. Litigation-related policy changes described by survey respondents	
Individual litigation policy changes	
Large jails	Prisons
<ul style="list-style-type: none"> ■ Revised use of force policy and hardened disciplinary penalties for excessive or inappropriate force. ■ Improved access to law library; improved recreation area. ■ Examined release of inmates who are on psychiatric medications. ■ Changed administrative system to remove final authority from staff. Grievances may be forwarded to the county solicitor, who determines if civil rights were violated. If so, matter is referred to the complaint review board and/or county prison board. ■ Changed use of force policy. ■ Changed use of force reporting and suicide policy. ■ Changed transportation rules and policy. ■ Made adjustments in medical services. ■ Changed medical practices. Modified use of force, discipline, search, and other operational policies due to court rulings from other jurisdictions. ■ Changed the way in which inmate property is tracked. ■ Changed medical/mental health intake screening form and practices; provided access to TDD phones. ■ Changed critical incident reporting of events, use of videotaping incident, and use of restraint chair. ■ Application of disciplinary sanction for restitution of damaged property. ■ Changed strip search requirements. ■ Added a general counsel position at the directors' level. 	<ul style="list-style-type: none"> ■ Allowed women inmates to live in a previously all-male minimum security facility. ■ Housed inmates in county jails; state supreme court wants faster movements into prisons. ■ Changed policy and practice on suicide prevention. ■ Addressed religious issues. ■ Changed policy on collection of urine samples. ■ Changed strip search policy. ■ Modified property policy. ■ Removed weight bars from institutions. ■ Modified the disciplinary process. ■ Changed policies on religious practices, e.g., providing a religious exemption to the rule that male inmates must have short hair. ■ Instigated a liability response unit within Legal Affairs to conduct litigation management of approx. 2,400 pending inmate civil lawsuits. ■ Introduced Risk Management component. ■ Changed bulk rate mail policy. ■ Modified medical policies. ■ Changed policies on property retention and destruction.
Class action policy changes	
Large jails	Prisons
<ul style="list-style-type: none"> ■ Revamped medical policies and procedures. ■ Changed medical care vendors; changed procedures and practices to include increasing available HIV medications in the pharmacy, increasing testing procedures for STDs, and changing dental practices. ■ Changes involved a population cap and medical services. ■ Changes involved sexual harassment and hearing impaired inmates (ADA). ■ Modified search policies; changed demographic percentages in housing units. ■ Changed policy re: use of restraint chair. ■ Changed strip search procedures; tightened up on times for release. ■ Began providing public school education in our jail. ■ Made substantial changes in staffing and method of inmate supervision. 	<ul style="list-style-type: none"> ■ Improved provision of mental health services for inmates. ■ Changes involved forced medication; double bunking; medical staffing; and mental health care. ■ Changed our publications procedure. ■ Changes involved contract medical services, policies for AIDS/HIV, and religious programming to provide contract Muslim services. ■ Reduced dependency on prison law libraries; fewer materials available, and inmates have improved access to attorneys. Improved barbershop sanitation practices. ■ Changed use of the Inmate Calling System based on a temporary restraining order. The class in this state court class action was decertified 11 months later, but the changes remain in place. ■ Modified female programs and protective segregation policy.

however, that because reported prison court orders may well apply to just one of many prisons in the system, this distinction may be somewhat spurious.) What is more interesting is the second column, which demonstrates that the prisons were far more likely than jails to get orders lifted—73% of prison systems and just 15% of jails had seen court orders closed out in the preceding 5 years.

Impact of Inmate Litigation

Operational impact. The survey asked questions about the operational impact of litigation, directing the questions at individual (non-class action) litigation, class action litigation, and court orders.

For individual and class actions, the questions were free-form: “Has your department changed any policies/procedures/practices as a result of individual inmate [and class action] lawsuits?” About 70% of survey respondents, for both large jails and prisons, answered yes with respect to individual lawsuits; of those who reported experience with class action litigation, a similar proportion (slightly lower for jails) also answered yes. Many provided details, which show that the changes range from small to quite significant.

Table 8, page 7, paraphrases the changes described by survey respondents. In both jails and prisons, they can be categorized into three types. First are changes relating to the management of the litigation itself—litigation staffing by a new General Counsel, or risk management section; ensuring that evidence is developed by videotape, and so on. Second are general managerial changes, designed to improve the administration’s supervision of line staff—augmented reporting requirements, for example. By far the most common changes reported are of a third conceptual type: substantive, operational changes. Medical and mental health care are the most common topics in this category, but use of force, strip searches, and a few other issues make repeat appearances as well.

The survey also asked about the operational impact of court orders, both current and recently lifted. Responses are also reported in Table 8. The survey separated out several possible results—hiring additional personnel, building new housing areas, reducing population, altering programming, or some other kind of change. A majority of both responding jails and prisons with court orders reported hiring additional personnel as a result—both security and medical care were the common augmented staffing areas. New housing and population reduction were even more prevalent than staffing increases among reporting jails, but less so among reporting prisons. (Recall, however, that prisons were more likely to have court orders in the first place.) A majority of prisons with court orders (but a much smaller portion of jails) reported altering their programming as a result.

Overall impact/burden. The survey asked two initial questions about the burdens imposed by individual inmate litigation and class action litigation. The first question asked, “How important is your department’s interest in avoiding/managing individual inmate [or class action] lawsuits for policy development or other planning?” The second question asked, “How burdensome are

individual [or class action] lawsuits for your department?” The answers, summarized in Table 9, suggest that although litigation is of real importance to both jail and prison agencies as they develop policy, the burden the litigation poses is definitely manageable.

Comparing jails and prisons, jail officials apparently tend to attach greater importance to the litigation and find dealing with it a more significant burden. (Recall, moreover, that the surveys in the prison sample, but not those in the jail sample, were filled out by lawyers.) The class action responses, though interesting, should be interpreted with caution, because so few of the survey-takers answered the questions.

Table 9. Importance and burden of litigation—percentage of survey respondents and (number)

		Importance		Burden	
		Large jails	Prisons	Large jails	Prisons
Individual litigation	extremely	52% (12)	28% (5)	11% (2)	5% (1)
	quite	30% (7)	28% (5)	50% (9)	27% (6)
	somewhat	17% (4)	44% (8)	33% (6)	59% (13)
	not very	0% (0)	0% (0)	6% (1)	9% (2)
	not at all	0% (0)	0% (0)	0% (0)	0% (0)
Class action litigation	extremely	53% (21)	18% (3)	17% (3)	33% (5)
	quite	25% (10)	41% (7)	11% (2)	13% (2)
	somewhat	13% (5)	29% (5)	28% (5)	27% (4)
	not very	5% (2)	6% (1)	17% (3)	13% (2)
	not at all	5% (2)	6% (1)	28% (5)	13% (2)

The survey also asked respondents to rate, on a five-point scale, the impact of their current and recently terminated court orders on inmate behavior, inmate health, physical plant, staff morale, and overall functioning of their agency (1 being the most negative rating and 5 the most positive). Results for this question appear in Table 10:

Table 10. Impact of court orders on agency

	Large jails			Prison		
	No impact	Impact rating		No impact	Impact rating	
	n	n	median	n	n	median
Inmate behavior	5	11	3.7 (4)	10	10	3.5 (3)
Inmate health	3	14	4.0 (4)	5	16	3.9 (4)
Physical plant	4	14	3.9 (4)	5	16	3.8 (4)
Staff morale	2	14	2.9 (3)	5	15	3.5 (4)
Overall functioning	2	15	3.8 (4)	3	18	3.8 (4)

Survey-takers reported that court orders were largely beneficial to their agencies' mission. Nearly all the ratings were 3s (the midpoint) or above—only one respondent rated any of the impacts of court orders as 1, the most negative, and very few gave even 2 ratings. The one exception is on the ratings on the impact of court orders on staff morale. Three of 15 jail respondents and 5 of 14 prison respondents gave court orders a 2 rating on this topic.

Effects of the Prison Litigation Reform Act

Individual and class action litigation. The survey asked about the impact of the Prison Litigation Reform Act (PLRA) on the total number of lawsuits (individual and class action); the proportions of those lawsuits that are frivolous; and the burden created by each type of lawsuit. The results were strikingly different for jails and prisons, with jail survey-takers far more likely to report no impact. Table 11 presents the results. (Because the prison but not the jail surveys were frequently filled out by lawyers, it is possible that these results are an artifact of lawyers' greater sensitivity to the PLRA's litigation impact, rather than any deep difference between jails and prisons.)

	Large jails n (% of respondents)	Prisons n (% of respondents)
No impact on individual lawsuits	21 (48%)	2 (7%)
No impact on class actions	32 (73%)	6 (22%)

Among those survey-takers who did report that the PLRA had changed their experience, nearly all reported a decrease in number, frivolous proportion, and burden. The most interesting aspect of these results is that more survey-takers noticed a decline in the number of lawsuits and the proportion of frivolous cases than reported a decline in the burden lawsuits posed.

	Termination sought, case is pending	Termination sought, rejected by court	Termination not sought
Large jails (n = 17)	18%	12%	71%
Prisons (n = 17)	59%	0%	41%

Court orders. It's clear that the PLRA has opened up opportunities for agencies to end the operation of court orders. Of the 18 prison surveys that reported the legal process by which court orders had been lifted since 1996, two-thirds reported that “termination [was] sought and granted under the PLRA.” The

remaining third reported that the orders had expired on their own terms or were terminated because their agencies had been in substantial compliance. Only six jail surveys answered this question, but their answers were similar: five of the six reported that termination was under the PLRA; the remaining one reported termination due to compliance.

Nonetheless, as Table 7 demonstrates, a good many orders remain in operation. The survey results provide some insight into why. The survey asked of each respondent who had reported one or more current order, “Has your facility/jurisdiction recently sought termination of the [current] orders, under the Prison Litigation Reform Act?” As one might predict from Table 7, substantially more of the jail respondents reported that their agencies had decided to forego opportunities to get court orders lifted.

Table 12, page 10, presents fuller data. The survey asked respondents whose jurisdictions had decided not to seek termination to explain why. The answers sort into three types: (1) the orders are useful to the agency, because they help to control population or help prevent individual litigation; (2) the orders are not very onerous to the agency; (3) the PLRA’s termination provisions are not applicable, either because the order is new, or (one can infer) because it is a state court, state law order not governed by the PLRA. The third category is applicable to several jail responses, but no prison responses.

Litigation’s Importance to Corrections

Since passage of the PLRA, the federal court civil rights inmate docket has shrunk by 40%. But the results of this survey establish that litigation remains extremely important to correctional administrators. It is clear that agencies continue to respond to the fact and prospect of damage and injunctive actions by seeking to avoid lawsuits, by hiring various kinds of staff to respond to litigation, and by reforming policy and supervision in areas that turn out to pose litigation risks.

On the details about how inmate litigation works—its prevalence, topics, outcomes, and impact—different observers will be struck by different aspects of the findings. For me, the most interesting results are:

- Problems in medical care are the preeminent topic of litigation and court orders, for both jails and prisons.
- Jails and prisons report quite different trial experiences: only 14% of large jails reported trial losses, compared to 58% of prisons.
- Both jails and prison respondents report a fairly low amount of damages paid annually, but jails report damage levels notably higher than those in the prison sample.
- Court orders continue to be very prevalent, and prisons are far more likely than jails to seek termination of the orders.

- Both jail and prison respondents rated both individual and class action litigation high in importance to their agencies.
- Jail respondents were more likely to consider individual litigation burdensome, but less likely to consider class action litigation burdensome.
- Both jail and prison respondents reported that court orders were largely beneficial to their agencies' mission.
- Nearly half of the jail respondents, but hardly any of the prison respondents, reported no impact of the PLRA on the number, frivolous proportion, and burden posed by individual and class action lawsuits. ■

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