

# WORKING P A P E R

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## How Transparent are Class Action Outcomes?

### Empirical Research on the Availability of Class Action Claims Data

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## **PREFACE**

Class actions are among the most public forms of civil litigation, especially because a judge must review and approve a proposed class settlement following public notice and a public hearing. Ironically, however, a veil of secrecy can fall over class action litigation the moment the judge signs off on the agreement and ultimately, little information is available about how many class members actually received compensation and to what degree. This lack of transparency is especially troubling because of evidence that aggregate payments in class settlements sometimes constitute a mere fraction of the compensation fund extolled by the parties at the time of settlement review.

This paper examines the extent to which claiming data are available and recommends ways to increase transparency in this area. We reviewed the official court files in a sample of 31 class action settlements and we also made direct inquiries to the judges, lawyers, and settlement administrators in another set of 57 cases. Searching through the case files and communicating with the participants, we were able to gain access to data in fewer than one of five closed cases. Despite the significant time and effort we put into the task, the final outcomes of four of five class action cases were beyond our discovery. It is not that the data are non-existent - claims administrators or parties certainly have them - it is, rather, that they are secreted away. The outcomes of publicly approved settlements lie locked in private files.

We argue that this is a problem for three reasons: because the case outcomes might not be all that they purport to be; because the lessons that they could teach - for example, about which approaches work best - are lost to secrecy; and because the public record is unnecessarily incomplete and public access unnecessarily thwarted. We end the paper by proposing a set of solutions, including requiring parties to report back to the court on the final claiming data, publicizing this data, and creating a central repository for it.

**HOW TRANSPARENT ARE CLASS ACTION OUTCOMES?: EMPIRICAL RESEARCH ON THE  
AVAILABILITY OF CLASS ACTION CLAIMS DATA <sup>1</sup>**

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**INTRODUCTION**

Class actions are among the most public forms of civil litigation. In a class case, a representative steps forward to litigate on behalf of a group of similarly situated parties, but her capacity to do so must be approved by a public judicial official. The judge must also approve any settlement in a class action case. Before the judge can bless the settlement, the law generally requires that the parties provide public notice to the represented class members, give them an opportunity to object, and then defend their settlement in open court at a fairness hearing. In federal court, the parties must also provide notice of a proposed class action settlement to government officials and those officials are then given time to comment on the terms of the agreement should they desire to do so. Where settlements distribute money to class members, the parties' defense of them often includes representations to the court about the overall size of the class, the total amount of money offered to resolve all claims, and the process by which individual claims can be made. Very few other areas of the civil law provide for such intensive judicial and public scrutiny of a privately negotiated settlement.<sup>4</sup>

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<sup>1</sup> A version of this paper will be included as a chapter in a forthcoming UCLA-RAND book based on the November 2007 conference "Transparency in the Civil Justice System" at UCLA School of Law.

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<sup>4</sup> Generally, parties in civil actions are not required to submit settlement agreements to the court, either for judicial approval or to make the terms of the contract a part of the public record. See, e.g., F.R.C.P. 41(a). Class actions are an exception to this rule. Other prominent exceptions include situations where a party to a settlement agreement is a minor or an incompetent, where certain types of consent decrees affect the rights of third parties or are negotiated between the

Ironically, a veil of secrecy can fall over class action litigation the moment the judge signs off on the agreement. The very last entry in the court's official case file might simply be the order approving the settlement's terms. Only sporadically do judges require public reporting of how the settlement fund was eventually distributed to class members. In some instances, attorneys on both sides have executed non-disclosure agreements, essentially ending all outside inquiry into the resolution of the class action. As a result, little information is available to the public about how many class members actually received compensation and to what degree. This lack of information might be of only academic interest but for the fact that class actions can result in aggregate payments constituting a mere fraction of the compensation fund extolled by the parties at the time of settlement review. By this point, however, the bright light of pre-approval scrutiny has been extinguished and only a handful of individuals ever know what ultimately took place. In short, one of the most transparent and open processes in the civil justice system can collapse into an informational black hole.

The lack of transparency concerning class action distribution rates is troubling because so many fundamental issues turn on what is contained in the missing data: How can class members and government officials make informed responses to proposed notice and claiming programs without some sense of the likely distributional outcome? On what basis are judges approving settlements and awarding fees without knowing the most likely results of their orders? Who ultimately benefits from class cases? Can different forms of notice and different types of distributional programs improve claiming rates? If so, which ones? If compensation programs are unlikely to change, should compensation remain a central feature of class actions or should the deterrent aspects be emphasized instead? If so, how? Despite the importance of these questions, it is unclear whether the data needed to answer them are available to policymakers and the public.

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government and a defendant in an antitrust case, and cases within specialized areas of the civil law such as workers' compensation, bankruptcy, or domestic relations.

This project aimed to examine the extent to which claiming data are available and - as necessary - to recommend ways to increase transparency in this area. Specifically, we sought to find out what types of information are already available about concluded class action settlement distributions; to identify the best sources for such information; and to identify policy options for improving the transparency of class action settlements. To accomplish these goals, we performed two data collections:

- We identified a selected sample of 31 federal class action settlements and then reviewed their official case files to determine what, if any, information about the distribution had been disclosed to the court;
- We made direct inquiries to the judges, lawyers, and settlement administrators associated with 57 class action resolutions, asking these sources to voluntarily provide information about the ultimate outcomes of the benefit distributions.

What we found, quite simply, was virtually nothing: few class action participants responded to our request for data, fewer still provided any; the official case files themselves were similarly sparse. Our two data collection efforts yielded information on fewer than one in five class actions in our sample. The information we were able to glean, however, confirmed that the distribution of benefits to class members in at least some cases fall far short of the ideal, thus underscoring the importance of transparency in this area.

Before describing what we learned in detail, we begin with a brief background on the typical class action settlement approval process and how monetary benefits are distributed. We next discuss the results of previous selected empirical studies that have attempted to gather information on distribution outcomes. In addition, we examine some of the sources available to judges, class members, and outsiders to help guide and inform their evaluations of proposed class settlements. We then describe what we learned through our data collection. Based on the lessons of this effort, we conclude by describing why it is so difficult

to gather settlement information, why it is so important to achieve more transparency in this area, and what can be done to make settlement information available to judges, government officials, watchdog organizations, class members, and the public.

## **BACKGROUND**

### **Class Action Litigation**

A class action lawsuit is a form of representative litigation. In a situation where many similarly situated individuals have suffered a common legal harm, one or several members of the group may step forward and file suit on behalf of the whole group. Class actions are most common in situations involving very small legal claims, as each individual class member in such circumstances does not have sufficient economic incentive to remedy the alleged harm: the costs of filing suit and paying a lawyer will be greater than her recovery. The class action mechanism, coupled with attorney fee provisions, make litigation possible by enabling an attorney to pool the group's claims together into one large case and then take a fee from what is recovered in the aggregate. As a means for combating widespread, small-harm problems, the class action represents a remarkable achievement of the American legal system. At the same time, though, the class action is prone to abuse, particularly by class action attorneys who operate as the class's agents but are largely unmonitored in doing so. Technically, class counsel's work is overseen by a named "class representative" who operates as the group's appointed plaintiff; in fact, however, because of the small stakes involved and the complex nature of the legal system, the class representative exercises little oversight of class counsel. Class action law is therefore a constant battle between reaping the benefits of representative litigation while ensuring that the class's champion remains faithful to the class. It often falls upon the court overseeing a class case to safeguard the class's interests.

### **The Litigation Process**

While class actions are a unique form of adjudication, they are largely disposed of in precisely the same manner as most other civil litigation in the United States: via a negotiated settlement among the

named parties. Many class actions commence in a conventional adversarial posture, with the plaintiffs' complaint being met by a defendant's motion to dismiss; that motion will typically raise a host of procedural and substantive problems with the allegations in the complaint, the plaintiffs' choice of a forum, the bona fides of the named plaintiffs and class counsel, etc. In some, though certainly not all, cases, a class certification motion is made and opposed at the outset of the case, providing the defendant a second opportunity to dispose of it short of settlement. If the plaintiffs are able to survive these sets of motions, some discovery about the merits of the case will follow, though both sets of parties have incentives to truncate the factual development process: plaintiffs' counsel might not want to expend an excessive amount of their own resources or time getting to the inevitable settlement (and collecting their fees) and defendants, of course, have an interest in revealing as little as possible while achieving global peace as quickly as possible. Thus, after some initial squabbling has died down, the class case is ripe for settling. The parties may also enlist the services of a professional mediator to oversee settlement negotiations.

#### **The Settlement Agreement**

A class action settlement agreement typically includes a variety of set pieces: a proposed final class definition; a final definition of all of the causes of action that the class members are relinquishing in return for the money or other benefits the defendant is proffering; the total amount of money that the defendants are offering to resolve all claims of all class members and to cover all associated costs of the litigation (sometimes referred to as the *common fund*); the benefits available to individual class members; the mechanisms by which such compensation will be distributed; the terms of any prohibitions against the defendant from continuing certain practices and policies in the future; the various responsibilities of class counsel and the defendants for paying for the costs of notice and other expenses; and, in some instances, the amount of attorneys' fees and expenses that class counsel will be seeking.

In many common fund cases, class counsel's fees and expenses - as well as the costs of notice and settlement administration - are deducted from the fund before distributing the remainder to class members. In other class action settlements, there is not a common fund per se but rather a promise on the part of the defendants to pay all qualifying claims plus any court-ordered expenses, including what a judge determines to be reasonable attorney's fees. In situations without a formal common fund, the parties may agree to a maximum cap on the defendant's total expenditures or provide information to the court that describes the potential payments the defendant might make for benefits, attorneys' fees, and the like. As such, the maximum cap on expenditures or the assertions made by the parties as to the potential total cost to the defendant essentially constitute the overall "value" of the settlement agreement much like a common fund.

#### **The Settlement Approval Process**

As indicated at the outset of this chapter, a judge must review and approve any agreement reached between the parties in a class action. Approval is often a three-stage process. First, the parties present the settlement to the judge for "preliminary approval." This is a largely perfunctory moment of oversight, meant only to ensure that the judge finds that the settlement is ready to be presented to the class for its approval. Once the judge provides preliminary approval, notice is given to the class members announcing that a settlement has been reached, setting forth the key terms of the settlement, and indicating a schedule for objections and for a final "fairness hearing." The notice campaign can be executed in any number of ways, but the two most common methods are to publish advertisements in national or local media and/or to send direct notification to class members by mail or email. Finally, after permitting sufficient time to pass for, in theory, class members to study the settlement and raise objections, if any, the court then holds the final fairness hearing, at which the judge officially scrutinizes the content of the settlement.

This settlement review process is a critical one for the absent class members: because they have no practical way to supervise or

control the decisions of class counsel or the representative plaintiffs who are legally responsible for safeguarding their interests, the most meaningful opportunity to voice their concerns or exit the class typically comes during the approval process. The notice of preliminary approval will inform class members that they have the option of objecting to the proposed terms of the agreement. Class members may object by filing a written submission with the court prior to the hearing and/or by appearing and speaking at the hearing itself. In some instances, others who were not parties to the litigation, such as government officials or public interest groups, may also register their views about the settlement with the court. In many cases, class members will be able to opt out of the class prior to the point of final settlement approval and, if they do so, will not be bound by its terms or eligible for any of its benefits. While these opportunities sound meaningful, they may have little practical import: many class notices are overwhelming to lay persons and simply ignored; it is a rare class member who would seek legal advice and/or appear to object without an attorney. Occasionally, lawyers from competing class action cases that will be precluded by the resolution of the present case will intervene and object to the settlement. Sometimes public officials, public interest groups, or private attorneys will appear and raise concerns or objections.

In approving the proposed settlement, judges must determine whether it is fair, reasonable, and adequate. Without the input of objectors and intervenors, however, the judge is likely to hear only those arguments that are jointly advanced by class counsel and the defendants' attorneys in favor of approval. If the judge declines to approve (or informally indicates his or her reservations), the law generally prohibits her from re-writing the settlement agreement or portions of it; rather, there may be additional rounds of negotiation, agreement, notice, and hearing among the parties to address the judge's concerns.

#### **Class Counsel Fees and Expenses**

The judge must approve class counsels' fees and expense reimbursements as well; sometimes this is accomplished at the fairness

hearing, in other circumstances, it may be a matter separate from review of the settlement agreement. As noted above, in many settlements, fee awards and expense reimbursements will come out of the common fund and thus reduce the aggregate amounts available to individual class members; in others, defendants will pay fees and expenses on top of whatever they will be required (or have promised) to pay to the class. While class counsel and the defendants may enter into a "clear sailing agreement" in which the defendant agrees not to contest class counsel's fee and expense request (or at least those requests below a certain maximum amount), ultimately it is up to the judge to decide the size of the fee award and the amount of expenses to be reimbursed. The calculus for making the fee award differs among jurisdictions, judges, and case types, but under the prevailing approach, the judge awards a percentage of some fixed amount, e.g., the amount in the common fund, or the maximum cap on expenditures, or the claimed overall value of the settlement. Such "percentage of fund" fee awards are based on estimates of what the actual monetary value of the settlement will be for the class. Under a less commonly used approach to fees, plaintiffs' counsel submit time records to the court showing the number of hours they have worked, propose an hourly rate for their compensation, and suggest, when appropriate, that their fee be adjusted by a "multiplier" to reflect the difficulty, risk, and outcome of the case. In addition to fees, plaintiffs' counsel will typically also seek to recoup expenses; reimbursable expenses can include the costs of providing notice to the class of certification and opt-out procedures, as well as the same sorts of expenses often incurred in non-class litigation such as expert witness fees and travel.

### **Claiming**

A variety of approaches are employed to deliver monetary compensation to the class. When the identities of class members are known, when their right to a share of the common fund and the appropriate level of such benefits can be determined in advance, and/or when there is an ongoing financial arrangement between the defendant and class members, the compensation can be automatically credited to

existing accounts or paid in the form of checks mailed to the last known address. Some securities class actions, where shareholders and share amounts are known, exemplify this simplistic distributional approach. In contrast, the circumstances of the litigation and the characteristics of the class may require that class members affirmatively request their share of the benefits, for instance when the location of the class members or their relative share of the fund is unknown. Consumer cases involving over-the-counter purchases by unidentified customers often employ this approach. In such situations, the claiming process may require the submission of completed claim forms along with supporting documentation. The defendant (or, as appears to be the case with many larger value cases, third-party "settlement administrators") manage and review submitted claims and make payments to qualified class members.

#### **Distributions**

Payments to class members can be structured in a variety of ways. Some settlements provide for a uniform benefit for all class members with a flat fee payment. Others tailor the benefit depending on the class member's particular losses, based on information that the defendant already possesses or that the plaintiff provides as part of the claiming process. Some class actions divide the entire compensation fund on a pro rata basis among just those class members making successful claims. In some instances, compensation comes not in the form of credits to accounts or negotiable instruments but in the authority to have repairs performed at the defendants' expense or in coupons that can be redeemed for discounts against future purchases of the defendants' goods and services.

Class action settlements can also differ as to what happens when not all of the net common fund (or the maximum cap on expenditures or the parties' claimed total settlement value) is distributed. The money may not all be claimed for a variety of reasons: class members may not learn that a settlement in a case in which they were considered to be plaintiffs had been approved; they might not know how to make a claim against the compensation fund; they might discover the settlement only after the cutoff date for making a claim had passed; they might decide

that the available benefit was not worth their time or even the cost of postage to assert a claim; they might make a timely claim but nevertheless fail to meet the various requirements for proving their eligibility; they might have had a check for benefits mailed to them at a bad address; and they might be given coupons or discounts for goods and services in lieu of monetary compensation and then never use such scrip. Whatever the reason for under-claiming, there are three commonly used methods of dealing with the excess funds. First, unclaimed funds may "revert back" to the defendants when not all of a common fund has been claimed.<sup>5</sup> In other cases, the defendants are required to pay any unclaimed funds to a third party, typically a charitable organization (such alternative payment plans are usually referred to as *cy pres* distributions). Under the third common approach, the unclaimed funds are distributed on a pro-rata basis among those class members who have already made successful claims.<sup>6</sup> There are no hard and fast rules about unclaimed funds and ultimately it is up to the judge to decide whether the size of the benefits available to individual class members, as well as the notice, claiming, and distribution programs agreed to by class counsel and the defendants, are in the best interests of the class.

#### **SELECTED EMPIRICAL STUDIES ON CLAIMING AND DISTRIBUTION RATES**

A Federal Judicial Center (FJC) study led by Thomas E. Willging (Willging, Hooper, and Niemic, 1996) - considered by many researchers to be the most comprehensive and thorough description of class action litigation available - closely examined all class actions terminated in four federal district courts over a two year period. The FJC study provides detailed information about these cases but was unable to reliably report on the distribution of benefits to claiming class members: "A large number of cases in the study used a claims procedure

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<sup>5</sup> Where there is not literally a common fund, the defendant has no responsibility to make payments beyond those required to satisfy successful claims; in such "claims made" settlements, the funds do not actually "revert back," rather the defendant in effect retains the difference between the maximum cap or claimed total settlement value and the actual payout.

<sup>6</sup> In rare instances, the unclaimed funds are subject to escheat and go to the government treasury.

to distribute the proceeds of a settlement fund to class members. Only those class members who filed claims shared in the benefits of the settlement, but all class members—as defined in the class certification order—who did not affirmatively opt out were bound by the judgment. Unfortunately, the parties generally did not report the number of claims received; thus, our data on claims received are too incomplete to present."<sup>7</sup>

Other researchers have attempted to discern class action outcomes by conducting intensive case studies or surveys. A RAND Institute for Civil Justice (ICJ) study of class action litigation led by Deborah Hensler (Hensler et al., 2000) closely examined ten illustrative class action settlements. The percent of the settlement funds that was actually paid to class members in the 10 cases ranged from 100 percent to about 30 percent, with some subclasses receiving less than 1 percent. The authors concluded that claims rates were influenced by the mechanisms incorporated in the settlement agreement for providing notice to class members of the case's resolution and the process for making claims, the use of automatic distribution schemes versus the need for class members' affirmative action to participate (such as clipping a claim form out of a newspaper announcement and mailing it in), and individual claim size. Because distribution information was not always available in the court's case file, for some of these cases the ICJ study team had to contact the parties directly to learn about the outcomes or used other sources such as statements filed with the U.S. Securities and Exchange Commission or media reports when the parties refused to cooperate.

Another ICJ study team used confidential surveys directed to defendants to look at the features of concluded insurance class actions, including claiming outcomes. Pace et al. (2007) found that the number of actual beneficiaries of a compensation fund was often much smaller than the class size estimated by the parties at the time of settlement

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<sup>7</sup> Willging, Thomas E., Laural L. Hooper, and Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, Washington, D.C.: Federal Judicial Center, 1996, p. 55, emphasis added.

review. In ten of 29 cases where both the potential class size and the number of claims paid were reported, all (100%) of the projected number of class members received some amount of direct compensation. But in 12 cases, no more than 6 percent of the estimated number of eligible class members submitted successful claims. The effectiveness of the settlement distribution plans did not change much when viewed from the standpoint of dollars paid out rather than number of successful claimants: In nine of the 29 cases, a third or less of the fund was actually distributed and, in three such instances, no more than 4 percent of the original net compensation fund was paid out. The researchers noted that their findings regarding final distributions were incomplete because a number of respondents declined to disclose information regarding the outcomes of class settlements even though they were always willing to share other details about the cases they defended.

A much earlier study of how various types of notice play a role in the outcomes of class actions also found evidence of low claiming rates. Kritzer (1988-89) examined a variety of sources to gather information on estimated class size and the number of claims or inquiries made by members (regardless of whether the claim resulted in any benefits) in 11 cases or clusters of similar cases. In one pension fraud case, three times as many claims were received as what the parties estimated to be the potential size of the class, but in eight other cases the results were far less successful: claiming rates were generally less than 10 percent and two subclasses had a rate of less than 1 percent.

Low rates of claiming are not unique to situations where ordinary individuals are members in class actions. Though our focus here is on consumer class actions, it is instructive to note that large institutional investors routinely fail to file claims in securities class action settlements (Cox & Thomas, 2005).

#### **SELECTED GUIDANCE FOR JUDGES CONCERNING CLAIMING**

Despite evidence that in at least some instances, class action distributions may fall far short of the ideal, judges receive mixed messages about whether they should continue their pre-approval oversight

into the claiming periods. Though scholars have opined that judges' "responsibility for the fairness, adequacy, and reasonableness of class action settlements should not end with their formal approval of those settlements,"<sup>8</sup> nevertheless the official guidance for federal judges produced by the Federal Judicial Center (FJC) is far less demanding. The FJC's most recent publication -- a "user-friendly" guide for judges managing class actions -- warns that barriers to making successful claims, when coupled with settlement terms allowing the defendants to retain any unclaimed funds, "are likely to substantially diminish the overall value of a settlement to the class."<sup>9</sup> However, the handbook makes no mention of any need to exercise continuing oversight of the distribution of monetary benefits in these cases nor does it suggest that judges routinely require the parties to submit a final accounting.<sup>10</sup>

The Bible of class action management is arguably the FJC's *Manual for Complex Litigation*, now in its Fourth Edition. The Manual clearly warns judges that "settlement distributions may not approximate the

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<sup>8</sup> Hensler, Deborah R., Nicholas M. Pace, Bonnie Dombey-Moore, Elizabeth Giddens, Jennifer Gross, and Erik Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, RAND Corporation, Santa Monica, Calif., MR-969-ICJ, 2000, p. 489.

<sup>9</sup> Rothstein, Barbara J. and Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, Washington, D.C.: Federal Judicial Center, 2005, at p. 13.

<sup>10</sup> The handbook does recommend that judges not reflexively use the potential fund size as a basis for any attorney fee award but rather consider linking the attorney fee award to the true value of any coupons, discounts, or certificates actually redeemed by class members after the redemption period has ended. Rothstein, Barbara J. and Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, Washington, D.C.: Federal Judicial Center, 2005, at p. 23. Such an approach would, obviously, require that a final accounting be provided by the parties before the case is terminated. But this advice focuses on cases involving coupons and "nonmonetary" benefits and does not appear to apply to settlement providing monetary payments to class members. Yet class settlements with only nonmonetary benefits (including injunctive relief) appear to be in the minority. See, e.g., Willging, Thomas E., Laural L. Hooper, and Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, Washington, D.C.: Federal Judicial Center, 1996, p. 68 and footnote 244.

available settlement funds.."11 But while the *Manual* discusses the benefits of making "periodic reports to the court" following approval that would include "information about distributions made, interest earned, allowance and disallowance of claims, the progress of the distribution process, administrative claims for fees and expenses, and other matters involving the status of administration," the suggestion is made only in the context of the duties of a court-appointed "claims administrator or special master,"12 an appointment usually associated only with especially complex or costly litigation. The *Manual* is silent on whether a judge should place a similar responsibility on those who are most likely to oversee routine consumer class action distributions, i.e., the defendant or the settling parties' privately selected agent.

The non-binding "Advisory Committee Notes" to Rule 23 of the Federal Rules of Civil Procedure makes a clearer statement of the need for requiring ongoing reporting. In regards to the adoption of subdivision (h) in 2003, the Committee noted that "In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known."13 Arguably, the Notes make such a recommendation primarily within the context of cases where there are concerns that the fee award might not be commensurate with the benefits gained for the class. Routine reporting for the primary purpose of providing additional transparency both for class members in the instant case and for future litigation is not discussed.

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<sup>11</sup> MCL 4<sup>th</sup> § 21.61. The warning comes in the context of advising judges on fee calculations, stating that one of the "recurring potential abuses in class action litigation that judges should be wary of as they review proposed settlements" involves "calculating the fee based on the allocated settlement funds, rather than the funds actually claimed by and distributed to class members." *Id.*

<sup>12</sup> MCL 4<sup>th</sup> § 21.611.

The clearest call for transparency in the post-approval process comes from the National Association of Consumer Advocates as part of their *NACA Class Action Guidelines*:

The monitoring of class settlements or court orders is often an overlooked step in class action cases, usually left as a role for the administrator of the settlement. But monitoring is a necessary component of class actions. Class counsel should not consider monitoring the responsibility of the defendant and the claims administrator only. Because of feelings of mutual agreement and understanding at the time a settlement is made between the parties, the need for ongoing monitoring can be underestimated, and undervalued because it is an unknown variable at time of settlement.<sup>14</sup>

In addition, the *Guidelines* recommend that the defendant or the settlement administrator be required to "provide information necessary to assure" they are "properly administering the distributions required by the settlement. . . ." This information should be "compiled into a report" that would "contain enough factual information to permit a monitor or judge to determine independently that the defendant is complying in a timely way with the provisions of the class settlement or order." Perhaps most importantly, the "reports also should be filed with the court or otherwise should be available to class members and their counsel upon request."<sup>15</sup> Notwithstanding these recommendations, the *Guidelines* generally place the responsibility for oversight on the shoulders of class counsel, not on the judge who reviewed and approved the settlement.

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<sup>13</sup> U.S.C.A. 23, *Notes of Advisory Committee on Rules: Subdivision (h)*, emphasis added.

<sup>14</sup> National Association of Consumer Advocates, *NACA Class Action Guidelines, 2006*, at p. 68. As of September 15, 2007: [http://www.naca.net/\\_assets/media/RevisedGuidelines.pdf](http://www.naca.net/_assets/media/RevisedGuidelines.pdf)

<sup>15</sup> National Association of Consumer Advocates, *NACA Class Action Guidelines, 2006*, at p. 69. As of September 15, 2007: [http://www.naca.net/\\_assets/media/RevisedGuidelines.pdf](http://www.naca.net/_assets/media/RevisedGuidelines.pdf)

In sum, not much systematic information is available regarding class action claiming rates, but what is clear is that settlements with less-than-full distributions are not rare phenomena. Despite evidence that compensation programs often fail to live up to original expectations, judges are only half-heartedly encouraged to monitor and publicly report on the post-approval process. A lack of mandatory oversight and disclosure may have played a role in the difficulties some researchers have experienced in gathering systematic information on class action settlement benefit distributions. The following section attempts to investigate the degree to which those who were not directly involved in a specific class action (such as researchers, watchdog organizations, judges, or other outsiders) can independently discover what the distribution process wrought and if that investigation is successful, what lessons might be learned.

#### **WHAT CAN OUTSIDERS LEARN ABOUT CLASS ACTION OUTCOMES?**

We sought to collect data about class action distributions from the two most obvious sources: the official court case files and the key participants (lawyers, judges, and settlement administration companies) themselves. In what follows, we provide, seriatim, a description of the methods of each effort and of the results that each effort produced.

#### **Mining the Official Record: An Analysis of Post-Approval Information in Court Case Files**

##### ***Introduction***

To gauge the extent to which class action post-approval outcome information finds its way into the public record, we undertook a review of papers and pleadings filed in a sample of cases that were resolved by a class settlement. Ideally our review would include cases from both state and federal courts. While accurate numbers for the overall frequency of class action filings in American courts are elusive at best, there is a general perception that the state courts are where the bulk of consumer class actions - that is, cases particularly likely to involve claiming processes - are litigated.<sup>16</sup> Unfortunately, only a

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<sup>16</sup> At least before the passage of the *Class Action Fairness Act of 2005* ("CAFA"), evidence suggested that the state courts processed most

very small number of state courts make an attempt to track class actions to any degree, thus preventing the identification of Rule 23-type litigation unless the cases have also attracted the attention of the general media or the specialized legal and business press.<sup>17</sup> In addition, almost all state court systems require members of the public to physically visit the courthouse to inspect the documents filed in civil cases, thus placing practical limits on the ability of geographically distant but nevertheless interested parties from learning what took place in these cases.

Because of these obstacles, we decided to use the federal courts as the exclusive forum for this data collection. The dockets<sup>18</sup> of most recent federal civil cases are available on-line and can be searched for terms that suggest the matter was resolved as a class settlement. Moreover, the federal courts' on-line system now enables web-based remote viewing not only of docket sheets but of recently filed papers and pleadings, regardless of whether the documents were submitted to the court electronically or over the counter in hardcopy form.

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class action litigation (measured by the number of case filings), although the federal courts were more likely to be the fora for certain types of cases (e.g., securities, antitrust, and civil rights matters). See e.g., Hensler, Deborah R., Nicholas M. Pace, Bonnie Dombey-Moore, Elizabeth Giddens, Jennifer Gross, and Erik Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, RAND Corporation, Santa Monica, Calif., MR-969-ICJ, 2000, pp. 56-58. See also Willging, Thomas E. and Emery G. Lee III, *Progress Report to the Advisory Committee on Civil Rules on the Impact of CAFA on the Federal Courts*, Federal Judicial Center, November 8, 2007, Figure 1 ("State and Federal Class Action Filings in California, 2002-2005"), [http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/\\$file/cafa1107.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/$file/cafa1107.pdf) (accessed April 4, 2008). Because CAFA expands federal subject matter jurisdiction so as to enable many state court class actions to now be filed in, or removed to, federal courts, the primacy of state courts as the locus of class action litigation may decrease.

<sup>17</sup> For a more detailed description of the chronic lack of centralized court data on class action filings, see Pace, Nicholas M., Stephen J. Carroll, Ingo Vogelsang, and Laura Zakaras, *Insurance Class Actions in the United States*, RAND Corporation, MG-587-ICJ, 2007, Appendix B.

<sup>18</sup> A "docket," sometimes referred to as the "register of actions," is a detailed listing of in-court appearances, entries of judicial orders and opinions, filings of pleadings, and other events associated with the life of a case.

While focusing on federal claiming rates provides but a partial picture, that picture reflects what some regard as the current best practices in class action management. Though we are not aware of any empirical studies that confirm their claims, some commentators have asserted that federal judges are better suited to the job of overseeing class actions than their counterparts in the 50 states.<sup>19</sup> If true, and if more robust supervision of a class action settlement involves requiring the parties to submit an accounting of how the funds were distributed, then the federal files should be more likely to contain information about what took place following approval compared to what we might find in a similar sample drawn from state courts.

### ***Shaping the Sample***

Our initial task was to identify a set of class action settlements where the final approval took place prior to January 1, 2007. We chose this cutoff date because our file review would take place in October 2007 and we wanted to provide sufficient time for the parties to file any post-approval distribution report with the court, either voluntarily or as a result of a judicial order. To improve the likelihood that the distribution would have been completed by the time of our review of the case files, we excluded any case that appeared to be actively litigated during the summer of 2007.<sup>20</sup> We also required the cases to have been commenced between 2003 and 2005, expecting that these relatively recent

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<sup>19</sup> See, e.g., Senate Committee on the Judiciary, *Report: The Class Action Fairness Act of 2005*, S. Rep. No. 109-14 at p. 14 (2005), reprinted in 2005 U.S.C.C.A.N. 3 at pp. 14-15: "The Committee finds, however, that one reason for the dramatic explosion of class actions in state courts is that some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions... In contrast, federal courts generally scrutinize proposed settlements much more carefully and pay closer attention to the procedural requirements for certifying a matter for class treatment... Another problem is that a large number of state courts lack the necessary resources to supervise proposed class settlements properly." (footnotes omitted)

<sup>20</sup> Such cases often involved appeals filed by dissatisfied class members or counsel in competing cases or the involvement of the bankruptcy courts. Either event might delay or cancel a planned settlement distribution.

cases would have been supervised using the most current class action management practices.

The sample was drawn from the 43 federal district courts (out of a total of 94) that by June 2004 had implemented the PACER\CM-ECF system for remote public access to electronic versions of case file documents, thus increasing the chances that we could look at key documents filed early in the case such as the original motion for certification.<sup>21</sup>

We searched Westlaw's federal docket databases for the 43 districts for any docket containing the word "class" within three words of "settlement." The dockets were reviewed to insure that there was indeed a final order approving a class settlement and that the order contemplated the distribution of monetary benefits following such approval. To minimize the instances where equitable remedies were the only relief ordered, we excluded any case where the terms "prisoner petition" or "civil rights" appeared in the docket. We also dropped class action settlements that might have had any final distribution reports filed in related or consolidated cases (and as a result, might have been missed in our case file review) and for similar reasons, excluded those matters that appeared to have been transferred by the Judicial Panel on Multidistrict Litigation (JPML) for coordinated pretrial processing.<sup>22</sup>

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<sup>21</sup> To be precise, a few additional federal district courts had implemented PACER\CM-ECF by our cutoff date of June 2004. However, a review of selected recent cases available on those courts' websites suggested that they did not routinely provide for remote access to scanned versions of traditionally filed paper documents. We excluded those district courts, leaving us with 43 that provided the best opportunity for a complete examination of all papers and pleadings in class settlements.

<sup>22</sup> The decision to exclude consolidated or coordinated class actions, including those transferred by the JPML, arose from concerns that pleadings and orders needed to understand the settlement and distribution process might be found in the court files of related matters but not in the file for the specific case we had selected as part of our sample. Systematically reviewing the records for all matters potentially related to our sample cases would have required resource expenditures that were beyond the scope of this work. This choice not only reduced the proportion of relatively complex cases in our sample, it also cast out cases that were assigned by the JPML, assignments that often go to judges considered by the Panel to have specialized experience in the management of class actions. We therefore

We wanted to focus primarily on those cases that might be thought of as "routine" Rule 23(b)(3) class actions involving financial losses (such as consumer or property damage claims), enabling class members to opt-out of the class, and creating classes made up primarily of individuals with little direct influence over the progress or resolution of the litigation. These would arguably be the types of cases where a judge would be required to exercise the greatest amount of supervision over the distribution process given a lack of involvement or knowledge of the litigation among the bulk of the absent class members.

To increase the chances that our sample would include such cases, we first reviewed the names of the representative plaintiffs to identify (and then drop) cases that were brought solely on behalf of non-individuals such as businesses or non-profit entities.<sup>23</sup> We then excluded intellectual property class actions because classes in such cases are more likely to be made up of businesses rather than individuals. We also excluded securities cases because they are managed under a set of class action rules distinct from those used for other Rule 23(b)(3) classes -- and because the plaintiffs with the largest losses have a significant role in the litigation (including choosing class counsel and defining the terms of the settlement) and can hardly be thought of an "absent" class member.<sup>24</sup> We attempted to minimize the number of employment-related class actions because the classes in these cases are either very small or are brought under 29 U.S.C. §216(b) as "collective actions" (often under the *Fair Labor Standards Act of 1938* [FLSA<sup>25</sup>]) where the class members must affirmatively opt-in to the

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cannot tell from our sample whether the MDL judges' specialized experience translated into a greater likelihood to order ongoing supervision of the benefit distribution process, though this would be an interesting topic for further exploration.

<sup>23</sup> Despite our general policy of selecting out cases where businesses were likely the main plaintiffs, it is certainly possible that in the cases that remained in the sample, some organizations would have been eligible for class benefits in addition to individuals.

<sup>24</sup> See, e.g., *Private Securities Litigation Reform Act of 1995* (Pub. L. No. 104-76, 109 Stat. 737 [1995]), the *Securities Litigation Uniform Standards Act of 1998* (Pub. L. No. 105-363, 112 Stat. 327 [1998]), and FRCP 23.1.

<sup>25</sup> 29 U.S.C. §201 et seq.

litigation. We also wanted to minimize the instances where the class action was brought under the *Employee Retirement Income Security Act of 1974* (ERISA<sup>26</sup>) because the benefits provided in many of these settlements are paid to the employees' pension and welfare plans rather than to individual claimants. We excluded personal injury cases because of the relatively higher individual benefit levels in these settlements and the more direct involvement of plaintiff class members in the case. In addition, one otherwise eligible group of consumer class actions we decided to exclude were cases brought under the *Fair Debt Collection Practices Act* (FDCPA<sup>27</sup>). A considerable number of federal class settlements involve FDCPA claims<sup>28</sup> brought against small businesses where relief for class members cannot exceed the lesser of \$500,000 or 1 percent of the net worth of the debt collector. Attorney fee requests in these cases often exceed the class's recovery and as such, they were unlikely to provide meaningful information on class claiming rates. To achieve all of these objectives, we dropped any potential class action settlement where its docket included the words "stockholder", "securities", "labor" within two words of "employment", "ERISA", "FLSA", "intellectual property", "personal injury", or "fair debt". However, some of our cases might nevertheless involve various aspects of these issues.

#### **Sample Characteristics**

The combined result of these exclusions was a set of 31 class action settlements whose case files were reviewed to ascertain the terms of the agreement, whether there was any distribution information in the public record, and if so, how much compensation was paid out.<sup>29</sup> Five of

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<sup>26</sup> Pub. L. 93-406, 88 Stat. 829 (1974).

<sup>27</sup> Pub. L. 104-208, 110 Stat. 3009 (1996).

<sup>28</sup> Recent data suggests that federal consumer credit class actions may comprise one of the largest single distinct categories of filings other than labor-related cases. See Willging, Thomas E. and Emery G. Lee III, *The Impact of the Class Action Fairness Act of 2005: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, Washington, D.C.: Federal Judicial Center, April 2007, tables 2a-2f.

<sup>29</sup> We generally focused our review on the original complaint; the motions for and against class certification (including memorandums of law and affidavits filed in support or opposition); the settlement

the cases involved personal product defect claims, two concerned environmental nuisance or real property damage, five were related to claims made by agents or employees, and 19 contained various consumer protection claims, about half of which involved retail installment contracts or other non-mortgage loans. Estimated sizes of the classes ranged from as few as 49 members to as many 27 million, but in seven cases we could not find any discussion of class size in the key documents in the files.

Net funds<sup>30</sup> available for class member compensation ranged from \$14,000 to \$106 million, four settlements provided that the defendants would pay all valid claims without any formal cap or projected payout (as such, no estimate of the potential costs for such payments were available), and one approved settlement had all agreed-to compensation designated only for *cy pres* recipients. The parties specifically provided information on average available individual benefits to class members in just seven cases, with those averages ranging from \$30 to \$2,900. Using the parties' own estimates of the sizes of the potential class and the net compensation fund to supplement what was reported in those seven cases, we calculated that the average available benefit in a total of 22 settlements ranged from 54 cents to \$84,000 (in eight cases, there was insufficient information to make this calculation and in one case, the average class member benefit would have been zero dollars because the funds were distributed solely via a *cy pres* award to third parties).

***Settlements with Distribution Information***

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agreement; the motions for preliminary approval of the settlement and notice plan (including memorandums of law and affidavits filed in support); orders giving preliminary approval; motions (and memorandums and affidavits) for final approval and attorneys' fees; final orders; distribution reports; and all documents filed following the final orders. We reviewed other documents in the case file as needed.

<sup>30</sup> By "net fund" we refer to the amount the parties had asserted prior to settlement approval would be available to class members in the form of compensation after all deductions for class counsel attorneys' fees and costs or other expenses were deducted. In some instances, the claimed retail value of products offered for compensation is included.

Based on our review, just six out of the 31 case files (or fewer than 20%) contained information on either the number of paid claims or the aggregate size of the distributed compensation. In another two cases, the file included a pleading or affidavit attesting to the fact that the distribution had been "completed" but provided no other information. The 23 remaining cases (roughly 75% of the sample) were completely silent on this issue; in fact, in all but four of these cases, the final order of approval of the settlement and/or attorneys' fees was essentially the last entry in the file.<sup>31</sup>

Even in the six cases where there was at least some meaningful information about the distribution, we learned very little. Four of the six involved settlements where class members were not required to make a claim in order to receive any direct benefit from the compensation fund. In these cases, checks were automatically sent to known class members and the only distributional issues arose where addresses were not valid or checks not cashed. Of the four, the highest fraction (99.6 percent) of available compensation was paid out to class members in a case involving about 200 potential claimants who would receive about \$2,000 each. Almost all (99.5 percent) members of that class ultimately received some payment. Of these four "automatic" distribution class actions, the lowest fraction of available compensation (72 percent) paid out to a class occurred in a case with a much larger class base (7,400 possible members) and a much smaller average available benefit (\$35). The shortfall was primarily caused by some class members failing to cash their benefit checks by the expiration date,<sup>32</sup> resulting in only 65 percent of potential recipients actually realizing any payment at all. A *cy pres* recipient received the value of all unredeemed checks in that case, thus resulting in essentially 100 percent of the fund being consumed (and as such no reversion to the defendants). What these data

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Typically, the defendant did not pay this amount into a separately managed account but simply made payments as necessary.

<sup>31</sup> Of the four cases with post-final order activity: two concerned the division of attorneys' fees, one involved a disputed claim, and one related to a request to set aside the final judgment.

<sup>32</sup> To a much lesser degree, the shortfall was also caused by check-bearing letters returned to the sender as undeliverable.

points support is the familiar presumption that a settlement where no claiming is needed will result in a very high rate of distribution, though that rate will be relatively smaller where classes involve thousands of members and the benefit size is relatively modest.

The other two cases with reported distribution data had very different outcomes from the four described above. Both required that class members affirmatively assert their rights to a share of the compensation fund, in one case by mailing in a paper form and in the other by completing a web-based form. In both cases, the claim period started just after preliminary approval of the settlements and continued beyond the date at which the final orders anointing the settlements' terms were issued. In both of these cases, information on how to claim was provided to class members at the time they were given notice of preliminary approval (such notice came in the form of direct mail or email and through publication).

Only a fraction of class members made a successful claim in these two cases. In one, slightly fewer than 20 percent of the owners of 3,500 known properties received any money at all under a settlement that offered an average cash payment of at least \$1,000 (and perhaps much more depending on how many claims were made in various sub-classes). In the other, just 4 percent of a class once asserted to contain 1,000,000 members wound up receiving compensation in the form of software with a claimed retail value of \$30. In the settlement with the cash payment to property owners, the financial impact to the defendant would have been the same no matter how many claims were paid: because the compensation fund was divided up on a pro rata basis, 100 percent of the fund was eventually paid out. In the software case, however, the defendant was able to avoid having to distribute software valued in the aggregate at \$29 million, notwithstanding the fact that class counsel had earlier asserted that the settlement could provide the equivalent of \$30 million worth of direct monetary benefits to the class. With only two cases it is difficult to reach any sort of generalized conclusion but the results suggest that claims-made distributions may not reach most class members, even when direct notice is provided, the benefits are relatively generous, and the class relatively small. Pro-rata

distribution of the compensation fund, however, will offset such shortcomings by making the defendants pay out all that was promised (though, as we discuss below, if forced to include a pro rata provision in the settlement, the defendant is also likely to promise less at the outset).

***"Red Flag" Cases without Distribution Information***

What types of settlements were approved in the 25 other cases where no meaningful information was provided (including the two cases where only the fact that the distribution process had been completed was reported)? Thirteen of these settlements appear to be ones where there was arguably a need for the court to keep a close watch on the distribution of benefits as the characteristics of these cases generally match those of the one described above that reported just a 4 percent claiming and payout rate. All of the 13 required at least some of the class members to submit a formal claim for benefits, notice to the class came in the form of direct mail or publication, and the end of the claiming period came about after the final order was granted. All but one of the 13 provided instructions on how to claim only as part of the notice of preliminary settlement approval, thus requiring class members to make a claim for benefits that, at least in theory, might disappear should the judge decline to grant final approval. In nine of the 13 there were estimates provided to the court of the total net compensation available to the class but because there was not a pro-rata division among class members, not all of the fund would be distributed if less than 100 percent of the class filed a successful claim. In the other four, the defendant essentially agreed to pay all valid claims but did not place a cap on expenditures nor did the defendant provide an estimate of the potential total payout. Accordingly, the only possible measure of the settlement's ultimate "value" in these four cases would have been their final payouts, something that their files do not reveal. Perhaps most importantly, it appeared that in 12 of the 13 cases, any unclaimed benefits would simply revert to or be retained by the defendants (in the remaining case, unclaimed discount coupons were to be distributed to all of the defendant's customers, whether or not they were included in the original class definition). If the purpose of

these types of class cases is understood to be class member compensation, these 13 cases share a number of characteristics - requiring the submission of a claim form, notice of how to claim combined with the notice of the proposed settlement, permitting the wholesale reversion of the fund to defendants, etc. - that raise real concerns about their compensatory effectiveness. Given those red flags, judges should have been, but did not appear to be, particularly interested in learning about the final claiming rates and monetary distributions.

It is possible, however, that in some instances the judge declined to require any summary accounting because he or she felt that the matter was a relatively modest one and therefore even if large numbers of class members failed to receive any monetary benefits, the consequences were small. But though two of the 13 "red flag" cases involved classes of less than 400 members, others classes numbered in the tens of thousands or even millions. Thus, the aggregate value of available monetary benefits in most of these cases was reported to be very significant at the moment of settlement -- in one instance, the reported value exceeded \$100 million - yet all of these grand numbers may well have evaporated completely following the claiming period. Moreover, nine of the 13 cases involved national classes. In sum, most of the 13 red flag cases concerned big classes, big funds available for compensation, and multistate implications - yet yielded no data reflecting their ultimate outcome.

***Cases Where Distribution Information Might Be Needed***

As described previously, the court records in six cases provided a modest degree of outcome information while an additional 13 cases had no such information in their files despite having features that should have raised a red flag before the supervising judge. The story of the remaining 12 cases that also were without any useful distribution information is, however, somewhat more nuanced. One involved a final order that directed all compensation to a *cy pres* recipient, which, in a sense, meant that at the time of approval, the judge would have had a clear picture of what the settlement would ultimately accomplish for the class. Of the other 11 cases, six did not require class members to make

a claim at all. The attorneys in these cases might argue that there is little need for public reporting given that the distribution of the benefits would be essentially automatic. On the other hand, the few class action settlements in our sample that did provide post-approval information suggest that even with automatic distribution, not all of the claimed numbers of class members in these six cases would have received compensation due to issues like bad addresses, uncashed checks, etc. Because none of these six cases divided the net compensation fund on a pro rata basis among successful class members and because just one provided for an alternative *cy pres* recipient, it is plausible that the defendants retained a portion of unclaimed benefits in five of these six cases - and it is impossible, without reporting, to know the size of that retention. It is, of course, also plausible that the particular distribution mechanism the parties chose (and the judge approved) resulted in essentially all of the monies being paid out, but neither the public - nor the court - will ever know.

The final five cases without distribution information required class members to affirmatively assert claims against the fund. Based on what little empirical information is available about claims-made class action settlement payouts, it is reasonable to presume that less than 100 percent of the estimated number of eligible class members received any compensation from these settlements. In three of these cases, however, the fund was to be divided up on a pro rata basis and as such, the defendant will make a full pay out of the agreed-to compensation no matter how many class members file claims. Nevertheless, without data, it is impossible to know whether the whole fund was distributed pro-rata among 5 percent of the class, 50 percent of the class, or 95 percent of the class. In short, information regarding the relative effectiveness of the particular combination of notice and claiming requirements in these three cases will not be available for others to use in evaluating the fairness, reasonableness, and adequacy of subsequent settlements.

The other two cases were ones where the claims period had ended prior to the point at which the judge would have given final approval to the proposed settlement (actual distribution, however, would have taken place subsequently). Though no information was provided to the court

about the payments that were eventually made, the attorneys in one of these two cases did file a report indicating that 312 successful claims were received before the deadline. With such information, the judge's approval in this relatively small class action (the total fund size was about \$115,000) was based on essentially complete knowledge about the case's ultimate benefit to the class.<sup>33</sup> In contrast, the remaining case carried with it the possibility that the defendant might avoid paying out a sizable portion of the potential funds available for compensation. Though payments would be provided automatically to approximately half of the class members, the other half in this case had to make an affirmative claim. We did not classify this settlement as a "red flag" case because all such claims should have been in before the time of the settlement approval. Notwithstanding that fact, our review of the case file failed to identify any document where the court was informed in writing about the total number of successful claimants prior to final settlement approval.

**Summary**

In just six of 31 federal court class action cases accessed through the PACER computer system were we able to find information about the distribution of awards to the class members. It appears fair to conclude that most federal class action cases (at least of the types we examined) are unlikely to end with this final piece of information in the official court file. The data we did find in the six cases was generally inscrutable, yielding few insights about what constituted a better or worse distribution programs. The several dozen case files without distribution information included many cases in which distribution concerns were palpable, and hence the court might have been assisted by predictions of distribution rates or information about results - but neither type of information was present. It is reasonable to conclude that class action participants are not voluntarily providing end result information to federal courts and that federal judges are not demanding this information. Of course, that conclusion does not mean that the participants lack the information, simply that they have not

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<sup>33</sup> It is possible, however, that some fraction of the 312 checks to be mailed were returned as undeliverable or otherwise uncashed.

placed it in the court file. Perhaps it could be obtained by asking the participants for it directly.

## **Straight From the Insiders: Asking the Litigants, Judges, and Settlement Administrators**

### ***Case Selection***

The second portion of our project sought to discern whether data on claiming rates was directly available from the participants themselves in concluded class action cases. We selected eight well known settlement administrators ("SAs") with national practices whose websites contained the names or the notices of at least some of the cases they have been associated with in the past.<sup>34</sup> Using the information posted at the websites, we identified 57 class actions in which the cutoff to submit claims had passed (47 had cutoff dates in 2006 or earlier and most of the remaining had cutoffs prior to July 2007). Twenty-eight of our 57 cases were state court cases, the remaining 29 federal. Most of the federal court cases appear to center on antitrust issues and most of the state cases concerned insurance, mortgage, or personal property defects claims. Though these cases cannot be considered a randomized sample of all class action settlements with monetary compensation distributions, we believe that what we found, or did not find, provides useful insight into the ability of outsiders to learn of what takes place in concluded litigation short of going to the original casefile.

The notices posted on the websites provided our source for (1) the name of the case, (2) the identity of the judge overseeing the settlement approval; (3) and the names of the lead attorneys for the class and the defense. We also used the notice to identify the address (typically a post office box) where class members could send in inquiries or claim forms. The name of the chief executive officer or the president of the each of the SA firms was obtained through other sources.

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<sup>34</sup>We have not identified the specific settlement administrators whose sites we employed. We did not want to appear to be criticizing these SAs because they are arguably more open and transparent than their competition in that the non-selected SAs often fail to publicly disclose prior experience or remove all traces of posted notice from their websites after the claiming period has expired.

***Letters of Inquiry***

For each of the 57 selected cases, we attempted to send out four sets of letters: one to the SA's contact post office box, one to the supervising judge, one to the first named class counsel in the notice, and one to the first named defense counsel in the notice.<sup>35</sup> The wording on each letter varied somewhat depending on the recipient but essentially we indicated that Harvard Law School and the RAND Corporation were in the process of researching the subject of claiming rates in class action lawsuits. We informed the recipient that we had randomly identified about 60 class action cases that had settled in the past few years and where the time period for redeeming a coupon or filing a claim had expired. We next explained that we understood the recipient to have been involved in one of the selected cases as a judge, as class counsel, as defense counsel, or as the designated settlement administrator. We identified the case, disclosed our assumptions that the recipient had access to the relevant claims data in the selected case, and then asked if they would provide us with such data (including the number of class members who took advantage of the available benefit, the total amount of money, coupons, vouchers, or other compensation actually distributed, and certain other types of information). If the recipient was unable or unwilling to provide us with this information, we requested that they reply with an explanation. A simple reply form and stamped business reply envelope were provided for their responses. We also told the recipient that we were in the process of obtaining the same information from others involved in the case, including the judge, to whom, we stated, we would report our results. Because we were interested to see what the general public or media could learn of the outcomes in these cases, no assurance of confidentiality was provided. The recipients were given a cutoff date for responding to our inquiries and told that if we received no response by that date, we would contact them directly to follow up.

In addition to the four individual letters sent out for each case, a single letter was mailed to each of the chief executives of the eight

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<sup>35</sup>There were several instances in which the websites from which we were working did not provide a contact for one of these participants.

settlement administrators that repeated much of the information described above. These letters listed the names of all the cases in our sample that were administered by the recipient company and requested claiming and distribution for each matter. Though presumably the same company would have received a similar request in the designated PO Box for each of the sample cases, we were concerned that some PO Boxes might have been shut down following the claim cutoff date. We also felt that a direct request to a top executive at the company would increase the chances of obtaining useful information.

After the initial returns period had lapsed, we made follow up phone calls to a selection of those participants from whom we had not heard.

### **Results**

We sent out letters to 222 participants in 57 class action cases. We received responses from 55 participants (25 percent). Of the 55 respondents, 14 (25 percent) sent the claims data our letter had solicited (generally the other 41 responses we received simply told us that they would not or could not provide any data to us.). This means that 6 percent of all of the 222 letters we sent out triggered a recipient to provide us with the case outcome data. The 14 distribution reports that we received concerned 11 cases, as several participants within one case sent the same data. Thus, we received at least some usable information in 11 of 57 cases, or about 19 percent.

Judges were by far the group of participants most likely to respond in any way, even to tell us they could not provide information: 39 percent of the judges responded, compared with 25 percent of the defense attorneys, 20 percent of the plaintiffs' counsel, and 16 percent of the settlement administrator recipients (federal judges were most responsive: 46 percent of them responded, compared to 31 percent of state judges). Although judges as a group were the most responsive, plaintiffs' counsel were the best source of actual data: 64 percent of the plaintiffs' counsel (7 of 11) that responded sent data, compared to just one of the defense attorneys (8 percent), one of the settlement administrators (10 percent), and five of the judges (24 percent). The SA chief executive officers were thoroughly unhelpful: only 2 of 8 (25

percent) responded to our inquiry and both did so solely to inform us that the information that they held was "proprietary" to their clients, namely the attorneys that had hired them to oversee the class action claiming process. This conceptualization of their role is, of course, contestable, a point to which we return below.

Of the 11 cases for which we received data, we know of the degree to which eligible class members made successful claims in 9 instances. In those cases, the distribution percentages clumped into three categories:

- \* three cases had distribution rates below 5 percent, two of which were below 1 percent;
- \* four cases had distributions rates between 20-40 percent of the class;
- \* two cases had distributions rates above 50 percent, one at 65 percent and one at 82 percent.

The cases with the highest claiming rates had very small class sizes (a few hundred class members), while those with the smallest distribution rates tended to have class sizes of several hundred thousand class members. Only one case involving a large class (roughly a million class members) had a more than negligible distribution rate (35 percent).

The average claim per class member varied from a low of about \$10 to a high of about \$850,000 (in a big antitrust case). Claiming rates did not vary directly with the size of the average claim, however: the classes with minute claiming rates paid from about \$350 per claim to \$1500 per claim, while other cases paying several hundred dollars per claim realized claiming rates of a third or more. The cases with the two highest claiming rates paid an average of \$5,000 per claim (65 percent of 431 class members claimed) and \$2,600 per claim (82 percent of 350 class members claimed).

It is impossible to draw any definitive empirical conclusions from this limited data set, but it appears, unsurprisingly, that claiming rates are apt to be lower the larger the class, higher the smaller of the class. It is not immediately apparent from this data set that higher average claim amounts create higher rates of distribution, but

more would need to be known about the type of claim, the type of notice program conducted, knowledge of it among class members, etc. before any firm conclusions could be drawn. Generally speaking, our data suggest that distributions rates vary wildly, with a not insignificant number of cases having negligible claiming, a core of cases having middling distribution rates, and a few exceptional cases demonstrating high distribution rates. Further research is required to ascertain whether any particular practices in each of these cases effected distribution rates favorably or unfavorably.

**Summary**

Contacting participants in class action lawsuits is not a terribly fruitful way to uncover claiming data. Our requests were probably more likely than a normal request to actually yield a response, given that we identified ourselves with institutional affiliations in our correspondence with the participants.<sup>36</sup> Yet the usable response rate (6 percent in terms of respondents, 19 percent in terms of cases) was small and the data we were able to get quite limited. Our data do suggest that it is more fruitful to correspond with some participants rather than others (e.g., plaintiffs' counsel) in a quest for data, but even focused requests would only raise the likelihood of gaining data to about a one in ten chance.<sup>37</sup>

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<sup>36</sup> It is possible that our institutional affiliations actually dissuaded participants from cooperating, perhaps out of distrust with what we would write about the data we found. For instance, one plaintiff's attorney wrote an angry response asking whether we would pay him for his time since we were obviously not working for free. Perhaps a lay person, with no identifiers, would have had better success gaining information from participants. Yet the possibility that such a correspondent would have simply been ignored seems equally likely.

<sup>37</sup> For instance, 12.5 percent of the letters sent to plaintiffs' attorneys resulted in usable information, compared to 9.1 percent of the letters to judges and 2 percent of the letters sent to defendant's counsel. As stated earlier, none of the SA corporate officials provided useful data.

## **TURNING UP THE LAMP**

### **What Our Data Collections Tell Us**

Our efforts demonstrate that it is very difficult, even for researchers with significant resources, to find distribution data in completed class action lawsuits. Searching the court records of 31 concluded federal class actions yielded usable data in only six cases, while communicating with participants in 57 state and federal cases yielded data in only 11 cases. Worse, the little that we were able to find out suggests that the hidden data contain troubling information: of these 17 cases with available distribution, four had fund payout rates of five percent or less. Overall, we were able to learn of what ultimately happened in fewer than one out of five class actions in the two samples combined. What this means is that court records themselves typically do not contain distribution data and class action participants are generally unwilling to provide it to interested persons. In other words, the data are neither publicly available nor privately provided.

### **Why Don't We See More Transparency In Estimating and Reporting on Class Action Outcomes?**

Why is it that claims data is difficult to find? The absence of available data is the result of the fact that not one of the repeat participants in class action cases (plaintiffs' counsel, defense counsel, judges, or settlement administrators) has any particular interest in making this data available. It is something of a perfect storm of silence, a confluence of incentives all geared toward non-transparency.

#### ***Resistance by Class Counsel***

Class counsel has dual interests - securing the best relief possible for the class while simultaneously obtaining a fee that exceeds the expenses invested in the case and its opportunity costs. While these incentives are aligned in some ways, in many they are not. In situations involving competing class actions, counsel must be one of the attorneys who negotiated the final settlement with the defendant or he or she is unlikely to receive any fee for the time invested; this creates incentives to sell out the class by settling low. Even without

the risk of losing a fee altogether, class counsel may be more likely to obtain an easy and generous fee from the defendant if they settle for lighter class relief.

This context gives rise to forms of class relief - coupon settlements, complex claiming programs, superficial notice campaigns, etc. - unlikely to yield significant claiming by the class. Class counsel has little interest in seeing these anemic distribution rates publicized. They have the potential to make class counsel look simultaneously incompetent and greedy: incompetent because the system they settled for yielded little relief, but greedy because they nonetheless took home a generous fee. Worse still, publicity about low claim rates may encourage judges in future cases to pin fee awards to the actual claiming done by the class; this possibility, which would likely result in far lower fee awards, creates added incentives for class counsel to under-emphasize the issue of likely rates of claiming and payout and to not push for the transparency of claiming data.

If courts took a more active interest in claiming rates, we believe that class counsel's job would be much more difficult. They would be forced to push for better class relief, a push that would be resisted by defense counsel who would, in turn, be less likely to settle quickly, less likely to agree to more expansive class definitions, and less likely to assent to maximizing the claimed value of the settlement. Moreover, fees based on claiming rates would require plaintiffs' counsel to have much more significant involvement in the details and design of the settlement claiming process. If that were not bad enough, class counsel might also fear that even if they pushed hard initially, and monitored the details of the settlement carefully, the redemption numbers might not meet up to what they promised the court at the time of settlement - and a disappointed judge might sanction them or lower their fee accordingly. Regardless of the accuracy of this worst case scenario, class counsel would understandably fear that closer scrutiny of claiming rates will likely delay their payday.

Our point is not to malign class counsel by identifying their anti-transparency interests, simply to note the particular contextual circumstances under which they operate.

***Resistance by the Defense***

Like class counsel, defense counsel also has dual interests at the moment of settlement: to purchase as much finality as possible for their client at as low a price as possible. Publicity about distribution rates threatens both of these goals.

If courts took more interest in distribution rates, finality may be put off until the claims period was concluded. Worse, if the rate came back low, the court might well demand more from the parties. To forestall these possibilities, defendants would have to spend more money on the settlement up front, put more money into notice programs, spend more time and money monitoring the claims administration process's effectuation - and then still worry about the end-result. If the numbers looked low, the court might again sanction counsel for misrepresenting the settlement at the fairness hearing, or the court might insist upon a *cy pres* award, costing the defendant more money, or the court might re-open the case. Even if finality were granted, each of these additional puzzle pieces raises opportunities for collateral attack, hence again undermining the repose that the defendant believes itself to be purchasing.

As was true for class counsel, we do not wish to malign defense counsel by identifying their anti-transparency interests. But it is instructive to note that while defendants are not generally supportive of class actions, *per se*, in situations where defeating certification is impossible, or where liability is likely, the class form provides an enormous boost to their interests: they can, in one fell swoop, be rid of the entire problem. Better yet, under current rules, they can play plaintiffs' counsel off against one another, or against a single counsel's need to keep expenses low, and obtain the needed finality at low cost. Publicity upsets this situation. It threatens to make liability more harsh and finality less certain.

***Resistance by the Judge***

The parties' interests could be offset by the judge who, after all, has to bless the final settlement with the stamp of approval. Yet judicial actors are situated in a context that also makes them averse to publicizing the actual claiming rates in class cases and even more

averse to basing their final decisions on the settlement's potential for achieving an acceptable rate. This is so for four reasons.

First, of course, judges are busy and a settlement now clears the case - often a large, complicated, time-consuming one - from their dockets. Second, judges have very little information about the actual case they are settling, much less the process which led to its conclusion, as the settling parties present the settlement with little adversarial discussion unless an objector shows up. After being told the settlement is so wonderful, why would a busy judge bother to prolong the case? This is especially true because, third, judges get some reputational boost for overseeing a large class action settlement. The last thing they want is for the boost to be delayed and/or for the reputational points to be undermined by information about what really transpired during the claiming process. Fourth, judges really have no information about what claiming rates ought to be since there is no independent and readily available data on the subject; so even if they were to insist on seeing distribution data, they might not know what to do with that they discovered.

In the face of this situation, judges may look for guidance to their professional literature, particularly, for example, the *Manual on Complex Litigation*. But they will not find much there suggesting either that parties should be required to provide estimates of future claiming rates or that they should report the distribution's ultimate outcome to the court. Judges have not, as a group, pushed one another to pursue information about the outcomes of class action cases.<sup>38</sup>

#### **Resistance By Settlement Administrators**

The private for-profit companies that oversee notice, claiming processes, and claims distributions are the institutions that actually possess most of the relevant data at issue here.<sup>39</sup> What's more, these

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<sup>38</sup> For an example of a judge who has in fact worked diligently to open up the distributional process to the light of day, see Neff, Joseph, "Fleeced Sears patrons shorted again in settlement," *The Raleigh News & Observer*, July 23, 2007, <http://www.newsobserver.com/news/story/646201.html> (accessed December 3, 2007) .

companies are arguably performing a public function, as they are providing a service to a court in performing its function of ensuring justice for absent class members. Yet claims administrators are the parties perhaps most averse to publicity - we were able to collect data from them in only one of 57 cases. In private conversations in response to the study, the CEOs generally informed us of the reason: they believe that the information they have is "proprietary" information owned by their clients, and they believe that their clients are the attorneys who hired them, not the court or class for whom they are performing their function.

The claims administrators, as for-profit companies, are particularly interested in perpetuating their business, that is, in being hired in future cases. They therefore want to serve the interests of the people who will hire them. These are the attorneys. Since both sets of counsel have an interest in non-transparency, so too will the claims administrator that seeks to be hired by these attorneys in the future. So great is this incentive, so complete the association of agent with private client, that we are skeptical that a settlement administrator would even release claiming data *to the court itself*, were a judge to request it, without first securing the client's consent.

#### **What Should Be Done?**

The simplest conclusion to be drawn from this study is that claims rates in completed cases should be made easily available to the parties, absent class members, and the general public. We recommend a number of mechanisms for achieving this result. At the same time, we are aware of the fact that such transparency would not occur in isolation: with data

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<sup>39</sup> Arguably defendants are the ones with the most complete access to distributional information because they wind up footing the bill for class action compensation programs. Moreover, defendant corporations handle the claiming and payout aspects of many class actions on their own without involving a third-party administrator. But settlement administrators have the greatest familiarity with the post-approval process because they are more likely repeat players than is any one defendant: one such company's website lists over 1,000 different class actions in which they have been involved in some way, a level of experience that would exceed even that of the most litigation-prone corporate entity.

more readily available, participants in on-going cases would be hard-pressed to ignore it. Transparency would, in short, change the incentives in the class action litigation process. Accordingly, we also argue here for the complimentary idea that if claims rates are to be made public, they should be accorded more weight in the settlement and conclusion of class cases - that is, judges should take claiming rates into account in on-going cases. We sketch out these proposals as they would occur in real time in a given case.

*Requiring Parties to Provide Estimates of Likely Distributions in Proposed Settlements*

When parties propose a settlement to a judge, they often attach a number to it, identifying it as, say, a \$30 million settlement. Hidden within that number, however, are many assumptions - perhaps the entire amount will be distributed on a pro rata basis among claimants regardless of the number of class members who actually file claims, or perhaps some will go to third parties via a *cy pres* award, or perhaps some will revert to the defendant, meaning, of course, that it is not really a \$30 million settlement. Perhaps the \$30 million includes attorney's fees, perhaps it does not.

**Our first proposal is that parties should have to attach a clear accounting to any proposed class action settlement that would as simply as possible identify with specificity the amounts intended to go to the plaintiff class, third parties, and class counsel, with any reversion possibilities noted.** As part of demonstrating the amount accorded to the class, the parties should have to estimate the proportion of class members likely to make claims and the likely average amount of such claims. In cases where the distribution is automatic, there should be estimates of the number of class members that will cash the checks mailed to them and the total amount likely to be distributed. In short, the numbers should be transparent and they should add up. Once distribution data is more widely known, a judge may have some benchmarks for assessing the parties' estimate provided in the proposed settlement. Until that time, courts should consider using independent "settlement evaluators" whose job would be to validate the parties' prediction of

the likely claiming and payout rates based on the notice program and the claiming process - or, if the parties refuse to provide such detail, the court could appoint the evaluator to do it *de novo*. Former employees of the big settlement administrators would be well suited for this task. The cost of employing such evaluators would be small because the review need only look at selected aspects of the settlement.

With this data now required to be part of a proposed settlement, our second proposal is that notice to the class should include the parties' estimates of the likely claiming and payouts rates, as validated or prepared by the independent settlement evaluator, presented in a simple straightforward manner, easily understandable to laypersons and lawyers alike. For example, one of us has proposed using a notice mechanism akin to the now-familiar nutritional labels found on food (Rubenstein 2006).<sup>40</sup>

<b>Pre-Approval Notice</b>	
<b>In re Megasoft Antitrust Case</b>	
<i>All figures are best estimates as of July 1, 2006</i>	
	% Total Settlement
<b>Settlement</b> \$50 million	<b>100%</b>
<b>Plaintiff fund</b> \$38.5 million	<b>77%</b>
<b>Expected claims</b> \$4.7 million	9%
Class members 500,000	
Projected claims 60,000 (12%)	
Settlement per class member \$79*	
<b>Expected residual</b> \$33.8 million	<b>68%</b>
Cy pres - Public schools, \$22.5 million	
Reversion - Megasoft, \$11.3 million	
<b>Attorneys' fees requested</b> \$10 million	<b>20%</b>
Lodestar \$4.0 million	
Hours 10,000	
Melded billing rate \$400/hr	
Multiplier 2.5	
<b>Attorney costs</b> \$0.5 million	<b>1%</b>
<b>Administrative costs</b> \$1 million	<b>2%</b>
The median award for class members filing a claim is estimated to be <b>\$79</b> . Instructions for filing your claim appear elsewhere in this settlement notice.	
* Settlement per class member is based on median damage. Actual individual settlements may be higher or lower depending on factual circumstances.	
This settlement received an 'A' grade from the Class Action Settlement Rating Association.	

<b>Post-Claim Filing Audit</b>	
<b>In re Megasoft Antitrust Case</b>	
<i>All figures are actual amounts as of June 30, 2007</i>	
	% Total Settlement
<b>Settlement</b> \$50 million	<b>100%</b>
<b>Claims paid</b> \$5.9 million	<b>12%</b>
Class members sent notice 500,000	
Actual claims 74,700 (15%)	
Opt-outs 2,000 (0.4%)	
Median recovery per claimant \$79	
<b>Residual</b> \$34.3 million	<b>69%</b>
Cy pres distribution \$22.9 million	
Reversion \$11.4 million	
<b>Attorneys' fees awarded</b> \$8.3 million	<b>17%</b>
Portion of distributed fund 22%	
<b>Attorney costs</b> \$0.5 million	<b>1%</b>
<b>Administrative costs</b> \$1 million	<b>2%</b>

<sup>40</sup> Rubenstein 2006, 53 *U.C.L.A. Law Review* 1460-1461.

As appears to have been the case with the nutritional labels, repeated use of an easily-readable similar format would raise consciousness among the public about what to look forward in settlement notices and how to find it.

The availability of this information ought to improve the quality of the resulting fairness hearing. Potential objectors will be able to get a clearer sense of what the settlement intends and of what assumptions it embodies. If these assumptions belie reality (based on data from similar cases) their objections will be improved; if, on the other hand, the parties' assumptions are realistic, this should ward off objectors. More information has the potential to make the settlement approval process function more efficiently, as well as more fairly. In some cases, some or all of the claims period will take place before the fairness hearing, so the judge will be able to assess the reasonableness of the parties' estimate at that hearing. This is not realistic for all cases, however, and there is some reason that claiming perhaps should not even begin until after the fairness hearing, lest the settlement not be approved and the prior claiming have been done in. Since claiming is most likely, therefore, to occur after final approval, it is that much more important that the estimates provided to, and relied on by, the court at the moment of settlement approval be as realistic and close to accurate as possible.

*Requiring Parties to Make a Final Report to the Court at the Conclusion of the Distribution Period*

Because we endorse finality even if claiming has not ended, the claims experience itself may have little effect on a concluded case. Nonetheless, **our third proposal is that every final judgment in a class action lawsuit should include a provision requiring the parties to file a detailed final accounting with the court at the conclusion of the distribution period.** Courts should require the parties to present the final payout data at a public hearing, with sufficient prior notice of it provided via the case's settlement website. The court would then have the opportunity to put on the record what the final data show and, if the final data do not match the proposed estimates, to ask the

participants to explain in open court what they think went wrong. The parties should not be sanctioned in any way for good faith efforts that failed, but if the claiming process demonstrates some sort of bad faith, there might be opportunities for the court to act accordingly.<sup>41</sup> There should also be sanctions built in for parties that fail to comply with the accounting requirement.

Even though this particular case has concluded, the value of a final accounting is four fold. First, it provides data for judges in future cases to use in assessing the reasonableness of the parties' estimate of proposed claiming in that future matter. Second, the parties' explanations of what, if anything, went awry, might help judges in future cases avoid similar mistakes. Third, the hearing record and final claiming data provide reputational information about lawyers: those whose estimates are always far from the mark will - as they should - be accorded less deference in future cases by judges being asked to approve their settlements. Finally, fourth, the accounting fills out the history of the case, leaving on the public record the true final outcome of the matter.

Class action participants might object to this accounting requirement for a variety of reasons. They might find it unnecessary in particular circumstances. For example, if a fund is established and the full amount will be distributed to class members who make claims on a pro-rata basis with no money reverting to the defendant, the parties might well argue that we know the final accounting at the moment of the fairness hearing - 100% of the money will be distributed to the class. But of course this misses a key question: was 100 percent of the money distributed to 1 percent of the class or 100 percent of the class? If the former, was there some problem with the notice or claims process? If so, perhaps there is a lesson in this case that could be used in future cases to ensure higher claiming rates. Information about such cases will help judges in future cases to decide whether proposed mechanisms for putting money into the hands of class members were the best possible under the circumstances.

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<sup>41</sup> See Fed. R. Civ. P. 60 (listing reasons for which a judgment can be altered within a year of its entry).

Participants might also want to simplify the accounting process by filing only "Affidavits of Compliance" - but these are insufficient. Knowing only that the defendant has completed its obligations under the settlement agreement says nothing about what actually happened.<sup>42</sup> On the other hand, the accounting provided to the court need not include any identifiers about particular class members. That form of confidentiality can be protected, although blanket confidentiality clauses that prevent class members and outsiders from enforcing terms of the settlement or learning of the settlement's results should be prohibited. *In camera* reports for the judge's eyes-only would be justified only in very limited circumstances. A better approach when sensitive information is involved would be to require the report to include only aggregated, non-identifiable information. The parties might also object on cost grounds. The costs of post-approval reporting need to be taken into account at the time of review so that the burden is not unfairly shouldered by class counsel or the defendants without adjusting the fund allocations accordingly.

**Our fourth proposal mirrors our second: when a final accounting is developed, it too, should be presented in a simple straightforward manner and it too should be available to the participants and other interested parties.** While the initial account estimate would be sent to the class in the proposed settlement notice, we do not believe another round of notice, after the final claiming data is in, is financially warranted. Rather, the settlement administrator for each case should create a case-specific website to present post-distribution information and maintain that site through the date of the hearing. The court's final approval order should require that the final accounting be (1) published at the case website reasonably in advance of the post-claiming hearing; (2) in the simple form described above; and (3) that this same information should be placed into the case file as part of the permanent

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<sup>42</sup> Indeed, compliance is not an issue at all. In none of the cases in our two data collections where distributions were made to a fraction of the announced class members was there any evidence to suggest that the defendants were not in complete compliance with the terms of the approved settlement agreement.

record and for easy access by the public (for instance, in federal courts via the PACER system for remote viewing of file entries).

*Publicizing Distribution Rates and Making Them Readily Available to Others*

Our first four proposals would ensure that claiming estimates and claiming results were both produced in a simple fashion and made readily available to the participants within given lawsuits. However, merely placing a copy of this information in the casefile or at the case website is not enough. Federal case files are available via PACER, but one still has to search for class cases; state case files are rarely available on line. Case websites are often closed down after a certain period of time. Class action payout information should be more readily accessible data than simply a piece of paper stuck in a case file.

**Our fifth proposal is that a central repository for class action outcomes be developed**, somewhat akin to Stanford Law School's Securities Class Action Clearinghouse (<http://securities.stanford.edu/>). The clearinghouse could be placed within a government agency, such as the Department of Justice, especially now that Congress has required in the *Class Action Fairness Act of 2005* that such agencies receive notice of pending class action settlements in federal court. There is a clear public interest in this information. Alternatively, a private organization, for profit or educational, could begin collecting and publicizing this data. Perhaps, as with the securities clearinghouse, a public-private partnership could be developed, with courts or legislatures requiring the delivery of such information and private corporations partnering with educational institutions to receive it.<sup>43</sup>

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<sup>43</sup> Professor Grundfest explains the genesis of the Stanford site as follows (see <http://securities.stanford.edu/info.html>):

This Internet site would not be possible without the cooperation of the judges of the United States District Court for the Northern District of California who have approved Local Rule 23-2. Rule 23-2 is the first local rule of court that requires Internet posting of major securities fraud class action litigation filings. The cooperation of the United States Securities and Exchange Commission in various aspects of this project is also extremely helpful.

### **Final Thoughts**

Through two independent data collection efforts, we have demonstrated that class action claiming data are largely unavailable. Searching through case files and communicating with participants, we were able to gain access to data in fewer than one of five closed cases. Despite the significant time and effort we put into the task, the final outcomes of four of five class action cases were beyond our discovery. It is not that the data are non-existent - claims administrators or parties certainly have them - it is, rather, that they are secreted away. The outcomes of publicly approved settlements lie locked in private files.

We argue that this is a problem for three reasons: because the case outcomes might not be all that they purport to be; because the lessons that they could teach - for example, about which approaches work best - are lost to secrecy; and because the public record is unnecessarily incomplete and public access unnecessarily thwarted.

We propose five solutions to this problem:

1. that parties should have to provide an estimated accounting when proposing a class action settlement;
2. that the accounting should be provided in a simple format, with the same format to be used in all class cases, and that the accounting in each case should be made available to the class with the class notice;
3. that the parties should have to provide a final accounting at the conclusion of the claiming period, in open court, before the judge that approved the settlement;
4. that the final accounting should be provided in the same simple format and be made available in a pre-announced place to the class members and public; and
5. that a central repository of class action outcomes should be developed.

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This project is made possible only through the vision and generosity of our sponsors: Cornerstone Research now provides major ongoing support, together with the Nasdaq Stock Market. George Roberts provided the "seed capital" for this venture, and MarketSpan provides their services for background research.

There are several things we have not done in this chapter. We do not mean to be heard to suggest that defendants "cheat" or fail to live up to their settlement agreement; they might well do exactly what the agreement says and, in some instances, nonetheless provide little direct benefit to the class. It is not our purpose to take a position on whether all settlements should be designed only to insure that the defendant pay out 100 percent of the compensation fund; *cy pres* mechanisms and pro-rata distributions may or may not be appropriate in particular cases for a variety of reasons, but neither are the answer to a lack of transparency about how class recoveries have been distributed among class members. Similarly, we do not mean to be heard to select out plaintiffs' counsel by seeming to suggest that their fees are out of line with what they actually deliver for the class in some cases. We did not undertake this study to prove that fees should be based only on the monetary benefits actually paid out or the fraction of class members receiving payment. Transparency in the process is our number one concern and the fee issue is best left for a different exploration in greater detail with a more focused analysis. Nevertheless, clearer guidance is needed as to the question of whether class counsel fees should be linked to compensatory benefits actually obtained, rather than merely available, or where compensatory benefits are likely to be low, whether fees should be linked to deterrence. In other words, our goal is not to lower fees where compensatory damages are low so much as it is to figure out what the data tell us about such situations so that future efforts can be made to ascertain how fees should be considered. For example, if fees were unlinked from claiming in certain cases, plaintiffs' counsel would have far less to fear about making claiming rates public.

It is characteristic of any article espousing transparency to conclude with Justice Brandeis' famous statement that "Sunlight is said to be the best of disinfectants, electric light the most efficient policeman."<sup>44</sup> What is less often commented upon is that the quotation

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<sup>44</sup>Brandeis, Louis D. , *Other People's Money and How the Bankers Use It*, "Chapter V: What Publicity Can Do", 1914 (accessed at

appears in a book entitled (in part), *Other People's Money*. Class action lawsuits are indeed lawsuits about other people's money - namely, the money of absent class members. That money is handled by third parties - lawyers and claims administrators - under the supervision of a public judicial official. Despite the imprimatur of public supervision, the final resting place of the other's people money is largely unknown and, we have here demonstrated, significantly unknowable. There is no good reason that this information need be kept secret and we have proposed a variety of mechanisms both to make this data more public and to make more decisions turn on what the data show. These proposals would have the effect of bringing not only more transparency, but also more legitimacy, to courts' handling of other people's money.

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