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## An Empirical Look at Compensation in Consumer Class Actions

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## ***An Empirical Look at Compensation in Consumer Class Actions***

Brian T. Fitzpatrick\* & Robert C. Gilbert<sup>+</sup>

### **I. Introduction**

Consumer class actions are under broad attack in the United States.<sup>1</sup> The principal charge against them is that they provide little compensation to class members, yet provide outsized compensation to the lawyers who bring them.<sup>2</sup> One response to this charge is the argument that one of us has made elsewhere: consumer class actions should not be measured by their compensatory value but by their deterrence value.<sup>3</sup> But here we

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\* Professor of Law, Vanderbilt University Law School. We are grateful to participants at the NYU Civil Justice Center’s Conference on the Future of Class Action Litigation for helpful comments on this article. We also thank Dylan Jacobs for research assistance. Professor Fitzpatrick served as an expert in many of the settlements discussed in this article.

<sup>+</sup> Mr. Gilbert has served as Plaintiffs’ Coordinating Counsel in the multidistrict litigation proceeding discussed in this article.

<sup>1</sup> See, e.g., Letter of Chamber of Commerce to CFPB 5 (2013), available at [http://www.instituteforlegalreform.com/uploads/sites/1/2013\\_12.11\\_CFPB\\_-\\_arbitration\\_cover\\_letter.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/2013_12.11_CFPB_-_arbitration_cover_letter.pdf) (“The claim that . . . class actions provide benefits to consumers . . . is not supported by the reality of class actions outcomes.”). See generally Linda Mullenix, *Ending Class Actions As We Know Them*, 64 *Emory L. J.* 399 (2014); Robert Klonoff, *The Decline of Class Actions*, 90 *Wash. U. L. Rev.* 729 (2013).

<sup>2</sup> See, e.g., Letter of Chamber, *supra*, at 5; Mullenix, *supra*, at 22 (“[T]here is scant evidence upon which to conclude that class action litigation and settlement actually accomplishes the state goal of compensating victims of wrongdoing.”).

<sup>3</sup> See Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 *U. PA. L. REV.* 2043, 2047–69 (2010) (“[S]mall-stakes class actions serve no [beneficial compensatory] function. Rather, the only function they serve is deterrence.”).

take up this critique of consumer class actions on its own terms: can they serve a meaningful compensatory role?

Scholars have taken up this question before, but they have been stymied by the lack of available data.<sup>4</sup> There are numerous empirical studies of class actions—including one authored by one of us<sup>5</sup>—and there is now considerable available data on the “face value” of class action settlements.<sup>6</sup> But scholars have found very little data on how much of the “face value” actually finds its way into the hands of class members, how many class members receive it, and what portion of their damages class members recover. Consequently, scholars have not dedicated much time to what can be done to improve any of these things.<sup>7</sup>

In this article, we try to begin filling some of these gaps in the literature. We present original data on the distribution of class action settlements in fifteen related small-stakes consumer class action lawsuits against some of the largest banks in the United States. Thirteen of these lawsuits were consolidated pursuant to the multidistrict litigation (“MDL”) statute before one federal district court; two of them remained outside the MDL and before other federal district courts. We summarize our findings from this data here:

- Between 1% and 70% of class members received compensation in these settlements. We call this the “participation rate.” The average payout ranged from \$13 to \$90, representing between 6% and 69% of average class member damages. We call this the “compensation rate.” The compensation rates were largely dependent on the underlying strength of the class’s claims.

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<sup>4</sup> See, e.g., Mullenix, *supra*, at 21 (“[T]here are no empirical studies that have drilled down to ascertain what class claimants actually are paid individually for their claims as a result of the class litigation.”).

<sup>5</sup> See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010).

<sup>6</sup> See, e.g., *id.*

<sup>7</sup> See Part II, *infra*.

- The settlements with the highest participation rates largely did not require class members to file claim forms; the parties were able to use information from the defendants about class members to automatically deposit settlement proceeds into their accounts or mail checks to them once the case settled. In the settlements with the lowest participation rates, all class members were required to file claim forms.
- Class members in claim-form settlements negotiated their checks at very high rates, above 90%. Class members in automatic settlements negotiated them at lower rates, ranging from 37% to 75%. We call this the “negotiation rate.” The settlements with the highest negotiation rates sent standard-sized checks to class members rather than cheaper, postcard-sized checks.
- A significant share of class members negotiated even the smallest checks—those for less than \$5. Even among settlements where class members received postcard-sized checks, more than 20% of class members negotiated the smallest checks. In other settlements, the smallest checks were negotiated as often as 80% of the time.

As we will explain in detail, we believe these findings can inform many contemporary debates over consumer class actions. We briefly summarize our conclusions here.

First, we believe our findings show that, if we wish the consumer class action to serve a compensatory function—and, again, one of us does not think it needs to<sup>8</sup>—it is possible in at least some cases for it to do so. Although the critics of consumer class actions have not set forth their definition of compensatory success, we think a fair starting point is delivering to a significant portion of the class compensation commensurate with the expected value of their claims. Under this definition, the majority of the settlements we study here were successful. Second, in light of the success of automatic distributions, courts and

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<sup>8</sup> See Fitzpatrick, *supra*, at 2047–69.

counsel interested in the compensatory side of class actions should make bolder efforts to find and preserve data on class members from the outset of their cases and to directly deposit settlement payments. Although the ALI, too, has recently encouraged this,<sup>9</sup> we believe there are more opportunities to do these things than even the ALI may have realized—and we think the opportunities will only grow in the future. If we are correct about this, it suggests that the compensatory value of consumer class actions will be brighter in the future than in the past. Finally, courts and class counsel should be mindful of appearances if they wish to maximize the compensatory side of consumer class actions: they should insist on standard-sized checks even if they might be slightly more expensive than postcard-sized checks and they should not be afraid to send checks of even the smallest denominations.

In Part II of this Article, we canvas the prior empirical literature on compensation in consumer class actions. In Part III, we describe the consumer class actions from which our data is drawn and set forth our data. In Part IV, we analyze our data and assess what it means for compensation in consumer class actions. In Part V, we conclude.

## **II. The prior literature on compensation in consumer class actions**

In 2008, Nicholas Pace and William Rubenstein set out to find data on how well class actions provided compensation to class members.<sup>10</sup> What they found was virtually nothing: “Our efforts demonstrate that it is very difficult, even for researchers with significant resources, to find distribution data in completed class action lawsuits.”<sup>11</sup> Indeed, they

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<sup>9</sup> See Principles of the Law of Aggregate Litigation, § 3.05, cmt. f (American Law Institute, 2010).

<sup>10</sup> Nicholas M. Pace & William B. Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data*, RAND Institute for Civil Justice Working Paper (July 2008), [billrubenstein.com/Downloads/RAND%20Working%20Paper.pdf](http://billrubenstein.com/Downloads/RAND%20Working%20Paper.pdf).

<sup>11</sup> *Id.* at 34.

devoted as much or more of the paper they wrote to calling for more transparency in class action settlement distributions as they did to describing and analyzing the data they found.<sup>12</sup> They urged courts to require class counsel and settlement administrators to make distribution data known.<sup>13</sup>

Things have not improved over the last seven years.<sup>14</sup> As far as we are aware, there have been no scholarly empirical studies of compensation in class actions since the Pace-Rubenstein study (although, as we explain below, there has been one nonacademic study), and, indeed, we are aware of only three that preceded it. Moreover, it appears these four studies have produced *only fourteen data points* in small-stakes class actions like the consumer cases we study in this article, and all of that data goes to participation rates and not compensation rates. The more recent nonacademic study adds only five more data points, and, again, only on participation rates. We summarize these matters below.

The earliest academic study is a 1986 article by Fred Gramlich, then an economist at the Department of Justice.<sup>15</sup> He studied 20 antitrust settlements where class members had been paid with coupons; it appears he selected these settlements because they comprised all of the antitrust coupon settlements of which he was aware.<sup>16</sup> He surveyed the settlement administrators and the parties to ask them how frequently class members redeemed the coupons.<sup>17</sup> He was able to collect data in 12 cases, but the only data useful here was reported in the aggregate. He found an average redemption rate of 26.3%, and, although he did not report the denominations of the coupons, he noted that in 10 cases the plaintiffs

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<sup>12</sup> See *id.* at 34-47.

<sup>13</sup> See *id.*

<sup>14</sup> See Mullenix, *supra*, at 21 (“[T]here are no empirical studies that have drilled down to ascertain what class claimants actually are paid individually for their claims as a result of the class litigation.”).

<sup>15</sup> See Fred Gramlich, *Scrip Damages in Antitrust Cases*, 31 *Antitrust Bull.* 261 (1986).

<sup>16</sup> See *id.* at 272-74.

<sup>17</sup> See *id.*

were consumers; he reported the average redemption rate in these settlements was 13.1%.<sup>18</sup> He did not report whether or not the settlements were automatically distributed nor how the coupons compared to the class's damages (i.e., the compensation rate).

The next study was a 1999 book by Deborah Hensler and others for the RAND Institute.<sup>19</sup> Professor Hensler and her co-authors performed case studies of ten class action settlements and found compensatory data useful here on six of them. The ten settlements were selected based on neutral, but idiosyncratic, criteria.<sup>20</sup> In Table 1, we set forth the data from these six settlements. As is apparent from the Table, most of the settlements awarded class members large payouts, but two of them were small-stakes settlements of the sort we are studying in this article. The participation rates in these two settlements were quite good: over 35% and over 90%. Both of these settlements were distributed, at least in part, through automatic distributions and without claim forms. The authors did not report any information on the compensation rate in these settlements.

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<sup>18</sup> See *id.*

<sup>19</sup> Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, Rand Inst. For Civil Just. 21 (1999), available at [http://www.rand.org/pubs/monograph\\_reports/MR969.html](http://www.rand.org/pubs/monograph_reports/MR969.html).

<sup>20</sup> See *id.* at 12-13 & 138.

**Table 1: Compensation Data, Hensler et al. Study (1999)<sup>21</sup>**

# class members	% class compensated (and projected)	Average payout	Automatic or claim forms
60,000	12.66% (same)	\$1478.89	Claim forms
60,379	93.59% (99.7%)	\$134.20	Automatic
4,401,817	35.22% (same)	\$5.75	Mixed
6,500	67.14% (93.38%)	\$100,000	Claim forms
3,931	100% (same)	\$6404.22	Claim forms
808,000	4.68% (unknown)	\$4367.27	Claim forms

The other study that predated the Pace-Rubenstein study is one that Nicholas Pace did by himself in 2007, also for RAND.<sup>22</sup> The Pace study surveyed major insurance companies and asked them about the class action lawsuits they had defended in recent years.<sup>23</sup> One part of the study reported on the distribution of the monies from settlements in 29 of these

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<sup>21</sup> See *id.* at 184, 204, 276, 310, 336, 359, 549-50. In the “mixed” settlement, payment was automatic for current and recent customers of the defendant. Others were required to file claim forms. See *id.* at 276.

<sup>22</sup> Nicholas M. Pace et al., *Insurance Class Actions in the United States*, RAND Inst. For Civil Justice (2007).

<sup>23</sup> See *id.* at 55



lawsuits.<sup>24</sup> Like the Gramlich study, the Pace study reported the data useful here only in the aggregate: in ten cases, 100% of the estimated class members received compensation; over the entire sample of 29 cases, the average participation rate was 45% and the median rate was 15%.<sup>25</sup> Again, however, many of these settlements involved more money than the typical consumer case: the average class member payout in these cases was \$4000 and the median payout was \$411.<sup>26</sup> The author did not provide any information on how these payouts fared relative to class member damages (i.e., the compensation rate) or whether the distributions were automatic or used claim forms.

The Pace-Rubenstein study the following year took a somewhat randomized sample of 31 class action settlements in federal court and sought to find data on their distributions from the federal judiciary's electronic docket.<sup>27</sup> The authors were able to find this data in only six of the 31 cases.<sup>28</sup> In four of the cases, the settlement was distributed automatically, with participation rates ranging from 65% (of 7400 class members; average payout \$35) to 99.5% (of 200 class members; average payout \$2000).<sup>29</sup> In the two non-automatic distributions, the participation rates were 20% (of 3500 class members; average payout \$1000) and 4% (of 1,000,000 class members; payout of software worth \$20).<sup>30</sup> They did not report data on compensation rates.

Not satisfied with six data points, Pace and Rubenstein also surveyed the litigants in 57 federal and state settlements they found on the websites of major settlement administration companies.<sup>31</sup> In nine cases, they

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<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> Pace & Rubenstein, *supra*.

<sup>28</sup> See *id.* at 23-24.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 32

received data on participation rates: there were two settlements with participation below 1%, one between 1% and 5%, three between 20% and 40%, one at 35% (with roughly 1 million class members), one at 65% (with 431 class members and an average payout of \$5,000), and one at 82% (with 350 class members and an average payout of \$2,600).<sup>32</sup> Again, there was no reporting on how these average claim sizes translated into compensation rates. There was also no reporting on whether or not the distributions were automatic. Many of the data points from both halves of the Pace-Rubenstein study involved much larger payouts (where payouts were reported to begin with) than are at issue in the small-stakes class actions we are studying here.

This is the sum of the prior scholarly data on compensation in class actions of which we are aware: a grand total of 62 data points. Even worse, only fourteen of these data points were from settlements where we know the payouts were as small as those in the paradigmatic consumer class action. The participation rates in these fourteen settlements were: 4% (software worth \$20), 13.1% (ten coupon settlements), 35% (\$5.75 average payout, mixed distribution), 65% (\$35 average payout, automatic distribution), and over 90% (\$134 average payout, automatic distribution). We have no data at all for compensation rates in these settlements

Given the dearth of scholarly studies in this area, it is worth asking whether there are any nonacademic studies. We are aware of only one.<sup>33</sup> It was done two years ago by the Mayer Brown law firm in Washington,

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<sup>32</sup> See *id.*

<sup>33</sup> The Consumer Financial Protection Bureau studied compensation in eight recent consumer class actions, but, although it reported the number of claims filed, it did not report the percentage of class members these claims comprised. See Arbitration Study Preliminary Results 100-10 (CFPB 2013), available at [http://files.consumerfinance.gov/f/201312\\_cfpb\\_arbitration-study-preliminary-results.pdf](http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf). One settlement administration firm has also published promotional material that gives potential clients broad ranges over which they might expect class members to file claims: 2-20% in consumer cases, 20-35% in securities cases, and 20-85% in employment cases. See Tiffany Allen, *Anticipating Claims Filing Rates in Class Action Settlements*, Class Action Persp. (Rust Consulting, Inc., Minneapolis, Minn.), Nov. 2008, available at [http://www.rustconsulting.com/Portals/0/pdf/Monograph\\_ClaimsFilingRates.pdf](http://www.rustconsulting.com/Portals/0/pdf/Monograph_ClaimsFilingRates.pdf). This material is too vague for our purposes here.

D.C., at the behest of the United States Chamber of Commerce as part of the Chamber's advocacy against consumer class actions.<sup>34</sup> In light of the duty of law firms to zealously represent their clients' viewpoints, we do not put the same stock in the Mayer Brown study, of course, as we do in academic studies. Nonetheless, the study collected data using neutral criteria and we have no reason to believe that the data was reported in a biased manner.<sup>35</sup> It should be noted, however, that the participation rates found in the Mayer Brown study are much, much lower than the fourteen data points we extracted from the academic studies.

The Mayer Brown study collected data on all federal court consumer class actions filed in 2009 and reported in two well-known reporters of class action litigation.<sup>36</sup> The authors identified 148 such putative class actions, 40 of which ended in settlement.<sup>37</sup> Of these 40 settlements, the authors found data on the participation rate in six of them: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%, and 98.72%.<sup>38</sup> The authors did not report any information on the average payout of these settlements except for the last one (which was the ERISA litigation resulting from the Madoff Ponzi scheme, with an average payout over \$2.5 million<sup>39</sup>), whether or not the settlements were distributed automatically, or compensation rates.

If we add the five non-Madoff data points from the Mayer Brown study to the consumer class action-sized data points from the prior academic literature, we can identify nineteen data points on

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<sup>34</sup> See Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, REUTERS (2013), <http://blogs.reuters.com/alison-frankel/files/2013/12/mayerbrownclassactionstudy.pdf>.

<sup>35</sup> See *id.* An appendix to the Mayer Brown study listed examples of other consumer settlements with "low participation rates." Because the cases in the appendix do not appear to have been collected pursuant to neutral criteria, we do not discuss them further here.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.* The number of consumer settlements found by Mayer Brown closely agrees with the numbers I found in my empirical study. See Fitzpatrick, *supra*, at 818 (tbl. 1) (finding an average of 43.5 consumer settlements per year in federal court). The fact that the Mayer Brown study agrees with findings from academic studies lends credibility to its methodology.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

compensation in consumer-sized class actions. We summarize this data in Table 2 (with blank cells for missing information).

**Table 2: Compensation Data, All Prior Literature (1986-2008)**

% class compensated	Average payout	Automatic or claim forms	Study
.000006%			Mayer Brown
.33%			Mayer Brown
1.5%			Mayer Brown
4%	\$20 software	Claim forms	Pace-Rubenstein
9.66%			Mayer Brown
12%			Mayer Brown
13.1% (n = 10)	Coupons of unknown size		Gramlich
35%	\$5.75	Mixed	Hensler et al.
65%	\$35	Automatic	Pace-Rubenstein
>90%	\$134	Automatic	Hensler et al.

Needless to say, this existing data on consumer class actions is far from sufficient to make any conclusions about whether they can serve a compensatory function—the criticism of consumer class actions we cited above notwithstanding. Moreover, we agree with Pace and Rubenstein: given that there are *over 300* class action settlements *every single year* in federal court *alone*,<sup>40</sup> it is indefensible that scholars have been able to unearth data in *only 62* settlements over the last *thirty years*. On this

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<sup>40</sup> See Fitzpatrick, *supra*, at 818 (tbl. 1)

point, we note that one of us has joined with several scholars to propose an amendment to Rule 23 that would require the parties to report to courts data on the distribution of every class action settlement once it is completed.<sup>41</sup> This proposal is currently before the committee reexamining Rule 23. Both of us endorse it.

### III. Our data: the overdraft fee class actions

But we wish to do more than simply call for more data in the future. We wish to try to fill some of the gaps in the existing literature now. To do this, we report original data on fifteen related consumer class action settlements. Thirteen of our settlements come from Rule 23(b)(3) class actions in the *In re Checking Account Overdraft Litigation* multidistrict litigation (“MDL 2036”),<sup>42</sup> which was consolidated in 2009 before the United States District Court for the Southern District of Florida.<sup>43</sup> The other two settlements, also Rule 23(b)(3) classes, come from related federal lawsuits that were not made part of MDL 2036.<sup>44</sup> We chose these settlements for the very simple reason that these are the settlements for which we have access to the data because one of us serves as plaintiffs’ coordinating counsel in MDL 2036. Of course, we can make no claim that these fifteen data points are any more representative of consumer class actions than the nineteen we identified in the prior literature.

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<sup>41</sup> See Letter from Alexandra Lahav to Rule 23 Advisory Committee (on file with author).

<sup>42</sup> *Tomes, et al. v. Bank of America, N.A.*, No. 08-cv-23323 (S.D. Fla.); *Case v. Bank of Oklahoma, N.A.*, No. 1:11-cv-20815 (S.D. Fla.); *Larsen et al. v. Union Bank, N.A.*, No. 09-cv-23235 (S.D. Fla.); *Dee v. Bank of the West, N.A.*, No. 10-cv-22985 (S.D. Fla.); *Lopez v. JPMorgan Chase Bank, N.A.*, No. 09-cv-23127 (S.D. Fla.); *Duval v. Citizens Financial Group, Inc.*, No. 10-cv-21080 (S.D. Fla.); *Mosser v. TD Bank, N.A.*, No. 10-cv-21386 (S.D. Fla.); *Wolfgeher v. Commerce Bank, N.A.*, No. 10-cv-22017 (S.D. Fla.); *Casayuran, et al. v. PNC Bank, N.A.*, No. 10-cv-20496 (S.D. Fla.); *Anderson v. Compass Bank*, No. 11-cv-20436 (S.D. Fla.); *Harris v. Associated Bank, N.A.* (S.D. Fla.); *Blahut v. Harris Bank, N.A.*; *Eno v. M&I Marshall & Ilsley Bank* (S.D. Fla.).

<sup>43</sup> *In re: Checking Account Overdraft Litig.*, 626 F. Supp. 2d 1333 (U.S. Jud. Pan. Mult. Lit. 2009).

<sup>44</sup> *Trombley v. Nat’l City Bank*, No. 10-00232 (D.D.C.); *Schulte v. Fifth Third Bank*, No. 09-cv-6655 (N.D. Ill.).

These lawsuits were brought by customers against many of the largest banks in the United States. They alleged that the banks violated various state laws by posting debit card transactions to their accounts in a manner designed to maximize overdraft transactions (from the largest transaction to the smallest transaction) and, consequently, to maximize overdraft fee revenues for the banks.<sup>45</sup> Class action lawsuits against 28 banks were made part of MDL 2036, and settlements against 18 of them have now been approved, generating over \$1 billion in settlement proceeds. The distributions for 13 of the MDL 2036 settlements are now completed, and we report data here for these settlements. We also report data on two federal class action settlements against other banks for the same overdraft practices that were not made part of MDL 2036 but that used the same settlement administrators.

In thirteen of the fifteen settlements, distributions to the vast majority of class members were made automatically using information the banks possessed and without the need to file claim forms: for current bank customers, the distributions were usually via direct account credits; for former bank customers, the distributions were mailed via checks; only when banks no longer possessed complete information did some class members in these settlements have to file claim forms (in which case they were mailed checks). If sufficient money was left over after the first distribution in these settlements (because some of the checks were not negotiated), a second distribution has or will occur. In the other two settlements, no automatic distribution was attempted and class members could participate only if they filed claims forms. All the class members in these two settlements were mailed checks; leftover money was sent to *cy pres*. In some of the fifteen settlements, the checks were standard-sized and in others the checks were cheaper, postcard-sized instruments.<sup>46</sup>

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<sup>45</sup> See generally *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330 (S.D. Fla. 2011).

<sup>46</sup> Standard-sized checks were typically printed on three-fold letter-sized bond and enclosed in a standard-sized business envelope. Postcard-sized checks were typically printed on one side of a double postcard; the bond was heavier and enclosed with a perforated edge with the recipient's name and address printed on the exterior. The printing, postage and processing costs associated with standard-sized checks were approximately one-third greater than the costs associated with the postcard-sized checks.

The number of class members in these fifteen cases ranged in size from 28,000 to almost 14 million, with an average size of 2.1 million and a median of over 800,000. The settlement amounts ranged from \$2.2 million to \$410 million, with an average of \$63 million and a median of \$19 million. In none of the settlements did any of this money revert back to the defendant banks. Rather, the vast majority of settlement proceeds were (or will be if second distributions are required) distributed to class members on a *pro rata* basis in proportion to their losses. In most cases, fully 70% of the settlements were or will be distributed to class members; this represents everything other than attorneys' fees and costs because the defendants usually agreed to pay the cost of notice and settlement administration on top of the settlement fund.<sup>47</sup> Even in the cases where notice and administrative costs came out of the settlement fund, however, a significant majority of the fund still was paid out to class members in every settlement. We report detailed data about these settlements below.

#### A. Participation rate

In Table 3, we set forth each of the fifteen settlements, the percentage of class members who received compensation from the settlement in the first (or only) distribution (again, what we call the "participation rate") either via direct deposit or negotiated check, the average payout per class member, whether the settlement was distributed automatically or relied on claim forms, and whether class members who were sent checks were sent standard-sized or postcard-sized instruments. All of the data in Table 3 comes from information that was publicly filed with the courts in these cases or from the settlement administrators. We do not include here any payouts from any second distributions because most of those distributions are still ongoing, but it is important to note that the average payout in Table 3 may grow for the first 13 settlements once those distributions are completed.

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<sup>47</sup> Some of the settlements contained provisions entitling banks to reimbursement from leftover funds for costs they paid for notice and administration before second distributions were attempted.

**Table 3: Participation Rate, Overdraft Fee Class Actions (2011-present)**

Bank	% class compensated	Average payout	Automatic or claim forms	Standard or postcard check
1	60.34%	\$13.38	Mixed	<b>Postcard</b>
2	60.44%	\$21.95	Automatic	<b>Postcard</b>
3	46.97%	\$90.92	Automatic	<b>Postcard</b>
4	62.91%	\$82.36	Mixed	Standard
5	64.30%	\$59.13	Automatic	Standard
6	61.91%	\$52.76	Mixed	Standard
7	37.27%	\$17.01	Mixed	<b>Postcard</b>
8	64.75%	\$66.49	Automatic	Standard
9	69.31%	\$17.15	Automatic	Standard
10	70.48%	\$40.49	Automatic	Standard
11	64.25%	\$57.97	Automatic	Standard
12	42.83%	\$49.99	Automatic	Standard
13	64.19%	\$70.08	Automatic	Standard
14	1.76%	\$68.04	<b>Claim forms</b>	Standard
15	7.39%	\$41.83	<b>Claim forms</b>	Standard

Table 3 shows that a significant majority of class members—and, again, these are large classes, often over 1 million people—received compensation from almost all of these settlements. The most notable exceptions were the two settlements that relied on claim forms. This is hardly surprising: it is much easier for class members to cash a check (or



do nothing at all in the case of the direct deposits) than it is to fill out even the simplest claim form. When automatic distributions are used, however, an impressive number of even small-stakes class members can participate, usually above 60%. If the payouts from these settlements return to class members an appropriate (in light of the strength of the class's claims) fraction of their damages—a question we take up below when we study compensation rates—then we believe it will be hard for critics to maintain that these settlements have not succeeded as compensatory vehicles.

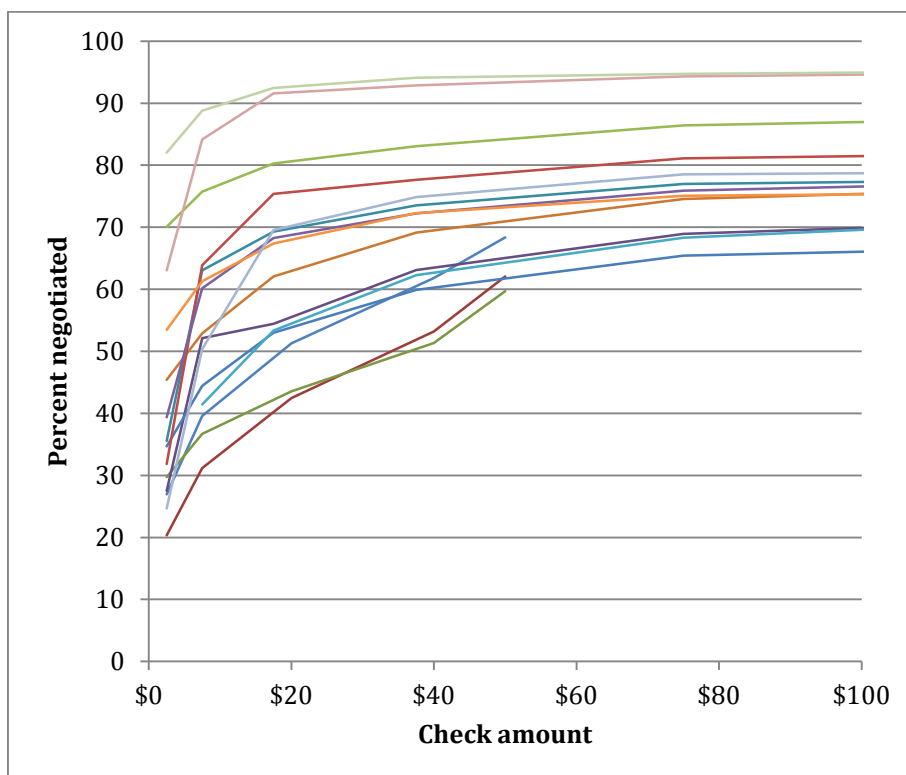
It should be noted that even among only the settlements that distributed (at least in part) automatically, there is still a substantial variation in the percentage of class members who participated, ranging from 37% to 70%. What explains this difference? We think it is largely due to the type of check that was sent to class members. As Table 3 shows, in settlements 1-3 and 4, the checks sent to class members were cheaper, postcard-sized instruments; in the other settlements, class members received standard-sized checks. With one exception (settlement 12), the four postcard-sized settlements had the lowest participation rates of the settlements distributed (at least in part) automatically. We believe postcard-sized checks may have suppressed participation rates because class members may have been skeptical that the postcard-sized checks were real or because they may have had trouble depositing these odd-sized checks on their cell phones (an increasingly common mode of banking).

#### B. Negotiation rate

Another possible explanation for the variation in participation rates in Table 3 is that the distribution of check denominations mailed to class members varied from settlement to settlement and class members were less likely to negotiate small checks. Indeed, as the average payout numbers in Table 3 suggest, there was some variation in payouts from settlement to settlement (largely, as we explain below, because class members had stronger claims in some cases than others). In order to explore how payout size may have influenced the participation rate, in this section we study the rate at which class members negotiated checks that were mailed to them as a function of the amount of the check. Figure 1 graphs this relationship for the fifteen settlements. It should be noted that the settlement administrators reported the negotiation rates over a

range of check denominations (such as checks under \$5, checks between \$5 and \$10, etc.) and the Figure plots the midpoint of these ranges. It should also be noted that two different firms administered these settlements and they reported data over different ranges, which is why some curves are truncated earlier than others.

**Figure 1: Negotiation Rate, Overdraft Fee Class Actions (2011-present)**



As Figure 1 shows, class members were more likely to negotiate their checks the larger their checks were. Again, this is hardly surprising. But Figure 1 does allow us to answer the question whether our hypothesis about the appearance of the check—standard-sized or postcard-sized—remains true even after we control for check denomination. It does. The bottom four curves in Figure 1 are the four settlements that used postcard-sized checks. Interestingly, the top two curves are the settlements that relied entirely on claim forms for distribution; it appears that, once class members have filled out claim forms, they are especially eager to cash the ensuing checks. By contrast, we suspect that some class

members are skeptical of checks that they receive in the mail through no effort of their own, and that they do not negotiate them for fear of becoming part of a scam. Nonetheless, as the participation rates in Table 3 demonstrated, the broader coverage of automatic distribution more than outweighed—by a significant margin—any increased reluctance to negotiate checks received automatically.

We find one other piece of Figure 1 worth mentioning: even the smallest checks were negotiated in large numbers in all of these settlements. Both settlement administrators reported negotiation rates for checks of between \$0 and \$5; this is the starting point of all of the curves in Figure 1. As these curves show, class members negotiated these checks as much as 80% of the time in the claims-made settlements, but even 30-40% or more when automatic distributions and standard-sized checks were used. In no settlement did they negotiate these checks less than 20% of the time. We were surprised how frequently class members negotiated even the smallest checks.

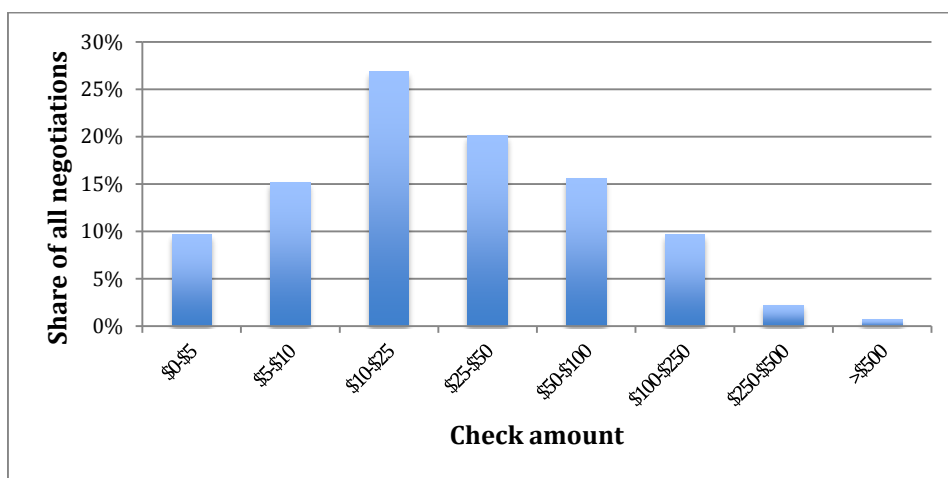
### C. Compensation rate

The data on participation and negotiation rates paints only a slice of the picture of how well the consumer settlements we study here compensated class members; it is incomplete without some measure of whether the money delivered to class members was significant in light of how much money they lost to begin with. It is one thing to deliver money; it is another to deliver meaningful compensation for losses. None of the prior studies on compensation in consumer class actions sought to assess this matter—understandably, because it is difficult to gather information about the class’s damages—but we have access from publicly filed documents to the class’s damages’ models for thirteen of our settlements. Thus, not only can we report the average payout for class members who participated in the settlements, but also what portion of damages this payout represents. This is what we call the “compensation rate.”

Before we get there, however, we are often asked what the distribution of payouts looked like in these settlements. We have this data from the settlement administrators for the class members who were mailed checks (as opposed to directly deposited), and we report in it in Figure 2. Because it is difficult to report this data clearly for all fifteen settlements, we instead aggregate this data for the twelve settlements

where we have data over the same ranges of check sizes (recall two different settlement administrators were used and they reported different ranges); we report the average percentage of class members in these twelve settlements who received payouts within each of the specified ranges. Figure 2 shows that almost half of the payouts in these settlements were for \$25 or more, roughly the size of one or more overdraft fees. A few class members negotiated very sizable checks, in the hundreds of dollars.

**Figure 2: Distribution of Check Payouts, Overdraft Fee Class Actions (2011-present)**



How do these numbers compare to the number of overdraft fees that class members had been wrongly assessed? To derive the answer to this question, we were able to extract from publicly filed documents in thirteen of these settlements how many overdraft fees the classes would have been charged had the banks processed transactions chronologically as opposed to the challenged ordering from the largest transaction to the smallest. We found that the settlements recovered between 9% and 65% of damages, with the variation based largely on the strength of the class's claims and the likelihood of winning certification of the class; for example, some banks had defenses (most notably arbitration clauses with class action waivers) that other banks did not. In Table 4, we report again the participation rates and average payouts from Table 3, the average class member damages using the damages' models we found, and the ratio of the two (i.e., the compensation rate).

**Table 4: Compensation Rate,  
Overdraft Fee Class Actions (2011-present)**

Bank	% class compensated	Average payout	Average damages	Average % damages paid out
1	<b>60.34%</b>	\$13.38	\$94.46	<b>14.16%</b>
2	<b>60.44%</b>	\$21.95	\$332.07	<b>6.61%</b>
3	<b>46.97%</b>	\$90.92	\$131.77	<b>69.00%</b>
4	<b>62.91%</b>	\$82.36	\$208.22	<b>39.55%</b>
5	<b>64.30%</b>	\$59.13	\$146.64	<b>40.32%</b>
6	<b>61.91%</b>	\$52.76	\$134.64	<b>39.19%</b>
7	<b>37.27%</b>	\$17.01	\$82.49	<b>20.62%</b>
8	<b>64.75%</b>	\$66.49	\$116.81	<b>56.92%</b>
9	<b>69.31%</b>	\$17.15	\$84.38	<b>20.32%</b>
10	<b>70.48%</b>	\$40.49	\$99.47	<b>40.70%</b>
11	<b>64.25%</b>	\$57.97	\$142.45	<b>40.70%</b>
12	<b>42.83%</b>	\$49.99	\$88.70	<b>56.36%</b>
13	<b>64.19%</b>	\$70.08	\$155.03	<b>45.21%</b>

Table 4 paints the complete picture on how well these settlements compensated class members for their losses, and we think that even the harshest critics of consumer class actions would have to concede that the picture it paints is a successful one. In most of these settlements, from the first column we see the vast majority of class members participated and from the last column we see when they did they received a significant portion of their damages. The weakest settlements in these regards were those that used postcard-sized checks and those where the class

recovered a smaller share of its damages because the class's claims were weaker.

#### **IV. Analysis and recommendations**

We believe the findings in the previous part can inform many of the contemporary debates over consumer class actions.

First, to the extent commentators have argued that consumer class actions are not capable of serving a compensatory role,<sup>48</sup> we believe our findings suggest that these criticisms are too broad. To our knowledge, none of these critics has set forth of a definition of what compensatory success means in consumer class actions. But we think a fair starting point is a class action that delivers to a significant portion of the class compensation that is commensurate with what those class members could have expected to receive in light of the strength of their claims. We think most of the settlements studied in this article meet this definition of success. In those settlements that 1) eschewed claim forms in favor of automatic distributions and that 2) relied on direct deposits or 3) standard-sized checks rather than the cheaper, postcard-sized variety, a majority of class members received a fair return on even small expected damages. Again, one of us believes consumer class actions are worthwhile even if they cannot serve a meaningful compensatory role.<sup>49</sup> But even for those who think otherwise, our findings suggest that, under these conditions, consumer class actions can succeed.

How often can these conditions be met? We think more often than some might expect. To begin with, it is easy enough for courts and counsel to insist that settlement administrators use standard-sized checks rather than postcard-sized checks. Although the former are more expensive than the latter,<sup>50</sup> the difference in price will have a miniscule effect on all but the tiniest payees.

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<sup>48</sup> See note, *supra*.

<sup>49</sup> See Fitzpatrick, *supra*, at 2047–69.

<sup>50</sup> See note, *supra*.

But we also think there are realistic opportunities to distribute settlements automatically. Many times the defendants will have sufficient information about some or all of its customers to make automatic distributions feasible. These will include defendants who sell directly to customers, especially those who sell online, where the paper trail is more often preserved. Courts and counsel interested in the compensatory side should be attentive to these opportunities and insist that defendants preserve such information at the outset of a case. The ALI has already encouraged this,<sup>51</sup> but we think the opportunities for automatic distributions go beyond even what the ALI has envisioned: if the files of defendants are bare, we think courts and counsel should turn to third parties. For example, when defendants sell their wares through retailers, the retailers that sell online (e.g., Amazon) will have this information; and even those that sell offline keep purchase information on those of their customers who hold so-called “loyalty” cards. These third-party retailers can be subpoenaed for information, as they were in a recent class action for which one of us served as an expert.<sup>52</sup> Again, courts and commentators interested in the compensatory side should be attentive to preserving these opportunities at the outset of a case, before the information is lost to data retention policies. Indeed, we suspect these opportunities will only become more common in the future. As the so-called “big data” phenomenon washes over more and more of the economy,<sup>53</sup> we suspect more and more defendants and third parties (not only retailers, but social media companies like Facebook) will possess the necessary data for automatic distributions.

Likewise, we believe there are realistic opportunities for directly depositing settlement money. Although in many instances class members will not have active accounts with the defendants, they may, again, have them with third parties, and there is nothing to prevent courts and counsel from crediting third-party accounts. This might be true, again, with regard to loyalty-card customers and online customers, but it might

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<sup>51</sup> See Principles of the Law of Aggregate Litigation, § 3.05, cmt. f (American Law Institute, 2010).

<sup>52</sup> See Chaudhri et al. v. Osram Sylvania, Inc. et al., No. 11-CV-05504 (D. N.J.).

<sup>53</sup> See, e.g., Steve Lohr, The Age of Big Data, N.Y. Times (Feb. 11, 2012), available at <http://www.nytimes.com/2012/02/12/sunday-review/big-datas-impact-in-the-world.html>.

be even more true for customers with Paypal and ApplePay accounts. These accounts are *made* for receiving money and there is nothing to prevent them from receiving money from class action settlements. Again, as these accounts become more and more ubiquitous, we are optimistic that these opportunities will only grow. Indeed, the fact that opportunities for automatic distribution and direct deposit may only grow suggests that compensation in consumer class actions will be brighter in the future than in the past. This suggests that the criticism of consumer class actions is not only overbroad, but also premature.

Finally, to the extent we will continue to rely on mailing checks to class members, a question often arises at what point we should cut off the checks—how low, so to speak, we should go. The findings in the previous part suggest we should go as low as we can. To be sure, at some point the cost of sending a check is greater than the check itself; in the experience of one of us, that point is hit around \$1. But in light of how frequently class members negotiated even the smallest checks in our settlements, we think courts and counsel should not be afraid to send checks at any denomination over the break-even point. If the definition of success in a consumer class action is delivering fair value to as many class members as possible, then there is little reason to exclude even the smallest payees if there is a decent chance they will negotiate their payments.

## V. Conclusions

For as long as scholars have studied consumer class actions, there has been gaps in the empirical literature on how well consumer class actions compensate class members. In this article, we have attempted to fill at least some of the gaps by reporting on the participation, negotiation, and compensation rates of fifteen related consumer class actions. Of course, our data will not close the gaps in the literature; we offer only fifteen new data points and we have no way of knowing how representative these points are of other consumer class actions.

Nonetheless, we think our findings should lead to optimism rather than pessimism about the compensatory potential of consumer class actions. Under certain conditions—automatic distributions that rely on direct deposits and standard-sized checks—consumer class actions can deliver fair compensation to a significant portion of class members.



Although we do not pretend that these conditions can be met in every consumer class action, we are optimistic that, as the economy changes, these conditions will become more and more prevalent in the years to come.

For these reasons, we think much of the criticism of the compensatory potential of consumer class actions has been overstated. But we cannot know for sure until large-scale empirical research is completed. As we noted, in order to facilitate this research, we both endorse the proposal pending before the committee reexamining Rule 23 to require settlement distribution data to be filed with the court at the conclusion of every class action. If this proposal is adopted, scholars should have complete answers to many of the questions raised in this article in only a few short years.