# Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions

By Mayer Brown LLP

## Executive Summary

This empirical study of class action litigation—one of the few to examine class action resolutions in any rigorous way—provides strong evidence that class actions provide far less benefit to individual class members than proponents of class actions assert.

The debate thus far has consisted of competing anecdotes. Proponents of class action litigation contend that the class device effectively compensates large numbers of injured individuals. They point to cases in which class members supposedly have obtained benefits. Skeptics respond that individuals obtain little or no compensation and that class actions are most effective at generating large transaction costs—in the form of legal fees—that benefit both plaintiff and defense lawyers. They point to cases in which class members received little or nothing.

Rather than simply relying on anecdotes, this study undertakes an empirical analysis of a neutrally-selected sample set of putative consumer and employee class action lawsuits filed in or removed to federal court in 2009.[1]

Here's what we learned:

- In our entire data set, ***not one of the class actions ended in a final judgment on the merits for the plaintiffs***. And none of the class actions went to trial, either before a judge or a jury.
- The vast majority of cases produced ***no benefits to most members of the putative class***—even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process (and the lawyers representing the defendants always did).
    - ***Approximately 14 percent of all class action cases remained pending four years after they were filed***, without resolution or even a determination of whether the case could go forward on a class-wide basis. In these cases, class members have not yet received any benefits—and likely will never receive any, based on the disposition of the other cases we studied.
    - ***Over one-third (35%) of the class actions that have been resolved were dismissed voluntarily by the plaintiff.*** Many of these cases settled on an individual basis, meaning a payout to the

[1] For information about our methodology, see Appendix C.

individual named plaintiff and the lawyers who brought the suit—***even though the class members receive nothing.*** Information about who receives what in such settlements typically isn't publicly available.

  - ***Just under one-third (31%) of the class actions that have been resolved were dismissed by a court on the merits***—again, meaning that class members received ***nothing.***

- ***One-third (33%) of resolved cases were settled on a class basis.***
  - This ***settlement rate is half the average for federal court litigation,*** meaning that a class member is far less likely to have even a chance of obtaining relief than the average party suing individually.
  - ***For those cases that do settle, there is often little or no benefit for class members.***
  - What is more, ***few class members ever even see those paltry benefits—particularly in consumer class actions.*** Unfortunately, because ***information regarding the distribution of class action settlements is rarely available***, the public almost never learns what percentage of a settlement is actually paid to class members. But of the six cases in our data set for which settlement distribution data was public, ***five delivered funds to only miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%.*** Those results are consistent with other available information about settlement distribution in consumer class actions.
  - Although some cases provide for automatic distribution of benefits to class members, automatic distribution almost never is used in consumer class actions—only ***one of the 40*** settled cases fell into this category.
  - Some class actions are settled without even the potential for a monetary payment to class members, with the settlement agreement providing for ***payment to a charity or injunctive relief that, in virtually every case, provides no real benefit to class members.***

***The bottom line: The hard evidence shows that class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys.*** Policymakers who are considering the efficacy of class actions cannot simply rest on a theoretical assessment of class actions' benefits or on favorable anecdotes to justify the value of class actions. Any decision-maker wishing to rest a policy determination on the

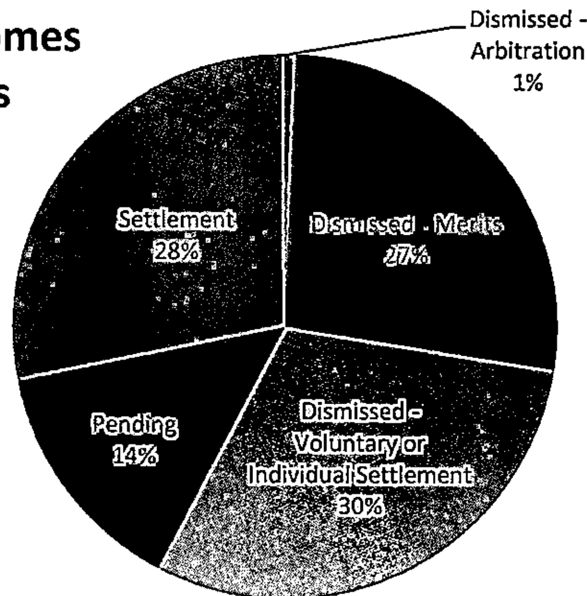
claimed benefits of class actions would have to engage in significant additional empirical research to conclude—contrary to what our study indicates—that class actions actually do provide significant benefits to consumers, employees, and other class members.

## Results

### *Overall Outcomes*

Of the 148 federal court class actions we studied that were initiated in 2009, 127 cases (or nearly 86 percent) had reached a final resolution by September 1, 2013, the date when the study closed.

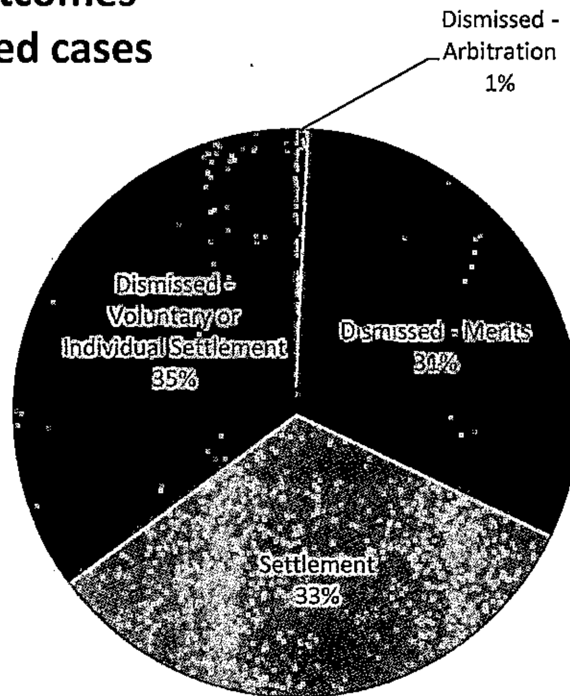
**Figure 1: Outcomes in 148 cases**




***Zero* cases resulted in a judgment on the merits**. Of the 148 cases in our sample set, ***not one had gone to trial***—either before a judge or jury. And, as of the closing date of our study, ***not one resulted in a judgment for the plaintiffs on the merits.***

Unlike ordinary (non-class) disputed cases, some of which end with a judgment on the merits in favor of the plaintiffs or defendants, class actions end without any determination of the case's merits. The class action claims that make it past the pleadings stage and class-certification gateway virtually always settle—regardless of the merits of the claims.

**Figure 2: Outcomes in 127 resolved cases**




Indeed, Justice Ruth Bader Ginsburg has recognized that "[a] court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."[2] Then-Chief Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit explained that certification of a class action, even one lacking in merit, forces defendants "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability."[3] And Judge Diane Wood of the Seventh Circuit has explained that certification "is, in effect, the whole case."[4] That may be why another study of class

---

2 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

3 *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

4 Hon. Diane Wood, Circuit Judge, Remarks at the FTC Workshop: Protecting Consumer Interests in Class Actions (Sept. 13–14, 2004), in *Panel 2: Tools for Ensuring that Settlements are "Fair, Reasonable, and Adequate,"* 18 Geo. J. Legal Ethics 1197, 1213 (2005).

actions reported that "[e]very case in which a motion to certify was granted, unconditionally or for settlement purposes, resulted in a class settlement."[5]

**Fourteen percent of the class actions filed remain unresolved**. Even though our study period encompassed more than 44 months since the filing of the last case in our sample (and 55 months from the filing of the first case), a significant number of cases—21 of the 148 in our sample, or 14%—remained pending with no resolution, let alone final judgment on the merits.[6]

And there is no reason to believe that these cases are more likely to yield a benefit for class members than the cases that have been resolved thus far. In 15 of these cases either no motion for class certification has been filed or the court has not yet ruled on the motion, and in another 2 the court denied certification. In a significant proportion of these pending cases, it seems likely that class certification will be denied or never ruled upon before the case is ultimately dismissed. After all, prior studies indicate that nearly 4 out of every 5 lawsuits pleaded as class actions are not certified.[7]

**Over one-third of the class actions that have been resolved were dismissed voluntarily by the named plaintiff and produced no relief at all for the class**. Forty-five cases were voluntarily dismissed by the named plaintiff who had sought to serve as a class representative or were otherwise resolved on an individual basis. That means either that the plaintiff (and his or her counsel) simply decided not to pursue the class action lawsuit, or that the case was settled on an individual basis, without any benefit to the rest of the class. These voluntary dismissals represent 30 percent of all cases studied, or 35 percent of cases that reached a resolution by the beginning of September 2013.[8]

---

[5] Emery G. Lee III et al., *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* at 11 (Federal Judicial Center 2008), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Preliminary%20Findings%20from%20Phase%20Two%20Class%20Action%20Fairness%20Study%20%282008%29.pdf (discussing 30 such cases).

[6] These results are broadly consistent with other studies of class actions. *See, e.g., id.* at 6 (noting that 9% of cases remained pending after at least 3.5 years).

[7] *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 Notre Dame L. Rev. 591, 635-36, 638 (2006).

[8] In one of the cases we studied, the court compelled arbitration of the named plaintiff's claims—a determination that almost always precludes class treatment of the case.

In fourteen of the cases that were voluntarily dismissed—approximately one-third of all voluntary dismissals in the data set—the dismissal papers, other docket entries, or contemporaneous news reports made clear that the parties were settling the claim on an individual basis, although the terms of those settlements were not available. Many of the remaining voluntary dismissals also may have resulted from individual settlements.

These settlements often provide that the plaintiff—and his or her attorney—receive recoveries themselves, even though the rest of the class that they sought to represent receive ***nothing***. When parties settle cases on an individual basis, those settlements often are confidential, and the settlement agreements therefore are not included on the court's public docket.[9]

**Just under one-third of the class actions that have been resolved were dismissed on the merits**. In addition to the 45 cases dismissed voluntarily by plaintiffs, 41 cases were dismissed outright by federal courts, through a dismissal on the pleadings or a grant of summary judgment for the defendant. The courts in these cases concluded that the lawsuits were meritless before even considering whether the case should be treated as a class action. These represented 27 percent of all cases studied, and 31 percent of resolved cases.

In other words, ***in over half of all putative class actions studied—and nearly two-thirds of all resolved cases studied—members of the putative class received zero relief.*** These results are depicted in Figures 1 and 2, which appear below. And these results are broadly consistent with other empirical studies of class actions. If anything, for reasons explained in Appendix C, abusive, illegitimate class actions are probably under-represented in our sample, and the sample therefore probably significantly ***overstates*** the extent to which class

---

[9] Unlike class settlements under Federal Rule of Civil Procedure 23, which must be publicly disclosed and approved by the court, individual settlements of lawsuits in federal court need not be disclosed publicly, nor is court approval required. Typically, parties that agree to settle claims on an individual basis in a lawsuit pending in federal court—whether or not those claims are part of a class action—enter into confidential settlement agreements, a condition of which is that the named plaintiff will voluntarily dismiss his or her individual claims with prejudice; remaining claims that were purported to have been brought on behalf of a class may be dismissed without prejudice with respect to other class members, who may or may not assert the claim in subsequent litigation.

members benefit from the class action. For comparison, another study found that ***84% of class actions ended without any benefit to the class.***[10]

**Fewer than thirty percent of the cases filed were settled.** All of the remaining class actions that have been concluded were settled on a class-wide basis: The parties reached settlements in 40 cases—28% of all cases studied, or 33% of all resolved cases.[11]

This subset of class actions is the only one in our study in which it is possible that absent class members could possibly receive any benefit at all. As we next discuss, however, the benefits claimed to be associated with such settlements are largely illusory.

## *Class Settlements*

**Class actions have a significantly lower settlement rate than other federal cases.** The settlement rate for our sample of cases—33% of resolved cases—is much lower than for federal court litigation as a whole. One study of federal litigation estimated that "the aggregate settlement rate across case categories" for two districts studied was "66.9 percent in 2001-2002."[12] Even the least frequently settled case category in that study—constitutional litigation—had a higher settlement rate (39%) than the 33% for the class action cases we studied.[13]

Thus, ***class actions are significantly less likely to produce settlements, and therefore significantly less likely to produce any benefit to class members, than other forms of litigation.*** Settlement is the only resolution that produces even the possibility of a benefit to class members, because class actions are virtually never resolved though judgments on the merits, a fact that our study corroborates. And the settlement rate in our sample set is not an outlier: a study of

---

10 *See, e.g.,* Lee et al., *supra* note 5, at 6 (noting that in cases not remanded, 55% of cases were voluntarily dismissed without class certification or class settlement, and another 29% were dismissed by the court).

11 This category includes one case in which the parties have announced a class settlement and sought preliminary approval; five cases in which the court has granted preliminary approval (but has not yet finally approved it); one case that resulted in a settlement to fewer than all plaintiff class members; and two cases in which appeals are pending.

12 Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?,* 6 J. Empir. Leg. Stud. 111, 115 (2009).

13 *Id.* at 133.

class actions brought in California state court in 2009 reported a similarly low settlement rate of 31.9%.[14]

Moreover, the fact that 40 of our sample cases were settled says nothing about the extent of the benefit, if any, that those settlements conferred on class members.

**Many class settlements—and virtually all settlements of consumer class actions—produce negligible benefits for class members.** It is a notoriously difficult exercise to assess empirically how class members benefit from class action settlements. These settlements fall generally into three basic categories:

- "Claims-made" settlements, under which class members are bound by a class settlement—and thereby release all of their claims—but only obtain recoveries if they affirmatively request to do so, usually through use of a claims form.[15] Funds not distributed to claimants are returned to the defendant or, in some cases, distributed to a charity via the *cy pres* process (which creates significant additional problems, as we discuss below). They are not given to class members. Most settlements fall into this category.
- Injunctive relief/*cy pres* settlements, in which the relief provided to settling class members involves only injunctive relief (which may provide little or no benefit to class members) or *cy pres* distributions (in which money is paid to charitable organizations rather than class members).
- "Automatic distribution" settlements, in which each class member's settlement is distributed automatically to class members whose

---

[14] Hilary Hehman, *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation*, Judicial Council of California: Administrative Office of the Courts, at Tables D1-D2 (Feb. 2010), http://www.courts.ca.gov/documents/classaction-certification.pdf (observing that 410 of 1294 resolved cases were settled); *see also* Patricia Hatamyar Moore, *Confronting the Myth of "State Court Class Action Abuses" Through an Understanding of Heuristics and a Plea for More Statistics*, 82 UMKC L. Rev. 133, at 165 & n.192 (2013).

[15] *See* 4 *Newberg on Class Actions* § 12:35 (4th ed. 2013) ("[A] common formula in class actions for damages is to distribute the net settlement fund after payment of counsel fees and expenses, ratably among class claimants according to the amount of their recognized transactions during the relevant time period. A typical requirement is for recognized loss to be established by the filing of proofs of claim. . . .").

eligibility and alleged damages could be ascertained and calculated—such as retirement-plan participants in ERISA class actions.

***The parties typically have no meaningful choice among these methods of structuring a settlement.*** Automatic distribution settlements are feasible only if the parties have the names and current addresses of class members as well as the ability to calculate each class member's alleged damages. But companies typically lack the information needed to settle cases using an automatic distribution mechanism—especially in consumer cases, where purchase records may be incomplete or unavailable, and/or class members' claimed injuries may vary widely and unpredictably.

***Thus, consumer class actions are almost always resolved on a claims-made basis, and the actual amount of money delivered to class members in such cases almost always is a miniscule percentage of the stated value of the settlement.*** That is because, in practice, relatively few class members actually make claims in response to class settlements: many class members may not believe it is not worth their while to request the (usually very modest) awards to which they might be entitled under a settlement. And the claim-filing process is often burdensome, requiring production of years-old bills or other data to corroborate entitlement to recovery.

<u>**The class members' actual benefit from a settlement—if any—is almost never revealed**</u>. Remarkably, the public almost never has access to settlement distribution data. One study found that settlement distribution data were available in "fewer than one in five class actions in [the] sample."[16] Companies and their defense lawyers are hesitant to reveal how much a company has been required to pay out to class members, and plaintiffs' counsel have strong incentives to conceal the information because requests for attorneys' fees based on a settlement's face value will appear overstated when compared to the actual value. Judges are often happy to have the case resolved, and therefore have little to no interest in requiring transparency in the settlement distribution process.

While third-party claims administrators often possess direct information about claims rates, they are routinely bound by contract to maintain the confidentiality of that information in the absence of party permission, a court order, or other legal authority.[17] This may be a function of the incentive shared by class

---

16 Nicholas M. Pace & William B. Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* at 3, RAND Institute for Civil Justice Working Paper (July 2008), billrubenstein.com/Downloads/RAND%20Working%20Paper.pdf.

17 *Id.* at 31-32 (explaining that in a survey of class action participants, only 25% of "chief executive officers" at settlement administrators responded to the survey, and even those only "did so solely to inform [the researchers] that the information

counsel and defense counsel to avoid facilitating grounds for a class member to object that a settlement was unfair because it provided too little tangible benefit to the class.[18] Indeed, "[h]ow many people were actually members of this class, how many of these class members actually submitted a claim form, and how much they were actually paid appear to be closely held secrets between the class counsel and the defendant."[19]

**In rare cases in which class-settlement distribution data was available, few class members received any benefit at all.** In our data set, ***18 cases were resolved by claims-made settlements***—44% of the total. ***We were able to obtain meaningful data regarding the distribution of settlement proceeds in only six of the 18 cases***, which is not surprising given the well-established and widespread lack of publically available information regarding the extent to which class members actually benefit from settlements. ***Five of the six cases resulted in minuscule claims rates: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%.***[20] These

---

that they held was 'proprietary' to their clients, namely the attorneys that had hired them to oversee the class action claiming process"); *cf.* Deborah R. Hensler, et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 163-64 (2000) (noting difficulty in obtaining "information about the claiming process and distribution" from a "settlement administrator," who "declined to share distribution figures, suggesting that we talk to the attorneys involved with the case," and noting further that the plaintiffs' and defense attorneys had agreed between themselves "not to discuss or divulge matters related to . . . the actual distribution to the class").

[18] *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 93 (2007) (explaining that when a "notice do[es] not estimate the size of the class, . . . class members are unable to calculate their own individual recoveries" and therefore lack "sufficient bases for objecting to the proposed settlement"); *see also Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744-45 (7th Cir. 2008) (Posner, J.) ("The defendants in class actions are interested in minimizing the sum of the damages they pay the class and the fees they pay the class counsel, and so they are willing to trade small damages for high attorneys' fees. . . . The result of these incentives is to forge a community of interest between class counsel, who control the plaintiff's side of the case, and the defendants. . . . The judge . . . is charged with responsibility for preventing the class lawyers from selling out the class, but it is a responsibility difficult to discharge when the judge confronts a phalanx of colluding counsel.") (citations omitted).

[19] Hensler, *supra* note 17, at 165.

[20] The lone outlier—a case with a 98.72% claims rate—involved the settlement of an ERISA case involving claims about the Bernie Madoff Ponzi scheme for which potentially enormous claims could be made. The math explains why an "astonishing

extremely small claim-filing rates are consistent with the few other reports of claim rates in class action settlements that have come to light.

As one federal court observed, "'claims made' settlements regularly yield response rates of 10 percent or less."[21] In fact, the claims rate frequently is ***much lower***—in the single digits. Appendix A contains a list of more than 20 additional cases for which information about distributions is available, all of which involved distributions to less than seven percent of the class and many of which involved distributions to less than one percent of the class.

There is thus ample evidence to infer that ***the extremely small claims rates for cases in our sample is representative of what happens in class actions generally, and particularly in consumer class actions.***[22] And although documents filed in the remaining 12 of the 18 claims-made settlements lacked information about claims rates, there is every reason to believe that class members made claims at the small rates ordinarily observed in such cases. While some may argue that parties should use automatic distribution mechanisms instead

---

98.72%" of the 470 members of the damages class filed claims in this $1.2165 billion settlement. Final Order at 11, *In re Beacon Assoc. Litig.*, No. 09-cv-777 (S.D.N.Y. May 9, 2013), PACER No. 77-2. Because each class member's individual claim was worth, on average, over $2.5 million, it is unsurprising that over 460 of the class members decided to submit a claim. Needless to say, virtually no consumer or employment class actions settle for anything approaching such a large amount per class member.

[21] *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d 34, 52 (D. Me. 2005).

[22] Some earlier studies purported to assess the benefits received by class members, but they examined "only what defendants *agreed to pay*" in settlements, rather than "the amounts that defendants *actually paid* after the claims administration process concluded." Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 826 (2010) (emphasis added); *see also* Theodore Eisenberg & Geoffrey Miller, *Attorney's Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 258-59 (2010) (using same approach).

Moreover, because Fitzpatrick studied only settlements (*see* 7 J. Empircial Legal Stud. at 812), his study failed to take into account that most putative class actions are dismissed or otherwise terminated without any benefits for class members. And Eisenberg and Miller ignored settlements that promised *only* nonpecuniary relief (such as coupons or injunctive relief) to class members. An earlier version of their study—which laid the methodological groundwork for the later expanded study in 2010 (*see id.* at 252)—appears to have counted cases involving such "soft relief" only when it was "included" along with pecuniary relief. Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27, 40 (2004).

of "claims-made" settlements to resolve class actions, the reality is that automatic distribution is difficult, if not impossible, to achieve in many (perhaps most) consumer class actions.

**<u>Only *one* consumer class action settlement was resolved through automatic distribution.</u>** Of the remaining 22 settled cases in our sample, 13 involved ***settlements with automatic distribution of settlement proceeds.*** Ten of these 13 involved claims by retirement plan participants in ERISA class actions, in which the class members' eligibility and alleged damages could be easily ascertained and calculated based on their investment positions. The plans of distribution in these 10 cases generally involved lump-sum payments to the plan, which would then be allocated directly to plan members' accounts.

The other three automatic-distribution settlements were reached in consumer and employment class actions. In each case—atypical of most class actions—the defendant was in a position to ascertain and calculate class members' eligibility and alleged damages:

- In one, an employer settled claims that it conspired with health care providers and insurers to dictate medical treatment provided to about 13,764 employees injured on the job, whose identities were readily known to the defendant employer; employees who were treated by one health-care provider received a check for $520, while injured employees treated by another provider received a check for $50.[23]
- In a second settlement, a credit-card issuer settled claims that it improperly raised the minimum monthly payment and added new fees in connection with promotional loan offers. The defendant issued class members a flat-rate payment of $25, plus (for certain customers) a share of the remaining settlement fund calculated by taking into account the ways the class member had used the promotional loan and had been charged fees.[24]
- Finally, as we explain in more detail below, a third settlement resolved privacy claims against a mobile-phone gaming app developer in

---

[23] Plaintiffs' Unopposed Motion for Order Preliminarily Approving Class Action Settlement at 8, *Gianzero v. Wal-Mart Stores, Inc.*, No. 09-cv-00656 (D. Colo. Nov. 21, 2011), PACER No. 464 ("*Gianzero* Preliminary Approval Motion").

[24] Plaintiffs' Motion for Preliminary Approval of Class Settlement at 5-7, *In re Chase Bank USA, N.A. "Check Loan" Contract Litigation*, No. 09-md-2032 (N.D. Cal. July 23, 2012), PACER No. 338.

exchange for 45 in-game "points" that were automatically distributed to users so they could advance through the game's levels.[25]

Thus, only two consumer cases involved automatic distributions, and in one the distribution involved "game points." ***Only a single settled consumer class action—one of 127 class actions resolved—conveyed real benefits to anything more than a small percentage of the class.***

***Cy pres* awards and injunctive relief serve primarily to inflate attorney's fee awards—and benefit third parties with little or no ties to the putative class.** The final group of 9 settled cases largely involved ***injunctive relief or cy pres distributions.*** Because these cases involve no monetary compensation to class members, it is difficult for outsiders to assess the claimed benefit. Certainly, ***in many cases "injunctive relief" has little or no real-world impact on class members, but is used to provide a basis for claiming a "benefit" to class members justifying an award of attorneys' fees to class counsel*** (as we detail below). The injunctive-relief-only settlements we reviewed included the following:

- Plaintiff subscribers of America Online ("AOL") claimed that it embedded advertisements at the bottom of the subscribers' email messages without their permission. After an early settlement was vacated on appeal for improper *cy pres* awards to unrelated charities, the parties again settled the claims, with AOL promising to tell subscribers how to opt out of email advertisements if it restarted the challenged practice.[26]
- In a class action involving claims that a social-networking app developer failed to protect properly the personally identifiable information of 32 million customers from a data security breach, the settlement provided that the defendant will undergo two audits of its information security policies with regard to maintenance of consumer records, to be made by an independent third party. The settlement explicitly reserves the rights of the plaintiff class to sue for monetary relief.[27]
- Plaintiffs brought false advertising claims against Unilever, contending that it had misrepresented the health or nutritional characteristics of "I Can't Believe It's Not Butter." As part of the

---

[25] *See* notes 44–46 and accompanying text.

[26] Revised Class Action Settlement Agreement ¶¶ 20-22, *Bronster v. AOL, LLC*, No. 09-cv-3568 (C.D. Cal. July 31, 2013), PACER No. 66-10. The settlement also proposes a *cy pres* award to a more related charitable organization. *Id.* ¶ 23.

[27] Settlement Agreement and Release at 4, *Claridge v. RockYou, Inc.*, No. 09-cv-6032 (N.D. Cal. Dec. 15, 2011), PACER No. 55-1.

settlement, Unilever was to remove all partially hydrogenated vegetable oils from its soft spreads by December 31, 2011, and from its stick products by December 31, 2012, and keep those ingredients out of those products for 10 years. Although they did not receive monetary compensation, class members released all monetary and equitable claims other than claims for personal injury.[28]

- Finally, in a class action alleging the violation of consumer protection laws arising out of the marketing of Zicam supplements (sold as a way of combating the common cold), the parties provided for a number of non-pecuniary "benefits"—all in the form of labeling changes. These include: (1) indicating that the FDA has not approved the supplements; (2) disclosing that customers with zinc allergies or sensitivities should consult a doctor; (3) informing customers that the products are not intended to be effective for the flu or for allergies; and (4) removing language recommending that customers continue to use the products for 48 hours after cold symptoms subside. If the court approves the settlement and requested attorneys' fees, the defendant will pay plaintiff's counsel up to $1.75 million in fees in one case, and another $150,000 in a related MDL proceeding.[29]

Like injunctive relief settlements, ***the* cy pres *doctrine is being used by plaintiffs' lawyers to inflate artificially the purported size of the benefit to the class in order to justify higher awards of attorney's fees to the plaintiffs' lawyers***. In four of the cases we examined, the settlement provided that one or more charitable organizations would receive either all monetary relief, or any remaining monetary relief after claims made were paid out.

Courts often assess the propriety of an attorneys' fee award in the settlement context by comparing the percentage of the settlement paid to class members or charities with the percentage of the settlement allocated to class counsel.[30] That

---

28 Notice of Joint Motion for Final Approval of Class Settlement and Memorandum of Points and Authorities in Support Thereof at 4, *Red v. Unilever United States, Inc.*, No. 10-cv-387 (N.D. Cal. June 6, 2011), PACER No. 153.

29 Plaintiffs' Memorandum in Support of Motion for Final Approval of Class Action Settlement at 4-5, *Hohman v. Matrixx Initiatives, Inc.*, No. 09-cv-3693 (N.D. Ill. May 26, 2011), PACER No. 81.

30 *See, e.g., Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 851 (5th Cir. 1998) (affirming the district court's decision to compare the "actual distribution of class benefits" against the potential recovery, and adjusting the requested fees to account for the fact that a "drastically" small 2.7 percent of the fund was distributed); *see also Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1223 (2000) (O'Connor, J., respecting the denial of certiorari) (noting that fee

approach has been endorsed by the Manual for Complex Litigation.[31] If no funds are allocated to the class, or a small portion of the amount ostensibly allocated to the class is actually distributed and the remainder of the funds returned to the defendants, the relative percentages could be disturbing to a court reviewing the fairness of the settlement. But if the amount not collected by class members is contributed to a charity that can be claimed to have some tenuous relationship to the class, then the percentage allocated to attorneys' fees may appear more acceptable.

The result, as one district court has warned, is that attorney fee awards "determined using the percentage of recovery" will be "exaggerated by *cy pres* distributions that do not truly benefit the plaintiff class."[32] As Professor Martin Redish has noted, the *cy pres* form confirms that "[t]he real parties in interest in . . . class actions are . . . the plaintiffs' lawyers, who are the ones primarily responsible for bringing th[e] proceeding."[33] One district court has noted that when a consumer class action results in a *cy pres* award that "provide[s] those with individual claims no redress," where there are other "incentives" for bringing individual suits, the class action fails the requirement that the class action be "superior to other available methods" of dispute resolution.[34]

**Lawyers (as opposed to class members) were the principal beneficiaries of the remaining settlements in our study**. For the "*cy pres*" settlements in our data set, and the "claims made" settlements for which there is no distribution data,

---

awards disconnected from actual recovery "decouple class counsel's financial incentives from those of the class," and "encourage the filing of needless lawsuits where, because the value of each class member's individual claim is small compared to the transaction costs in obtaining recovery, the actual distribution to the class will inevitably be small").

[31] *See* Federal Judicial Center, *Manual for Complex Litigation (Fourth)* § 27.71 (2004).

[32] *SEC v. Bear Stearns & Co.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009).

[33] Testimony of Martin H. Redish at 7, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, *Hearing: Class Actions Seven Years After the Class Action Fairness Act* (June 1, 2012), available at http://judiciary.house.gov/hearings/Hearings%202012/Redish%2006012012.pdf.

[34] *Hoffer v. Landmark Chevrolet Ltd.*, 245 F.R.D. 588, 601-04 (S.D. Tex. 2007) (Rosenthal, J.). In one of the cases in our sample, the same district judge cautioned that *cy pres* awards "'violat[e] the ideal that litigation is meant to compensate individuals who were harmed,'" but ultimately approved the award because prior court precedents had authorized the use of *cy pres*. *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1076 (S.D. Tex. 2012) (Rosenthal, J.).

publicly available information provides further support for the conclusion that little in the way of benefit flows to class members. Examples from our data set include:

- ***Disproportionate allocation of settlement funds to attorneys' fees.*** Plaintiffs brought a class action alleging that the defendants improperly interfered with the medical care of injured employees in violation of Colorado law.[35] Under the settlement agreement, the defendants (who denied wrongdoing) were required to make an $8 million fund available to compensate more than 13,500 class members. But class counsel received over $4.5 million out of the $8 million—more than 55 percent of the fund.[36]
- ***Named plaintiffs object to the settlement.*** In a class action against the National Football League, retired players alleged that the league was using their names and likenesses without compensation to promote the league. The NFL and some players settled the class-wide claims under federal competition law and state right of publicity laws. But the original named plaintiffs who spearheaded the litigation objected to the settlement, arguing that it provided ***no direct payout to the retired players***.[37] Rather, it created an independent organization that would fund charitable initiatives related to the health and welfare of NFL players—and would create a licensing organization that would help fund the independent organization. Meanwhile, "[p]laintiffs' lawyers would receive a total of $7.7 million under the proposed agreement."[38]
- ***Low recovery for class members.*** Plaintiffs alleged in eight consolidated class actions that their employer, a bank, violated the federal Employee Retirement Income Security Act (ERISA) by offering its own stock as a retirement plan investment option while hiding the true extent of the bank's losses in the mortgage crisis.[39] The class

---

[35] *Gianzero* Preliminary Approval Motion at 4.

[36] *Id.* at 10.

[37] The Dryer Plaintiffs' Opposition to Preliminary Approval of the Proposed Settlement Class, *Dryer v. Nat'l Football League*, No. 09-cv-2182 (D. Minn. Mar. 20, 2013), PACER No. 264.

[38] Alison Frankel, Retired NFL stars reject settlement of their own licensing class action, REUTERS (Mar. 25, 2013), available at http://blogs.reuters.com/alison-frankel/2013/03/25/retired-nfl-stars-reject-settlement-of-their-own-licensing-class-action/.

[39] Class Action Complaint at 2, 24-25, *In re Colonial Bancgroup, Inc. ERISA Litig.*, No. 2:09-cv-792 (M.D. Ala. Aug. 20, 2009), PACER No. 1.

settlement established a $2.5 million common fund that was ostensibly designed to compensate the employees for their losses arising from the bank's alleged breach of fiduciary duty.[40] But commentators note that, when all of the allegations in the various complaints were taken into account, plaintiffs had alleged more than $50 million in losses, meaning that class members would recover no more than five cents on the dollar.[41] And according to the plan of allocation, members of the settlement class who were calculated to have suffered damages less than $25 would receive *nothing*[42]—meaning that their claims were released without even the opportunity to receive something in exchange. Meanwhile, the plaintiffs' attorneys received a fee award amounting to 26% of the common fund ($645,595.78), plus $104,404.22 in expenses.[43]

- ***Settlement requires further use of defendant's services.*** A plaintiff filed a class action alleging that certain mobile-phone gaming apps were improperly collecting and disseminating users' mobile phone numbers.[44] Under the terms of the settlement agreement, class members were not entitled to any monetary payment. Instead, they were slated to receive 45 in-game "points" (with an approximate cash value of $3.75) per mobile device owned; the points could be used to advance through the gaming apps' levels.[45] These points could be redeemed or used only within the defendant's apps.[46] Unsurprisingly, the plaintiffs' counsel were not paid in points, but instead were awarded $125,000 in attorneys' fees.

---

40 *See, e.g.*, Final Judgment at 2-3, *In re Colonial Bancgroup, Inc. ERISA Litig.*, No. 2:09-cv-792 (M.D. Ala. Oct. 12, 2012), PACER No. 207 ("*Colonial Bancgroup* Final Judgment").

41 Bill Donahue, *Colonial Bank Execs Pay $2.5m to Dodge ERISA Claims*, Law360 (June 18, 2012), available at http://www.law360.com/articles/350930

42 Plan of Allocation at 3, *In re Colonial Bancgroup, Inc. ERISA Litig.*, No. 2:09-cv-792 (M.D. Ala. Sept. 14, 2012), PACER No. 192-1.

43 *Colonial Bancgroup* Final Judgment at 8.

44 First Amended Complaint at 2, *Turner v. Storm8, LLC*, No. 4:09-cv-05234 (N.D. Cal. June 22, 2010), PACER No. 27.

45 Motion for Final Approval of Class Action Settlement Agreement at 3, *Turner v. Storm8, LLC*, No. 4:09-cv-05234 (N.D. Cal. Nov. 11, 2010), PACER No. 32.

46 Settlement Agreement at 8, *Turner v. Storm8, LLC*, No. 4:09-cv-05234 (N.D. Cal. June 22, 2010), PACER No. 26-1.

- ***Attorneys seek fees far exceeding class recovery.*** Class counsel in a case involving allegedly faulty laptops found their fee request chopped down from $2.5 million to $943,000.[47] The settlement resulted in a recovery of $889,000 to claimants, plus $500,000 in additional costs for administering the settlement—meaning that the attorneys were seeking just under ***three times*** the amount that would have gone directly to the class—and even after the fees were cut down, they still represented 106 percent of the class's direct recovery.

These characteristics are not unique to the sample cases. To the contrary, results are consistent with a significant number of class action settlements that produce minimal benefits for the class members themselves. We summarize additional examples of such settlements—taken from outside our data set—in Appendix B.

Other studies of class settlements and attorneys' fees confirm that these examples are not outliers: Such settlements commonly produce insignificant benefits to class members and outsize benefits to class counsel. A RAND study of insurance class actions found that attorneys' fees amounted to ***an average of 47% of total class-action payouts***, taking into account benefits actually claimed and distributed, rather than theoretical benefits measured by the estimated size of the class. "In a quarter of these cases, the effective fee and cost percentages were 75 percent or higher and, in 14 percent (five cases), the effective percentages were over 90 percent."[48]

In other words, for practical purposes, counsel for plaintiffs (and for defendants) are frequently the only real beneficiaries of the class actions.

---

[47] Attorney's Fees Slashed in Faulty Laptop Class Action, *BNA Class Action Litigation Report*, 14 Class 1497 (Oct. 25, 2013), available at http://news.bna.com/clsn/CLSNWB/split_display.adp?fedfid=37476946&vname=clasnotallissues&jd=a0e2t3w1f0&split=0. This case was among the ones we studied, but the court's decision awarding a reduced amount of attorneys' fees was issued after the closing date of our study.

[48] Nicholas M. Pace et al., *Insurance Class Actions in the United States*, Rand Inst. for Civil Just., xxiv (2007), http://www.rand.org/pubs/monographs/MG587-1.html. Another RAND study similarly found that in three of ten class actions, class counsel received more than the class. *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Executive Summary), Rand Inst. for Civil Just., 21 (1999), http://www.rand.org/pubs/monograph_reports/MR969.html.

## Conclusion

This study confirms that class actions rarely benefit absent class members in whose interest class actions are supposedly initiated. The overwhelming majority of class actions are dismissed or dropped with ***no recovery*** for class members. And those recoveries that class settlements achieve are typically minimal—and obtained only after long delays. To be sure, not every class action is subject to these criticisms: a few class actions do achieve laudable results. But virtually none of those were consumer class actions. Certainly our analysis demonstrates—at a bare minimum—that the vast majority of class actions in our sample set cannot be viewed as efficient, effective, or beneficial to class members.

## Appendix A: Additional Examples of Settlements With Payments to a Very Small Percentage of Class Members

- The Seventh Circuit vacated an order approving a class action settlement so that the district court could "evaluate whether the settlement is fair to class members," where (among other problems with the settlement) only "a *paltry* three percent" of the quarter-million-wide proposed class "had filed proofs of claim."[49] And the Third Circuit recently noted that "consumer claim filing rates *rarely* exceed seven percent, even with the most extensive notice campaigns."[50]
- One affidavit analyzed 13 cases for which data had been disclosed (and in which the settlement was approved). The median claims rate was 4.70%. The highest claims rate in those cases was 5.98%, and the lowest non-zero claims rate was 0.67%. In two cases, the claims rate was 0%—reflecting that not a single class member obtained the agreed-on recovery.[51]
- A class action alleging antitrust claims in connection with compact disc "music club" marketing settled, with only 2% of the class making claims for vouchers (valued at $4.28) for CDs.[52]
- Indeed, in many cases, the claims rate may be well under 1 percent.
    - Fair Credit Reporting Act case: court noted that "less than one percent of the class chose to participate in the settlement."[53]
    - Case alleging that a software manufacturer sold its customers unnecessary diagnostic tools: court approved settlement despite the fact that only 0.17% of customers made claims for a $10 payment, because "the settlement amount is commensurate with the strength of the class' claims and their likelihood of success absent the settlement."[54]

---

49 *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 648, 650 (7th Cir. 2006) (emphasis added).

50 *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329 n. 60 (3d Cir. 2011) (en banc) (emphasis added; quotation marks omitted).

51 Declaration of Kevin Ranlett in Support of Defendants' Amended Motion to Compel Arbitration at 8, *Coneff v. AT&T Corp.*, No. 2:06-cv-00944 (W.D. Wash. May 27, 2009), PACER No. 199. Mr. Ranlett is a Mayer Brown lawyer.

52 *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 370 F. Supp. 2d 320, 321 (D. Me. 2005).

53 *Yeagley v. Wells Fargo & Co.*, 2008 WL 171083, at *2 (N.D. Cal. Jan. 18, 2008), *rev'd*, 365 F. App'x 886 (9th Cir. 2010).

54 *LaGarde v. Support.com, Inc.*, 2013 WL 1283325, at *6 (N.D. Cal. Mar. 26, 2013). The court approved a proposed modified settlement under which the class

- Case involving product liability claims related to alleged antenna problems with Apple's iPhone 4: court approved settlement noting that the "number of claims represents somewhere between 0.16% and 0.28% of the total class."[55]
- Class action alleging fraud in the procurement of credit-life insurance: Supreme Court of Alabama noted that "only 113 claims" had been made in a class of approximately 104,000—or a response rate of 0.1%.[56]
- Action alleging that restaurant chain had printed credit-card expiration dates on customers' receipts: "approximately 165 class members" out of 291,000—or fewer than 0.06% of the class—"had obtained a voucher" for one of four types of menu items worth no more than $4.78.[57]
- Class action alleging that Sears had deceptively marketed automobile-wheel alignments: "only 337 valid claims were filed out of a possible class of 1,500,000"—a take rate of just over 0.02%.[58]
- Class action alleging that video game manufacturer had improperly included explicit sexual content in the game: ***one fortieth of one percent*** of the potential class (2,676 of 10 million) made claims.[59]
- Class action involving allegations that a Ford Explorer was prone to dangerous rollovers: only 75 out of "1 million" class members—or ***less than one hundredth of one percent***—participated in the class settlement.[60]

---

members "who made a claim" after having been "offered a $10 cash payment * * * will now receive a $25 cash payment, rather than $10." *Id.* at *4.

55 *In re Apple iPhone 4 Prods. Liab. Litig.*, 2012 WL 3283432, at *1 (N.D. Cal. Aug. 10, 2012).

56 *Union Fid. Life Ins. Co. v. McCurdy*, 781 So. 2d 186, 188 (Ala. 2000).

57 *Palamara v. Kings Family Rests.*, 2008 WL 1818453, at *2 (W.D. Pa. Apr. 22, 2008).

58 *Moody v. Sears, Roebuck & Co.*, 2007 WL 2582193, at *5 (N.C. Super. Ct. May 7, 2007), *rev'd*, 664 S.E.2d 569 (N.C. Ct. App. 2008).

59 *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139 (S.D.N.Y. 2008).

60 Cheryl Miller, "Ford Explorer Settlement Called a Flop," *The Recorder* (July 13, 2009), http://www.law.com/jsp/article.jsp?id=1202432211252.

## Appendix B: Additional Examples of Settlements Providing Negligible Benefits to Class Members

- ***Class members receive extended membership in buying club.*** In a class action against DirectBuy—a club for which customers pay a membership fee to purchase goods at lower prices—the plaintiffs alleged that the defendant had misrepresented the nature of the discounts that were available through the club.[61] The settlement afforded class members nothing other than discounts for renewal or extension of their memberships in the very club that was alleged to have tricked them into joining in the first place. Meanwhile, the attorneys for the class "could receive between $350,000 and $1 million."[62]
- ***$21 million for the lawyers, pennies and coupons for the class members.*** One Missouri class settlement in a case against a brokerage house alleging breaches of fiduciary duties provided $21 million to class counsel, but only $20.42 to each of the brokerage's former customers and three $8.22 coupons to each current customer. And most of the coupons are unlikely to be redeemed.[63]
- ***Class members receive right to request $5 refund, lawyers take (and fail to disclose sufficiently) $1.3 million in fees.*** Under the settlement of a class action in which the plaintiffs alleged that Kellogg's had misrepresented that Rice Krispies are fortified with antioxidants, class members could request $5 refunds for up to three boxes of cereal purchased between June 1, 2009, and March 1, 2010.[64] Class counsel sought $1.3 million in attorneys' fees on a claim fund valued at $2.5 million to be paid out to class members.[65]

---

[61] Michelle Singletary, *Class-action Coupon Settlements are a No-Win for Consumers*, Wash. Post, Apr. 28, 2011 at A14.

[62] *Id.*

[63] *See* Stipulation of Settlement of Class Action, *Bachman v. A.G. Edwards, Inc.*, No. 22052-01266-03 (Mo. Cir. Ct. St. Louis Feb. 18, 2010), http://www.agedwardsclassactionsettlement.com/bach_20100219094521.pdf; *see also* Daniel Fisher, *Lawyer Appeals Judge's Award of $21 Million in Fees, $8 Coupons for Clients*, FORBES.COM (Jan. 10, 2011), http://blogs.forbes.com/danielfisher/2011/01/10/lawyer-appeals-judges-award-of-21-million-in-fees-8-coupons-for-clients ("The judge didn't even see fit to inquire into the lawyers' valuation of the coupon portion of the settlement, despite strong evidence that less than 10% of coupons in such cases are ever redeemed").

[64] Stipulation of Settlement at 2-8, *Weeks v. Kellogg*, No. 2:09-cv-8102 (C.D. Cal. Jan. 10, 2011), PACER No. 121.

[65] Memorandum of Law in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Plaintiff Service Awards at 4, *Weeks v. Kellogg*, No. 2:09-cv-8102 (C.D. Cal. July 18, 2011), PACER No. 135-1.

- ***Class receives opportunity to attend future conferences.*** In a 2009 settlement in the District of Columbia, a court approved a settlement against a conference organizer that failed to deliver promised services to those who had paid to attend. The settlement provides class members with nothing other than coupons to attend future events put on by the same company alleged to have bilked them in the first place; class counsel will take $1.4 million in fees.[66]
- ***Class members receive nothing, class counsel take $2.3 million.*** In a $9.5 million settlement of a class action against Facebook over the disclosure to other Facebook users of personal information about on-line purchases through Facebook's "Beacon" program, the class members received no remedy whatever for the invasions of their privacy and were barred from making future claims for any remedy. Instead, approximately $6.5 million went to create and fund a new organization that would give grants to support projects on internet privacy; a few thousand dollars went to each of the named plaintiffs as "incentive payments"; and class counsel received more than $2.3 million.[67] Meanwhile, although Facebook agreed to end the Beacon program—which it had actually already ended months before—it remained free to reinstitute the program as long as it didn't use the name "Beacon."[68] As one federal appellate judge put it (in a dissent from a decision upholding the settlement):

  > The majority approves ratification of a class action settlement in which class members get no compensation at all. ***They do not get one cent.*** They do not get even an injunction against Facebook doing exactly the same thing to them again. ***Their purported lawyers get millions of dollars.*** Facebook gets a bar against any claims any of them might make for breach of their privacy rights. The most we could say . . . is that in exchange for giving up any claims they may have, the exposed Facebook users get the satisfaction of contributing to a charity to be funded by Facebook, partially controlled by Facebook, and advised by a legal team consisting of Facebook's counsel and their own

---

66 *See* Memorandum Opinion at 3-5, 8, *Radosti v. Envision EMI, LLC,* No. 1:09-cv-887 (D.D.C. June 8, 2010), PACER No. 40; Order at 1-2, *Radosti v. Envision EMI, LLC,* No. 1:09-cv-887 (D.D.C. Jan. 19, 2011), PACER No. 45.

67 *Lane v. Facebook, Inc.,* 696 F.3d 811 (9th Cir.), *reh'g en banc den.* 709 F.3d 791 (9th Cir. 2013), *cert. denied,* 134 S. Ct. 8 (2013).

68 Petition for Certiorari at 11-13, *Marek v. Lane,* No. 13-136 (filed July 26, 2013), 2013 WL 3944136.

> purported counsel whom they did not hire and have never met.[69]

The Supreme Court ultimately declined to review the Ninth Circuit's decision approving the settlement. As Chief Justice Roberts explained in a rare statement addressing the court's denial of certiorari, the objectors had challenged "the particular features of the specific *cy pres* settlement at issue," but in his view had not addressed "more fundamental concerns surrounding the use of such remedies" and the standards that should govern their use. Such concerns, he pointed out, would have to await a future case.[70]

- ***Court reduced attorneys' fees because of lack of benefit to class members.*** The Sixth Circuit upheld a district court's decision to reduce class counsel's requested fees from $5.9 million to $3.2 million in a settlement of a class action involving auto-insurance benefits.[71] In affirming the decision, the Sixth Circuit pointed out that the district court "did not believe that the class members received an especially good benefit [because] Class Counsel chose to pursue a relatively insignificant claim" as opposed to "other potential claims, . . . and [they] agreed to a settlement mechanism which yielded a low claims rate[.]"[72] Although the court noted that "the settlement makes available a common fund of $27,651,288.83 less any attorney fee award, costs, and administrative expenses," for individual class member benefits up to a maximum of $199.44, "only a small percent of eligible class members have made claims" totaling approximately $4 million—or 14% of the total common fund available.[73] What is more, class counsel represented in their fee motion that they provided notice to 189,305 class members and received "well over 12,000" claims—in other words, a claims-made rate of just over six percent.[74]

---

69 *Lane*, 696 F.3d at 835 (Kleinfeld, J., dissenting) (emphasis added).

70 *Marek*, 134 S. Ct. at 9 (Roberts, C.J., respecting the denial of certiorari).

71 *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496 (6th Cir. Aug. 26, 2011).

72 *Id.* at 500.

73 Opinion and Order at 10-11, *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, No. 1:08-cv-605 (N.D. Ohio, Apr. 30, 2010), PACER No. 308.

74 Class Counsel's Supplemental Memorandum in Support of Class Counsel's Motion for Award of Attorney's Fees and Reimbursement of Litigation Expenses at 3-4, 7, *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, No. 1:08-cv-605 (N.D. Ohio Mar. 19, 2010), PACER No. 296

## Appendix C: Study Design and Methodology

### *Identifying the Study Sample*

The first step in studying putative class actions was to select a suitable pool of cases. Identifying every putative class action filed during 2009 would be impracticable—not least without extensive resources and staff support.[75] We instead used two commercial publications—the *BNA Class Action Litigation Reporter* and the *Mealey's Litigation Class Action Reporter*—to identify cases for inclusion in the study. These publications cover a wide array of developments in class action litigation, and therefore provide a diverse sample of filed class action complaints. The publications have an incentive to report comparatively more significant class actions out of all class actions filed, without wasting readers' time and attention on minor or obviously meritless suits. If anything, the sample would be skewed in favor of more significant class actions filed by prominent plaintiffs' attorneys—which should be *more meritorious on average* than a sample generated randomly from all class actions filed.

We reviewed issues of BNA and Mealey's published between December 2008 and February 2010 in order to identify cases filed in 2009. The reason for that limitation was the importance of analyzing "modern" cases that were filed after the passage of the Class Action Fairness Act of 2005, but long enough ago to track how the cases have actually progressed and whether they have been resolved. From those publications, we identified a pool of putative class actions brought by private plaintiffs that were either filed in federal court or were removed to federal court from state court in 2009. To begin with, because data about state court cases is much more difficult to obtain, we excluded a number of cases, such as those brought in state court initially (where the BNA or Mealey's report did not mention that the case was removed). We also excluded one case that was removed to federal court and then remanded to state court. This left us with 188 cases.

Nineteen of these eventually became part of eleven other consolidated cases that were also part of our data set—whether under the multidistrict litigation

---

[75] *See, e.g.*, Deborah Hensler, et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* § 4.60 (RAND Institute for Civil Justice, Monograph MR-969/1-ICJ) (1999) ("Enormous methodological obstacles confront anyone conducting research on class action litigation. The first obstacle is a dearth of statistical information. No national register of lawsuits filed with class action claims exists. Until recently, data on the number of federal class actions were substantially incomplete, and data on the number and types of state class actions are still virtually nonexistent. Consequently, no one can reliably estimate how much class action litigation exists or how the number of lawsuits has changed over time. Incomplete reporting of cases also means that it is impossible to select a random sample of all class action lawsuits for quantitative analysis.").

("MDL") procedure, 28 U.S.C. § 1407, or otherwise (for example, cases are often consolidated when they are pending in the same federal district court). When multiple putative class actions appearing in our data set were consolidated, we treated the consolidated case as a single action to avoid the risk of "overcounting" lawsuits.[76] And when a case in our data set was consolidated with other cases not in our data set, we considered activity reflected on the docket of the "lead" consolidated case that was attributable to the individual case as filed. If after consolidation the case was resolved together with the "lead" case—such that we could not trace outcomes for the individual case separate from the "lead" case—we considered activity attributable to the "lead" case. This approach dovetails with the practical mechanics of consolidation: After cases are consolidated into an MDL, for example, the judge to whom the MDL proceeding is assigned will resolve pretrial motions presented in all the consolidated cases. And more generally, to the extent that courts treat a number of separately filed cases together as a single unit for purposes of adjudication, we have followed the courts' lead.[77] Excluding the cases that became part of other consolidated cases in our data set left us with 169 cases.

---

[76] By way of example, four cases—*Sansom v. Heartland Payment Sys., Inc.* No. 09-cv-335 (D.N.J.); *Lone Summit Bank v. Heartland Payment Sys., Inc.* No. 09-cv-581 (D.N.J.); *Tricentury Bank v. Heartland Payment Sys., Inc.* No. 09-cv-697 (D.N.J.), and *Kaissi v. Heartland Payment Sys., Inc.* No. 09-cv-540 (D.N.J.)—eventually were consolidated into *In re: Heartland Payment Sys., Inc., Customer Data Security Breach Litigation,* No. 4:09-md-02046 (S.D. Tex.).

[77] The decision to treat these consolidated cases along with the lead case had little effect on our data. A comparison of statistics on outcomes reveals that, if anything, treating consolidated class actions as a single action rather than separately tended to overstate the benefits of class actions.

In our full 188-case sample set (including the consolidated cases), 99 cases (54%) were dismissed, whether on the merits by the court, by the plaintiff voluntarily, or as an inferred settlement on an individual basis; 31 cases (16%) remain pending; 55 cases (29%) were settled on a class-wide basis; and 3 cases (2%) were dismissed after the court granted a motion to compel arbitration. By comparison, in the 169-case sample set (excluding the consolidated cases), 99 cases (57%) were dismissed, whether on the merits by the court, by the plaintiff voluntarily, or as an inferred settlement on an individual basis; 23 cases (14%) remained pending; 47 cases (28%) were settled on a class-wide basis; and 1 (1%) was dismissed after the court granted a motion to compel arbitration.

Similarly, this methodology ensures that me-too actions—cases filed by other attorneys after a complaint in a different case, raising materially identical claims—that are routinely dismissed after consolidation without any award or settlement will instead be treated as sharing in any benefits to class members that were actually obtained.

Our next goal was to identify a set of class actions consisting of claims resembling those asserted by consumers—because that is the area under study by the CFPB. We therefore excluded three non-Rule-23 putative class actions brought by the Equal Employment Opportunity Commission.[78] We also excluded nine Fair Labor Standards Act cases.[79] Finally, we excluded nine securities cases, because the stakes and nature of those claims are very different from the claims asserted in consumer class actions, and because they are litigated in a different manner because of the procedural checks imposed by federal laws governing securities litigation.[80] Excluding these 21 EEOC, securities, and FLSA cases had next to no effect on the statistical results of our study.[81]

Accordingly, the statistics about the total number of class actions filed in 2009 are based on a set of 148 putative class actions.

---

[78] The Supreme Court has held that the EEOC may pursue enforcement actions under Title VII § 706 without being certified as a class representative under Federal Rule of Civil Procedure 23. *See Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 US. 318 (1980). The Supreme Court's reasoning would appear to apply equally outside the context of Title VII. Because the EEOC does not need to pursue a Rule 23 class, the dynamics of EEOC class-wide enforcement actions differ markedly from those in Rule 23 actions.

[79] Class actions under the FLSA are certified conditionally as "opt-in" classes. Section 216(b) of the FLSA permits a right of action against an employer by an employee on behalf of "other employees similarly situated," who must have opted in by providing and filing with the court "consent in writing" to become a plaintiff. 29 U.S.C. § 216(b). These cases present different incentives for plaintiffs' counsel than consumer class actions, because they typically involve statutory attorneys' fees to prevailing plaintiffs and may involve large backpay and overtime pay awards.

[80] As one academic study explained, securities class actions "are managed under a set of class action rules distinct from those used for other Rule 23(b)(3) classes—and . . . 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 [as] an 'absent' class member." Pace & Rubenstein, *supra* note 16, at 20; *see, e.g.*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-76, 109 Stat. 737 (1995); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998).

[81] Recall that our 169-case sample set, which included these cases, resulted in 57% of cases dismissed, 14% pending, 28% settled on a class-wide basis, and 1% dismissed after an order compelling arbitration. *See supra* note 77. After excluding them, our 148-case sample set resulted in 57% of cases dismissed, 14% pending, 28% settled on a class-wide basis, and 1% dismissed after an order compelling arbitration. *See* Figure 1.

*Constructing the Data Set*

We identified and coded a number of variables about each case. Using the federal courts' Public Access to Court Electronic Records ("PACER") system, we evaluated the filings on each case's docket. Where criteria for a case could be coded in more than one way, we scrutinized the underlying filings and rulings to determine whether the criteria better fit one or another category. For administrative purposes, we treated September 1, 2013, as the date on which our study period closed. We did not code filings and events that were entered onto the docket after that date.

Among the data collected for each case were: jurisdiction; date filed; plaintiffs' firm; assigned judge; cause of action (as reported by PACER); nature of suit (as reported by PACER); whether the case was a lead or related case (if it was in a consolidated action);[82] whether the court granted class certification; whether the case was voluntarily dismissed,[83] settled, settled but on appeal, dismissed, otherwise disposed of, or still pending; the current posture of the case;[84] and the date of the last action on the case.

---

[82] If a case was a related case in a consolidated action, we collected information based on what happened in the lead case.

[83] If a case was voluntarily dismissed, we attempted to discern from filings (and from sources external to the docket) whether the dismissal should be attributed to a settlement on an individual basis—such as when the filings refer to a settlement, or when the named plaintiff sought to dismiss her own claims with prejudice but without prejudice to absent members of the putative class. On one hand, this is likely to understate the rate at which individual plaintiffs settle their claims individually, which in any event results in no recovery to other absent members of the putative class unless another lawsuit moves forward. On the other hand, we were often not able to discern whether the claims in a lawsuit dismissed voluntarily would continue to be litigated (or settled) by another named plaintiff under a different case caption. Thus our decision to select a readily accessible sample of class actions may understate the extent to which members of a putative class may have their claims dismissed on the merits, or alternatively settled, in a class action under a different docket.

[84] The data set includes two certified class actions in which motions for summary judgment are pending. The data set also includes an additional certified class action in which the court granted summary judgment to the plaintiffs on their claim for injunctive relief, and granted summary judgment to the defendants on all remaining claims. At the time our study closed, on September 1, 2013, the parties proposed text for an injunctive order that would resolve the parties' remaining claims on a class-wide basis.

For cases involving settlements, we also collected information about the date of dismissal or final settlement approval; the terms of the settlement agreement; any attorneys' fees, expenses, and incentive payments to lead plaintiffs; and the presence of any *cy pres* provision in the settlement agreement.

There are, of course, limitations to the data we collected. First, our conclusions are based on the cases that we reviewed. While there is good reason to believe that generalizations can be made to all class actions, the sample is undoubtedly smaller than the total number of class actions filed in 2009. Attempting to estimate that number reliably—let alone to examine those cases—would have exceeded the scope of our review. On the other hand, the sample includes cases from across the country and is drawn from sources that are likely to report on significant class actions—those that are of comparatively greater importance or quality than those actions that neither BNA nor Mealey's considered worth reporting. Because the BNA and Mealey's reporters do not present a random sample of all class actions filed in 2009, it would not be useful to calculate a margin of error or otherwise attempt to quantify the extent to which the sample differs randomly from the population of all class actions filed in 2009.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Civil Action No. 11-cv-02092-MSK-KLM

MARGARET MARTINEZ;
MARIA ELENA CASTONON;
JORGE DOMINGUEZ RAMIREZ;
CAROLINA CRUZ;
MARIA BERENICE CRUZ RAMOS;
ROSA BAUTISTA;
PEDRO ROMAN;
TEODORO RUEDA;
MARTHA GARCIA;
ADELIA VALDEZ;
GENOVEVA RODRIGUEZ;
MARIA DURAN;
REFUGIO DE LA CRUZ;
JUAN RODRIGUEZ;
EVA DE LA CRUZ;
BARBARA JOJOLA;
LETICIA SILVA;
RAFAEL CASTANEDA;
MARIA CHAVEZ EGUIA;
JUANA MARTINEZ;
ALFREDO LEDEZMA;
JOSE ESPITIA, JR.;
RAYMOND VALDEZ;
JORGE TERRAZA MONTOYA;
MARICA LARIZ;
PRUDENCIA DE LA ROSA;
MARIA NIEBLAS;
JOSE ARRENDONDO;
MARIA VALASQUEZ;
CARMEN BERMUDEZ;
PATRICIA CASTANEDA;
JOSE JUAN RAMIREZ;
MARIA TRINIDAD OSORIO;
TINA MONTEZ;
DORA LIZ CRUZ;
MAYRA CARMONA;
LETICIA JIMINEZ;
MAURICIO CACCIA;

RITA ORALIA SIERRO;
LORENZO POSADA;
MARIA MONTOYA;
MARISELA SAYAGO;
MIGUEL TOLEDO;
ROCIO AGUILERA;
MARIA RAMIREZ;
OSCAR PEREZ;
JUVENAL TORRES;
CONSUELO TORRES;
HILDA CORDIAL;
NANCY CRUZ RAMOS;
ESPERANZA RAMOS PADILLA;
TANIA ANDRADE REYES;
HERIBERTO MARTINEZ;
CYNTHIA MARTINEZ;
TANIA MARTINEZ;
SERGIO SOSA, JR.;
FELIPE CERVANTES;
SUSANA ORELLANA;
IRMA SKINNER;
LUIS GARCIA;
ROSA BOTELLO;
MARIA DEL CARMEN CONTRERAS;
GLORIA FERNANDEZ;
JAVIER HERNANDEZ;
LIDIA JAIME CARDENA;
MARIA DEL CARMEN SALAZAR;
ESMERALDA OSEGUERA MARTINEZ;
REYNA MORALES;
ANA MELGAR;
GUSTAVO JACO;
MARIA DE JACO;
MARIO MOLINA;
MARCO CHAVEZ;
YANIRA JACO;
ANGEL BANUELOS;
CESAR YANEZ;
MARISELA ROMERO;
CLAUDIA JAVIER;
MAGDALENA GARCIA;
ROSAURA L DE MERAZ;
JUAN CARLOS ARRENDONDO;
RAMON HOLGUIN; and

**JOSE LUIS SANCHEZ, on behalf of themselves and all others similarly situated,**

**Plaintiffs,**

**v.**

**NASH FINCH COMPANY, d/b/a Avanza Supermarket,**

**Defendant.**

---

**OPINION AND ORDER GRANTING, IN PART, MOTION TO DISMISS**

---

**THIS MATTER** comes before the Court pursuant to the Defendant's ("Avanza") Motion to Dismiss (**# 14**), the Plaintiffs' response (**# 17**), and Avanza's reply (**# 20**).

**FACTS**

Although lengthy , the Plaintiffs' Amended Complaint (**# 3**) describes a straightforward factual scenario. During 2008 and 2009, Avanza operated several grocery stores. Prices for goods were posted on the goods, on store shelves or in various published advertisements. Some promotional materials, stated: "A great way to save - plus 10% at the register!"[1]

The Plaintiffs, all customers of Avanza, allege that they understood the promotional language to mean that the posted price would be reduced by 10% at the register, resulting in a 10% savings. The reality, however, was precisely the opposite - at the register, the posted or advertised price was increased by 10%. The Plaintiffs contend that they were misled by Avanza's representations, and, as a result, overpaid for the goods that they purchased from Avanza.

---

[1]An exhibit reflecting this language also contains what appears to be a similar statement in Spanish. Neither party has purported to provide the Court with a translation of the Spanish text, and thus, the Court does not consider the Spanish component in its analysis.

The Plaintiffs assert three claims: (i) violation of the Colorado Consumer Protection Act ("CCPA"), C.R.S. § 6-1-101 *et seq.*, in that Avanza's representation was deceptive and misleading as to the prices of its goods; (ii) common-law fraud, apparently under Colorado law, on the same basis as claim one[2]; and (iii) civil theft under C.R.S. § 18-4-405, in that Avanza "obtained money from the plaintiffs by deception".

Avanza moves (**# 14**) to dismiss the claims against it, arguing: (i) as to the CCPA claim, the Plaintiffs have failed to plead fraud with the particularity required by Fed. R. Civ. P. 9(b), have failed to plead facts showing any statement that could be construed as fraudulent, and in any event, the remedies provided by C.R.S. § 6-1-113(2) are expressly unavailable in a class action (which the Plaintiffs purport to bring here)[3]; (ii) as to the common-law fraud claim, the Plaintiffs have failed to plead facts showing a misleading statement, Avanza's knowledge of the statement's misleading character, and the Plaintiffs' own reliance on the statement; and (iii) as to the civil theft claim, that the Plaintiffs' claims are untimely and that the Plaintiffs fail to adequately plead facts showing a civil theft.

## ANALYSIS

### A. Standard of review

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept all well-plead allegations in the Complaint as true and view those allegations in the light most favorable to the nonmoving party. *Stidham v. Peace Officer Standards and Training*, 265 F.3d

---

[2]Claim two is also susceptible to a reading that it is asserting a statutory claim for false advertising under C.R.S. § 18-5-301 and -303.

[3]The Court notes that the Plaintiffs have recently moved for class certification (**# 49**). That motion is not yet at issue.

1144, 1149 (10th Cir. 2001), *quoting Sutton v. Utah State Sch. For the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). With regard to what must be pled to avoid dismissal, the Supreme Court in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009), described the standard that must be met as "facial plausibility." In this context, "plausibility" refers to the scope and degree of specificity of the allegations in the complaint. *Khalik v. United Air Lines*, ___ F.3d ___, 2012 WL 364058 (10th Cir. Feb. 6, 2012). Although Fed. R. Civ. P. 8(a)(2) still requires the pleader to supply only "a short and plain statement of the claim," that statement must provide more than "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or generalized allegations of conduct that "encompass a wide swath of conduct, much of it innocent." *Id.* In this regard, the plaintiff must do more than articulate a set of facts that could "conceivabl[y]" or "possibly" give rise to a claim; he must "nudge[ ] his claims across the line from conceivable to plausible." *Id.* Of course, the degree of specificity that will be required will necessarily vary based on the context of the case. *Id.*

**B. CCPA claim**

**a. Particularity in pleading**

The CCPA prohibits a wide variety of "deceptive trade practices," including "mak[ing] false or misleading statements of fact concerning the price of goods" and "advertisi[ing] good . . . with intent not to sell them as advertised." C.R.S. § 6-1-105(1)(*i*), (*l*). To adequately plead a CCPA claim, the Plaintiffs must allege: (i) that Avanza engaged in a practice deemed deceptive under the statute; (ii) that the practice occurred in the course of Avanza's business; (iii) that the practice significantly impacts the public as actual or potential consumers of Avanza's goods; (iv) that the Plaintiffs suffered an injury in fact; and (v) that the deceptive trade practice was the

cause of that injury. *HealthONE of Denver, Inc. v. United Health Group, Inc.*, 805 F.Supp.2d 1115, 1120 (D. Colo. 2011).

Where the alleged deceptive trade practice sounds in fraud, allegations as to fraudulent statements must be pled with particularity, as required by Fed. R. Civ. P. 9(b). *Id.* at 1120-21. Typically, to satisfy Rule 9(b), the Plaintiffs must "set forth the time, place and contents of the false representation, the identity of the party making the false statements, and the consequences thereof." *Id.* at 1121, *quoting Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000). The particularity requirement is designed to afford a defendant "fair notice of the plaintiff's claims and the factual ground upon which they are based." *Id.* At the same time, Rule 9(b) must be read in conjunction with the requirements of Fed. R. Civ. P. 8, which calls for simple and concise pleading. *Id.*

Avanza contends that the Plaintiffs have not pled the CCPA claim with the degree of particularity required by Rule 9(b), insofar as they do not identify the time, place, and contents of paticular advertisements and promotional materials that misrepresent the "plus 10%" policy. This argument is without merit.

First, the Court reads the Amended Complaint to allege that Avanza engaged in deception through both misleading affirmative representations and omissions. As to omissions, the Court understands the Plaintiffs to allege that although Avanza advertised and displayed prices for various products, it failed to meaningfully disclose the fact that those prices would be increased at the register. Although Rule 9(b)'s requirement of particularity in pleadings applies to claims of fraudulent omission, that standard is modified somewhat. *S.E.C. v. Nacchio*, 438 F.Supp.2d 1266, 1277 (D. Colo. 2006). For claims premised on omissions, the Plaintiffs must

sufficiently identify "the particular information that should have been disclosed, the reason the information should have been disclosed, the person who should have disclosed it, and the approximate time or circumstances in which the information should have been disclosed." *Id.*

The Court finds that the Amended Complaint, and the reasonable inferences that can be drawn therefrom, satisfy this standard. The information that the Plaintiffs allege should have been disclosed (but was not) was that posted or advertised prices would be increased by 10% at the register. In the absence of any affirmative representation, the failure to correctly state the price or disclose that it will be increased is a material omission. The Plaintiffs allege that this was a business practice applied to their purchases. As to CCPA claims premised on deceptive omissions by Avanza, the Court finds that the Amended Complaint satisfies Rule 9(b)'s particularity requirement.

The Plaintiffs also allege that Avanza made affirmative misrepresentations in advertising materials that state: "A great way to save - plus 10% at the register!" These allegations satisfy Rule 9(b)'s requirement that the Plaintiffs identify the false statement with particularity. The Plaintiffs also adequately allege the consequences of that statement, contending that it caused customers to "believe that they were receiving 10% additional savings or discount at the point of purchase rather than 10% additional charge."

Admittedly, the Amended Complaint does not identify the time and place of every advertisement that included the pertinent language, but under the circumstances, the failure to allege such matters does not deprive Avanza of meaningful notice of the grounds upon which the Plaintiffs' claim is made. The Plaintiffs appear to contend that the "great way to save - plus 10%" language was commonly used by Avanza, appearing in "advertisements, displays, and

sales materials," suggesting that Avanza made repeated and systematic use of the misleading language. Presumably, Avanza itself is aware of the contents of its own advertising materials, and thus, can readily ascertain when and where it used the "great way to save - plus 10%" language, or, at the very least, can clarify the matter via discovery. Thus, under the circumstances, the Court finds that the Plaintiffs have pled their claims of deception under the CCPA with sufficient specificity to satisfy Rule 9(b).

**b. Deceptive language**

Next, the Court turns to Avanza's argument that the express statement identified by the Plaintiffs – the "great way to save - plus 10%" language – is not deceptive as a matter of law. Avanza argues that the statement is not literally false, and that to the extent it is susceptible to multiple interpretations, at least one of those interpretations is not misleading. Thus, Avanza argues that the Plaintiffs' claims do not rise to *Iqbal*'s "plausibility" standard.

The Court rejects both arguments. A natural and plausible reading of the "great way to save - plus 10%" language is the interpretation offered by the Plaintiffs: that Avanza was promising an additional 10% savings that would be applied at the time of checkout. The close linguistic proximity of the word "save" and the "plus 10%" suggests that the concepts of "sav[ing]" and "plus 10%" are related. In addition, the Plaintiffs' understanding that an additional discount would be offered at the time of checkout is consistent with general retail practice. Most consumers have encountered sales in which a discount is promoted along with the advisement of "discount taken at register". It is far less common that a retailer that displays items with conspicuous price tags systematically charges a higher price for those items at the register. Finding that the Plaintiffs' understanding of the language "great way to save - plus

10%" is plausible satisfies *Iqbal* and is sufficient to create a legal and factual issue as to whether such language is deceptive.[4]

**c. No Statutory remedy**

Finally, Avanza argues that the CCPA does by a class of plaintiffs.[5] C.R.S. § 6-1-113(1)(a) provides for "a civil action for any claim against any person who has engaged in . . . any deceptive trade practice" by an "actual or potential consumer of the defendant's goods." The statute also provides that "**Except in a class action**, . . . any person who, in a private civil action, is found to have [violated the CCPA] shall be liable in an amount equal to the sum of" actual damages (or statutory damages of $500, or trebled damages in certain circumstances) plus costs and attorney's fees. C.R.S. § 6-1-113(2). The Plaintiffs concede that the "except in a class action" language operates to preclude them from recovering statutory or trebled damages or attorney's fees, but contend that cases such as *Robinson v. Lynmar Racquet Club, Inc.*, 851 P.2d 274, 278 (Colo. App. 1993), permit class actions to recover actual damages sustained by class members. Avanza argues that the "except in a class action" language operates to preclude recovery of any monetary damages, actual or otherwise.

On this issue, Avanza has the stronger argument. When interpreting a statute, the Court begins by examining its plain language, and if the statutory language is clear, the Court's

---

[4]This Court is not persuaded by the reasoning of the United States District Court for the District of Minnesota in *Salinas v. Nash Finch Co.*, D. Minn. Case no. 09-172 (Jul. 1, 2009), granting Avanza's motion to dismiss in a similar case. Notably, the transcript of the court's oral ruling (attached to Avanaza's motion here) makes no mention of the juxtaposition of the "great way to save" and "plus 10%" language; the transcript mentions only advertising language consisting of "plus 10% at the register."

[5]For purposes of analysis, the Court begins with the assumption that a class will be certified.

analysis

is at an end. *Russell v. U.S.*, 551 F.3d 1174, 1178 (10th Cir. 2008). Moreover, where a statute provides for (or, here, excludes) a particular remedy, the Court must be leery of reading other remedies into the statutory scheme. *Id.*

Here, C.R.S. § 6-1-113(1) makes a private cause of action available under the CCPA, and contains no text limiting the ability of a plaintiff class to bring such a claim. However, when identifying the remedies available in a private action – actual damages, statutory damages, trebled damages, and attorney's fees and costs – § 6-1-113(2) expressly provides that the remedies are not available to a plaintiff class.

The Plaintiffs appear to concede that § 6-1-113(2) operates to preclude statutory and treble damages and attorney's fees in class actions, but argue that actual damages nevertheless remain available. The relevant statutory text reads as follows:

> (2) Except in a class action . . ., any person who, in a private civil action, [is found liable] shall be liable in an amount equal to the sum of:
>
> (a) the greater of:
>
> (I) the amount of actual damages sustained;
>
> (II) five hundred dollars; or
>
> (III) Three times the amount of actual damages sustained [in cases of bad faith conduct]; plus
>
> (b) . . . the costs of the action together with reasonable attorney's fees.

C.R.S. § 6-1-113(2). All of the remedies authorized by subsection (2) are subject to the

exclusion for class actions. Thus, **all** of the remedies found in subsection (2)(a)(I)-(III) (as well as those in subsection (b)) are unavailable in a private class action. The Plaintiffs offer no tenable argument by which the Court can conclude that statutory damages or treble damages under subsection (2)(a)(II) and (III) are somehow subject to the exclusionary language, but that actual damages under subsection (2)(a)(I) are not. The plain and unambiguous language of the statute compels the conclusion that all of the remedies in subparts (a)(I)-(III) and (b), including actual damages, are not available to classes.

The Plaintiffs rely on *Robinson v. Lynmar Racquet Club, Inc.*, 851 P.2d 274, 278 (Colo. App. 1993), for the proposition that actual damages are recoverable in class actions. In *Robinson*, a disgruntled health club customer brought a CCPA claim against the club and sought leave to pursue that claim on behalf of a class. The trial court denied class certification, apparently on the grounds that § 6-1-113(2) precluded any class remedies. The trial court then concluded that the plaintiff had proven her individual CCPA claim and awarded her statutory damages. On appeal, the plaintiff argued that the "trial court erroneously interpreted the damages provision of the CCPA to exclude members of a class from entitlement to certain statutory damages," but the Court of Appeals disagreed. *Id.* at 277. *Robinson* concerned a prior version of § 6-1-113(2), that provided:

> (2) Except in a class action, . . . [a defendant shall] be liable in an amount equal to the sum of:
>
> > (a) Three times the amount of actual damages sustained or two hundred fifty dollars, whichever is greater; and
> >
> > (b) [costs and attorney's fees].

851 P.2d at 278. The Court of Appeals explained that:

> By its plain language, this statute establishes a defendant's liability in a private civil action . . . and sets forth the damages available to an individual plaintiff. Contrary to Robinson's assertions, it expressly excludes members of a class from benefitting from damages provided in subparagraphs 2(a) and (b). Thus, as is relevant here, although an individual plaintiff may be awarded $250 under the provision without proof of actual damages, class action members may not.

*Id.* The Court went on to note that "although the statute does not preclude class members from bringing an action for actual damages, Robinson alleged no actual damages in her complaint and her arguments have focused on their entitlement, not to actual damages, but rather to the $250 provided by statute." *Id.*

Because this Court is asked to apply Colorado law, it defers to *Robinson* insofar as it determined that the remedies provided in subsections 2(a) and (b) of the version of § 6-1-113 then in effect were unavailable to class members. That conclusion finds its support in the unambiguous statutory text. *Robinson's* pronouncement that "the statute does not preclude class members from bringing an action for actual damages" was *dicta*[6], and therefore is not instructive on this issue. Indeed, this statement is impossible to reconcile with the court's actual holding that the $250 statutory damages of the then-§ 6-1-113(2)(a) were unavailable to class members, given that (trebled) actual damages were listed in the same statutory provision that the court concluded did not apply to a class. Accordingly, this Court is unpersuaded that *Robinson* stands for the proposition that a class of plaintiffs can obtain an award of actual damages under § 6-1-113.

---

[6]As the court noted, "Robinson alleged no actual damages in her complaint," and thus, the question of whether class members could recover actual damages was not a question before the court. It was also unconnected to the statutory language, insofar as the court offered no statutory citation or source of authority for its belief that class members could nevertheless obtain actual damages under § 6-1-113(2).

Turning to the statutory language, the parties focus their arguments on the type of remedy provided in § 6-1-113(2). However, the language of § 6-1-113(2) is not limited to the articulation of remedies; indeed, it defines a defendant's liability under the CCPA in a private action. It limits such liability to specified remedies, and expressly states that such remedies are not applicable in class actions. By logical extension, the CCPA creates no statutory liability for a defendant in a private class action.[7]

At this juncture, each plaintiff is pursuing his or her own rights and no class certification has been sought. In such context, the full panoply of CCPA remedies (and full scope of liability) appears to be at issue. Accordingly, the Court denies Avanza's motion to dismiss the CCPA claims as currently pled.

**C. Common-law fraud**

To plead a claim for common-law fraud under Colorado law, the Plaintiffs must allege facts showing: (i) Avanza made a false representation of fact or an omission of a material fact; (ii) that the representation or omission was made to induce the Plaintiffs to act; (iii) the Plaintiffs acted to their detriment; and (iv) they did so in reliance upon the misrepresentation or omission. *Nelson v. Gas Research Inst.*, 121 P.3d 340, 344 (Colo. App. 2005). Avanza moves to dismiss the Plaintiffs' common-law fraud claims, arguing that the Plaintiffs have failed to allege a

---

[7] Although the parties have not focused on it, the critical operative language of § 6-1-113(2) may be its reference to a private action. A regulatory action can be initiated by the attorney general or district attorney for violations of the CCPA in accordance with § 6-1-110. In such action, civil penalties can be imposed in accordance with § 6-1-112. Such action is brought on the behalf of the public and penalties are payable to the general fund. Reading such sections together with § 6-1-113(2), it would appear that the Colorado Assembly intended that the interests of plaintiff classes would be protected by the attorney general or district attorney, rather than through private action.

misleading statement, Avanza's knowledge of the misleading character of the statement, and the Plaintiffs' own reliance upon it.

The Court finds each of Avanza's arguments to be meritless. As noted above, the "great way to save - plus 10%" language is readily susceptible to an interpretation which promises 10% savings, not a 10% surcharge, to customers. Moreover, one could reasonably infer from Avanza's use of such an unorthodox pricing model, coupled with promotional language that tends to obscure, rather than highlight, that pricing policy, that Avanza specifically expected and intended that its customers might misunderstand the nature of the policy. Although Avanza may be correct that the specific allegations as to each Plaintiff's reliance on the "great way to save - plus 10%" language are largely conclusory, the Court cannot say, in the particular circumstances of this case, that more detail is necessary to put Avanza on notice of the Plaintiffs' claims.

It may ultimately be revealed through discovery that particular Plaintiffs cannot prove that they relied upon the "great way to save - plus 10%" language (or any other misrepresentations or omissions that may be established) when deciding when and how often to patronize Avanza,[8] but that is a matter that is best dealt with at summary judgment. At the pleading stage, the Court finds that under the particular circumstances of this case, a largely conclusory assertion that the Plaintiffs relied upon Avanza's misleading advertising is sufficient

[8]Avanza appears to argue that, because customer receipts disclosed the 10% surcharge, the Plaintiffs could not have relied upon the advertising materials to believe they were instead receiving a 10% savings. There are passing mentions that one the Plaintiffs noticed the 10% surcharge listed on her receipts, but the Amended Complaint does not elaborate. The Court is not prepared to say that, based on these limited factual allegations, the element of reliance cannot be satisfied. The manner in which the 10% surcharge was disclosed on the receipt and the reasonableness of the Plaintiffs' diligence (or lack thereof) in reviewing the receipts inform the reliance question in fact-dependent ways, such that dismissal at the pleading stage would be inappropriate.

to state a claim for common-law fraud.

**D. Civil theft**

Finally, the Court turns to the Plaintiffs' claims for civil theft under C.R.S. § 18-4-405. That statute provides that "the owner [of property obtained by theft, robbery, or burglary] may maintain an action not only against the taker thereof but also against any person in whose possession he finds the property." To plead a claim for civil theft, the Plaintiffs must allege facts showing that Avanza obtained control over the Plaintiffs' property in circumstances amounting to "theft, robbery, or burglary."[9] Such theft may occur where a person simply takes another's property without authorization, or in more complicated circumstances, such as where the person, via deception, obtains the owner's authorization to take the property. *West v. Roberts*, 143 P.3d 1037, 1040 (Colo. 2006).

Avanza argues that the Plaintiffs' civil theft claims are untimely. Civil theft claims are subject to a two-year statute of limitations. *Maez v. Springs Automotive Grp.*, 268 F.R.D. 391, 395 (D. Colo. 2010). The Amended Complaint alleges that the Plaintiffs shopped at Avanza from June 2008 to March 2009. This action was commenced in the Colorado District Court for Denver County on June 20, 2011. Thus, the question presented is when the Plaintiffs' civil theft claims accrued.

C.R.S. § 13-80-108 generally governs the question of accrual of claims. Whether a civil theft claim under C.R.S. § 18-4-405 is characterized as "a cause of action for injury to person

[9]The statute also creates liability in a person who actually possesses property taken from a plaintiff through theft, even if the person in possession did not commit the theft. Given the nature of the allegations here, the Court does not understand the Plaintiffs to contend that Avanza is the innocent possesor of property that was taken from them by someone else.

[or] property," C.R.S. § 13-80-108(1), or whether, in the circumstances here, it is better described as "a cause of action for fraud, misrepresentation, concealment, or deceit," C.R.S. § 13-80-108(3), is largely immaterial; in either circumstance, the cause of action accrues on the date that the injury or deceit "is [known/discovered] or should have been [known/discovered] by the exercise of reasonable diligence." Thus, the Plaintiffs' civil theft claims accrued at the point in time in which the Plaintiffs either knew or discovered that they were being charged an additional 10% on their purchases, or at the time that they reasonably **should have** known or discovered that fact.

The Amended Complaint indicates that Plaintiff Margaret Martinez actually discovered the existence of the 10% surcharge on January 27, 2009, as a result of examining her receipts. Because Ms. Martinez had actual notice of the purported deception as of that time, her civil theft claim accrued on January 27, 2009, and thus was barred by the statute of limitations as of January 27, 2011, prior to the filing of this action in June 2011. Thus, her civil theft claim is dismissed as untimely.

The Amended Complaint does not address the dates upon which any other Plaintiff actually discovered the existence of the 10% surcharge. Avanza argues that because the 10% surcharge was displayed on customers' receipts, and all the Plaintiffs at issue here completed their shopping by March 2009, they were on constructive notice of the surcharge for more than two years prior to the filing of this action, rendering all of the civil theft claims untimely. Although it may ultimately be that conspicuous disclosure of the 10% surcharge on customer' receipts might be sufficient to put the customers on constructive notice of the surcharge, the Court is not prepared to dismiss the civil theft claims on that ground at this early stage of the

litigation. Assuming that the surcharge is displayed on customer receipts, the record does not reflect where and how the surcharge is disclosed. Whether the disclosure of the surcharge is so sufficiently clear and conspicuous that a customer exercising reasonable diligence should be expected to promptly discover it is a question better suited for analysis on a full factual record at the summary judgment stage.

As to Avanza's argument that the Plaintiffs fail to adequately plead the elements of a civil theft claim – specifically, that Avanza committed a "theft" – the Plaintiffs are required to allege facts showing that Avanza "knowingly obtain[ed] or exercis[ed] control over anything of value of [the Plaintiffs] without authorization, *or by threat or deception*, and ... [i]ntend[ing] to deprive the [Plaintiffs] permanently of the use or benefit of the thing of value." *West v. Roberts*, 143 P.3d 1037, 1040 (Colo. 2006) (emphasis in original). Although the Amended Complaint does not allege such facts verbatim, a reasonable inference to be drawn from its allegations is that the Plaintiffs contend that Avanza obtained control over their money – specifically, the 10% surcharge they paid – by means of deception, and that Avanza intended to retain that money permanently. Thus, under the liberal standards of Rule 8, the remaining Plaintiffs have adequately pled the elements of civil theft.

**CONCLUSION**

For the foregoing reasons, Avanza's Motion to Dismiss (# **14**) is **GRANTED IN PART**, insofar as Plaintiff Margaret Martinez's civil theft claim is **DISMISSED** as untimely, and **DENIED IN PART** in all other respects.

Dated this 13th day of August, 2012

**BY THE COURT:**

Marcia S. Krieger
United States District Judge

<table>
<tr><td>DISTRICT COURT<br>CITY & COUNTY OF DENVER, COLORADO<br>1437 Bannock Street<br>Denver, Colorado 80202</td><td rowspan="2">▲ COURT USE ONLY ▲</td></tr>
<tr><td>Plaintiffs: KATHLEEN HISE, et. al.<br><br>v.<br><br>Defendants: CANYON SUDAR PARTNERS, LLC, et. al.</td></tr>
<tr><td></td><td>Case Number: 09CV600<br><br>Courtroom: 18</td></tr>
<tr><td colspan="2">DISMISSAL OF CCPA CLAIMS</td></tr>
</table>

THIS MATTER comes before the Court on the Defendants' Joint Motion to Dismiss Plaintiffs' Colorado Consumer Protection Act Claims. The Court, having reviewed its file and the related pleadings, finds and rules as follows:

Defendants SSC Submaster Holdings, LLC; SSC Equity Holdings, LLC; SavaSeniorCare, LLC; SavaSeniorCare Administrative Services, LLC; SSC Denver South Monaco Operating Company, LLC; SSC Red Rocks Operating Company, LLC; SSC Berthoud Operating Company, LLC; SSC Aurora Operating Company, LLC; SSC Fort Collins Lemay Avenue Operating Company, LLC; SSC Thornton Operating Company, LLC; SSC Longmont Operating Company, LLC; SSC Colorado Springs Aspen Operating Company, LLC; SSC Pueblo Belmont Operating Company, LLC; SSC Boulder Operating Company, LLC; SSC Colorado Springs Cedarwood Operating Company, LLC; SSC Greeley Centennial Operating Company, LLC; SSC Colorado Springs Colonial Columns Operating Company, LLC; SSC Durango Operating Company, LLC; SSC Littleton Operating Company, LLC; SSC Greeley Kenton Operating Company, LLC; SSC Pueblo Operating Company, LLC; SSC Palisade Operating Company, LLC; SSC Englewood Operating Company, LLC; SSC Montrose San Juan Operating Company, LLC; SSC Loveland Operating Company, LLC; SSC Fort Collins Spring Creek Operating Company, LLC; SSC Sterling Operating Company, LLC; SSC Brush Sunset Manor Operating Company, LLC; SSC Colorado Springs Terrace Gardens Operating Company, LLC; SSC Windsor Operating Company, LLC; SSC Yuma Operating Company, LLC; and Wayne Sanner (collectively, the "Defendants") seek to dismiss the Plaintiffs' request for injunctive relief under the Colorado Consumer Protection Act (the "CCPA") on the grounds that 1) there is no private right of injunctive relief under the CCPA, 2) the Plaintiffs' CCPA claims are not plead with sufficient particularity, 3) the Plaintiffs' CCPA claims for affirmative misrepresentations are not actionable as puffery, and 4) the Plaintiffs' CCPA claims are barred

by the doctrines of separation of powers and primary jurisdiction. The Plaintiffs confirm that they are seeking injunctive relief under the CCPA on their own behalf and on behalf of the proposed class, and oppose the Defendants' Motion on substantive grounds.

With regard to the availability of a private remedy for injunctive relief, the CCPA is modeled after the Revised Uniform Deceptive Trade Practice Act (the "Uniform Act"), however, the General Assembly departed significantly from the Uniform Act in drafting the CCPA. *Hall v. Walter*, 969 P.2d 224, 232 (Colo. 1998). Section 3(a) of the Uniform Act, under the heading "Remedies," specifically provides that "A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable." *Unif. Deceptive Trade Practices Act* § 3, 7A U.L.A. at 289-90. In fact, other than those otherwise available under the common law or other statutes, the only remedies provided for under the Uniform Act are a private injunction, and a discretionary award of attorney fees. Unlike the Uniform Act, the CCPA creates a private action for damages, but reserves injunctive relief as an enforcement tool to be utilized by the Attorney General or one of the State's district attorneys.

C.R.S. § 6-1-103 provides that the Attorney General and the district attorneys of each of the judicial districts in Colorado are jointly responsible for the enforcement of the CCPA. Along these lines, C.R.S. § 6-1-107 grants the Attorney General or a district certain investigatory powers, and C.R.S. § 6-1-108 permits them to issue subpoenas and conduct hearings in support of related investigations. C.R.S. § 6-1-108 further permits the Attorney General or a district attorney to prescribe forms and promulgate rules to administer the provisions of the CCPA. Pursuant to C.R.S. § 6-1-109, if a person fails to cooperate with an investigation or obey a subpoena under the CCPA, the Attorney General or a district attorney may apply to a district court for relief, including injunctive relief. Under C.R.S. § 6-1-112, the Attorney General or a district attorney may bring a civil action on behalf of the State to seek the imposition of civil penalties. Finally, in this regard, C.R.S. § 6-1-110 permits the Attorney General or a district attorney to obtain injunctive relief against a person who violates the CCPA. The Attorney General or such district attorney, however, has the ability, under C.R.S. § 6-1-110, to accept an assurance of discontinuance in lieu of, or as part of, a civil action. With regard to this latter ability, the Colorado Supreme Court has indicated that the ability to craft an individualized treatment of a particular offender under the CCPA justifies the discretionary authority of the Attorney General or a district attorney. *People ex rel. Dunbar v. Gym of America, Inc.*, 493 P.2d 660 (Colo. 1972). In addition to the above, extensive, enforcement scheme, C.R.S. § 6-1-113 also permits a private individual to recover damages in a civil action for injuries he suffered as a result of a deceptive trade practice. That section, however, does not discuss any remedy other than recovery of certain, specified damages.

The Plaintiffs' primary argument is, essentially, that C.R.S. § 6-1-113(1) states the provisions "of this article" are available in a private civil action, that C.R.S. § 6-1-110 is included in Article 1 of Title 6, and, therefore, that a private individual may obtain injunctive relief for violations of the CCPA. In fact, the Plaintiffs go so far as to argue that private individuals may, therefore, "seek all other remedies made available in the entire article setting

forth the CCPA, including injunctions." In other words, according to the Plaintiffs' position, a private individual would have the ability to conduct investigations, require other individuals and business to file reports and make statements, impound property, administer oaths and conduct hearings, and prescribe forms and promulgate rules to administer the provisions of the CCPA.

Particularly in the area of deceptive trade practices, there is a critical difference in effect between an award of damages and an injunction. While damages can compensate a particular plaintiff for injuries done to him, since such a plaintiff is necessarily aware of the purported deceptive practice, injunctive relief would not serve to further protect him. Instead, an injunction can only serve to possibly protect others. As such, injunctive relief in the area of deceptive trade practices, in effect, accomplishes the goal of regulation. A review of the CCPA, both in context and in conjunction with the Uniform Act, reveals a clear statutory system whereby the General Assembly chose to place responsibility for regulating deceptive trade practices in the hands of the Attorney General and the various district attorneys of the state, rather than rely upon piecemeal litigation by private consumers. Although C.R.S. § 16-1-113 permits a private individual to seek compensation for injuries done to him, there is nothing in the CCPA which suggests the General Assembly intended to provide private individuals with the ability to usurp the responsibility it placed upon the Attorney General and district attorneys.

The Plaintiffs also argue that the phrase "any claim" in C.R.S. § 6-1-113(1) plainly include claims for injunctions. The word claim in this context, however, appears to refer to an assertion, rather than a legal claim for relief. As such, it does not appear to be a hidden effort to expand the types of remedies available to a private individual. It certainly does not appear, contrary to the Plaintiffs' assertions, to be an indication that the General Assembly wished to to explicitly grant private individuals "identical and co-equal" enforcement rights to those of the Attorney General and district attorneys. In fact, C.R.S. § 6-1-113(2) goes on to define the liability of a person found to have engaged in a deceptive trade practice, and, thereby, defines the remedies available in a private suit against such a person. Further, it is of note that the provision of the CPAA entitled "Restraining orders--injunctions--assurances of discontinuance," C.R.S. § 6-1-110, discusses only the Attorney General and the various district attorneys, while the only provision which mentions remedies for private individuals, C.R.S. § 6-1-113, is entitled "Damages." Although the title of a statute is not dispositive of the legislative intent, it may still be useful in that interpreting that intent. *People v. Madden*, 111 P.3d 452, 457 (Colo. 2005); *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004). Looking at all parts of C.R.S. § 6-1-113, and not just select phrases, it is clear that it was intended to provide private individuals a means by which to obtain compensation for injuries they suffered as a result of a deceptive trade practice, and not to grant them the enforcement powers available elsewhere in the CCPA.

The Plaintiffs cite to *May Dept. Store v. State ex rel. Woodard*, 863 P.2d 967 (Colo. 1993); *Jahn v. ORCR*, 92 P.3d 984 (Colo. 2004); and *Spires v. Hospital Corp. of America*, 289 Fed.Appx. 269, 2008 WL 2152402 (10th Cir., 2008)[1], in support of their arguments.

[1] The *Spires* opinion was not selected for publication in the Federal Reporter.

The action in *May Dept. Store*, and, therefore, the request for injunctive relief under the CCPA, however, was brought by the Attorney General, not a private individual.

The plaintiffs in *Jahn* had also been included in a class certified in *Kilbourne v. Health Care Mgmt. Partners*, Denver Dist. Ct. case no. 99CV2232. Although the District Court in *Kilbourne* certified a class seeking an injunction under the CCPA, the action was later settled and the class claims were dismissed with prejudice. The plaintiffs in *Jahn*, however, were only seeking damages and were not seeking any injunctive relief. As such, the issue of whether injunctive relief is properly available under the CCPA was not before the Colorado Supreme Court. The fact that the court did not, *sua sponte*, comment on a ruling in a case which was not before it has no persuasive value.

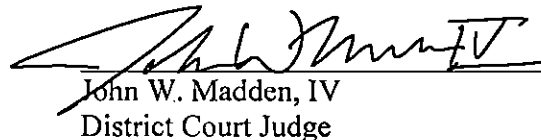
In *Spires*, the court applied the Kansas Consumer Protection Act. Unlike the CCPA, Kan.Stat.Ann. § 50-634(a)(2), the section of the Kansas Consumer Protection Act entitled "Private remedies," specifically permits a consumer to bring an action to enjoin a supplier who has violated the act. As such, the fact that the plaintiffs in *Spires* were allowed to seek injunctive relief is irrelevant to whether such relief is available under the CCPA.

Based on the above, the Court concludes that injunctive relief is not an available remedy under the CCPA for a private plaintiff. The Defendants' other arguments for dismissal are rendered moot by this determination. Although the Court has reviewed and considered the related arguments by all of the parties, given their complexity, a full analysis and ruling on each would be unnecessarily long and would be a waste of judicial time and resources under the circumstances.

Accordingly, the Defendants' Joint Motion to Dismiss Plaintiffs' Colorado Consumer Protection Act Claims is GRANTED.

SO ORDERED this 20th day of July, 2010

BY THE COURT:



John W. Madden, IV
District Court Judge

**From:** LexisNexis File & Serve
**To:** Norris, Elise
**Subject:** Case: 2009CV600; Transaction: 32240170 - Notification of Service
**Date:** Tuesday, July 20, 2010 5:44:49 PM
**Attachments:** Dismissal of CCPA Cl.pdf

---

Terence M Ridley has allowed you, Elise Norris, to receive a copy of this notification for Transaction ID 32240170. The details for this transaction are listed below.

To: Terence M Ridley
Subject: E-Service for CO Denver County District Court 2nd JD

Title: Dismissal of CCPA Claims (4 pages)
Case: HISE, KATHLEEN et al vs. CANYON SUDAR PARTNERS LLC et al
Case #: 2009CV600
Date: Jul 20 2010 5:35PM MDT
Attorney: John William Madden
Firm: CO Denver County District Court 2nd JD
Transaction #: 32240170
Check for additional details (and view the documents) online at:
https://fileandserve.lexisnexis.com/Login/Login.aspx?FI=32240170 (subscriber login required)

Thank you for using LexisNexis File & Serve.

Questions? For prompt, courteous assistance please contact LexisNexis Customer Service by phone at 1-888-529-7587 (24/7).

<<Dismissal of CCPA Cl.pdf>>

**6-1-112. Civil penalties.** Any person who violates any court order or injunction issued pursuant to this article shall forfeit and pay to the general fund of this state a civil penalty of not more than ten thousand dollars. For the purposes of this section, the court issuing the order or injunction shall retain jurisdiction, and the cause shall be continued. Upon violation, the attorney general may petition the court for the recovery of the civil penalty. Such civil penalty shall be in addition to any other penalty or remedy available for the enforcement of the provisions of this article and any court order or injunction.

**Source:** L. 69, p. 376, § 9; C.R.S. 1963, § 55-5-9.

**6-1-113. Damages.** The provisions of this article shall be available to any person in a civil action for any claim against any person who has acquired any money or real or personal property by means of any deceptive trade practice listed in section 6-1-105. Costs shall be allowed to the prevailing party unless the court otherwise directs. The court may award attorneys' fees to the prevailing party.

**Source:** L. 69, p. 376, § 12; C.R.S. 1963, § 55-5-12.

**Am. Jur.** See 37 Am. Jur.2d, Fraud and Deceit, § 283; 52 Am. Jur., Trademarks, Tradenames, and Trade Practices, § 144.
**C.J.S.** See 87 C.J.S., Trade-Marks, § 213.

**6-1-114. Criminal penalties.** Any person who promotes a pyramid promotional scheme in this state, upon a first conviction, is guilty of a class 1 misdemeanor, as defined in section 18-1-106, C.R.S. 1973, and upon a second or subsequent conviction, is guilty of a class 5 felony, as defined in section 18-1-105, C.R.S. 1973.

**Source:** L. 73, p. 620, § 5; C.R.S. 1963, § 55-5-14.

**Cross references.** As to felonies classified, see § 18-1-105. As to misdemeanors classified, see § 18-1-106.

## ARTICLE 2

### Unfair Practices Act

6-2-101. Short title.
6-2-102. Legislative declaration.
6-2-103. Discriminatory sales — exceptions.
6-2-104. Personal responsibility.
6-2-105. Unlawful to sell below cost.
6-2-106. How cost established.
6-2-107. Allegation and proof — evidence.
6-2-108. Secret rebates or refunds prohibited.
6-2-109. Contract illegal — when.
6-2-110. When provisions not applicable.
6-2-111. Unlawful acts — remedy — license.
6-2-112. Testimony — books and records.
6-2-113. Selling below cost.
6-2-114. Advertising goods not available.
6-2-115. Evidence to establish legal price.
6-2-116. Penalty.
6-2-117. Remedies cumulative.

**6-2-101. Short title.** This article shall be known and may be cited as the "Unfair Practices Act".

**Source:** L. 37, p. 1287, § 14; CSA, C. 48, § 302(13); L. 41, p. 824, § 13; L. 49, p. 349, § 17; CRS 53, § 55-2-17; C.R.S. 1963, § 55-2-17.

**Law review.** For article, "The Unfair Practices Act of Colorado and Its Recent Amendment", see 26 Dicta 162 (1949).

for each such violation. For the purposes of this section, the court issuing the order or injunction shall retain jurisdiction, and the cause shall be continued. Upon violation, the attorney general or a district attorney may petition the court for the recovery of the civil penalty. Such civil penalty shall be in addition to any other penalty or remedy available for the enforcement of the provisions of this article and any court order or injunction.

**Source:** Amended, L. 77, p. 351, § 8; amended, L. 87, p. 359, § 8.

**6-1-113. Damages.** (1) The provisions of this article shall be available to any person in a civil action for any claim against any person who has engaged in or caused another to engage in any deceptive trade practice listed in section 6-1-105 or 6-1-105.5.

(2) Except in a class action, any person who, in a private civil action, is found to have engaged in or caused another to engage in any deceptive trade practice listed in section 6-1-105 or 6-1-105.5 shall be liable in an amount equal to the sum of:

(a) Three times the amount of actual damages sustained or two hundred fifty dollars, whichever is greater; and

(b) In the case of any successful action to enforce said liability, the costs of the action together with reasonable attorney fees as determined by the court.

(3) Any person who brings an action under this article which is found by the court to be groundless and in bad faith or for the purpose of harassment shall be liable to the defendant for the costs of the action together with reasonable attorney fees as determined by the court.

(4) Costs and attorney fees shall be awarded to the attorney general or a district attorney in all actions where the attorney general or the district attorney successfully enforces this article.

**Source:** Amended, L. 86, p. 446, § 5; amended, L. 87, p. 360, § 9.

**Award of attorney fees under this section appropriate** inasmuch as defendant's fraudulent misrepresentation was a deceptive trade practice under § 6-1-103. Dodds v. Frontier Chevrolet Sales & Service, Inc. 676 P.2d 1237 (Colo. App. 1983).

**6-1-114. Criminal penalties.**

**...w reviews.** For article, "Criminal Prose-...s under the Colorado Securities Act", U. Colo. L. Rev. 233 (1976).

**...-1-115. Limitations.** All actions brought under this article must be com-...enced within three years after the date on which the false, misleading, or ...eceptive act or practice occurred or the date on which the last in a series ...of such acts or practices occurred or within three years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice. The period of limitation provided in this section may be extended for a period of one year if the plaintiff proves that failure to timely commence the action

**Grant of immunity contained in subsection (1) cannot withstand constitutional scrutiny.** People ex rel. MacFarlane v. Sari, 196 Colo. 235, 585 P.2d 591 (1978) (decided prior to 1981 amendment).

**Immunity allows state to compel testimony.** A grant of immunity as extensive as a witness' constitutional privilege against self-incrimination allows a state to compel testimony which might otherwise be unobtainable. People ex rel. Smith v. Jordan, 689 P.2d 1172 (Colo. App. 1984).

**6-1-112. Civil penalties.** (1) Any person who violates or causes another to violate any provision of this article shall forfeit and pay to the general fund of this state a civil penalty of not more than two thousand dollars for each such violation. For purposes of this subsection (1), a violation of any provision shall constitute a separate violation with respect to each consumer or transaction involved; except that the maximum civil penalty shall not exceed one hundred thousand dollars for any related series of violations.

(2) Any person who violates or causes another to violate any court order or injunction issued pursuant to this article shall forfeit and pay to the general fund of this state a civil penalty of not more than ten thousand dollars for each such violation. For the purposes of this section, the court issuing the order or injunction shall retain jurisdiction, and the cause shall be continued. Upon violation, the attorney general or a district attorney may petition the court for the recovery of the civil penalty. Such civil penalty shall be in addition to any other penalty or remedy available for the enforcement of the provisions of this article and any court order or injunction.

**Source: L. 69:** p. 376, § 9. **C.R.S. 1963:** § 55-5-9. **L. 77:** Entire section amended, p. 351, § 8, effective July 1. **L. 87:** Entire section amended, p. 359, § 8, effective July 1.

**The general assembly expressly stated its intent that penalties imposed under subsection (1) are civil in nature.** Moreover, the fact that the legislature provided that civil enforcement proceedings are to be governed by the Colorado rules of civil procedure reinforces the legislature's intent to create a civil penalty. Duncan v. Norton, 974 F. Supp. 1328 (D. Colo. 1997).

**Subsection (1) aids the Colorado Consumer Protection Act's overall remedial purpose of protecting the state's consumers against deceptive trade practices and is therefore properly characterized as serving primarily a remedial, and also a punitive, purpose.** Duncan v. Norton, 974 F. Supp. 1328 (D. Colo. 1997).

**Federal court declined to find that any amount of penalty imposed in the civil enforcement proceeding under subsection (1) would be so far criminal in nature as to preclude the attorney general from seeking penalties by use of plaintiff's prior compelled testimony.** Duncan v. Norton, 974 F. Supp. 1328 (D. Colo. 1997).

**Civil penalties based on the dissemination of misleading information** rather than on the receipt of the information or on a consumer acting on the information effectuate the purpose of the statute. May Dept. Stores v. State, 863 P. 2d 967 (Colo. 1993).

**Statute is intended to punish wrongdoer** not compensate injured party. May Dept. Stores v. State, 863 P.2d 967 (Colo. 1993).

**"Each consumer or transaction" contemplates two separate violations,** one involving a consumer and one involving a transaction. A consumer relying or acting upon an advertisement is a separate and distinct violation from the act of advertising. Consumer involvement almost necessarily involves injury while a transaction does not have to cause actual injury to the consumer to be a violation. May Dept. Stores v. State, 863 P.2d 967 (Colo. 1993).

**This section does not require an actual injury or loss** to a customer before a civil penalty may be awarded. State v. May Dept. Stores Co., 849 P.2d 802 (Colo. App. 1992).

**In determining the amount of a civil penalty award, the court should apply the following concepts:** (a) The good or bad faith of the defendant; (b) the injury to the public; (c) the defendant's ability to pay; and (d) the desire to eliminate the benefits derived by violations of the Colorado Consumer Protection Act. State v. May Dept. Stores Co., 849 P.2d 802 (Colo. App. 1992).

**6-1-113. Damages.** (1) The provisions of this article shall be available in a civil action for any claim against any person who has engaged in or caused another to engage in any deceptive trade practice listed in this article. An action under this section shall be available to any person who:

(a) Is an actual or potential consumer of the defendant's goods, services, or property and is injured as a result of such deceptive trade practice; or

(b) Is any successor in interest to an actual consumer who purchased the defendant's goods, services, or property; or

(c) In the course of the person's business or occupation, is injured as a result of such deceptive trade practice.

(2) Except in a class action or a case brought for a violation of section 6-1-709, any person who, in a private civil action, is found to have engaged in or caused another to engage in any deceptive trade practice listed in this article shall be liable in an amount equal to the sum of:

(a) The greater of:

(I) The amount of actual damages sustained; or

(II) Five hundred dollars; or

(III) Three times the amount of actual damages sustained, if it is established by clear and convincing evidence that such person engaged in bad faith conduct; plus

(b) In the case of any successful action to enforce said liability, the costs of the action together with reasonable attorney fees as determined by the court.

(2.3) As used in subsection (2) of this section, "bad faith conduct" means fraudulent, willful, knowing, or intentional conduct that causes injury.

(2.5) Notwithstanding the provisions of subsection (2) of this section, in the case of any violation of section 6-1-709, in addition to interest, costs of the action, and reasonable attorney fees as determined by the court, the prevailing party shall be entitled only to damages in an amount sufficient to refund moneys actually paid for a manufactured home not delivered in accordance with the provisions of section 6-1-709.

(3) Any person who brings an action under this article that is found by the court to be groundless and in bad faith or for the purpose of harassment shall be liable to the defendant for the costs of the action together with reasonable attorney fees as determined by the court.

(4) Costs and attorney fees shall be awarded to the attorney general or a district attorney in all actions where the attorney general or the district attorney successfully enforces this article.

**Source: L. 69:** p. 376, § 12. **C.R.S. 1963:** § 55-5-12. **L. 86:** Entire section amended, p. 446, § 5, effective April 17. **L. 87:** Entire section amended, p. 360, § 9, effective July 1. **L. 98:** IP(2) amended and (2.5) added, p. 748, § 3, effective August 5. **L. 99:** Entire section amended, p. 636, § 1, effective May 18.

**Editor's note:** Section 15 of chapter 188, Session Laws of Colorado 1999, provides that the act amending this section applies to acts committed on or after May 18, 1999.

**Am. Jur.2d.** See 37 Am. Jur.2d, Fraud and Deceit, § 283; 74 Am Jur.2d, Trademarks and Tradenames, § § 145, 149, 150.

**C.J.S.** See 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 213.

**The plain language of this section provides that any person may bring an action under the Colorado Consumer Protection Act (CCPA).** Therefore, third-party non-consumers have standing to bring actions under the CCPA. Walter v. Hall, 940 P.2d 991 (Colo. App. 1996).

**If a claim by a corporation is within the zone of interests of the Colorado Consumer Protection Act, a corporation is a person entitled to bring a claim under the Act.** Fiberglass Component Prod. v. Reichhold Chems., Inc., 983 F. Supp. 948 (D. Colo. 1997).

**Claimant not within group of persons the statute was intended to protect because the physician's conduct in performing claimant's independent medical examination** occurred in the context of the contract between the physician and the insurer and not between the physician and the claimant. Claimant never asserted that the physician made false representations to her or that she relied on such misrepresentations. Martinez v. Lewis, 942 P.2d 1219 (Colo. App. 1996).

**Award of attorney fees under this section appropriate** inasmuch as defendant's fraudulent misrepresentation was a deceptive trade practice under § 6-1-103. Dodds v. Frontier Chevrolet Sales & Service, Inc., 676 P.2d 1237 (Colo. App. 1983).

**Treble damages provided by this section and punitive damages awarded under § 13-21-102 serve the same purposes of punishment and deterrence.** Lexton-Ancira Real Estate Fund v. Heller, 826 P.2d 819 (Colo. 1992).

**Plaintiff was not entitled to recover both treble damages under this section and punitive damages under § 13-21-102, since damages under both sections serve same purposes.** Lexton-Ancira Real Estate Fund v. Heller, 826 P.2d 819 (Colo. 1992).

**Retroactive application of enhanced civil remedies in this section is permissible.** Treble-damages provision of this section could be applied where health club had violated substantive provisions of act prior to amendment of this section, since amendment did not impose new duties on health clubs in relation to their customers. Robinson v. Lynmar Racquet Club, Inc., 851 P.2d 274 (Colo. App. 1993).

**Attorney fees incurred in unsuccessful attempt to obtain class certification were proper-**

ly disallowed, since subsection (2) of this section clearly prohibits an award of attorney fees in a class action. Robinson v. Lynmar Racquet Club, Inc., 851 P.2d 274 (Colo. App. 1993).

**Trial court may limit award of attorney fees to that which is "reasonable".** Robinson v. Lynmar Racquet Club, Inc., 851 P.2d 274 (Colo. App. 1993).

**6-1-114. Criminal penalties.** Upon a first conviction any person who promotes a pyramid promotional scheme in this state or who violates any provision of section 6-1-701 is guilty of a class 1 misdemeanor, as defined in section 18-1-106, C.R.S., and upon a second or subsequent conviction is guilty of a class 6 felony, as defined in section 18-1-105, C.R.S.

**Source: L. 73:** p. 620, § 5. **C.R.S. 1963:** § 55-5-14. **L. 89:** Entire section amended, p. 820, § 2, effective July 1. **L. 92:** Entire section amended, p. 231, § 3, effective July 1. **L. 99:** Entire section amended, p. 654, § 7, effective May 18.

**Editor's note:** Section 15 of chapter 188, Session Laws of Colorado 1999, provides that the act amending this section applies to acts committed on or after May 18, 1999.

**Law reviews.** For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976).

**6-1-115. Limitations.** All actions brought under this article must be commenced within three years after the date on which the false, misleading, or deceptive act or practice occurred or the date on which the last in a series of such acts or practices occurred or within three years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice. The period of limitation provided in this section may be extended for a period of one year if the plaintiff proves that failure to timely commence the action was caused by the defendant engaging in conduct calculated to induce the plaintiff to refrain from or postpone the commencement of the action.

**Source: L. 87:** Entire section added, p. 360, § 10, effective July 1.

**Applicable limitation statute is that in effect when claim accrues.** Robinson v. Lynmar Racquet Club, Inc., 851 P.2d 274 (Colo. App. 1993).

## PART 2

## AUTO RENTAL CONTRACTS - COLLISION DAMAGE WAIVERS

**6-1-201. Definitions.** As used in this part 2, unless the context otherwise requires:

(1) "Collision damage waiver" means any contract or contractual provision, whether separate from or a part of a motor vehicle rental agreement, whereby the lessor agrees, for a charge, to waive any and all claims against the lessee for any damages to the rental motor vehicle during the term of the rental agreement.

(2) "Lessee" means any person or organization obtaining the use of a rental motor vehicle from a lessor under the terms of a rental agreement.

(3) "Lessor" means any person or organization in the business of providing rental motor vehicles to the public.

(4) "Private passenger type automobile or vehicle" means a motor vehicle of the private passenger or station wagon type, including passenger vans and minivans that are primarily for the transport of persons.

(5) "Rental agreement" means a written agreement setting forth the terms and conditions governing the use of a rental motor vehicle by a lessee for a period of less than one hundred eighty days.

(6) "Rental motor vehicle" means a private passenger type automobile or vehicle which, upon execution of a rental agreement, is made available to a lessee for its use.

**Source: L. 89:** Entire part added, p. 361, § 1, effective January 1, 1990.