Attachment A

RESTORING CLASS ACTIONS UNDER THE COLORADO CONSUMER PROTECTION ACT

Summary

The Colorado Consumer Protection Act C.R.S. § 6-1-101 *et seq.* ("CCPA" or "Act"), passed in 1969, was enacted to safeguard Colorado consumers from deceptive business practices. To ensure robust enforcement, the CCPA allows the Attorney General to investigate and bring claims and also allows for a private right of action to anyone who "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...." C.R.S. § 6-1-113.

But here's the rub: while class actions were allowed under the Act from 1969 onward, that all changed with the joint decisions in *Martinez v. Nash Finch Co.*, 886 F.Supp. 2d 1212 (D. Colo. 2012) ("*Martinez I*") and *Martinez v. Nash Finch Co.*, 2013 U.S. Dist. LEXIS 45576, 2013 WL 1313899 (D. Colo. Mar. 29, 2013) ("*Martinez II*") (collectively the "*Martinez* Decisions"). Breaking from precedent, the *Martinez* Decisions, citing a 1999 Amendment to the CCPA (the "1999 Amendment"), held that the plain language of the Act doesn't allow class actions. This is so despite the fact that the Colorado legislature never intended the 1999 Amendment, or any other amendment to do away with class actions.

Rather, the apparent deletion of class relief was the result of a typo that has had demonstrably negative repercussions. Since 2012, courts from Ohio to California have struck down CCPA class actions as being expressly disallowed under the Act. That places Colorado in the company of states like Alabama, Mississippi, Tennessee and South Carolina—all of which have chosen to deny their citizens the ability to join together in class actions under their respective state consumer fraud laws.

Absent the prospect of class relief, few victims of CCPA violations can vindicate their rights. $500 in individual damages, even when attorneys' fees are theoretically included, simply fails to incentivize counsel to take such cases. A legislative fix is needed to restore class actions to the CCPA.

Facts: Until the *Martinez* Decisions, Class Actions Were Always Allowed Under The CCPA

- From 1969 until 2012, litigants routinely brought class actions under the CCPA. The CCPA was amended in 1987 to insert language indicating that treble damages, or statutory damages of $250, were available to prevailing litigants under the Act "except in a class action."

- Despite the addition of such "except in a class action" language, Colorado courts uniformly agreed that class actions under the CCPA were still allowed for *actual damages—just not for treble damages or statutory damages.* The central case during this time was *Robinson v. Lynmar Racquet Club, Inc.*, which explained that "...the statute (§ 6-1-113(2)) does not preclude class members from bringing an action for actual damages...." 851 P.2d 274 (Colo. App. 1993). *Robinson* was widely followed.

- The 1999 Amendment wasn't passed to delete class actions from the Act at all. Rather, in 1999 the Legislature sought to limit the type of person who could sue under the Act to an actual or prospective consumer of a defendant's goods or services. By making certain "redline" edits, the end result could give the impression that class actions are not allowed at all.

- Because the 1999 Amendment wasn't designed to do away with class actions, it wasn't until 13 years later in 2012 that a litigant raised the issue for the first time.[1] In the *Martinez* decisions, Chief Judge

[1] Indeed, during the interim period from 1999 to 2012, courts routinely proceeded as if nothing had changed and that class actions for actual damages were allowed under the CCPA. *See e.g. Garcia v. Medved Chevrolet, Inc.*, 263 P.3d 92, 94 (Colo. 2011) (CCPA class action adjudicated by CO Supreme Court with no mention that the entire action was disallowed under Colorado law).

Kreiger of the United States District Court for the District of Colorado (federal court) held that the plain language of the CCPA disallows class actions for money damages. Courts have relied on *Martinez* ever since to dismiss alleged CCPA class actions of all stripes.

Cases: Since The *Martinez* Decisions, CCPA Class Actions Have Been Routinely Dismissed

Not surprisingly, since 2012, numerous courts across the Country have used *Martinez* to deny private litigants the ability to proceed on their CCPA claims on a class basis—effectively gutting enforcement of rights under the CCPA. These cases include, for example:

- *Friedman v. Dollar Thrifty Auto. Grp., Inc.*, No. 12-CV-02432-WYD-KMT, 2015 WL 4036319, at *4 (D. Colo. July 1, 2015) (Daniel, J.) (Dismissing class claims against rental car company for violations of CCPA loss-damage-waiver provision);

- *In re Syngenta AG MIR 162 Corn Litig.*, 131 F. Supp. 3d 1177, 1234 (D. Kan. 2015) (class claims by corn farmers against seed maker for deceptive practices and fraud dismissed);

- *Simmons v. Author Sols., LLC*, No. 13CV2801 DLC, 2015 WL 4002243, at *5 (S.D.N.Y. July 1, 2015) (dismissing CCPA class claims for deceptive marketing);

- *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, No. 13cv1803 (EMC), 2014 WL 1048710, at *10 (N.D.Cal. Mar. 14, 2014) (dismissing CCPA claim, "to the extent it seeks to assert a class action for monetary relief");

- *In re: Elk Cross Timbers Decking Mktg.*, No. 2577, 2015 WL 6467730, at *17 (D.N.J. Oct. 26, 2015) (dismissing defective products class action under CCPA);

- *Chapman v. Tristar Prod., Inc.*, No. 16-CV-1114, 2016 WL 6216135, at *5 (N.D. Ohio Oct. 25, 2016) ("[T]he CCPA prohibits monetary damages in class actions.");

- *Fuentes v. Kroenke Sports & Entertainment, LLC*, 2014 CV 32619 (Dist Ct. Denver Jan. 26, 2015) (Dismissing alleged class action under CCPA's ticket restriction laws);

- *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prod. Liab. Litig.*, 288 F. Supp. 3d 1087 (D.N.M. 2017) (Dismissing CCPA class claim in the context of litigation against Big Tobacco for deceptive sales practices); and

- *Dillon v. DTG Operations, Inc.*, 2012 IL App (1st) 102441-U, ¶ 24 (Dismissing class claims for violations of CCPA loss-damage-waiver provision).

Conclusion

The Colorado General Assembly never intended to remove class actions from the CCPA. Yet courts, following the *Martinez* Decisions, have read class actions out of the statute. This, in turn, has had a chilling effect on the ability of consumers to vindicate their CCPA rights. The time has come for the legislature to fix this drafting error and to restore the ability of consumers to join together to enforce their rights by bringing class actions for damages and injunctive relief under the CCPA. Otherwise, enforcement of our State's consumer protection laws will remain only as strong as the Attorney General decides.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Colorado Revised Statutes Annotated
Title 6. Consumer and Commercial Affairs (Refs & Annos)
Fair Trade and Restraint of Trade
Article 1. Colorado Consumer Protection Act (Refs & Annos)
Part 1. Consumer Protection--General (Refs & Annos)

C.R.S.A. § 6-1-105

§ 6-1-105. Deceptive trade practices

Effective: October 1, 2018
Currentness

(1) A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person:

(a) Knowingly passes off goods, services, or property as those of another;

(b) Knowingly makes a false representation as to the source, sponsorship, approval, or certification of goods, services, or property;

(c) Knowingly makes a false representation as to affiliation, connection, or association with or certification by another;

(d) Uses deceptive representations or designations of geographic origin in connection with goods or services;

(e) Knowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods, food, services, or property or a false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith;

(f) Represents that goods are original or new if he knows or should know that they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(g) Represents that goods, food, services, or property are of a particular standard, quality, or grade, or that goods are of a particular style or model, if he knows or should know that they are of another;

(h) Disparages the goods, services, property, or business of another by false or misleading representation of fact;

(i) Advertises goods, services, or property with intent not to sell them as advertised;

(j) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(k) Advertises under the guise of obtaining sales personnel when in fact the purpose is to first sell a product or service to the sales personnel applicant;

(l) Makes false or misleading statements of fact concerning the price of goods, services, or property or the reasons for, existence of, or amounts of price reductions;

(m) Fails to deliver to the customer at the time of an installment sale of goods or services a written order, contract, or receipt setting forth the name and address of the seller, the name and address of the organization which he represents, and all of the terms and conditions of the sale, including a description of the goods or services, stated in readable, clear, and unambiguous language;

(n) Employs "bait and switch" advertising, which is advertising accompanied by an effort to sell goods, services, or property other than those advertised or on terms other than those advertised and which is also accompanied by one or more of the following practices:

(I) Refusal to show the goods or property advertised or to offer the services advertised;

(II) Disparagement in any respect of the advertised goods, property, or services or the terms of sale;

(III) Requiring tie-in sales or other undisclosed conditions to be met prior to selling the advertised goods, property, or services;

(IV) Refusal to take orders for the goods, property, or services advertised for delivery within a reasonable time;

(V) Showing or demonstrating defective goods, property, or services which are unusable or impractical for the purposes set forth in the advertisement;

(VI) Accepting a deposit for the goods, property, or services and subsequently switching the purchase order to higher-priced goods, property, or services; or

(VII) Failure to make deliveries of the goods, property, or services within a reasonable time or to make a refund therefor;

(o) Knowingly fails to identify flood-damaged or water-damaged goods as to such damages;

(p) Solicits door-to-door as a seller, unless the seller, within thirty seconds after beginning the conversation, identifies himself or herself, whom he or she represents, and the purpose of the call;

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(p.3) to (p.7) Repealed by Laws 1999, Ch. 188, § 14, eff. May 18, 1999.

(q) Contrives, prepares, sets up, operates, publicizes by means of advertisements, or promotes any pyramid promotional scheme;

(r) Advertises or otherwise represents that goods or services are guaranteed without clearly and conspicuously disclosing the nature and extent of the guarantee, any material conditions or limitations in the guarantee which are imposed by the guarantor, the manner in which the guarantor will perform, and the identity of such guarantor. Any representation that goods or services are "guaranteed for life" or have a "lifetime guarantee" shall contain, in addition to the other requirements of this paragraph (r), a conspicuous disclosure of the meaning of "life" or "lifetime" as used in such representation (whether that of the purchaser, the goods or services, or otherwise). Guarantees shall not be used which under normal conditions could not be practically fulfilled or which are for such a period of time or are otherwise of such a nature as to have the capacity and tendency of misleading purchasers or prospective purchasers into believing that the goods or services so guaranteed have a greater degree of serviceability, durability, or performance capability in actual use than is true in fact. The provisions of this paragraph (r) apply not only to guarantees but also to warranties, to disclaimer of warranties, to purported guarantees and warranties, and to any promise or representation in the nature of a guarantee or warranty; however, such provisions do not apply to any reference to a guarantee in a slogan or advertisement so long as there is no guarantee or warranty of specific merchandise or other property.

(s) and (t) Repealed by Laws 1999, Ch. 188, § 14, eff. May 18, 1999.

(u) Fails to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction;

(v) Disburses funds in connection with a real estate transaction in violation of section 38-35-125(2), C.R.S.;

(w) Repealed by Laws 1999, Ch. 188, § 14, eff. May 18, 1999.

(x) Violates sections 6-1-203 to 6-1-206 or part 7 of this article 1;

(y) Fails, in connection with any solicitation, oral or written, to clearly and prominently disclose immediately adjacent to or after the description of any item or prize to be received by any person the actual retail value of each item or prize to be awarded. For the purposes of this paragraph (y), the actual retail value is the price at which substantial sales of the item were made in the person's trade area or in the trade area in which the item or prize is to be received within the last ninety days or, if no substantial sales were made, the actual cost of the item or prize to the person on whose behalf any contest or promotion is conducted; except that, whenever the actual cost of the item to the provider is less than fifteen dollars per item, a disclosure that "actual cost to the provider is less than fifteen dollars" may be made in lieu of disclosure of actual cost. The provisions of this paragraph (y) shall not apply to a promotion which is soliciting the sale of a newspaper, magazine, or periodical of general circulation, or to a promotion soliciting the sale of books, records, audio tapes, compact discs, or videos when the promoter allows the purchaser to review the merchandise without obligation for at least seven days and provides a full refund within thirty days after the receipt of the returned merchandise or when

a membership club operation is in conformity with rules and regulations of the federal trade commission contained in 16 CFR 425.

(z) Refuses or fails to obtain all governmental licenses or permits required to perform the services or to sell the goods, food, services, or property as agreed to or contracted for with a consumer;

(aa) Fails, in connection with the issuing, making, providing, selling, or offering to sell of a motor vehicle service contract, to comply with the provisions of article 11 of title 42, C.R.S.;

(bb) Repealed by Laws 1999, Ch. 188, § 14, eff. May 18, 1999.

(cc) Engages in any commercial telephone solicitation which constitutes an unlawful telemarketing practice as defined in section 6-1-304;

(dd) Repealed by Laws 1999, Ch. 188, § 14, eff. May 18, 1999.

(ee) Intentionally violates any provision of article 10 of title 5, C.R.S.;

(ee.5) to (ff) Repealed by Laws 1999, Ch. 188, § 14, eff. May 18, 1999.

(gg) Fails to disclose or misrepresents to another person, a secured creditor, or an assignee by whom such person is retained to repossess personal property whether such person is bonded in accordance with section 4-9-629, C.R.S., or fails to file such bond with the attorney general;

(hh) Violates any provision of article 16 of this title;

(ii) Repealed by Laws 1999, Ch. 188, § 14, eff. May 18, 1999.

(jj) Represents to any person that such person has won or is eligible to win any award, prize, or thing of value as the result of a contest, promotion, sweepstakes, or drawing, or that such person will receive or is eligible to receive free goods, services, or property, unless, at the time of the representation, the person has the present ability to supply such award, prize, or thing of value;

(kk) Violates any provision of article 6 of this title;

(*ll*) Knowingly makes a false representation as to the results of a radon test or the need for radon mitigation;

(mm) Violates section 35-27-113(3)(e), (3)(f), or (3)(i), C.R.S.;

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(nn) Repealed by Laws 2000, Ch. 2, § 1, eff. July 1, 2001.

(*oo*) Fails to comply with the provisions of section 35-80-108(1)(a), (1)(b), or (2)(f), C.R.S.;

(pp) Violates article 9 of title 42, C.R.S.;

(qq) Repealed by Laws 1999, Ch. 188, § 14, eff. May 18, 1999.

(rr) Violates the provisions of part 8 of this article;

(ss) Violates any provision of part 33 of article 32 of title 24, C.R.S., that applies to the installation of manufactured homes;

(tt) Violates any provision of part 9 of this article;

(uu) Violates section 38-40-105, C.R.S.;

(vv) Violates section 24-21-523(1)(f) or (1)(i) or 24-21-525(3), (4), or (5);

(ww) Violates any provision of section 6-1-702;

(xx) Violates any provision of part 11 of this article;

(yy) Repealed by Laws 2015, Ch. 259, § 7, eff. Aug. 5, 2015.

(zz) Violates any provision of section 6-1-717;

(aaa) Violates any provision of section 12-61-904.5, C.R.S.;

(bbb) Violates any provision of section 12-61-905.5, C.R.S.;

(ccc) Violates the provisions of section 6-1-722;

(ddd) Violates section 6-1-724;

(eee) Violates section 6-1-701;

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(fff) Violates section 6-1-723;

(ggg) Violates section 6-1-725;

(hhh) Knowingly represents that hemp, hemp oil, or any derivative of a hemp plant constitutes retail marijuana or medical marijuana unless it fully satisfies the definition of such products pursuant to section 44-12-103(22) or section 44-11-104(11);

(iii) Knowingly enters into, or attempts to enforce, an agreement regarding the recovery of an overbid on foreclosed property if the agreement concerns the recovery of funds in the possession of:

(I) A public trustee prior to transfer of the funds to the state treasurer under section 38-38-111, C.R.S.; or

(II) The state treasurer and does not meet the requirements for such an agreement as specified in section 38-13-128.5, C.R.S.;

(jjj) Violates section 6-1-726.

(2) Evidence that a person has engaged in a deceptive trade practice shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

(3) The deceptive trade practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other statutes of this state.

Credits

Amended by Laws 1975, S.B.69, § 1, eff. July 1, 1975; Laws 1984, H.B.1271, § 2, eff. July 1, 1984; Laws 1984, H.B.1385, § 2, eff. July 1, 1984; Laws 1985, H.B.1159, § 2, eff. June 1, 1985; Laws 1987, H.B.1300, §§ 3, 4, eff. July 1, 1987; Laws 1988, H.B.1236, § 2, eff. July 1, 1988; Laws 1988, H.B.1263, § 2, eff. July 1, 1988; Laws 1989, H.B.1195, § 2, eff. Jan. 1, 1990; Laws 1989, H.B.1305, §§ 1, 4, eff. June 7, 1989; Laws 1990, H.B.90-1090, § 2, eff. July 1, 1990; Laws 1990, H.B.90-1243, § 2, eff. April 20, 1990; Laws 1991, H.B.91-1253, § 1, eff. May 16, 1991; Laws 1991, H.B.91-1264, § 1, eff. June 8, 1991; Laws 1992, H.B.92-1314, § 2, eff. June 1, 1992; Laws 1992, S.B.92-17, § 2, eff. April 29, 1992; Laws 1993, H.B.93-1144, § 2, eff. July 1, 1993; Laws 1993, S.B.93-17, § 3, eff. July 1, 1993; Laws 1993, S.B.93-165, § 1, eff. July 1, 1993; Laws 1994, H.B.94-1102, § 1, eff. July 1, 1994; Laws 1994, S.B.94-1, § 14, eff. Jan. 1, 1995; Laws 1994, S.B.94-23, § 10, eff. July 1, 1994; Laws 1994, S.B.94-36, § 1, eff. April 20, 1994; Laws 1996, H.B.96-1137, § 1, eff. July 1, 1996; Laws 1996, H.B.96-1260, § 1, eff. July 1, 1996; Laws 1997, H.B.97-1105, § 13, eff. May 21, 1997; Laws 1997, H.B.97-1284, § 1, eff. July 1, 1997; Laws 1997, S.B.97-24, § 1, eff. July 1, 1997; Laws 1998, Ch. 213, § 2, eff. Aug. 5, 1998; Laws 1999, Ch. 188, §§ 3, 14, eff. May 18, 1999; Laws 2000, Ch. 2, § 1, eff. July 1, 2001; Laws 2000, Ch. 203, § 2, eff. Aug. 2, 2000; Laws 2000, Ch. 259, § 3, eff. July 1, 2001; Laws 2001, Ch. 321, § 37, eff. July 1, 2001; Laws 2001, Ch. 324, § 2, eff. Aug. 8, 2001; Laws 2002, Ch. 323, § 3, eff. June 7, 2002; Laws 2003, Ch. 29, § 3, eff. March 5, 2003; Laws 2004, Ch. 55, § 2, eff. March 23, 2004; Laws 2004, Ch. 130, § 2, eff. Aug. 4, 2004; Laws 2006, Ch. 291, § 2, eff. May 30, 2006; Laws 2007, Ch. 210, § 1, eff. July 1, 2007; Laws 2007, Ch. 386, § 10, eff. June 1, 2007; Laws 2007, Ch. 387, § 5, eff. June 1, 2007; Laws 2010, Ch. 180, § 2, eff. Aug.

11, 2010; Laws 2013, Ch. 271, § 2, eff. May 24, 2013; Laws 2013, Ch. 399, § 2, eff. June 5, 2013; Laws 2014, Ch. 358, § 2, eff. Aug. 6, 2014; Laws 2015, Ch. 199, § 7, eff. May 18, 2015; Laws 2015, Ch. 259, § 7, eff. Aug. 5, 2015; Laws 2016, Ch. 97, § 2, eff. Aug. 10, 2016; Laws 2016, Ch. 117, § 1, eff. Aug. 10, 2016; Laws 2016, Ch. 246, § 2, eff. July 1, 2016; Laws 2017, Ch. 207, § 4, eff. July 1, 2018; Laws 2018, Ch. 36, § 1, eff. Aug. 8, 2018; Laws 2018, Ch. 55, § 4, eff. Oct. 1, 2018.

Notes of Decisions (249)

C. R. S. A. § 6-1-105, CO ST § 6-1-105
Current with emergency legislation through Ch. 95 of the First Regular Session of the 72nd General Assembly (2019)

End of Document

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1999 Colo. Legis. Serv. Ch. 188 (S.B. 99–143) (WEST)

COLORADO 1999 LEGISLATIVE SERVICE

Sixty-Second General Assembly, First Regular Session

Additions are indicated by <<+ Text +>>; deletions by

<<- Text ->>. Changes in tables are made but not highlighted.

Vetoed provisions within tabular material are not displayed.

CHAPTER 188

S.B. 99–143

CONSUMER AFFAIRS—CONSUMER PROTECTION ACT—POTENTIAL PLAINTIFFS, NONECONOMIC DAMAGES, CLARIFICATIONS

AN ACT CONCERNING AMENDMENTS TO THE "COLORADO CONSUMER PROTECTION ACT", AND, IN CONNECTION THEREWITH, LIMITING THE CLASS OF POTENTIAL PLAINTIFFS TO CONSUMERS OF A DEFENDANT'S GOODS, SERVICES, OR PROPERTY, RESTRUCTURING THE NONECONOMIC DAMAGES PROVISIONS, AND REORGANIZING PROVISIONS FOR CLARITY.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 6–1–113, Colorado Revised Statutes, is amended to read:

<< CO ST § 6–1–113 >>

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->> <<+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 <<-6–1–105(1)(qq)->> <<+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 <<-section 6–1–105 or 6–1–105.5->> <<+this article+>> shall be liable in an amount equal to the sum of:

(a) <<-Three times->> <<+The greater of:+>>

(I) The amount of actual damages sustained; or

(II) <<-two hundred fifty->> <<+Five hundred+>> dollars; <<- whichever is greater; and->> <<+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.+>>

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(2.5) Notwithstanding the provisions of subsection (2) of this section, in the case of any violation of section <<-6-1-105(1)(qq)->> <<+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 <<-6-1-105(1)(qq)->> <<+6-1-709+>>.

(3) Any person who brings an action under this article <<-which->> <<+ 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.

SECTION 2. Article 1 of title 6, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW PART CONTAINING RELOCATED PROVISIONS, WITH AMENDMENTS, to read:

<<+PART 7+>>

<<+SPECIFIC PROVISIONS+>>

<< CO ST § 6-1-701 >>

<< CO ST § 6-1-105.5 >>

6-1-701. [Formerly 6-1-105.5] Hearing aid dealers—deceptive trade practices. (1) As used in this section, unless the context otherwise requires:

(a) "Audiologist" means an individual who <<-holds a master's or doctoral degree in audiology, who has passed an examination conducted under the auspices of the American speech-language-hearing association or an equivalent examination, and who has obtained a certificate of competency in audiology from a nationally recognized certification agency->> <<+is registered as an audiologist pursuant to part 1 of article 5.5 of title 12, C.R.S.,+>> or who has been certified as a school audiologist by the Colorado department of education pursuant to section 22-60-104, C.R.S.

<<-(a.5)->><<+(b)+>> "Dispense" means any transfer of title, possession, or the right to use by lease, bailment, or any other method, but excludes transactions with distributors or dealers.

<<-(b)->><<+(c)+>>(I) "Hearing aid" means any wearable instrument or device designed or offered for the purpose of aiding or compensating for impaired human hearing and any parts, attachments, or accessories thereto, including ear molds but excluding batteries and cords; except that "hearing aid" does not include a "cochlear implant" or "cochlear prosthesis".

(II) "Cochlear implant" or "cochlear prosthesis" means an electrode or electrodes surgically implanted in the cochlea, which are attached to an induction coil buried under the skin near the ear, and the associated unit, which is worn on the body.

<<-(c)->><<+(d)+>> "Hearing aid dealer" means <<-any person engaged in the practice of dispensing, fitting, or dealing in hearing aids->> <<+an individual who is registered as a hearing aid dealer pursuant to part 2 of article 5.5 of title 12, C.R.S.+>>

<<-(d)->><<+(e)+>> "Practice of dispensing, fitting, or dealing in hearing aids" includes the selection and adaptation for the sale of hearing aids and includes the testing of hearing for these purposes. The practice also includes the making of impressions for ear molds, plus counseling and instruction pertaining to the selection, fitting, adaptation, or sale of hearing aids.

<<-(e)->><<+(f)+>> "Trial period" means the first thirty days the buyer has the hearing aid or aids in such buyer's possession. Any such trial period shall be extended by mutual agreement of the buyer and the hearing aid dealer.

(2) In addition to any other deceptive trade practices under section 6-1-105 <<+or this part 7+>>, a hearing aid dealer or, with respect to only paragraph (a) of this subsection (2), an audiologist engages in a deceptive trade practice when such dealer:

(a) Fails to deliver to each person supplied with a hearing aid a receipt <<-which->> <<+that+>>:

(I) Bears the business address of the hearing aid dealer together with specifications as to the make and serial number of the hearing aid furnished and the full terms of the sale clearly stated. If a hearing aid <<- which->> <<+that+>> is not new is sold, the container thereof and the receipt shall be clearly marked as "used" or "reconditioned", whichever is applicable, within the terms of the guarantee, if any.

(II) Bears, in no smaller type than the largest used in the body of the receipt, in substance, a provision that the purchaser has been advised at the outset of <<-his->> <<+the purchaser's+>> relationship with the hearing aid dealer that any examination or representation made by a hearing aid dealer in connection with the practice of dispensing, fitting, or dealing in hearing aids is not an examination, diagnosis, or prescription by a person licensed to practice medicine in this state and, therefore, must not be regarded as medical opinion or advice;

(III) Bears, in no smaller type than the largest used in the body of the receipt, a provision indicating that consumer complaints <<-which->> <<+ that+>> cannot be resolved with the dealer may be filed initially with the office of the district attorney for the jurisdiction where the device was sold or with the state attorney general's office and the address and telephone number of the district attorney's office or attorney general's office where such complaints may be filed;

(IV) Bears a provision labeled "warranty" in which the exact warranty terms and periods available from the manufacturer are documented, or includes an original or photocopy of the original manufacturer's warranty with the receipt;

(b) Sells a hearing aid to a child eighteen years of age or younger without ascertaining whether the child has been examined by a licensed physician and an audiologist within six months prior to the fitting;

(c)(I) Fails to receive from a licensed physician, prior to dispensing, fitting, or dealing in a hearing aid to any person, a written prescription or recommendation <<-which->> <<+that+>> specifies that the person is in fact in need of a hearing aid; except that any person eighteen years of age or older who objects to medical evaluation for religious or personal beliefs may waive the requirement in <<-his->> <<+such person's+>> own handwriting;

(II) Sells, provides, dispenses, adjusts, provides training or teaching in regard to, or otherwise services cochlear implants unless <<-he->> <<+ such hearing aid dealer+>> is an audiologist or a physician;

(d) Fails to recommend in writing prior to fitting or dispensing a hearing aid that the best interests of the prospective user would be served by consulting a licensed physician specializing in diseases of the ear, or, any licensed physician, if any of the following conditions exists:

(I) Visible congenital or traumatic deformity of the ear;

(II) History of or active drainage of the ear within the previous ninety days;

(III) History of sudden or rapidly progressive hearing loss;

(IV) Acute or chronic dizziness;

(V) Unilateral hearing loss of sudden onset within the previous ninety days;

(VI) Audiometric air-bone gap equal to or greater than fifteen decibels at 500 hertz (Hz), 1,000 Hz, and 2,000 Hz;

(VII) Visible evidence of cerumen accumulation on or a foreign body in the ear canal;

(VIII) Pain or discomfort in the ear;

(e) Fails to provide a thirty-day rescission period with the following terms:

(I) The buyer shall have the right to cancel the purchase for any reason before the expiration of the rescission period by giving or mailing written notice of cancellation to the seller. The thirty-day rescission period shall be tolled for any period during which a hearing aid dealer takes possession or control of a hearing aid after its original delivery.

(II) The buyer, upon cancellation, is entitled to receive a full refund of any payment made for the hearing aid within thirty days <<-of->> <<+ after+>> return of the hearing aid to the seller; except that, if the hearing aid is returned for any reason other than a defect in such hearing aid, the seller may retain an itemized amount to cover the minimum costs of materials used by the dealer and a manufacturer's return fee, but such amount may not be greater than five percent of the total charge for the hearing aid.

(III)(A) The seller shall provide a written receipt or contract to the buyer <<-which->> <<+that+>> includes, in immediate proximity to the space reserved for the signature of the buyer, the following specific statement in all capital letters of no less than ten-point, bold-faced type:

"THE BUYER HAS THE RIGHT TO CANCEL THIS PURCHASE FOR ANY REASON AT ANY TIME PRIOR TO 12 MIDNIGHT OF THE 30TH CALENDAR DAY AFTER RECEIPT OF THE HEARING AID BY GIVING OR

MAILING THE SELLER WRITTEN NOTICE OF CANCELLATION AND BY RETURNING THE HEARING AID. BY LAW, THE SELLER IS ALLOWED TO RETAIN AN ITEMIZED AMOUNT, NOT TO EXCEED FIVE PERCENT OF THE TOTAL CHARGE FOR THE HEARING AID, TO COVER THE COSTS OF A MANUFACTURER'S RETURN FEE AND THE MINIMUM COSTS OF MATERIALS USED BY THE DEALER, UNLESS THE HEARING AID IS RETURNED BECAUSE IT IS DEFECTIVE."

(B) The written contract or receipt provided to the buyer shall also contain a statement, in print size no smaller than ten-point type, that the sale is void and unenforceable if the hearing aid being purchased is not delivered to the consumer within thirty days after the date the written contract is signed or the receipt is issued, whichever occurs later. The written contract or receipt shall also include the hearing aid dealer's registration number and a statement that the hearing aid dealer shall promptly refund all moneys paid for the purchase of a hearing aid if it is not delivered to the consumer within such thirty-day period. Such statement is not subject to waiver by the buyer.

(IV) A refund request form shall be attached to each receipt and shall contain the information in subparagraph (I) of paragraph (a) of this subsection (2) and the statement, in all capital letters of no less than ten-point, bold-faced type: "Refund request—this form must be postmarked by _____ (Date to be filled in). No refund will be given until the hearing aid or hearing aids are returned to the seller." A space for the buyer's address, telephone number, and signature must be provided. The buyer shall only be required to sign, list the buyer's current address and telephone number, and mail the refund request form to the seller. If the hearing aid is sold in the buyer's home, at the buyer's option, the seller shall be responsible for arranging the return of the hearing aid.

(f) Represents that the service or advice of a person licensed to practice medicine will be used or made available in the selection, fitting, adjustment, maintenance, or repair of hearing aids when that is not true or using the terms "doctor", "clinic", "state-licensed clinic", "state-registered", "state-certified", or "state-approved" or any other term, abbreviation, or symbol when it would falsely give the impression that service is being provided by persons trained in medicine or that the hearing aid dealer's service has been recommended by the state when such is not the case or when that would be false or misleading;

(g) Directly or indirectly gives or offers to give or permits or causes to be given money or anything of value to any person who advises another in a professional capacity as an inducement to influence <<-him->> <<+such person+>> or have <<-him->> <<+such person+>> influence others to purchase or contract to purchase products sold or offered for sale by a hearing aid dealer or influences persons to refrain from dealing in the products of competitors;

(h) Dispenses a hearing aid to a person who has not been given tests utilizing appropriate established procedures and instrumentation in the fitting of hearing aids, except in cases of selling replacement hearing aids within one year after the date of the original purchase;

(i) Makes a false or misleading statement of fact concerning goods or services or the buyer's right to cancel with the intention or effect of deterring or preventing the buyer from exercising the buyer's right to cancel;

(j) Charges, collects, or recovers any cost or fee for any good or service that has been represented by the hearing aid dealer as free.

(3) Fines collected pursuant to this part 1 shall be distributed in the following manner: Fifty percent shall be divided by the court between state and local law enforcement agencies assisting with the prosecution, including but not limited to the office of the attorney general and the district attorney's office, and fifty percent shall be paid to the state treasurer, who shall credit the same to the general fund.

<< CO ST § 6–1–702 >>

<< CO ST § 6–1–105 >>

6–1–702. [Formerly 6–1–105(1)(p.3), (1)(p.5), and (1)(p.7)] Telephone and facsimile solicitations—deceptive trade practices. <<+(1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person:+>>

<<-(p.3)->><<+(a)+>>(I) Solicits a consumer residing in Colorado by telephone as a seller, unless the seller, within one minute after beginning the conversation, identifies himself or herself, whom he or she represents, and the purpose

of the call or repeatedly causes any telephone to ring or engages any person in a telephone conversation repeatedly or continuously with the intent to annoy, abuse, or harass any person at the telephone number called.

(II) The provisions of this paragraph <<-(p.3)->> <<+(a)+>> shall not apply to a telephone solicitation between a seller and a consumer if there is an existing business relationship between the seller and the consumer at the time of the telephone solicitation or if the call is initiated by the consumer.

<<-(p.5)->><<+(b)+>>(I) Solicits a consumer residing in Colorado by a facsimile transmission without including in the facsimile message a toll-free telephone number <<-which->> <<+that+>> a recipient of the unsolicited transmission may use to notify the sender not to transmit to the recipient any further unsolicited transmissions.

(II) The provisions of this paragraph <<-(p.5)->> <<+(b)+>> shall not apply to unsolicited transmissions if there is an existing business relationship between the seller and the consumer at the time of the solicitation or if the facsimile transmission was requested or initiated by the consumer. The provisions of this paragraph <<-(p.5)->> <<+(b)+>> shall not apply to the transmission of documents by a telecommunications provider to the extent that the telecommunications provider merely provides transmission facilities.

<<-(p.7)->><<+(c)+>> Sells a consumer's facsimile number without either giving notice to the consumer that the number could be sold to other persons or without allowing the consumer the option of preventing the sale of the consumer's number to others.

<< CO ST § 6–1–703 >>

<< CO ST § 6–1–105 >>

6–1–703. [Formerly 6–1–105(1)(s)] Time shares—deceptive trade practices. <<+(1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person+>>

<<-(s)->> engages in one or more of the following activities in connection with the advertisement or sale of a time share:

<<-(I)->><<+(a)+>> Misrepresents the investment, resale, or rental value of any time share; the conditions under which a purchaser may exchange the right to use accommodations or facilities in one location for the right to use accommodations or facilities in another location; or the period of time during which the accommodations or facilities contracted for will be available to the purchaser;

<<-(II)->><<+(b)+>> Fails to allow any purchaser of a time share a right to rescind the sale within five calendar days after the sale;

<<-(III)->><<+(c)+>> Fails to provide conspicuous notice on the contract of the right of a purchaser of a time share to rescind the sale either by telegram, mail, or hand delivery. For purposes of this <<-paragraph (s)->> <<+section +>>, notice of rescission is considered given, if by mail when postmarked, if by telegram when filed for telegraphic transmission, or if by hand delivery when delivered to the seller's place of business; <<+ or+>>

<<-(IV)->><<+(d)+>> Fails to refund any down payment or deposit made pursuant to a time share contract within seven days after the seller receives the purchaser's written notice of rescission.

<<-(V) Repealed.->>

<< CO ST § 6–1–704 >>

<< CO ST § 6–1–105 >>

6–1–704. [Formerly 6–1–105(1)(t)] Health clubs—deceptive trade practices. <<+(1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person+>>

<<-(t)->> engages in one or more of the following activities in connection with the advertisement or sale of a membership in a health club:

<<-(I)->><<+(a)+>> Fails to allow any buyer of a membership in a health club to rescind the membership contract within three business days after receipt by the buyer of a copy of the contract;

<<-(II)->><<+(b)+>> Fails to provide conspicuous notice of the right of a purchaser of a health club membership to rescind the sale either by telegram, mail, or hand delivery. For purposes of this <<-paragraph (t)->> <<+section+>>, notice of rescission is considered given, <<-when specified in subparagraph (III) of paragraph (s) of this subsection (1)-

>> <<+if by mail when postmarked, if by telegram when filed for telegraphic transmission, or if by hand delivery when delivered to the seller's place of business.+>>

<<-(III)->><<+(c)+>> Fails to allow the buyer, or the estate of the buyer, to cancel the membership contract when:

<<-(A)->><<+(I)+>> The buyer dies;

<<-(B)->><<+(II)+>> The buyer becomes totally physically disabled as determined by a licensed physician for the duration of the membership contract;

<<-(C)->><<+(III)+>> The health club is moved to a location that is more than five miles from the location of the establishment when the buyer entered into the membership contract;

<<-(D)->><<+(IV)+>> The membership in the health club is transferred to a location of the same club or another club, which location is more than five miles from the location of the club when the buyer entered into the contract, and this transfer occurs because of cessation of health club services at the club location from which the membership is transferred;

<<-(E)->><<+(V)+>> The seller permanently discontinues operation of the health club or sells the health club and the sale results in substantial alteration of the quality of health club services or facilities or the nature of benefits so that they no longer conform to the provisions of the membership contract, but there shall be a thirty-day "right to cure" during which the fees payable by the buyer under the membership contract shall be suspended and the health club may bring the services, facilities, and benefits into conformance with the provisions of the membership contract;

<<-(IV)->><<+(d)+>> Fails to refund all payments made pursuant to the membership contract, less a prorated fee for days of actual use of the health club by the buyer, within fifteen days after the seller receives the buyer's written notice of rescission;

<<-(V)->><<+(e)+>> When a health club is planned or under construction, and the sale of the membership takes place before the health club is completed, fails to:

<<-(A)->><<+(I)+>> Disclose clearly and conspicuously in the membership contract the date on which the health club will open for use;

<<-(B)->><<+(II)+>> Escrow all preopening membership sales receipts in a separate account in a bank or trust company doing business in the state of Colorado or provide a cash bond, letter of credit, certificate of deposit, or other similar surety, in the amount of fifty thousand dollars, for the repayment of amounts actually paid under preopening membership agreements until the health club is open for business;

<<-(C)->><<+(III)+>> Allow the buyer to cancel the membership contract and receive a full refund of all payments made pursuant to the membership contract if the date the health club will open for use is delayed more than sixty days from the date of opening specified in the membership contract;

<<-(VI)->><<+(f)+>> Sells any membership contract, the actual or financial duration of which, including any option to renew, is longer than twenty-four months; except that a person does not engage in a deceptive trade practice when such person sells any membership contract the actual or financial duration of which is not longer than thirty-six months with a buyer's option to renew annually thereafter if:

<<-(A)->><<+(I)+>> The health club has been in operation in this state more than two years; and

<<-(B)->><<+(II)+>> The health club maintains a bond with a corporate surety from a company authorized to do business in this state or other security acceptable to and approved by the attorney general; and

<<-(C)->><<+(III)+>> The aggregate amount of the bond is one hundred thousand dollars for each club location; and

<<-(D)->><<+(IV)+>> The bond is payable to the state for the benefit of any buyer injured in the event the health club goes out of business prior to the expiration of the buyer's membership contract; and

<<-(E)->><<+(V)+>> The bond is maintained for so long as the health club has any membership contracts in place and outstanding, the specified term for which exceeds twenty-four months; and

<<-(F)->><<+(VI)+>> The bond is not cancelled, revoked, or terminated except after notice to, and with the written consent of, the attorney general at least forty-five days in advance of such cancellation, revocation, or termination; and

<<-(G)->><<+(VII)+>> The annual renewal option for continued membership contained in the membership contract is not automatic but requires that the buyer affirmatively accept the renewal option by notice in writing to the person selling the membership contract for reasonable consideration on or before the expiration of each contract term, but not more than six months prior to the expiration of any contract term; and

<<-(H)->><<+(VIII) In the event that+>> the health club elects to cancel, revoke, or terminate the bond, it <<-shall post->> <<+posts+>> a notice of such action, in twenty-four-point bold-faced type, to its customers, on the front door of such health club; <<+or+>>

<<-(VII)->><<+(g)+>> Makes any representation, orally or in writing, in connection with the offer or sale of a membership in a health club that a membership contract is for a lifetime or is for a perpetual membership, or uses coercive sales tactics, or misrepresents the quality, benefits, or nature of the services.

<< CO ST § 6–1–705 >>

<< CO ST § 6–1–105 >>

6–1–705. [Formerly 6–1–105(1)(w)] Dance studios—deceptive trade practices. <<+(1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person+>>

<<-(w)->> engages in one or more of the following activities or practices in connection with the advertisement, sale, or performance of contracts for dance studio services in which the total amount of the obligation that the purchaser undertakes is in excess of five hundred dollars:

<<-(I)->><<+(a)+>> Fails to execute a written contract and to provide a copy of the contract to the purchaser at the time the purchaser signs it;

<<-(II)->><<+(b)+>> Fails to include, printed in ten-point, bold-faced type in the contract:

<<-(A)->><<+(I)+>> The total amount of the obligation the purchaser undertakes;

<<-(B)->><<+(II)+>> All goods and services that the purchaser is to receive under the contract set forth in specific terms, including the total number or hours of dance instruction to be given by the dance studio under the contract broken down by different hourly rates, if applicable, and all other goods and services;

<<-(C)->><<+(III)+>> The itemized cost of all goods and services to be provided under the contract, including but not limited to the cost per hour of dance instruction and the different hourly rates for different types of dance lessons, if any, and any charges to be paid by the purchaser for cost of travel, accommodations, or other expenses of dance studio owners, operators, managers, agents, or employees, the total cost of which shall equal the amount to be specified in the contract pursuant to <<-sub-subparagraph (A) of this->> subparagraph <<-(II)->> <<+(I) of this paragraph (b)+>>; and

<<-(D)->><<+(IV)+>> The purchaser's right to cancel as specified in <<-subparagraphs (III) to (V) of this paragraph (w)->> <<+paragraphs (c) to (e) of this subsection (1)+>>;

<<-(III)->><<+(c)+>> Fails to include in the contract the following statement in bold-faced type under the conspicuous caption, "PURCHASER'S RIGHT TO CANCEL":

"YOU, THE PURCHASER, MAY CANCEL THIS CONTRACT AT ANY TIME DURING THE TERM OF ITS EFFECTIVENESS. YOU MUST GIVE WRITTEN NOTICE TO THE DANCE STUDIO THAT YOU DO NOT WANT TO BE FURTHER BOUND BY THIS CONTRACT. THE NOTICE OF CANCELLATION MAY BE SERVED IN PERSON, BY TELEGRAM, OR BY MAIL TO THE DANCE STUDIO AT THE ADDRESS STATED IN THIS CONTRACT OR AT THE LOCATION WHERE DANCE LESSONS ARE CONDUCTED. WITHIN THIRTY DAYS <<-OF->> AFTER RECEIPT OF YOUR NOTICE OF CANCELLATION, THE DANCE STUDIO SHALL REFUND TO YOU THE CONTRACT PRICE LESS THE COST OF GOODS AND SERVICES ALREADY RECEIVED BY YOU AND AN AMOUNT OF LIQUIDATED DAMAGES EQUAL TO NOT MORE THAN TEN PERCENT OF THE COST OF THE REMAINING GOODS AND SERVICES.";

<<-(IV)->><<+(d)+>> Fails to allow the contract to be cancelled by the purchaser upon the purchaser's serving written notice to the dance studio;

<<-(V)->><<+(e)+>> Fails, upon cancellation of a contract for dance studio services, to refund to the purchaser all prepayments made under the contract, minus the total of:

<<-(A)->><<+(I)+>> The amount equal to the cost of goods and services actually received by the purchaser under the contract; and

<<-(B)->><<+(II)+>> An amount of liquidated damages equal to not more than ten percent of the cost of the remaining goods and services not received by the purchaser;

<<-(VI)->><<+(f)+>> Subtracts a total amount under <<-sub-subparagraphs (A) and (B) of subparagraph (V) of this paragraph (w)->> <<+ subparagraphs (I) and (II) of paragraph (e) of this subsection (1)+>> that exceeds the total amount of the obligation as set out in <<-sub-subparagraph (A) of->> subparagraph <<-(II)->> <<+(I)+>> of <<-this->> paragraph <<-(w)->> <<+(b) of this subsection (1)+>>;

<<-(VII)->><<+(g)+>> Fails to have a performance bond in the amount of twenty-five thousand dollars, as to each studio, location, or owner, for the benefit of any person who enters into a contract for dance studio services in which the total amount of the obligation that the purchaser undertakes is in excess of five hundred dollars and who is damaged by the failure of the dance studio to provide the services specified in the contract or by the failure of the dance studio to comply with this section, which performance bond guarantees the dance studio's performance of its contractual obligations with the purchaser in accordance with the provisions of this section, or fails to disclose in the contract with such purchaser the existence of the performance bond;

<<-(VIII)->><<+(h)+>> Sells or induces any person to purchase or to become obligated directly or contingently, or both, under more than one contract for dance studio services at the same time for the purpose of avoiding the provisions of this section; <<+or+>>

<<-(IX)->><<+(i)+>> Assigns or accepts an assignment of dance studio services without the written consent of the purchaser.

<< CO ST § 6–1–706 >>

<< CO ST § 6–1–105 >>

6–1–706. [Formerly 6–1–105(1)(bb)] Buyers' clubs—deceptive trade practices. <<+(1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person+>>

<<-(bb)->> engages in one or more of the following activities or practices in connection with the advertisement, sale, or performance of any contract of membership in a buyers' club in which the price of the membership equals or exceeds one hundred dollars:

<<-(I)->><<+(a)+>> Fails to allow any purchaser of a membership in a buyers' club to rescind the membership contract at any time prior to the close of business on the next business day following the day the purchaser signs the contract;

<<-(II)->><<+(b)+>> Fails to provide in the membership contract the following mandatory disclosure under the heading, "PURCHASER'S RIGHT TO CANCEL": "THE PURCHASER MAY CANCEL THIS CONTRACT FOR ANY REASON AT ANY TIME PRIOR TO THE CLOSE OF BUSINESS ON THE NEXT BUSINESS DAY FOLLOWING THE DAY THE PURCHASER SIGNS THE MEMBERSHIP CONTRACT BY DELIVERING OR MAILING TO THE BUYERS' CLUB WRITTEN NOTICE OF CANCELLATION. NOTICE OF CANCELLATION, IF SENT BY MAIL, IS DEEMED TO BE GIVEN AS OF THE DATE THE MAILED NOTICE WAS POSTMARKED." Said heading and disclosure shall be in capital letters in no less than ten-point, bold-faced type.

<<-(III)->><<+(c)+>> Fails to refund all payments made pursuant to the membership contract within fifteen days after the buyers' club receives notice of cancellation from the purchaser.

<< CO ST § 6–1–707 >>

<< CO ST § 6–1–105 >>

6–1–707. [Formerly 6–1–105(1)(dd), (1)(ee.5), (1)(ee.7), and (1)(ee.8)] Use of title or degree—deceptive trade practice. <<+(1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person:+>>

<<-(dd)(I)->><<+(a)(I)+>> Claims, either orally or in writing, to possess either an academic degree or an honorary degree or the title associated with said degree, unless the person has, in fact, been awarded said degree from an institution that is:

(A) Accredited by a regional or professional accrediting agency recognized by the United States department of education or the council on postsecondary accreditation, or is recognized as a candidate for accreditation by such an agency;

(B) Provided, operated, and supported by a state government or any of its political subdivisions or by the federal government;

(C) A school, institute, college, or university chartered outside the United States, the academic degree from which has been validated by an accrediting agency approved by the United States department of education as equivalent to the baccalaureate or postbaccalaureate degree conferred by a regionally accredited college or university in the United States;

(D) A religious seminary, institute, college, or university <<- which->> <<+that+>> offers only educational programs that prepare students for a religious vocation, career, occupation, profession, or lifework, and the nomenclature of whose certificates, diplomas, or degrees clearly identifies the religious character of the educational program;

(E) Authorized to grant degrees pursuant to article 2 of title 23, C.R.S.

<<-(F) Repealed.->>

<<-(I.5)->><<+(II)+>> This paragraph <<-(dd)->> <<+(a)+>> shall not apply to persons claiming degrees or certificates that were submitted as a requirement of the application process for licensure, certification, or registration pursuant to title 12, C.R.S.

<<-(II)->><<+(III)+>> No person awarded a doctorate degree from an institution not listed in <<-subparagraph (I) of this paragraph (dd)->> <<+paragraph (a) of this subsection (1)+>> shall claim in the state, either orally or in writing, the title "Dr." before the person's name or any mark, appellation, or series of letters, numbers, or words, such as, but not limited to, "Ph.D.","Ed.D.", "D.N.", or "D.Th.", which signify, purport, or are generally taken to signify satisfactory completion of the requirements of a doctorate degree, after the person's name.

<<-(ee.5)->><<+(b)+>> Claims either orally or in writing to be a "dietitian", "dietician", "certified dietitian", "certified dietician", "C.D.", or "D." to indicate that such person is a dietitian, unless such person:

(I) Possesses a baccalaureate, masters, or doctorate degree in human nutrition, foods and nutrition, dietetics, nutrition education, food systems management, or public health nutrition from an institution that is:

(A) Accredited by a regional or professional accrediting agency recognized by the United States department of education or the council on postsecondary accreditation, or is recognized as a candidate for accreditation by such accrediting agency;

(B) Authorized to grant degrees pursuant to article 2 of title 23, C.R.S.; or

(C) A school, institute, college, or university chartered outside the United States, the academic degree from which has been validated by an accrediting agency approved by the United States department of education as equivalent to a baccalaureate or postbaccalaureate degree conferred by a regionally accredited college or university in the United States; and

(II) Meets one of the following:

(A) Completes at least nine hundred hours of a planned, continuous, preprofessional work experience in a nutrition or dietetic practice under the supervision of a qualified dietitian; or

(B) Holds a certificate of registered dietician through the commission on dietetic registration;

<<-(ee.7)->><<+(c)+>> Claims either orally or in writing to be a "certified occupational therapist", an "occupational therapist registered", a "licensed occupational therapist", or an "occupational therapist" or uses the abbreviation "O.T.R." or "O.T.R./L." to indicate that such person is an occupational therapist unless such person:

(I) Has earned a baccalaureate, masters, or doctorate degree in occupational therapy from an institution that is:

(A) Accredited by the north central council of colleges and schools and by the American occupational therapy association's accreditation council for occupational therapy education; or

(B) A school, institute, college, or university chartered outside the United States, the academic degree from which has been validated by the world federation of occupational therapists, the American occupational therapy association, or other nationally recognized accrediting agency; and

(II) Meets all of the following:

(A) Has completed a minimum of six months or nine hundred forty hours of advanced internship under the supervision of an occupational therapist;

(B) Successfully passed the current certification examination given by the American occupational therapy certification board; and

(C) Holds a certificate through the American occupational therapy certification board; or <<-in lieu of the requirements of subparagraphs (I) and (II) of this paragraph (ee.7);->>

(III) <<+In lieu of the requirements of subparagraphs (I) and (II) of this paragraph (c)+>> has earned an associates degree in occupational therapy from an institution that is:

(A) Accredited by the north central council of colleges and schools and by the American occupational therapy association's accreditation council for occupational therapy education; or

(B) A school, institute, college, or university chartered outside the United States, the academic degree from which has been validated by the world federation of occupational therapists, the American occupational therapy association, or other nationally recognized accrediting agency; and

<<-(III.5)->><<+(IV)+>> If such person satisfies the requirements of subparagraph (III) of this paragraph <<-(ee.7)->> <<+(c)+>>, such person shall also meet all of the following requirements:

(A) Has a minimum of three years experience in occupational therapy field work under the supervision of an occupational therapist holding a certificate through the American occupational therapy certification board;

(B) Successfully passed the current certification examination given by the American occupational therapy certification board; and

(C) Holds a certificate through the American occupational therapy certification board;

<<-(ee.8)->><<+(d)+>>(I) Claims either orally or in writing to be a "certified optician" or "certified opticien", unless such person holds a current certificate of competence issued by the American board of opticianry. Each certificate shall be prominently displayed or maintained in such person's place of business and made available for immediate inspection and review by any consumer or agent of the state of Colorado. No person may associate a service, product, or business name with the title "certified optician" unless such person holds the required certificate of competence. This paragraph <<- (ee.8)->> <<+(d)+>> shall not apply to persons authorized under article 36 or 40 of title 12, C.R.S., to practice medicine or optometry.

(II) Performs or claims orally or in writing to be able to perform the following procedures, and such person is a certified optician:

(A) Vision therapy;

(B) Refractions;

(C) Automated refractions; except that a certified optician may use an auto refractor to provide vision screenings for the sole purpose of determining if the subject of the screening needs a further eye examination;

(D) Refractometry;

(E) Fitting contact lenses;

(F) Keratometry or automated keratometry; or

(G) Any other act that constitutes the practice of optometry or the practice of medicine.

(III) A certified optician does not engage in a deceptive trade practice under subparagraph (II) of this paragraph <<-(ee.8)->> <<+(d)+>>, if said optician performs the described procedures under the direction and supervision of a person who has statutory authority under title 12, C.R.S., to supervise the work of others within the scope of his or her license.

<< CO ST § 6–1–708 >>

<< CO ST § 6–1–105 >>

6–1–708. [Formerly 6–1–105(1)(ff)(I)] Motor vehicle sales—deceptive trade practices. <<+(1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person:+>>

<<-(ff)(I)->><<+(a)+>> Commits any of the following acts pertaining to the sale of a motor vehicle or a used motor vehicle:

<<-(A)->><<+(I)+>> Guarantees to a purchaser of a motor vehicle or used motor vehicle who conditions such purchase on the approval of a consumer credit sale as defined in section 5–2–104, C.R.S., or a consumer loan as defined in section 5–3–104, C.R.S., that such purchaser has been approved for either a consumer credit sale or a consumer loan

if such approval is not final. For purposes of this <<-sub-subparagraph (A)->> <<+subparagraph (I)+>>, "guarantee" means a written document or oral representation between the purchaser and the person selling the vehicle that leads such purchaser to a reasonable good faith belief that the financing of such vehicle is certain.

<<-(B)->><<+(II)+>> Accepts a used motor vehicle as a trade-in on the purchase of a motor vehicle or used motor vehicle and sells such used motor vehicle before the purchaser has been approved for a consumer credit sale as defined in section 5–2–104, C.R.S., or a consumer loan as defined in section 5–3–104, C.R.S., if such approval is a condition of the purchase;

<<-(C)->><<+(III)+>> Fails to return to the purchaser any collateral or down payment tendered by such purchaser conditioned upon a guarantee by a motor vehicle or used motor vehicle dealer that a consumer credit sale as defined in section 5–2–104, C.R.S., or a consumer loan as defined in section 5–3–104, C.R.S., has been approved for such purchaser, if such approval was a condition of the sale and if such financing is not approved and the purchaser is required to return the vehicle;

<<-(ii)->><<+(b)+>> **[Formerly 6–1–105(1)(ii)]** Fails to disclose in writing, prior to sale, to the purchaser that a motor vehicle is a salvage vehicle, as defined in section 42–6–102(13), C.R.S., that a vehicle was repurchased by or returned to the manufacturer from a previous owner for inability to conform the motor vehicle to the manufacturer's warranty in accordance with article 10 of title 42, C.R.S., or with any other state or federal motor vehicle warranty law, or knowingly fails to disclose, in writing, prior to sale, to the purchaser that a motor vehicle has sustained material damage at any one time from any one incident.

<<-(II)->><<+(2)+>> **[Formerly 6–1–105(1)(ff)(II)]** For purposes of <<-subparagraph (I) of this paragraph (ff)->> <<+this section+>>, if a motor vehicle or used motor vehicle dealer guarantees financing and if approval for financing is a condition of the sale, such motor vehicle or used motor vehicle dealer shall not retain any portion of such purchaser's down payment or any trade-in vehicle as payment of rent on any vehicle released by such dealer to such purchaser pending approval of financing even if such dealer has obtained a waiver of such purchaser's right to return a vehicle or has contracted for a rental agreement with such purchaser.

<< CO ST § 6–1–709 >>

<< CO ST § 6–1–105 >>

6–1–709. [Formerly 6–1–105(1)(qq)] Sales of manufactured homes—deceptive trade practices. <<+(1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person:+>>

<<-(qq)->><<+(a)+>> Except with respect to activities subject to article 61 of title 12, C.R.S., and those that would be covered except for a specific exemption set forth in said article 61 of title 12, C.R.S., in connection with the advertisement or sale of a manufactured home:

(I) Fails to disclose clearly and conspicuously in the contract the date on which the manufactured home will be delivered, subject to the possibility of unavoidable delay;

(II)(A) Fails to escrow home sale deposits in a separate fiduciary account for the benefit of home purchasers in a bank or trust company doing business in the state of Colorado or provide a letter of credit, certificate of deposit issued by a licensed financial institution, or a surety bond issued by an authorized insurer in a form approved by the attorney general of the state of Colorado and conditioned upon the person's refund of any home sale deposit received under agreements for the sale of manufactured homes. No financial institution or corporate surety shall be required to make any payment to any person claiming under such deposit or bond until a final determination of fraud, defalcation of funds, or conversion has been made by a court of competent jurisdiction or upon a bankruptcy filing by the seller, or upon the failure to refund or pay a reasonable per diem living expense pursuant to subparagraph (III) of this paragraph <<-(qq)->> <<+(a)+>>.

(B) Any letter of credit, certificate of deposit, surety bond, or other similar surety shall be filed with and drawn in favor of the attorney general of the state of Colorado for use of the people of the state of Colorado who are purchasers of manufactured homes and shall be revocable only with the written consent of the attorney general.

(C) In any contract for the sale of a manufactured home, the seller shall disclose in the contract that the buyer may have no legal right to rescind the contract unless specifically provided by the terms of the contract or for delinquent delivery and that the seller has a separate fiduciary account for the escrow of home sale deposits pending delivery or a letter of

credit, certificate of deposit, surety bond, or other similar surety filed with the attorney general of the state of Colorado for the repayment of home sale deposits pending delivery of manufactured homes. Any such contract shall also disclose that escrow deposit complaints against sellers of manufactured homes may be filed with the office of the attorney general of the state of Colorado or the district attorney for the judicial district where the sale occurs. Any such contract shall also disclose that an aggrieved person may bring a civil action under the "Colorado Consumer Protection Act" to remedy violations of the provisions of this paragraph <<-(qq)->> <<+(a)+>>.

(III) All contracts for the sale of a manufactured home must provide a date certain for delivery of the home or a specification of delivery preconditions <<-which->> <<+that+>> must occur before the date of home delivery can be determined. Unless delay in delivery is unavoidable, or caused by the buyer, the contract for manufactured home sale shall further provide that, at seller's election, <<-he->> <<+the seller+>> will refund the home sale deposit or pay a reasonable buyer living expense per diem <<- which->> <<+that+>> relates back to the contract delivery date if the date of delivery is more than sixty days after the contract date of delivery or the completion of delivery preconditions set forth in the contract if no delivery date certain has been set.

SECTION 3. 6–1–105(1)(x), Colorado Revised Statutes, is amended to read:

<< CO ST § 6–1–105 >>

6–1–105. Deceptive trade practices. (1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person:

(x) Violates the provisions of sections 6–1–203 to 6–1–205 <<+or of part 7 of this article+>>;

SECTION 4. 6–1–104, Colorado Revised Statutes, is amended to read:

<< CO ST § 6–1–104 >>

6–1–104. Cooperative reporting. The district attorneys may cooperate in a statewide reporting system by receiving, on forms provided by the attorney general, complaints from persons concerning deceptive trade practices listed in sections 6–1–105 and <<-6–1–105.5->> <<+part 7 of this article+>> and transmitting such complaints to the attorney general.

SECTION 5. The introductory portion to 6–1–107(1), Colorado Revised Statutes, is amended to read:

<< CO ST § 6–1–107 >>

6–1–107. Powers of attorney general and district attorneys. (1) When the attorney general or a district attorney has cause to believe that any person has engaged in or is engaging in any deceptive trade practice listed in section 6–1–105 or <<-6–1–105.5, he->> <<+part 7 of this article, the attorney general or district attorney+>> may:

SECTION 6. 6–1–110, Colorado Revised Statutes, is amended to read:

<< CO ST § 6–1–110 >>

6–1–110. Restraining orders—injunctions—assurances of discontinuance. (1) Whenever the attorney general or a district attorney has cause to believe that a person has engaged in or is engaging in any deceptive trade practice listed in section 6–1–105 or <<-6–1–105.5, he->> <<+part 7 of this article, the attorney general or district attorney+>> may apply for and obtain, in an action in the appropriate district court of this state, a temporary restraining order or injunction, or both, pursuant to the Colorado rules of civil procedure, prohibiting such person from continuing such practices, or engaging therein, or doing any act in furtherance thereof. The court may make such orders or judgments as may be necessary to prevent the use or employment by such person of any such deceptive trade practice or which may be necessary to completely compensate or restore to <<-his->> <<+the+>> original position <<+of+>> any person injured by means of any such practice or to prevent any unjust enrichment by any person through the use or employment of any deceptive trade practice.

(2) Where the attorney general or a district attorney has authority to institute a civil action or other proceeding pursuant to the provisions of this article, <<-he->> <<+the attorney general or district attorney+>> may accept, in lieu thereof or as a part thereof, an assurance of discontinuance of any deceptive trade practice listed in section 6–1–105 or <<-6–

1–105.5->> <<+part 7 of this article+>>. Such assurance may include a stipulation for the voluntary payment by the alleged violator of the costs of investigation and any action or proceeding by the attorney general or a district attorney and any amount necessary to restore to any person any money or property <<-which->> <<+that+>> may have been acquired by such alleged violator by means of any such deceptive trade practice. Any such assurance of discontinuance accepted by the attorney general or a district attorney and any such stipulation filed with the court as a part of any such action or proceeding shall be a matter of public record unless the attorney general or the district attorney determines, at his <<+or her+>> discretion, that it will be confidential to the parties to the action or proceeding and to the court and its employees. Upon the filing of a civil action by the attorney general or a district attorney alleging that a confidential assurance of discontinuance or stipulation accepted pursuant to this subsection (2) has been violated, said assurance of discontinuance or stipulation shall thereupon be deemed a public record and open to inspection by any person. Proof by a preponderance of the evidence of a violation of any such assurance or stipulation shall constitute prima facie evidence of a deceptive trade practice for the purposes of any civil action or proceeding brought thereafter by the attorney general or a district attorney, whether a new action or a subsequent motion or petition in any pending action or proceeding.

SECTION 7. 6–1–114, Colorado Revised Statutes, is amended to read:

<< CO ST § 6–1–114 >>

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 <<-6–1–105.5->> <<+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.

SECTION 8. 6–1–304(1)(h), Colorado Revised Statutes, is amended to read:

<< CO ST § 6–1–304 >>

6–1–304. Unlawful telemarketing practices. (1) A commercial telephone seller engages in an unlawful telemarketing practice when, in the course of any commercial telephone solicitation, the seller:

(h) Engages in any deceptive trade practice defined in section 6–1–105 or <<-6–1–105.5->> <<+part 7 of this article +>>.

SECTION 9. 6–1–501(7)(a), Colorado Revised Statutes, is amended to read:

<< CO ST § 6–1–501 >>

6–1–501. Definitions. As used in this part 5, unless the context otherwise requires:

(7) "Facilitative device" means a device that has a retail price equal to or greater than one hundred dollars and that is exclusively designed and manufactured to assist a person with a disability with such person's specific disability, through the use of facilitative technology, to be self-sufficient or to maintain or improve that person's quality of life. "Facilitative device" does not include wheelchairs as that term is defined in section 6–1–402 (17). "Facilitative device" does include the following:

(a) Telephone communication devices for the hearing impaired and other facilitative listening devices except for hearing aids as defined in section <<-6–1–105.5(1)(b)(I)->> <<+6–1–701(1)(c)(I)+>> and cochlear implants as defined in section <<-6–1–105.5(1)(b)(II)->> <<+6–1–701(1)(c)(II)+>>;

SECTION 10. 12–5.5–102(1), Colorado Revised Statutes, is amended to read:

<< CO ST § 12–5.5–102 >>

12–5.5–102. Registration required—application—bond. (1) An audiologist shall register with the division of registrations before performing audiology services in this state. Upon registering, the audiologist shall be given a certificate of registration bearing a unique registration number. The audiologist shall include the registration number on all written contracts and receipts, as required pursuant to section <<-6–1–105.5(2)(a)->> <<+6–1–701(2)(a)+>>, C.R.S.

SECTION 11. 12–5.5–202(1), Colorado Revised Statutes, is amended to read:

<< CO ST § 12–5.5–202 >>

12–5.5–202. Registration required—application—bond. (1) A hearing aid dealer shall register pursuant to this part 2 before selling or negotiating to sell, directly or indirectly, any hearing device for the hearing impaired, unless such dealer holds a current registration pursuant to part 1 of this article. Upon registering, the hearing aid dealer shall be given a certificate of registration bearing a unique registration number. The hearing aid dealer shall include the registration number on all written contracts and receipts, as required pursuant to section <<-6–1–105.5(2)(a)->> <<+6–1–701(2)(a)+>>, C.R.S. A hearing aid dealer who is also an audiologist and is registered only under part 1 of this article shall include the registration number issued pursuant to such part 1 on all written contracts and receipts.

SECTION 12. 12–5.5–205(1)(b)(V), Colorado Revised Statutes, is amended to read:

<< CO ST § 12–5.5–205 >>

12–5.5–205. Grounds for discipline—disciplinary action. (1)(b) The following acts shall constitute grounds for discipline:

(V) Refusing to honor a buyer's request to cancel a contract for the purchase of a hearing device for the hearing impaired, if such request was made during the rescission period set forth in section <<-6–1–105.5(2)(e)->> <<+6–1–701(2)(e)+>>, C.R.S.;

SECTION 13. 42–6–205, Colorado Revised Statutes, is amended to read:

<< CO ST § 42–6–205 >>

42–6–205. Consumer protection. All provisions of section <<-6–1–105(1)(ff)->> <<+6–1–708+>>, C.R.S., concerning deceptive trade practices in the sale of motor vehicles shall apply to the sale of used motor vehicles.

<< CO ST § 6–1–105 >>

<< Repealed: CO ST § 6–1–105.5 >>

SECTION 14. **Repeal of provisions being relocated in this act.** 6–1–105(1)(p.3), (1)(p.5), (1)(p.7), (1)(s), (1)(t), (1)(w), (1)(bb), (1)(dd), (1)(ee.5), (1)(ee.7), (1)(ee.8), (1)(ff), (1)(ii), and (1)(qq), and 6–1–105.5, Colorado Revised Statutes, are repealed.

<< Note: CO ST § 6–1–104 >>

SECTION 15. **Effective date—applicability.** Sections 2 through 16 of this act shall take effect upon passage and shall apply to acts committed on or after said date. Section 1 of this act shall take effect upon passage and shall apply to civil actions filed on or after said date.

SECTION 16. **Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved May 18, 1999.

CO LEGIS 188 (1999)

End of Document

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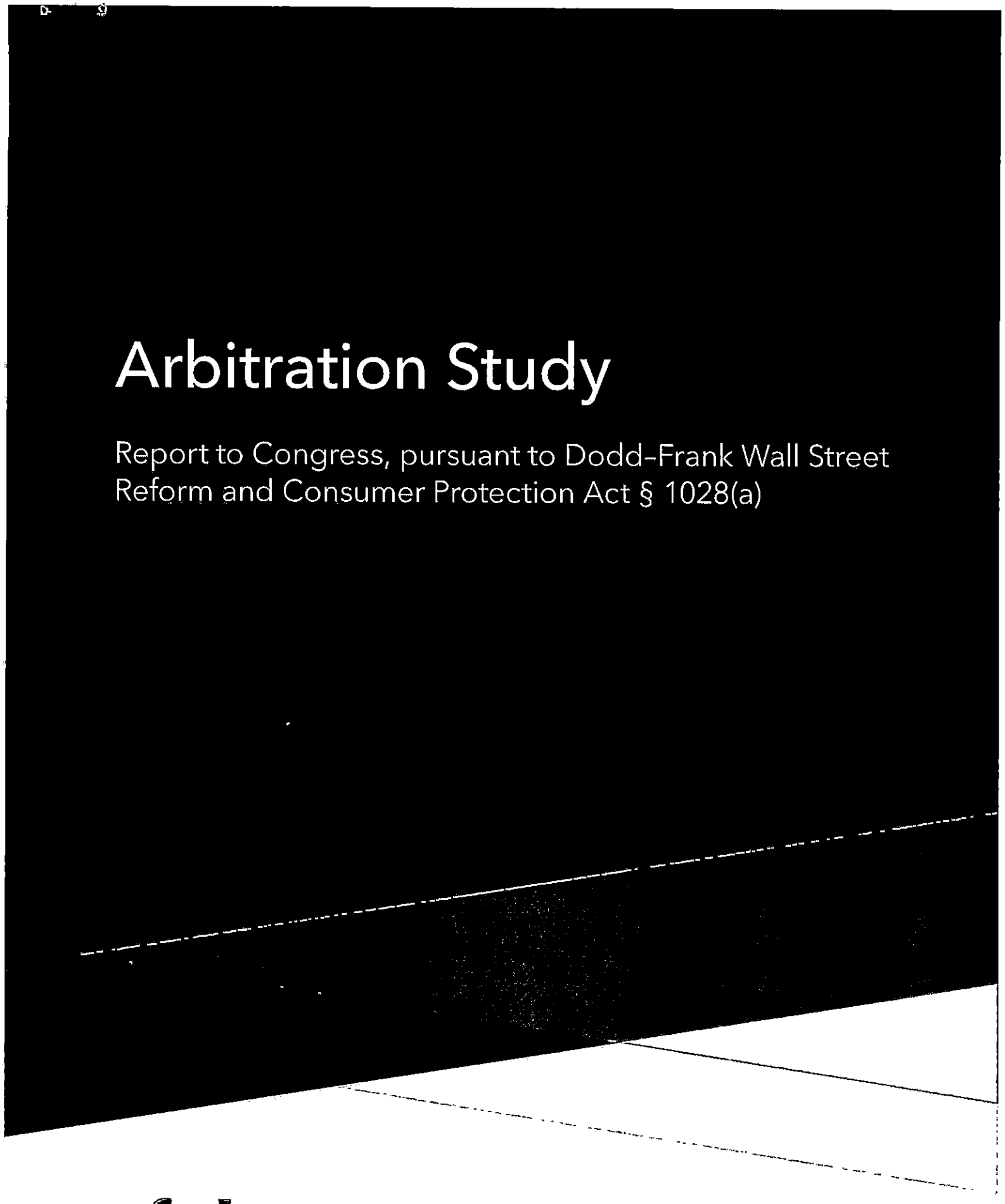
Arbitration Study

Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)



Consumer Financial Protection Bureau

March 2015

Section 8

What is the value of class action settlements?

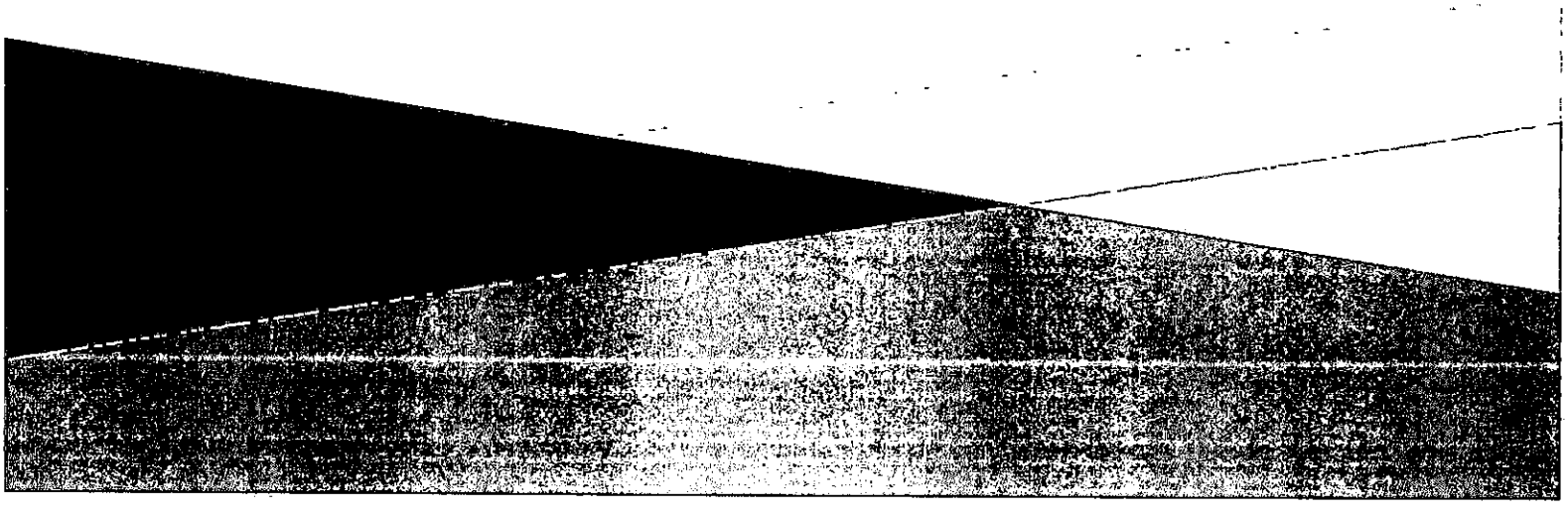


Table of contents

Introduction

In Section 6, we presented findings with respect to the types of consumer finance claims brought in litigation and the form of resolution of those claims based upon a data set of cases filed in 2010–2012. That data set covers six consumer finance markets and included slightly more than 70 cases in which classwide relief was obtained, almost always through a settlement. To expand our understanding of class actions and more specifically the substance of class settlements, we identified a larger data set consisting of 422 consumer financial class action settlements finalized in federal district courts from 2008 through 2012. (Where the analysis in Section 6 focused on *complaints* that were filed during a defined period of study, this section discusses *settlements* that were entered in its period of study.) This data set covers substantially all consumer finance markets and overlaps with the data set used for our analysis of class and individual litigation and also the data set used in the 2013 Preliminary Results.[1]

Commenters from different perspectives asked us to look into class action settlements, including whether "weight should be given to data concerning class action lawsuits,"[2] and to compare "the benefits to consumers of individual arbitration as compared with class action litigation."[3] While

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[1] We explain in Section 8.3 and Appendix S how we defined "consumer finance class action" for purposes of developing the data set we analyze here. The data set includes a number of cases that are also part of the data set used for the litigation analysis; these overlapping cases were filed between 2010 and 2012 (the period used to bound the litigation data set) and finally resolved by the end of 2012 (the period used to bound our class action settlement data set). In Section 4.8.2 of the 2013 Preliminary Results (which, as previously noted, we are including as part of this Report) we identified a set of state and federal class actions involving credit cards, deposit accounts, or payday loans for which a settlement was approved beginning in the last half of 2009 and where the relationship between the class members and the defendant was governed by an arbitration clause that offered AAA as an arbitral forum. We reported on the number of claims submitted or number of consumers eligible for relief, the amount of the relief, and the number of class members who opted out of the class and the total number who after opting out submitted individual claims in arbitration. Three of the 8 cases in that data set were federal class settlements finally resolved between 2008 and 2012 and thus are included in our class settlement data set.

[2] Ltr. from American Bankers Association, the Consumer Bankers Association, and The Financial Services Roundtable to the Bureau of Consumer Financial Protection, Re: Comments on Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements (Docket No. CFPB-2012-0017) at 8 (June 22, 2012).

[3] Ltr. from the U.S. Chamber of Commerce to Consumer Financial Protection Bureau, "Re: Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements,' Docket No. CFPB-2012-0017," at 18 (June 22, 2012).

these stakeholders appeared to have varied approaches and attitudes toward the topic of class settlements, all seem to agree at least on the need to study class settlements and their outcomes.

The data set of class settlements assembled for analysis here permits us to perform a more detailed analyses of class settlement outcomes, including analysis of the number of class members eligible for relief in these settlements and the amount and types of relief available to class members under these settlements; the number of class members who had received relief and the amount of that relief; and the extent to which relief went to attorneys. We supplement this data analysis with a case study drawn from multidistrict litigation about the overdraft practices of a number of banks.

This data also provided the basis for us to conduct further analyses on the overlap between government enforcement actions and class actions in Section 9.

8.1 Summary of analysis and results

Our work resulted in the following general findings (later sections provide further details) as to consumer financial class action settlements in federal court from January 1, 2008, through December 31, 2012:

- *Case incidence.* We analyze 419[4] consumer financial class action settlements, the bulk of which (89%) involved just four products or services: debt collection, checking/savings accounts, credit cards, and credit reporting.
- *Class members.* We were able to find precise figures or estimates for the class size for 329 of the 419 settlements. There were 350 million total class members in these consumer financial class action settlements for cases reporting such data. These numbers include one class action settlement (*In Re TransUnion Privacy Litigation*) in which 190 million class members were eligible for cash and in-kind relief. Excluding that one action, there were 160 million class members overall.

[4] Of the 422 settlements we identified, we analyze only 419. For the purposes of uniformity in analyzing data, we excluded 3 cases for which we were unable to find data on attorneys' fees; these would not have affected results materially. From this point on, our analysis is based on the 419 cases, or subsets of those 419 cases.

- *Forms of relief.* We were able to determine the type of relief obtained in all of the 419 cases. The vast majority provided for cash relief[5] (410 settlements reporting data, including settlements where in-kind and/or behavioral relief were also components). There were 24 settlements that provided in-kind relief (including where cash and/or behavioral relief were also components),[6] and 56 settlements that provided "behavioral relief" (including settlements where cash and/or in-kind relief were also components).[7] The numbers do not add up to 419 because some settlements feature more than one type of relief.

- *Total relief.* Of our 419 settlements, the total amount of gross relief – defined as the total amount defendants offer to provide in cash relief (including debt forbearance) or in-kind relief and to pay in fees and other expenses was $2.7 billion. This estimate includes cash relief of $2.0 billion and in-kind relief of $644 million.[8] These figures represent a floor. Many settlements had relief, such as provisions in which companies agreed to change company behavior towards consumers, that was not quantified as of final approval.

- *Payments.*[9] Of the 251 settlements (60% of all settlements) reporting data, $1.1 billion had been or was scheduled to be paid to class members in cash or debt forbearance as of the time of the last document we were able to review.

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[5] We use the term cash relief to include all money payments provided for in the settlement other than payments to class representatives that exceeded the amount paid to class members. This includes cash payments to class members, debt forbearance for class members, and class expenses and fees paid for by defendants as part of the settlement. For 28 settlements which provided for a *cy pres* payment for the benefit of class members but no payment directly to class members, cash relief also includes the amount of the *cy pres* payment.

[6] We use the term "in-kind relief" to refer to class settlements in which consumers were provided with free or discounted access to a service, such as credit monitoring.

[7] We use the term "behavioral relief" to refer to class settlements which contained a commitment by the defendant to alter its behavior prospectively, for example by promising to change business practices in the future or implementing new compliance programs.

[8] In-kind relief is valued based upon the difference between the market price of a service given to class members and the price the class members were required to pay. Most often, in-kind relief entailed free access to a service.

[9] As set out in Section 8.3.3, *infra*, we define "payment" as an amount that a defendant must actually pay to class members because (i) class members actually submitted claims; (2) the settlement requires an automatic distribution of relief to known class members (*e.g.*, all customers of the defendant during time period x); or (3) the

- *Individual payments and claims.* Of 236 settlements reporting data (56% of all settlements), 34 million consumers were guaranteed recovery as of the time of the last document available for review, having made claims (11 million consumers) or participated in an automatic distribution (24 million consumers).

- *Claims rate.* Of 105 settlements requiring claims and reporting both the number of claims made by class members and the number of total claims-eligible class members (including claims for cash and claims for in-kind relief), the average claims rate was 21%, and the median was 8%. Rates for these cases should be viewed as a floor, given that the claims numbers used to calculate these rates may not be final for many of these settlements. The weighted average claims rate was 4% including the *TransUnion* settlement, and 11% without *TransUnion*. Interviews with claims administrators suggest that these claims rate figures are consistent with their data.

- *Attorneys' fees.* Of the 419 settlements, the overall percentage was 21% of cash relief, or 16% of total cash and in-kind relief.[10]

- *Time to settlement.* Of the 419 settlements, the average time to settlement (from the filing of the initial complaint to entry of the final approval order) was 690 days; the median was 560 days.

- *Motions practice.* Attempts to dispose of claims through motions to dismiss or summary judgment motions were filed in 191 (46%) of the cases. Of these, 169 (or 88% of 191) involved the adjudication of at least one motion prior to the parties reaching a settlement.

We provide further details below on settlement incidence, the number of class members eligible for relief, claims rates, monetary relief and payments, attorneys' fees and other costs, subject matter of claims, time to settlement, and motions practice.

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settlement requires defendant to pay the class a fixed amount under a pro rata distribution (*i.e.*, the total amount the defendant must pay is fixed, and the individual amount to be paid each individual is contingent on the total number of claims submitted). We do not include in payments any bonus amounts paid to class representatives, any *cy pres* payments, or any payments of expenses or fees.

[10] We do not calculate fee rates that include any value for behavioral relief because behavioral relief is seldom quantified in the cases. This exclusion, however, means that we are generally overstating fee percentages. As a share of total relief, calculated attorneys' fees would fall to the extent that behavioral relief was included.

8.2 Prior research

A number of previous studies of class action settlements have been published. Few of these were quantitative in nature and none focused on consumer financial cases.

For instance, RAND and the Federal Judicial Center (FJC) conducted studies in 1999 and 2001, but both relied largely on case studies rather than attempting to comprehensively catalogue and analyze class settlements.[11] The FJC produced a more recent study of the impact of the Class Action Fairness Act of 2005 (CAFA) on class actions in federal courts, presenting interim findings on class action filings and removals in the federal courts from July 1, 2001, through June 30, 2007.[12] Other major studies have been conducted of insurance class actions, mass torts and securities class actions.[13] More recently, the law firm Mayer Brown LLP issued a study of putative employee and consumer class actions filed in or removed to federal court in 2009.[14] The study also did not purport to be comprehensive, relying on certain published reports on class actions, to identify 188 filed class actions, of which 40 had settled by the time the study was published.[15]

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[11] *See* Deborah Hensler, *et al.*, Class Action Dilemmas: Pursuing Public Goals for Private Gain (RAND Institute for Civil Justice, Monograph MR - 969/1 - ICJ) (1999); Laural L. Hooper & Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study*, 209 F.R.D. 519, Appx. A (Federal Judicial Center ed. 2001).

[12] Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, (2008), http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf (last visited Mar. 6, 2015).

[13] *See, e.g., supra* n.11.

[14] Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* at 1 (Dec. 11, 2013). On February 27, 2015, the National Association of Consumer Advocates and the American Association for Justice released a study that reviewed a number of the same class action filings addressed in the Mayer Brown LLP study. *Class Actions are a Cornerstone of our Civil Justice System: A Review of Class Actions Filed in 2009*, http://www.consumeradvocates.org/sites/default/files/Class%20Action%20Report%202-27-15.pdf (last visited Mar. 6, 2015).

[15] *See generally* Mayer Brown, *supra* n.14.

Of the existing studies we reviewed, the single most comprehensive was a study conducted by Professor Brian Fitzpatrick.[16] In one study, he set out a methodology to cull, from Westlaw and other sources of federal dockets, class action settlements in 2006 and 2007.

While not specifically focused on consumer financial cases, Professor Fitzpatrick's study classified the class settlements by subject areas, of which three appeared to be potentially relevant to our study: consumer, debt collection and antitrust.[17] For each subject area, he reported on case incidence,[18] the duration of the cases (time from initial complaint to settlement),[19] monetary relief,[20] and attorneys' fees.[21] What follows expands on his work and focuses exclusively on federal consumer financial class settlements.

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[16] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. of Empirical Leg. Stud. 811 (2010).

[17] Professor Fitzpatrick's analysis set out 9 different categories of class action settlements, by subject matter: securities, labor and employment, consumer, employment benefits, civil rights, debt collection, antitrust, commercial, and other. *See* Fitzpatrick, *supra* n.16, at 818 tbl 1. Four of the categories – securities, labor and employment, employee benefits, and commercial–by definition do not include any consumer financial cases. *Id.* Debt collection cases were cases "brought under the Fair Debt Collection Practices Act" and thus are predominantly cases involving consumer financial services. *Id.* At least some of what Fitzpatrick labeled "consumer cases" involved consumer financial products or services. *See id.* ("cases brought under the Fair Credit Reporting Act as well as cases for consumer fraud and the like"). Finally, based on the description of antitrust cases ("cases brought under federal or state antitrust laws") we could not definitively exclude the possibility that this category included consumer financial cases.

[18] Overall, Fitzpatrick recorded 688 settlements in all subjects for 2006 and 2007. Of the three potentially consumer financial related subject areas, there was an upper limit of 72 settlements in 2006 and 87 settlements in 2007. For 2006, Fitzpatrick reported 40 consumer settlements, 19 debt collection settlements, and 13 antitrust settlements, for a total of 72. Fitzpatrick, *supra* n.16. For 2007, Fitzpatrick reported 47 consumer settlements, 23 debt collection settlements, and 17 antitrust settlements, for a total of 87 settlements. *Id.*

[19] Fitzpatrick, *supra* n.16 at 820. For all settlements, Fitzpatrick reported an overall average of 1,196 days and overall median of 1,068 days from complaint filing to final settlement. For consumer settlements, Fitzpatrick reported an average of 963 days and median of 720 days. For debt collection settlements, he reported an average of 738 days and median of 673 days. For antitrust settlements, he reported an average of 1,140 and median of 1,167.

[20] Fitzpatrick, *supra* n.16, at 820. *For consumer cases* – which included financial and non-financial cases – the overall totals were $517.3 million in 2006 and $732.8 million in 2007. Consumer settlements recovered an average of $18.8 million and median of $2.9 million. For debt collection cases, all of which we would categorize as consumer financial cases, the overall total was $8.9 million in 2006 and $5.7 million in 2007. The average amount paid by defendants was $370,000 and the median was $88,000. For antitrust cases, some of which may be consumer

8.3 Data

Below is a summary of our methodology in identifying and reviewing federal class action settlements. A more complete treatment of our methodology is set out in Appendices R S.

To build our data set, we applied search terms related to final settlement orders to the Westlaw database for federal district court docket sheets.[22] Our analysis covered settlement orders reported in case dockets from 2008 through 2012.[23]

Our search in Westlaw yielded about 4,500 dockets. We eliminated cases based on the civil cover sheet descriptions that were clearly unrelated to consumer financial cases (such as pharmaceuticals, etc.). We then reviewed the remaining dockets and documents within each docket sheet manually to determine if the settlement involved consumer financial products and services. Specifically, we focused on those settlements where the complaint alleged a violation of one of the enumerated consumer protection statutes under Title X of the Dodd-Frank Act (statues administered by the Bureau), and settlements where the plaintiffs were primarily consumers and the defendants institutions selling consumer financial products or engaged in providing consumer financial services (other than consumer investment products and services), regardless of the basis of the claim. To the extent that the case involved *any* such consumer financial product or service – not only the six main product areas we have identified in our arbitration and litigation data sets – we included it in our data set. However, we excluded cases involving disputes between borrowers and a residential mortgage lender because they are

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financial cases, the overall total for 2006 was $1.079 billion, and the total for 2007 was $660.5 million. The average settlement was $60 million and the median settlement was $22 million.

[21] *See* Fitzpatrick, *supra* n.16, at 830. Fitzpatrick calculated that, as to all settlements in his set, attorneys' fees as a percentage of total settlement recovery were an average of 25.7% and median of 25%. *Id.* at 835. In consumer cases, including FCRA, attorneys' fees constituted an average of 23.5% and a median of 24.6% of total recoveries. *Id.* In debt collection cases, the average was 24.2% and the median was 25%. *Id.* In antitrust cases, the average was 25.4% and median was 25%. *Id.*

[22] Our collection and analysis of federal and state court documents is covered by the CFPB's Market Analysis of Administrative Data under Research Authorities Privacy Impact Assessment, as well as the Bureau's Market and Consumer Research Records Systems of Records Notice (CFPB.022).

[23] Professor Fitzpatrick covered a two-year period (2006–2007). Fitzpatrick, *supra* n.16, at 816. Additionally, Fitzpatrick searched Westlaw for published and unpublished final settlement orders; we believe that searching docket sheets resulted in the identification of a more complete set of settlements. *Id.*

outside of the scope of this study[24]and we further excluded another subset of settlements because, while involving claims under enumerated consumer financial statutes, they did not involve "covered persons" regulated by the Bureau.[25] We elaborate on these exclusions in Appendix S.

As a check on the robustness of this methodology, we reviewed BNA Class Action Litigation Reporter and Mealey's Jury Verdicts and Settlements.[26] We found no additional cases in those reporters not already in our data set, leaving us with a data set of 422 settlements.[27]

As to each settlement, we captured information pertaining to the identity of the parties, product type, claim type (federal and state laws), class sizes, forms of relief (cash, in-kind, behavioral), method of distribution (automatic or claims made), opt-outs, and claims rates, and other matters.[28]

In collecting numerical data, we followed a hierarchy of data sources. In order, we relied first on court findings and orders. We then relied on settlement administrator submissions or reports, and then lastly relied on shared party positions (*e.g.*, settlement agreements or joint motions). We relied on more precise data (*e.g.*, "1,573,298" notices sent) over estimates (*e.g.*, "more than 2

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[24] We did not include cases about mortgages and related agreements (here, any consumer credit transaction secured by a consumer's dwelling, including a home equity line of credit) because, under the Dodd-Frank Act amendments to the Truth in Lending Act, arbitration clauses were banned from mortgage agreements effective June 1, 2013. 15 U.S.C. § 1639c(e)(1) & 12 C.F.R. § 1026.36(h). As such, mortgage loans are outside the scope of this study. However, we did include mortgage-related contracts, such as cases about title or mortgage insurance, which are generally not covered by the statute.

[25] For example, we did not include cases in which the defendants were merchants even if the claim was brought under one of the enumerated consumer protection statutes. There were 97 Fair and Accurate Credit Transaction Act (FACTA) settlements brought against merchants, and we excluded these from our data set.

[26] These sources were also used by Mayer Brown and by Fitzpatrick, amongst others, to identify class action settlements. *See* Mayer Brown, *supra* n.14, at 17; Fitzpatrick, *supra* n.16, at 816.

[27] We also reviewed documents provided to the Illinois Attorney General pursuant to the Class Action Fairness Act, 28 U.S.C. §1715 from 2009 through 2013 to determine whether there was additional relevant information with respect to class action settlements in our data set. Because the documents provided to the Illinois Attorney General did not comprise a complete set of the class action settlements within our study, and because the information included in the provided documents was not determined to be additionally relevant information for purposes of analyzing the settlements within our study, we did not rely on this information.

[28] We detail our methodology and our definition of terms such as "in kind" or "behavioral" in Appendix S.

million" class members) when both were available, using the same priority of sources (court order, settlement administrator reports, etc.) where there was more than one source with precise but inconsistent data.[29]

For a list of data inputs we extracted from the settlements, please review Appendix S.

There are limitations to our analysis, including the following. First, our data may not include every federal consumer finance class action settlement between 2008 and 2012. It is possible that some dockets pertaining to final settlements were not responsive to our search terms and were not reported in the sources we used to check our results.

Second, we did not attempt to identify class settlements in state court class action litigation, so the results reported here do not cover the entire universe of class settlements in consumer finance cases during the period under study.

Third, not every settlement offered information on every data point or metric we analyzed. As such, for every metric we report on, we offer the number of settlements that provided numbers or estimates, in accord with the methodology set out in Appendix S. Caution is advised in comparing between data points, as the universe of cases from which we were able to calculate any given metric may not be the same as the universe for which we were able to calculate another metric.

Fourth, as the description of our methodology suggests, settlements are often complex and varied. Even where information exists, it is often partial or ambiguous and requires interpretation and judgment of case documents. Our aggregate figures (overall dollar amounts and class member counts), however, may be less sensitive to these limitations, likely because such larger settlements (despite the complexity of some of them) tend to be better documented.

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[29] Except as specified in Appendix S, we did not rely on numbers provided by only one side in the dispute (*i.e.*, the defendant alone or the plaintiff alone). The exceptions did not apply to relief numbers, only to certain class size metrics. *See* Appendix S. For instance, in one settlement in our data, *Griffin v. Capital One Bank*, Case No. 8:08cv132 (M.D. Fla.), the plaintiff's motion for attorneys' fees stated a claims-made cash relief amount of $250 million. *See* Mem. In Support of Pl.'s Mot. for Award of Attorney's Fees at 11 [Dkt. #154], *Griffin v. Capital One Bank*, Case No. 8:08cv132 (M.D. Fla. Oct. 1, 2010). This amount did not appear to have been mentioned or sanctioned in the court's final approval order (or subsequent orders), nor was it in the parties' settlement agreement. According to our methodology, we could not include this in our calculation of gross relief for the Griffin settlement.

Finally, the claims data that we have on the settlements we have identified is necessarily incomplete. A case was included in our data set if there was a final settlement order issued by the court. Final settlement orders may be issued in class action settlements before claims numbers are final; often, the docket is closed once the final approval settlement order is issued.[30]

8.3.1 Settlement incidence

As noted, our search methodology yielded 419 individual federal consumer financial class action settlements (after excluding three cases) from 2008 through 2012, an average of 84 settlements per year. We further analyze settlement incidence by product type and claim type.

Product type

As Table 1 shows, 89% of the cases in our data set were concentrated among just four product areas: debt collection, checking or savings products, credit card, and credit reporting.

[30] If additional settlement information was available after the entry of the final approval order, we incorporated that data into our results.

TABLE 1: SETTLEMENT INCIDENCE BY PRODUCT AND YEAR

Product or service	2008	2009	2010	2011	2012	Total
Auto	2	5	5	3	3	18
Checking/savings	5	19	15	25	19	83
Credit card	2	9	8	7	4	30
Credit reporting	9	4	1	8	3	25
Debt collection	49	49	45	49	42	234
Debt settlement				2	2	4
Money transfers					1	1
Mortgage-related	1	7	1	2	3	14
Prepaid		1	1			2
Privacy/ID				1	1	2
Student loan		1	2	3		6
Total	**68**	**95**	**78**	**100**	**78**	**419**

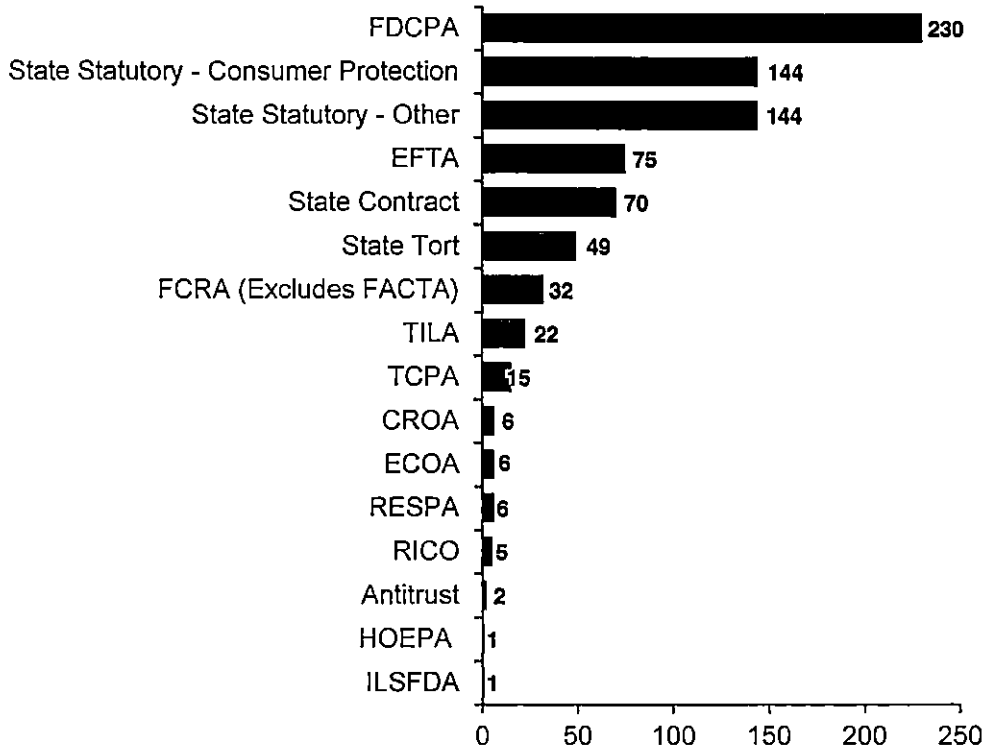
In the majority of debt collection cases, the nature of the underlying debt was either not clear from the pleadings or involved multiple consumer financial products or services.[31]

[31] In our review of litigation cases in Section 6, we excluded debt collection cases if those cases could not be attributed to one of the product markets being studied. Here we include such cases.

Claims type

We reviewed the complaints and coded federal and state grounds for relief. By the number of cases, as Figure 1 below indicates, overall the three most frequently invoked legal grounds of requested relief in our set of class action settlements were the FDCPA (55% of settlements), state statutory claims not specific to consumer finance (34%) and state statutory claims specific to consumer finance (also 34%). The sum of all percentages exceeds 100% because any given complaint may contain multiple claims on alternate grounds.

FIGURE 1: FREQUENCY OF CLAIM TYPES BY SETTLEMENT[32]



[32] *See, e.g.*, Fitzpatrick, *supra* n.16; Mayer Brown, *supra* n.14;

8.3.2 Number of class members

We review, below, two separate metrics for determining the number of persons reached by consumer financial class action settlements: (1) the number of claims forms or other notices sent; and (2) the number of class members eligible for relief.[33]

Notices

Federal civil procedure requires in a settlement of most class actions seeking damages that individualized notice be sent to prospective class members who can be identified through reasonable effort.[34] In our data set, 267 settlements reported numbers of prospective class members to whom such notices were sent. As set out in Table 2 below, 130 million notices were sent to individual class members in those settlements. The average number of notices sent per settlement reporting individualized notice was 485,494; the median was 2,724.

TABLE 2: NUMBER OF REPORTED INDIVIDUALIZED NOTICES TO CLASS BY PRODUCT

Product	n =	Notices	Average	Median
Auto	13	173,487	13,345	2,680
Checking/savings	15	20,779,365	1,385,291	137,763
Credit card	21	56,927,131	2,710,816	30,000
Credit reporting	19	20,154,839	1,060,781	4,377

[33] Neither Fitzpatrick nor Mayer Brown provided data on the number of class members participating in settlements. *See generally* Fitzpatrick, *supra* n.16; Mayer Brown, *supra* n.14.

[34] Fed. R. Civ. P. 23(c)(2)(B) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including *individual notice to all members who can be identified through reasonable effort.* The notice must clearly and concisely state in plain, easily understood language (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).") (emphasis added).

Debt collection	184	12,112,304	65,828	1,410
Debt settlement	4	919,084	229,771	106,462
Mortgage-related	9	16,252,627	1,805,847	24,330
Prepaid	1	2,724	2,724	2,724
Privacy/ID	1	2,305,429	2,305,429	2,305,429
Total	**267**	**129,626,990**	**485,494**	**2,724**

It is important to note that the number of notices sent is not necessarily equal to the size of the class in these cases, since a class may include consumers who cannot be identified with reasonable effort as well as individuals who can be so identified, or the notice program may have (intentionally or unintentionally) sent more notices than the number of unique individuals who were expected to be in the class.

Class membership

In many settlements the case records report on the number of class members separate from the number of notices sent; in some other settlements only the former and not the latter is reported Table 3 below shows that, out of 329 settlements reporting data on class size, there were 350 million class members in total.[35] Of these, 190 million came from one settlement as explained in the margin below.[36] Excluding that action, the total number of class members was 160 million.

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[35] We used the number of individual notices sent as a proxy for the number of class members where a settlement did not report on the number of class members.

[36] A single class action settlement, *In Re TransUnion Corp. Privacy Litig.*, 1:00-CV-04729, Final Approval Order (N.D. Ill. Sept. 17, 2008) covered 190 million class members. Plaintiffs alleged a settlement class including "[a]ll persons in the United States whose consumer reports were disclosed by *TransUnion* or its agents to an unaffiliated third party, without authorization by the consumer" from 1997 to the filing of the complaint (and later extended to 2008 in the settlement order). Second Am. Consol. Compl., *In Re TransUnion Corp. Privacy Litig.* (N.D. Ill. Nov. 1, 2002). Where we offer aggregate data on the number of class members that would include the *TransUnion* settlement, we report those figures with and without that case. Note that the TransUnion settlement did not provide individualized notice, given the size of the class.

TABLE 3: NUMBER OF REPORTED CLASS MEMBERS IN CONSUMER FINANCIAL SETTLEMENTS BY YEAR

Year	n =	Class members
2008	58	246,809,644
Without TransUnion	*57*	*56,809,644*
2009	74	34,913,394
2010	60	10,726,995
2011	71	22,360,972
2012	66	35,151,309
Total	**329**	**349,962,314**
Without TransUnion	*328*	*159,962,314*

The total number of unique persons directly covered by these settlements may be, indeed is likely to be, less than 160 million (*i.e.*, one person may have been a class member in more than one settlement). On the other hand, this figure excludes class members from the 90 settlements for which we had no data on class size and also did not have data on the number of individual notices sent. Figure 2 below sets out the distribution of class members by the size of the settlement class including the one large settlement. As the figure illustrates, even putting this one case aside, a small number of the settlements accounted for most of the class members.

FIGURE 2: DISTRIBUTION OF CLASS MEMBERS BY SIZE OF CLASS

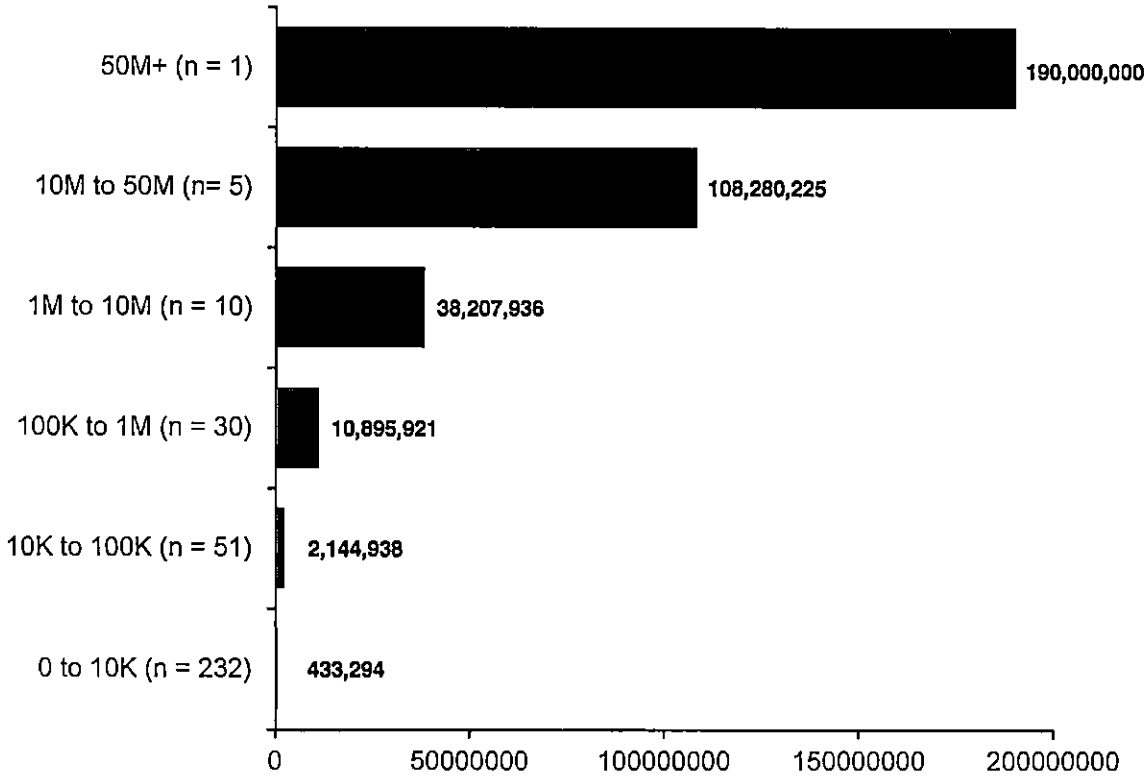

Table 4 below sets out the number of class members by the type of consumer financial product at issue in the settlement.

TABLE 4: NUMBER OF CLASS MEMBERS BY PRODUCT

Product	n =	Class members	Average	Median
Auto	17	568,212	33,424	2,172
Checking/savings	37	21,035,501	568,527	8,136
Credit card	22	57,118,228	2,596,283	25,000
Credit reporting	22	230,001,344	10,454,607	7,175
Without TransUnion	*21*	*40,001,344*		
Debt collection	213	20,630,235	96,856	1,106

Debt settlement	4	919,082	229,771	106,461
Mortgage-related	10	17,259,083	1,725,908	21,514
Prepaid	1	2,700	2,700	2,700
Privacy/ID	1	2,305,429	2,305,429	2,305,429
Student loan	2	122,500	61,250	61,250
Total	**329**	**349,962,314**	**1,063,715**	**2,190**
Without TransUnion	*328*	*159,962,314*		

Forms of relief and method of distribution

One important aspect of settlements is the form of relief and how relief is distributed. Previous studies offered little data on this topic.[37] For each settlement, we captured three general forms of settlement relief: cash, in-kind, and behavioral.

We also captured two methods of distributing cash relief and in-kind relief: claims made and automatic payment. In a claims-made process class members must submit some form of documentation to obtain cash relief or in-kind relief (and for in-kind claims-made cases, relief is sometimes a voucher given to those who submit a claim[38]). With an automatic payment, cash or in-kind relief (often in the form of a voucher) is distributed to class members identified through administrative records of the defendant without requiring any affirmative action by these individuals (although class members still are given notice and an opportunity to opt out of the class if they prefer not to be bound by the judgment and preserve their right to pursue an individual action). Both automatic payment and claims-made processes can be used in a single

[37] *See generally* Fitzpatrick, *supra* n.16; Mayer Brown, *supra* n.14, at 7–8.

[38] Some academics have criticized in-kind relief, in the form of coupons or vouchers, in class actions. Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 Geo. J. Legal Ethics 1395, 1396-97 (2005) (criticizing coupon settlements on the grounds that they do not "provide meaningful compensation to most class members," "fail to disgorge ill-gotten gains from the defendant," and may force class members "to do future business with the defendant").

settlement where some but less than all class members can be identified through the defendant's records.

Claims-made processes may be used for several reasons. In some cases, claim eligibility may turn on data only customers possess or a company's customer data may be inadequate because of – for example – a merger or lapsed contact with customers. In other cases, claims processes help determine the amount to which an individual claimant is entitled, even where claim eligibility is determinable from administrative records. Additionally, settlement administrators interviewed for this study suggested that in some instances, claims-made processes are adopted for tactical reasons even if they are not needed to identify class members or determine their claims. For example, a claims made process may reduce what defendants ultimately pay or increase the per person payment for class members relative to an automatic payment process.[39]

The vast majority of settlements involved cash relief. Some form of cash relief was available in 410 settlements. In addition to these cash settlements, there were 6 settlements that offered only in-kind relief, and 3 that offered only behavioral and in-kind relief.

Figure 3 breaks down the incidence of the class settlements that offer cash relief. From the 410 settlements making cash relief available, we excluded 28 cases in which cash relief consisted solely of a *cy pres* payment or reward payment to the lead plaintiff(s).[40] Figure 3 breaks down the remaining 382 settlements by whether they make any cash available automatically.

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[39] A claims-made process can be used in connection with an agreement to pay out a fixed amount pro rata to those submitting claims so the amount received by each claimant will be inversely proportional to the number of claims.

[40] We exclude these cases because, for class members, they are neither automatic nor claims-made distributions. The 28 cases we excluded also include settlements with a behavioral relief component in addition to the cash relief in the form of *cy pres* or an incentive payment for the lead plaintiff.

FIGURE 3: BREAKDOWN OF SETTLEMENTS INCLUDING CASH RELIEF

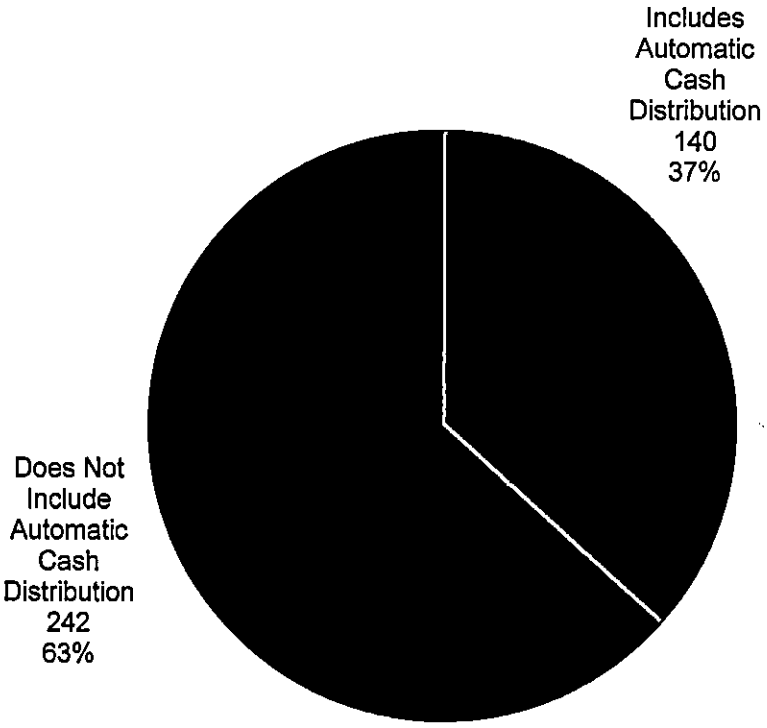

Table 5 below shows the different forms of relief employed by settlements pertaining to different product types and the method of distribution. The counts for the three types of distribution are not meant to be mutually exclusive; any one settlement may employ one, two or all three forms of relief for class members.

TABLE 5: METHOD OF DISTRIBUTION OF RELIEF BY PRODUCT

Product	n =	Cash	Behavioral	In-kind
Auto	18	18	3	3
Checking/Savings	83	83	5	2
Credit Card	30	28	2	2
Credit Reporting	25	20	7	7
Debt Collection	234	234	28	6

Debt settlement	4	4	1	0
Money transfers	1	1	1	0
Mortgage-related	14	13	4	2
Prepaid	2	1	2	1
Privacy/ID	2	2	1	0
Student loan	6	6	2	1
Total	**419**	**410**	**56**	**24**

Cash was the single most common form of relief for class members; it was the primary form in a majority of settlements across all but three product areas. In-kind relief was relatively infrequent though somewhat more prevalent in auto loan and credit card settlements. Behavioral relief was somewhat more common, in aggregate, than in-kind relief.

Class members eligible for claims-made relief

There were 319 million individual class members eligible for claims-made cash or in-kind relief in 208 settlements from 2008 through 2012 in our data set for which eligibility numbers can be ascertained. *TransUnion Privacy Litigation*, previously discussed, accounted for nearly 190 million claims-eligible class members, or nearly all consumers in the United States during the relevant class period who had an open credit account or a credit grantor located in the United States. Excluding this one settlement, claims-made cash or in-kind relief was available to 129 million class members. (Because some consumers may have been class members in more than one instance, it is possible that less than 129 million unique individuals were involved.)

The average number of claims-made damages class members per settlement was approximately 622,000 (excluding the *TransUnion* case), and the median number of claims-made damages class members per settlement was approximately 3,300. The large difference between average and median reflects the significance of the small number of large class actions. Almost all these class members were eligible for claims-made cash relief.

Automatic relief

As set out in Table 6, below, there were 24 million class members who had received or were to receive automatic cash or in-kind distributions in the 133 settlements reporting automatic distribution figures.[41] Almost all these class members were eligible for automatic cash relief.

TABLE 6: REPORTED NUMBER OF AUTOMATIC DAMAGES CLASS MEMBERS BY PRODUCT

Product	n =	Members
Auto	10	17,404
Checking/Savings	11	20,063,100
Credit Card	10	1,130,683
Credit Reporting	9	1,477,140
Debt Collection	89	1,095,575
Debt Settlement	1	1,090
Prepaid	1	2,724
Student Loan	2	122,500
Total	**133**	**23,910,216**

Behavioral relief

Of 53 settlements reporting behavioral relief for which there is also some report of class size information, at least 106 million individual class members were included within the scope of behavioral relief.[42]

[41] In comparison to Figure 3 above, these 133 cases include a handful of settlements with in-kind only automatic distributions, but excludes settlements which did not report the number of class members.

8.3.3 Monetary relief and payments

Since there is no uniform way of referring to different types of recovery in a settlement – no specific terms for what a defendant agrees to pay, what a defendant pays out of pocket, and what is paid to consumers – we define such terms for purposes of our analysis here. We define "relief" as the quantity of recovery – in the form of cash or in-kind relief – that a defendant commits to make available to or for the benefit of a class pursuant to a settlement order. This excludes the value, or cost to the defendant, of making agreed behavioral changes to business practices.

Subject to this exclusion, therefore, "gross relief" refers generally to aggregate amounts promised to be made available to or for the benefit of damages classes as a whole, calculated before any fees or other costs are deducted. "Net relief" deducts from gross relief attorneys' fees and other costs such as settlement administrator fees. "Relief," whether gross or net, represents everything a defendant has agreed to pay (other than the costs associated with carrying out agreed behavioral changes, any "bonus" payments made to class representatives, and any direct settlement administrator costs the defendant assumes without reimbursement from settlement funds), but is not necessarily what the defendant actually pays.

As a result, we define "payment" to refer to the actual amount a defendant has paid or is unconditionally obligated to pay to class members as of the date of the last document available for review. It includes (1) amounts attributable to claims already made; (2) automatic distributions; and (3) amounts that must be paid under pro rata settlements. Here, a "payment" is always net of fees and costs and is not subject to further contingency or claw back by the defendant, with the exception of uncashed checks. The overall payment figure we calculated, therefore, is a floor with respect to the cases for which we have numbers, to the extent it does not account for any of the claims made after final approval orders.

As set out in Table 7, gross relief was $2.7 billion in 419 settlements, which consisted of the following:

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[42] These numbers generally reflect the record on the number of consumers affected by the relevant conduct during the class period. Some of those consumers may no longer have or in the future may cease to have a relationship with the defendant and thus may not be beneficiaries of the behavioral relief. On the other hand, these numbers do not include additional consumers who may in the future have a relationship with the defendant and become direct beneficiaries of the relief. In cases which provided behavioral relief in combination with cash and in-kind relief, all but the latter group (not sized in the number stated in text) would also be included within the number of class members eligible for cash or in-kind relief.

- Cash relief of $2.0 billion (of 410 settlements reporting); and
- In-kind relief of $644 million (of 16 settlements reporting quantifiable in-kind figures).[43]

There were 7 cases in this set reporting both cash and in-kind relief figures. After all settlement and litigation related costs (including attorneys' fees, other litigation costs, and settlement and administrators fees which together totaled $489.2 million or 18% of the gross relief), net relief available to class members was $2.2 billion. These amounts are set out by year, in Table 7 below.

TABLE 7: GROSS AND NET RELIEF TO PLAINTIFFS BY YEAR (IN DOLLARS)

Year	n =	Cash relief	In-kind relief	Total gross relief	Fees + costs	Net Relief
2008	68	121,216,540	620,306,813	741,523,353	41,070,981	700,452,372
2009	95	599,597,668	2,932,525	602,530,193	106,812,523	495,717,670
2010	78	156,162,419	175,000	156,337,419	36,832,704	119,504,715
2011	100	701,872,599	13,559,557	715,432,156	168,034,003	547,398,153
2012	78	471,102,619	7,225,000	478,327,619	136,420,649	341,906,970
Total	**419**	**2,049,951,845**	**644,198,895**	**2,694,150,740**	**489,170,860**	**2,204,979,880**

Table 8 below shows a breakdown by product type. It shows that the largest settlements by cash relief involved checking and savings products, credit cards, and auto loans. The larger overall gross from these three product areas largely corresponds with the higher incidence of settlements in these areas.

The bulk of in-kind relief came from credit reporting (of which $575 million came from a single settlement[44]). Settlements in many product categories – auto loans, checking/savings, and

[43] Of this, nearly $575 million of in-kind relief (in the form of credit monitoring from one of the national credit reporting agencies) was provided by a single multidistrict settlement in *Lockwood v. Certegy Check Services, Inc.* This was the value of services offered to consumers pursuant to requests in a claims-made process.

student loans – had no or practically no in-kind relief offered. Credit reporting included the highest number of settlements reporting in-kind relief, but in that product category, however, more settlements involved cash relief than in-kind relief.

Overall, therefore, the product areas that provided for the most cash and total relief were checking and savings, credit reporting, credit cards, and auto loans. The product areas that provided the smallest aggregate relief were prepaid and money transfers. We found no payday cases within these 419 settlements.

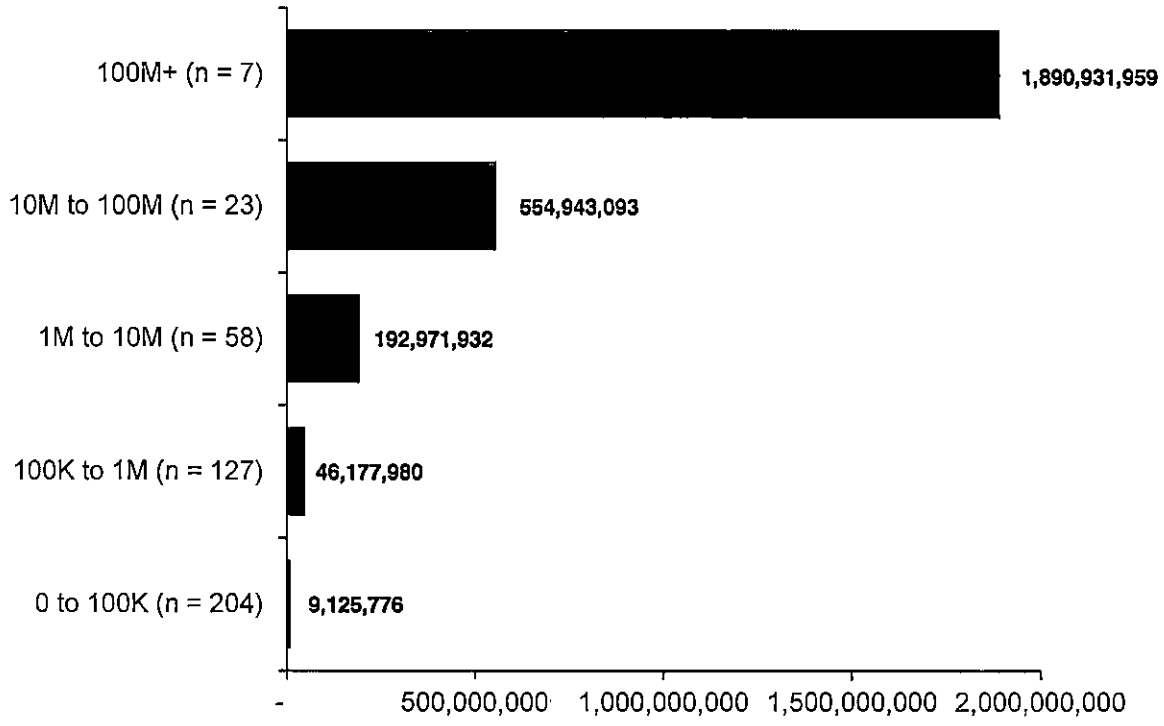
TABLE 8: GROSS RELIEF TO CLASS MEMBERS BY PRODUCT (IN DOLLARS)

Product	n =	Cash relief	n =	In-kind relief	n =	Total relief
Auto	18	202,863,349	0		18	202,863,349
Checking/Savings	83	844,955,851	0		83	844,955,851
Credit Card	28	566,825,830	2	9,225,000	30	576,050,830
Credit Reporting	20	133,537,750	7	628,609,157	25	762,146,907
Debt Collection	234	95,965,067	4	860,525	234	96,825,592
Debt Settlement	4	8,910,031	0		4	8,910,031
Money Transfers	1	5,500,000	0		1	5,500,000
Mortgage-Related	13	26,611,094	2	5,329,213	14	31,940,307
Prepaid	1	484,640	1	175,000	2	659,640
Privacy/ID	2	12,400,000	0		2	12,400,000
Student Loan	6	151,898,233	0		6	151,898,233
Total	**410**	**2,049,951,845**	**16**	**644,198,895**	**419**	**2,694,150,740**

[44] Final Approval Order, *Lockwood v. Certegy Check Services, Inc.*, No. 8:07-cv-01434 (M.D. Fla. Sept. 3, 2008).

As Figure 4 below shows, the bulk of cash and in-kind relief in our data set came from a number of larger settlements. Over 90% of cash and in-kind relief came from settlements exceeding $10 million in total relief.

FIGURE 4: GROSS RELIEF GROUPED BY BANDS OF GROSS RELIEF



Number of Class Members Receiving Payments

Although relief figures (amounts defendants agreed to put up initially) are usually determinable from settlement documents, *payment* information, as we have defined it here, is more difficult to ascertain. Such information in claims-made settlements is – if available at all – often included in final approval orders or settlement administrators' reports, which are not consistently available and are not required to be made public. Further, where administrator's reports are available, they may not contain the final numbers. And even in automatic relief cases, the court records do not always specify the amount of relief or the number of class members receiving such relief.

Given these limitations, our calculation of the number of class members receiving payments and the amount of aggregate payments represents a conservative floor on the value of actual payments in the case for which we have data to make these calculations. Specifically, we include

several categories of information: (1) the value of actual cash claims made where reported; (2) the value of automatic cash distributions; and (3) claims-made floors or minimums defendants committed to in the settlement order (*e.g.*, pro rata cases). We excluded settlements if (1) not even interim claims figures were available for our review and (2) the settlements were not otherwise subject to a floor or minimum (*e.g.*, non-*pro rata* claims-made settlements). Our payment figures also exclude the value of behavioral relief, given that it is not distributed to individual class members. To be conservative, we excluded in-kind payments as well, in part because there are so few pure in-kind settlements.

Of the 208 settlements reporting an estimated number of claims-eligible class members, 129 of these reported an actual number of cash claims made by eligible class members. In these 129 cases, 11 million class members made claims for relief, as shown in Table 9 below as of the date of the last document that was available for review.[45] There were also 24 million recipients of automatic distributions, in 137 settlements reporting such data, as reported above in Table 6. Combined, 236 settlements reported 34 million class members who received, or will receive, a cash payment.

TABLE 9: SUMMARY OF CLAIMS MADE IN SETTLEMENTS BY YEAR

Year	n =	Claims made
2008	20	508,685
2009	36	10,103,601
2010	19	59,944
2011	31	272,153
2012	23	271,893
Total	**129**	**11,216,276**

[45] By way of comparison, in the four class settlements that were discussed in our 2013 Preliminary Results – but that are outside of our data set for this analysis because they were settled after 2012 or in state court – there were 1,255,000 class members entitled to automatic relief, with payments amounting to $29.8 million. *See* 2013 Preliminary Results at 106–10.

Dollar Amount of Payments Received by Class Members

Overall, we estimate a total of $1.1 billion in 251 settlements reporting data on the dollar amount of payments. Of these, 241 settlements ($980 million in payments), involved *only* cash distributions – whether automatic or claims-made.[46] The remaining 10 settlements, or about $114 million in payments, involved a combination of in-kind distributions and cash (but only cash payments are included in this calculation). Figure 5 below shows the distribution of settlements reporting cash payments by the dollar volume of payments.[47]

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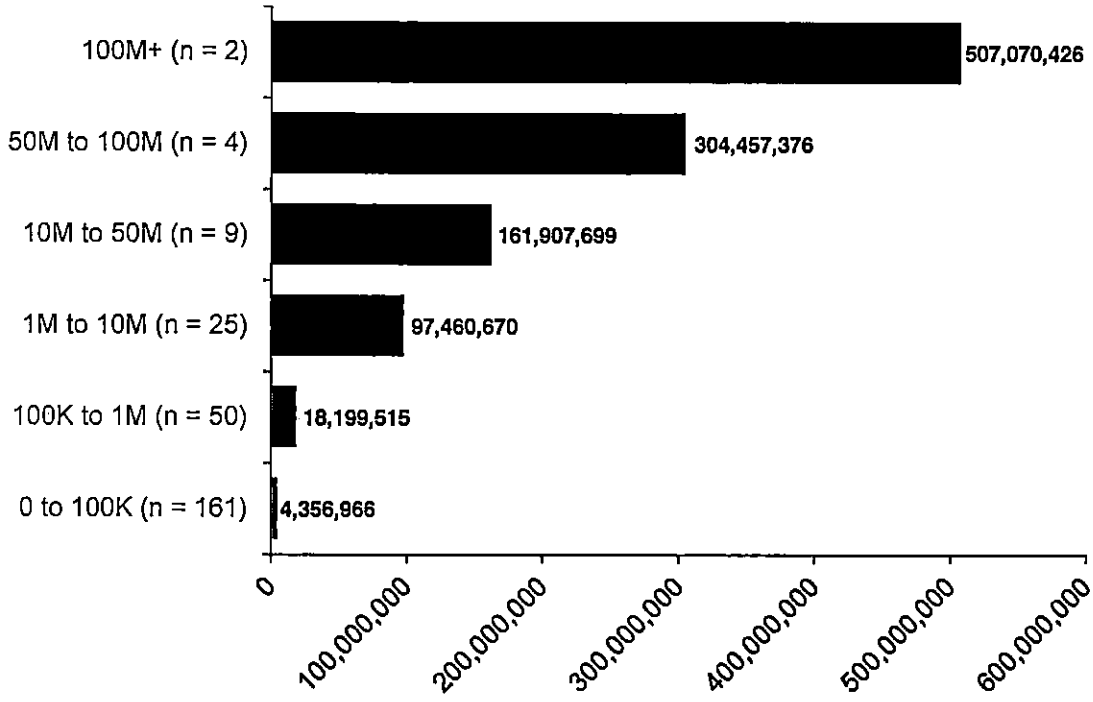
[46] Of these 251 settlements reporting payments, 127 cases ($322 million in payments), were in exclusively claims-made cash distribution cases; 100 cases ($709 million in payments), were in exclusively automatic cash distribution cases, and 24 settlements ($63 million in payments), were in joint automatic and claims-made distribution cases.

[47] The settlements resulting in total payments to class members over $50 million include *In re Currency Conversion Fee Litigation*, Final Approval Order, 1:01-md-01409 (S.D.N.Y. Sept. 17, 2008); *Tornes v. Bank of America, NA (In re Checking Account Overdraft Litig.)*, Order of Final Approval of Settlement, 1:08-cv-23323-JLK (S.D. Fla. Nov. 22, 2011); *Faloney v. Wachovia*, Final Approval Order, 2:07-cv-01455 (E.D. Pa. Jan. 22, 2009); *Holman v. Student Loan Xpress, Inc.*, Final Approval Order, 8:08-cv-00305 (M.D. Fla. Jan. 4, 2011); *In re Chase Bank USA NA Check Loan Contract Litig.*, Final Approval Order and Judgment, 3:09-MD-02032, (N.D. Cal. Nov. 11, 2012); *Lopez v. JPMorgan Chase Bank NA (In re Checking Account Overdraft Litig.)*, Order of Final Approval of Settlement, 1:09-cv-23127-JLK (S.D. Fla. Dec. 19, 2012).

FIGURE 5: TOTAL PAYMENTS BY BANDS OF PAYMENT



8.3.4 Claims rates

Claims rates from settlements

Other studies have not offered comprehensive data on claims rates by claims-eligible class members in consumer financial class action settlements using a claims-made form for distributing relief.[48] The data below, subject to limitations, is the most comprehensive treatment

[48] Professor Fitzpatrick did not present data on claims rates. *See generally* Fitzpatrick, *supra* n.16. Out of its sample of 40 settlements initiated by complaints filed in 2009, Mayer Brown found claims data as to only 6 settlements, none of which it identified as consumer financial cases. *See* Mayer Brown, *supra* n.14, at 7-8 & n.20. Mayer Brown selected an additional 14 settlements, outside of the data range of its sample, identified as "Additional Examples of Settlements With Payments to a Very Small Percentage of Class Members." Of these additional settlements, only one settlement was identified as a consumer financial case, a FCRA case. *See id.* at 13, 22 & n.53.

of claims rates we are aware of specific to consumer financial cases.[49] We supplement this data with qualitative information, based on interviews with settlement administrators.

We were able to calculate an estimated claims rate in 105 settlements because for these cases at least some claims numbers were reported, even if they were preliminary or estimated figures, and an eligible class size also was stated or estimated. Because final claims numbers are not available in many of these cases, however, these calculated claims rates have to be viewed as claims rate floors for these settlements (assuming the class size was not understated in the court files). Final claims rates would increase to the extent that additional claims are filed after the last recorded claims information available for a given case.

For these 105 settlements the *unweighted* average claims rate was 21% and the median was 8%.[50] The *weighted* average claims rate was 4% including the TransUnion settlement, and 11% without *TransUnion*.

Settlement administrator interviews

Because final claims rate data was often incomplete or missing, we supplemented our data with qualitative research—interviews with settlement administrators about their experience with claims processes. Five class action settlement administrators, all of which administer multiple consumer financial cases every year, provided information on claims processes and claims rates. We estimate that these five companies administer slightly over half of the consumer financial class actions settled each year. They reported as follows.

Claims rates. The five administrators each provided a range for claims-made rates in consumer finance cases based upon their experience. Each provided the same estimate for the bottom of the range based on their internal data: 5%. However, there was considerable variance in their upper-end experience, with one administrator stating an upper end of 12% and others an upper

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[49] In general, claims rate data is difficult to acquire from public sources. *See* Mayer Brown, *supra* n.14, at 7. District courts usually issue final approval orders in claims-made settlements long before the period to file claims ends. In some cases, after the entry of the final approval order, the parties submit the settlement administrator's report that often contains final claims rates. In other cases, the parties do not file a report.

[50] We calculate the claims rate based on the estimated class size before opt-outs. However, opt-out rates where known are well under 1% so that excluding opt-outs from the denominator for calculating claims rates would not materially change the estimates.

end as high as 40% or 50% in consumer financial class action settlements, The administrators reported that these claims rates were higher than the overall average for class action settlements they administered, but lower than some other types of class action settlements (*e.g.*, securities, small employment-related classes).

The administrators reported that procedural complexity influenced claims rates. Claims rates fell nearly 90% if documentary proof was required compared to claims rates in settlements where there is no such requirement of proof. A signature-only form increases claims rates by 5-10% compared to other types of forms requiring a class member's response to specific questions or requests. An online process, combined with mail claims, increases rates by 5-10% compared to a mail-only process. Most consumer financial claims forms were simple.

Claims rates by amount. Most administrators felt that the dollar amount that an individual can receive influenced claims rates. One offered data that claims rates rose with claim amounts, plateauing after $500.[51] Others agreed generally that the magnitude of the relief available to an individual claimant affected claims rates. The description of a claim amount (*e.g.*, "you could receive up to $75") also influences claims rates. One administrator cited internal research that, within a reasonable range, claim amounts do not impact claims rates much. The nature and "viscerality" of the claims also mattered.

Recent trends and changes to class actions. Settlement administrators noted recent trends and changes in the structure and administration of class action settlements that may affect claims rates in the future. Judges have been encouraged by the Federal Judicial Center to maximize class member claims,[52] and recent judicial decisions suggest, in the view of settlement

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[51] For example, that firm found that claims rates were 2–6% for $25 claims, 5–10% for $100 claims, and 8–15% for $500 claims.

[52] The Federal Judicial Center, part of the federal court system, researches and publishes on best practices in class actions for counsel and judges. *See, e.g.*, Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (3d Ed. 2010), http://www.fjc.gov/public/pdf.nsf/lookup/ClassGd3.pdf/$file/ClassGd3.pdf (last visited Mar. 6, 2015); Class Action Notices Page, http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/376 (last visited Mar. 6, 2015). The FJC seeks to ensure effective notice and increase the number of eligible class members receiving relief. *See* Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide (2010), http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf (last visited Mar. 6, 2015). It advises judges to "consider whether a claims process is necessary at all" where "defendant [has] the data it needs to automatically pay the claims of at least a portion of class members who do not opt out." Rothstein & Willging, *supra*, at 30.

administrators, increased attention to claims rates. Final approvals have come later in a settlement process, sometimes after the end of the claims period. Further, courts have scrutinized settlements, especially the reasonableness of a claims-made process instead of an automatic one.[53] Where a claims-made procedure is used, the active oversight of the process by judges can improve claims and distribution rates.[54]

8.3.5 Attorneys' fees and other expenses

Below we review metrics for determining the amount of class relief money going to attorneys' fees. We cover attorneys' fees as a percentage of gross cash relief, as a percentage of gross cash and in-kind relief, and as a percentage of cash payments. We do not factor behavioral relief into these calculations because its quantification may be incomplete or missing. For some cases included in these calculations, then, we will have the full numerator (attorneys' fees) but not the full denominator (total relief, including the value of behavioral relief). As a result, the rates expressed in this section will generally overstate attorneys' fees as a share of relief, so these reported rates should be seen as ceilings.

Attorneys' fees as a percentage of gross relief

In Table 10 below, we show again that in our set of 419 settlements, the cash relief available to plaintiffs was $2.0 billion, and the gross cash and in-kind relief made available was $2.7 billion.

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[53] *See, e.g., De Leon v. Bank of Am., N.A. (USA)*, 6:09-CV-1251-ORL-28, 2012 WL 2568142 (M.D. Fla. Apr. 20, 2012) (citing FJC and questioning the necessity of a claims made process for a consumer finance settlement in which the defendant was able to identify all injured class members); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 391 (C.D. Cal. 2007) (observing that credit reporting agency defendants "already maintain all of [the necessary] information" causing the court "to question the necessity of [a] claims-made procedure"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1340–41 (S.D. Fla. 2011) (approving use of an automatic distribution and noting that "[t]he absence of a claims-made process further supports the conclusion that the Settlement is reasonable").

[54] *See, e.g.*, Francis McGovern, *Distribution of Funds in Class Actions—Claims Administration*, 35 J. of Corp. Law 123 (2009). For example, in the foreign currency exchange rate settlement, the number of claims was boosted from 90,000 (0.45% of the class) to 10,115,836 (27% of the class) by redesigning the claims forms and making the claims process simpler. Over 7 million class members in that case filled out a form for just $25, demonstrating that considerable numbers of consumers will claim small-dollar recoveries if the claims process is simple and easy to understand. *Id.* at 128–29. Additionally, one judge has stated that "tying the award of attorneys' fees to claims made by class members is one step that judges can take toward repair[ing]" class actions. *In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 4 (D. Mass. 2008).

The attorneys' fees awarded to counsel in cases reporting both attorneys' fees and cash and/or in-kind relief data was $424 million. That is equal to 21% of cash relief or 16% of gross relief.

TABLE 10: PERCENTAGES OF ATTORNEYS' FEES TO CASH RELIEF AND GROSS RELIEF, BY PRODUCT

Product	n =	Attys Fees	Cash Relief	Attys Fee %	Total Gross Relief	Atty Fee %
Auto	18	9,437,896	202,863,349	5%	202,863,349	5%
Checking/ Savings	83	213,003,911	844,955,851	25%	844,955,851	25%
Credit Card	30	117,372,359	566,825,830	21%	576,050,830	20%
Credit Reporting	25	31,107,537	133,537,750	23%	762,146,907	4%
Debt Collection	234	22,709,015	95,965,067	24%	96,825,592	23%
Debt Settlement	4	3,541,701	8,910,031	40%	8,910,031	40%
Money Transfers	1	1,200,000	5,500,000	22%	5,500,000	22%
Mortgage-Related	14	9,187,814	26,611,094	35%	31,940,307	29%
Prepaid	2	305,000	484,640	63%	659,640	46%
Privacy/ID	2	5,400,000	12,400,000	44%	12,400,000	44%
Student Loan	6	11,230,218	151,898,233	7%	151,898,233	7%
Total	**419**	**424,495,451**	**2,049,951,845**	**21%**	**2,694,150,740**	**16%**

As Table 10 shows more clearly, there were variations by product. The highest attorneys' fee to gross cash and in-kind relief percentages were in prepaid and debt settlement. The lowest attorneys' fee to gross relief percentages were in auto lending, credit reporting, and student loans. Variations in behavioral relief may explain some of the product differences we observed.

Other studies – including Professor Fitzpatrick's – primarily compiled data on a per-settlement basis. This tends to skew the overall average and median figures and figures per product, because attorneys' fees tend to constitute a smaller proportion of gross relief as gross relief increases. Table 11 below shows that, for smaller settlements (less than $100,000 gross relief),

the average attorneys' fee percentage was 56%. For the larger settlements (more than $100 million), the average was 10%. Between these extremes, the general trend was downward: The larger the recovery, the lower the percentage to attorneys' fees. Medians follow the same trend.

TABLE 11: UNWEIGHTED AVERAGE AND MEDIAN ATTORNEYS' FEES VS. TOTAL RELIEF BY SETTLEMENT

Total Gross Relief	n =	Average	Median
0+ to 100K	204	55.9%	57.0%
100K+ to 1M	127	33.7%	39.6%
1M+ to 10M	58	25.7%	33.8%
10M+ to 100M	23	21.0%	18.8%
100M+	7	9.9%	15.4%
Total	**419**	**40.9%**	**45.7%**

Table 12 below shows attorneys' fee rates weighted by class size. Over 90% of individual class members in consumer financial settlements (of the 329 settlements reporting both number of class members and attorneys' fee percentages) are in settlements where the fee rate is under 40%. Indeed, the vast majority of class members are in settlements where the fee rates, even excluding behavioral relief, are less than 20%.

TABLE 12: NUMBER OF CLASS MEMBERS GROUPED BY ATTORNEYS' FEE BAND

Attorneys' Fee Percentage	n =	Class Members	% of Total
0 to 10%	28	228,752,031	65%
10% to 20%	19	52,485,034	15%
20% to 30%	60	36,963,650	11%

30% to 40%	59	3,955,330	1%
40% to 50%	46	15,141,865	4%
50% to 60%	31	5,104,770	1%
60% to 70%	24	66,847	0%
70% to 80%	26	2,205,802	1%
80% to 90%	20	389,542	0%
90% to 100%	16	4,897,443	1%
Total	**329**	**349,962,314**	**100%**

Attorneys' fees as a percentage of cash payments

One potential criticism of using gross relief as a denominator in calculating attorneys' fees is that it may overestimate the actual amount received by the class. Under this view, a fairer measure is a comparison of attorneys' fees to the actual payments made to class members.

Below, we conducted a percentage-of-payments calculation. We calculated attorneys' fees as a percentage of cash payments, as we have defined it here. For these calculations, then, we are excluding not only the value of behavioral relief but also the value of any in-kind relief. Table 13 presents the results by product and overall. These results are not calculated by case, but are weighted by the value of payments.

TABLE 13: ATTORNEYS' FEES AS A PERCENTAGE OF CASH PAYMENTS (IN DOLLARS)

Product	n =	Attorneys' fees	Payments to class	Denominator (payments + attys fees)	Attys fees / (attys fees + payments)
Auto	10	3,425,339	82,595,328	86,020,667	4%
Checking/Savings	39	205,261,797	470,638,729	675,900,526	30%
Credit Card	15	94,372,062	388,795,637	483,167,699	20%
Credit Reporting	12	9,035,337	12,264,050	21,299,387	42%
Debt Collection	164	9,735,788	38,522,642	48,258,430	20%
Debt Settlement	3	3,241,701	4,816,223	8,057,924	40%
Mortgage-Related	3	3,457,425	9,358,887	12,816,312	27%
Prepaid	1	180,000	299,640	479,640	38%
Student Loan	4	9,406,354	86,161,516	95,567,870	10%
Total	**251**	**338,115,803**	**1,093,452,652**	**1,431,568,455**	**24%**

8.3.6 Time to settlement

One metric reported in many studies of class action settlements is the number of days between the filing of a complaint and final settlement approval by the district court. Professor Fitzpatrick's analysis found that for the entire body of federal class action settlements he studied in 2006 to 2007, the average case duration was 1,196 days, and the median case duration was 1,068 days.[55]

[55] *See* Fitzpatrick, *supra* n.16, at 820.

The consumer financial cases in our data set settled somewhat more quickly than settlements overall in Fitzpatrick's earlier and more general data. In our data set, the average was 690 days, and the median was 560 days. There were, of course, variations in the time to settlement.

Settlements involving smaller recoveries tended to settle faster than those involving larger recoveries. Overall, based on different ranges of settlement recoveries, there appeared to be a generally linear relationship between the settlement size and the average and median number of days to settlement as Table 14 shows. In the smallest settlements, less than $100,000, between filing and final settlement, there were an average of 557 days. In the largest recoveries, over $100 million, the average time to settlement was 1,455 days. Medians followed a similar trend.

TABLE 14: DAYS TO SETTLEMENT BY BANDS OF TOTAL RELIEF

Total gross relief	n =	Average	Median
0+ to 100K	204	557	463
100K+ to 1M	127	764	619
1M+ to 10M	58	875	834
10M+ to 100M	23	757	808
100M+	7	1,455	1,056
Total	**419**	**690**	**560**

8.3.7 Motions practice

Overall, as Table 15 below shows, just under half of the settlements in our data set were preceded by a dispositive motion[56] – 191 cases out of 419. The disposition of those motions is set out in Table 16, below.

TABLE 15: INCIDENCE OF SETTLEMENTS BY MOTIONS TO DISMISS AND SUMMARY JUDGMENT FILED

	Motion to Dismiss Filed	Motion to Dismiss Not Filed	Total
Summary Judgment Filed	51	33	84
Summary Judgment Not Filed	107	228	335
Total	158	261	**419**

TABLE 16: DISPOSITION OF MOTIONS TO DISMISS AND/OR SUMMARY JUDGMENT MOTIONS

	MTD and SJ decided	Motion to dismiss only	Summary judgment only	No motions decided	Total
MTD and SJ	34	11	3	3	51
Motion to dismiss only		92		15	107
Summary judgment only			29	4	33
Total	**34**	**103**	**32**	**22**	**191**

[56] Here, and as set out in Section 6.6.1, we define a dispositive motion to mean any motion to dismiss or summary judgment motion that would result in the disposition of one or more claims as to one or more parties; the motion need not seek the dismissal or disposition of the entire action.

There were 107 settlements where at least one motion to dismiss was filed and no summary judgment motions; the motion was decided prior to settlement in 92 of these cases.

There were 33 cases in our set in which a summary judgment motion, but no motion to dismiss, was filed before settlement. Of these, 29 were resolved before settlement.

There were 51 instances in which *both* a motion to dismiss and a summary judgment motion were filed before settlement. In 34 cases, at least one motion to dismiss and one summary judgment motion were decided before settlement. In 14 cases, either one of a motion to dismiss or for summary judgment were decided (but not both). In just 3 cases, no motions were decided.

8.3.8 Case study of the Checking Account Overdraft Litigation

Our data set includes several cases from *In Re Checking Account Overdraft Litigation*, MDL 2036, a class action proceeding that, as explained further below, illustrates the intersection of arbitration clauses and class action litigation and settlements. This MDL action also helps to shed light on the extent to which consumers are able to resolve disputes raised by consumers, at the customer service level, before they become formal legal claims.[57]

The Overdraft MDL consolidated many individual putative class actions against different financial institutions all of which were sued based on the order in which these institutions posted transactions to checking accounts. Plaintiffs in these cases claimed that by posting transactions from highest-to-lowest transaction size the banks caused consumers to pay millions of dollars more in overdraft fees than they would have had the transactions been posted in a more neutral order.

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[57] Some commenters have suggested that this is particularly likely to occur where companies have adopted arbitration clauses and thereby may reduce the number of formal disputes filed. *See, e.g.*, Class Defense Blog, *"Preliminary Results" of the Consumer Financial Protection Bureau's Ongoing Study of Arbitration Reveal Much More Work to Do*, at 1–3 (Dec. 17, 2013). For instance, some have noted that AAA rules require companies to pay at least $1,500 in arbitration filing fees and consumers not more than $200; thus, companies have a strong incentive to settle any non-frivolous consumer dispute of less than approximately $1,500. *Id.* These commenters also contend "bonus provisions" in arbitration agreements—which require companies to pay a specified sum to consumers who receive an arbitration award greater than the company's last settlement offer—give companies a strong incentive to settle non-frivolous consumer disputes of less than the amount of the bonus. *Id.* Our research on the extent of bonus provisions is at page 51 of the 2013 Preliminary Results.

Across the defendants in these cases, there was broad similarity in business practices and the legal claims against the banks, but variety in the contracts between the consumers and the banks and also in their approach to litigation. Some banks did not have arbitration clauses in their checking account agreements with consumers and settled the cases, generally providing both monetary and behavioral relief. Other banks had arbitration clauses in their agreements, moved to compel arbitration, and secured dismissal of federal class actions in favor of individual consumer arbitration. Yet other banks had arbitration provisions in their consumer agreements and nevertheless settled either without invoking the arbitration clause or after invoking the clause with something less than complete success.

The tables below reflect the outcomes in these cases, including some cases that were already in our data in this section and in our litigation data, Section 6.4, and some cases that were not (because they were out of the date range we set for our data). Note that we have limited this analysis to cases consolidated in or transferred to the Overdraft MDL. It does not cover still other overdraft reordering cases that are not within the Overdraft MDL.

Table 17 shows each defendant (several of which resolved multiple cases in the same settlement) that settled. These 18 settlements covered 29 million class members and provided for $1.0 billion in cash relief. Nearly all received automatic cash payments (after deduction of fees). In 10 settlements, 13 million class members were also in the scope of behavioral relief. In two settlements, banks changed their challenged practices prior to settlement such that the settlement itself did not incorporate behavioral relief.

TABLE 17: CLASS SETTLEMENTS IN THE OVERDRAFT REORDERING MULTIDISTRICT LITIGATION[58]

Defendant	Class members	Cash Relief?	Behavioral Relief?	Arbitration Clause?
Associated Bank	197,050	Automatic	Yes	Yes
Bank of America	13,200,000	Automatic	No	Yes[59]
Bank of Oklahoma	270,000	Automatic	No	No
Bank of the West	380,000	Automatic	No	No
Comerica Bank	190,000	Automatic & Claims-Made	No	No
Commerce Bank	393,169	Automatic & Claims-Made	Yes	No
Compass Bank	870,000	Automatic & Claims-Made	No	Yes
Great Western Bank	27,490	Automatic & Claims-Made	Yes	No
Harris Bank	116,132	Automatic	Yes	No
IBERIABANK Corp	50,000	Automatic & Claims-Made	Yes	No

[58] This table excludes a settlement nearly reached in *Given v. M&T Bank Corp.*, Case No. 10-cv-20478-JLK (S.D. Fla.). The hearing for final approval of the settlement was held on March 4, 2015, just before this Report went to press.

[59] Bank of America had an arbitration clause in the applicable deposit account agreement but in 2009 began to issue checking account agreements without an arbitration clause. In the *Tornes* action filed in Dec. 2008, Bank of America moved to stay pending the resolution of the *Closson* matter and to compel individual arbitration (*See* Dkt # 1885 at p.4–5). Once *Tornes* was transferred to the MDL (June 10, 2009) Bank of America did not seek to compel arbitration but listed it as an affirmative defense. (*See* Dkt # 1885 at 9).

JPMorgan Chase Bank	5,000,000	Automatic & Claims-Made	Yes	Yes
M&I Marshall & Ilsley Bank	189,500	Automatic & Claims-Made	Yes	Yes
PNC Bank	2,000,000	Automatic	Yes	No
RBS Citizens/ Citizens Financial Group	2,000,000	Automatic	Yes	No
Susquehanna Bank	60,737	Automatic	No	No
TD Bank	1,006,309	Automatic	No	No
Union Bank	300,000	Automatic	No	Yes
U.S. Bank	2,700,000	Automatic	Yes	Yes
Total	**28,950,387**			

Second, in Table 18 below, we review those cases in which defendants with arbitration provisions moved to compel arbitration and achieved final dismissal of their cases as a result. We note the date that the motion to compel arbitration was granted.

TABLE 18: DEFENDANTS IN OVEDRAFT MDL THAT COMPELLED ARBITRATION AND ULTIMATELY WON

Defendant	Date(s) motion to compel was granted
Huntington National Bank	5/25/2010
Regions Bank	12/21/2012, 3/12/2013
BB&T Bank	8/31/12, 9/5/2012, 3/12/2013
M&T Bank	8/6/2013
SunTrust Bank	12/12/2012

Table 19 below sets out the settlements that involved companies that did not have arbitration provisions, listing the number of class members and the total cash relief, and describing behavioral relief.

TABLE 19: OVERDRAFT DEFENDANTS WITH NO ARBITRATION PROVISIONS THAT SETTLED

Defendant	Class members	Total cash relief	Behavioral relief
Bank of Oklahoma	270,000	$19,000,000	None.
Bank of the West	380,000	$18,000,000	None.
Comerica Bank	190,000	$14,850,000	Already stopped overdraft.
Commerce Bank	393,169	$18,300,000	For at least 2 years agreed to post debit card transactions in chronological order.
Great Western Bank	27,490	$2,200,000	Agreed, for at least two years, to low-to-high or chronology order for transactions, to limit overdraft fees to 5 per day per account, and to refrain from assessing fee unless balance is under -$10.
Harris Bank	116,132	$9,400,000	Agreed to modify posting methodology.
IBERIABANK Corp	50,000	$2,500,000	Agreed to modify posting methodology.
PNC Bank	2,000,000	$90,000,000	Agreed to post transactions in chronological order.
RBS Citizens/ Citizens Financial Group	2,000,000	$137,500,000	Agreed to post debit card transactions in chronological order for at least 3 years.
Susquehanna Bank	60,737	$3,680,000	None.
TD Bank	1,006,309	$62,000,000	None.
Total	**6,493,837**	**$377,430,000**	

Table 20 below sets out the settlements that involved companies that had arbitration provisions but did not file motions to compel arbitration, listing the number of class members and the total cash relief, and describing behavioral relief.

TABLE 20: DEFENDANTS IN OVERDRAFT SETTLEMENTS THAT HAD ARBITRATION PROVISIONS BUT DID NOT COMPEL ARBITRATION

Defendant	Class members	Total cash relief	Behavioral relief
Associated Bank	197,050	$13,000,000	For at least 3 years, agreed to (1) post transactions in chronological order, (2) assess fee on no more than 4 transactions per day, and 3) cap fee at $35 per transaction
Bank of America[60]	13,200,000	$410,000,000	None (already stopped overdraft).
Union Bank	300,000	$35,000,000	None.
Total	**13,697,050**	**$458,000,000**	

Table 21 below sets out the settlements that involved companies that had arbitration provisions and did file motions to compel arbitration, listing the number of class members and the total cash relief, describing behavioral relief, and setting out the status, if any status is clear, of the motion to compel arbitration before settlement.

[60] *See supra* n.66.

TABLE 21: DEFENDANTS IN OVERDRAFT MDL THAT MOVED TO COMPEL ARBITRATION THEN SETTLED

Defendant	Class members	Cash Relief	Behavioral relief	Disposition of Motion to Compel
Compass Bank	870,000	$11,500,000	None.	Motion filed but not resolved before settlement
JPMorgan Chase Bank	5,000,000	$110,000,000	Agreed to modify posting methodology for at least 2 years.	Motion denied, appealed, remanded in light of *Concepcion, and* refiled before settlement.
M&I Marshall & Ilsley Bank	189,500	$4,000,000	Agreed to post transactions in chronological order and limit fees for at least 3 years.	Motion denied and then appealed before settlement.
U.S. Bank	2,700,000	$55,000,000	Agreed to post debit card transactions in chronological order for at least 2 years.	Motions filed, denied, and appealed before settlement.
Total	**8,759,500**	**$180,500,000**		

In almost all of these cases, the finalization of the settlement relief, and of the number of class members, came after specific calculations by an expert witness who took into account the number and amount of fees that had already been reversed and consumers reimbursed presumably as a result of informal dispute resolution.[61] The expert witness used data provided by the banks to calculate the amount of consumer harm on a per-consumer basis; the data

[61] Decl. of Arthur Olsen in Support of Final Approval of Class Action Settlement with Associated Bank, Case No. 1:09-MD-02036-JLK at 7 (Jan. 28, 2013); Decl. of Arthur Olsen in Support of Final Approval of Class Action Settlement with Compass Bank, Case No. 1:09-MD-02036-JLK at 11 (May 16, 2013); Decl. of Arthur Olsen in Support of Final Approval of Class Action Settlement with Harris Bank, N.A., Case No. 1:09-MD-02036-JLK at 11 (May 17, 2013); Decl. of Arthur Olsen in Support of Final Approval of Class Action Settlement with PNC Bank, N.A., Case No. 1:09-MD-02036-JLK at 12 (Mar. 22, 2013); Decl. of Arthur Olsen in Support of Final Approval of Class Action Settlement with U.S. Bank, Case No. 1:09-MD-02036-JLK at 11 (Oct. 23, 2013).

showed, and the calculations reflected informal reversals of overdraft charges.[62] Thereafter, nearly $1 billion in relief was made available to more than 28 million class members in these MDL cases.[63]

[62] *See, e.g.*, Decl. of Arthur Olsen in Support of Final Approval of Class Action Settlement with JPMorgan Chase Bank N.A., Case No. 1:09-MD-02036-JLK at 9 (Oct. 15, 2012).

[63] The expert submitted data in 17 of the 18 settlements. The witness's methodology and results were approved of by the Court in *Gutierrez v. Wells Fargo Bank*, 730 F. Supp. 2d 1080, 1139–40 (N.D. Cal. 2010). The MDL court also rejected several challenges to the expert's methodology. *See, e.g.*, Order Denying Defs. Bancorpsouth Bank and PNC Bank, N.A.'s Mot. to Strike the Decl. of Arthur Olsen, Case No. 1:09-MD-02036 (Apr. 23, 2012); Order Denying Def. Comerica Bank's Mot. to Excl. the Test. of Pl.'s Expert Arthur Olsen, Case No. 1:09-MD-02036 (July 2, 2012). Indeed, the MDL court cited the expert's calculations as part of the basis for approving several of the settlements. *See, e.g.*, Order of Final Approval of Settlement, *Harris v. Associated Bank*, Case No. 1:09-MD-02036 at 19 (Aug. 2, 2013); Order Granting Final Approval of Settlement, *Simmons v. Comerica Bank*, Case No. 1:09-MD-02036 at 16 (Jun. 10, 2014).

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The Class Action Effect (Catherine Piché, ed., Éditions Yvon Blais, Montreal, 2018)

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Do Class Actions Deter Wrongdoing?

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* Professor of Law, Vanderbilt Law School. Many thanks to Ann Lipton, Kip Viscusi, and the participants at the conference "The Class Action Effect" at the University of Montreal for helpful comments on this article. Many thanks as well to Nigel Halliday for invaluable research assistance.

INTRODUCTION

The class action is said to serve three principal purposes: litigation efficiency, compensation of victims, and deterrence of wrongdoing.[1] When the claims at issue in a class action are small, as they usually are in the United States, it is unlikely that any litigation efficiency is gained because there would be no individual litigation at all in the absence of the class action. This leaves us with compensation and deterrence. But the class action is not known for its success at delivering compensation to class members in small-stake cases; sometimes it does it well—and it may get better as technology improves—but, in the run-of-the-mill case, only a small percentage of victims are made whole.[2] None of this has bothered me or many other scholars, because we have always pointed to the deterrence virtue of the class action, arguing that it alone is enough to justify the class device.[3]

In recent years, however, critics have begun arguing that class actions may not even offer any deterrence. This is a change from the usual complaint critics make about class actions and deterrence: that they deter too much.[4] But there they are nonetheless: some argue that the entire theory of deterrence is inapplicable to class actions and others argue that, whatever the theory, there is no empirical proof that class actions do what the theory says.[5]

In this article, I take up these critiques: Is there any reason to doubt the theory of deterrence as applied to class actions? Is it

1. Jay TIDMARSH, *Class Actions: Five Principles to Promote Fairness and Efficiency*, LexisNexis, 2013, §1.03.
2. Brian T. FITZPATRICK and Robert C. GILBERT, "An Empirical Look at Compensation in Consumer Class Actions", (2015) 7 *New York University Review of Law & Business* 771-772 and 778.
3. Brian T. FITZPATRICK, "Do Class Action Lawyers Make Too Little?", (2010) 158 *University of Pennsylvania Law Review* 2067.
4. John C. COFFEE, Jr., *Entrepreneurial Litigation*, Cambridge, MA, Harvard, 2015, p. 134.
5. See text accompanying notes 26, 32, 45-46, *infra*.

true that there is no empirical evidence in favor of the theory? As I will show, the theory of deterrence remains just as strong today as it was when it was introduced 50 years ago by the "classical" law and economics movement. Moreover, although there is not a great deal of empirical evidence to support the theory for class actions, there is some, it is uncontroverted, and it is consistent with reams and reams of empirical evidence in favor of deterrence for individual lawsuits. In short, the conventional view that the class action can be justified by the deterrence rationale alone remains sound.

1. SPECIFIC VERSUS GENERAL DETERRENCE

Let me begin by making an important distinction that is sometimes overlooked in the discussion about class actions and deterrence. There are two types of deterrence, and it is hard to deny that class actions *do* accomplish one of them.

One type of deterrence is known as "specific deterrence." Specific deterrence refers to how an *actual* wrongdoer responds to an *actual* lawsuit against it: does that wrongdoer stop the misbehavior after it gets caught?[6] General deterrence, by contrast, refers to how *potential* wrongdoers respond to a *potential* lawsuit: do potential wrongdoers decide not to commit misconduct to begin with because they are afraid of lawsuits against them?[7]

There is little doubt that class action lawsuits generate specific deterrence. How do we know this? We know this because when class action lawsuits are resolved they often include a court order obligating the defendant to change its behavior. Almost all class actions that are not dismissed are settled, and, when I examined every single one of them in U.S. federal court over a two-year period, I found that, almost one quarter of the time, the settlement included a provision requiring the defendant to change its behavior in some way.[8]

6. See, for example, Sean FARHANG: "specific deterrence refers to the effects of enforcement against a particular violator on *that* violator's future conduct ...", *The Litigation State: Public Regulation and Private Lawsuits in the U.S.*, Princeton, NJ: Princeton University Press, 2010, p. 9.
7. See, for example, FARHANG: "general deterrence refers to effects of visible enforcement efforts in the legal environment on other would-be violators who have yet to actually be the targets of enforcement and hope never to be", *ibid.*
8. See Brian T. FITZPATRICK, "An Empirical Study of Class Action Settlements and Their Fee Awards", (December 2010) 7 4 *Journal of Empirical Legal Studies* 811-846.

In some types of class action lawsuits, I found behavior-modification provisions as often as 75% of the time.[9] But even when there was no behavior modification provision, this does not mean the class action did not cause specific deterrence: sometimes defendants drop offending practices on their own after they get sued.[10]

Some critics complain that the behavior-modification provisions in class action settlements are cosmetic and do not impose real restrictions on corporations.[11] This is a difficult complaint to evaluate without digging into the merits of each and every one of the hundreds of class action settlements that are approved every year. Although I have examined these settlements for my research, I was in no position to assess the merits of each case. But I have served as an expert in dozens of class action cases where I did dig into the merits, with many of these cases having ended in settlements that included behavior-modification provisions, and the provisions in my cases were not toothless.[12] I also know that class action critics have not identified very many toothless provisions when they have had the chance to do so. Of the thousands upon thousands of class action settlements over the past few years, I could find only a small

9. See *ibid.*

10. See, *e.g.*, my declaration found in Exhibit 2 of the Motion for Attorneys' Fees in *Fernandez* v. *Merrill Lynch, Pierce, Fenner & Smith*, No. 15-22782 (S.D. Fla., Nov. 28, 2017), where I noted that the settlement did not include "an injunction obligating the defendant to secure mutual fund fee waivers in the future for class members' accounts ... only because the defendant already transitioned those accounts to a platform that ensures they will not be charged the improper mutual fund fees in the future."

11. See, for example, Erin L. Sheley and Theodore H. Frank's complaint that many injunctions "amount to no more than a rearranging of the deck chairs to create the illusion of value to justify attorney's fees." "Prospective Injunctive Relief and Class Settlements", (April 2012) 39:3 *Harvard Journal of Law and Public Policy* 779-780.

12. For example, in several settlements in class action lawsuits against banks for reordering their customers' debit card transactions from chronological order to an order that maximized the number of overdraft fees the bank could charge them, the settlements included provisions forbidding the banks from reordering their customers' transactions in the future. See *Harris* v. *Associated Bank, N.A.*, Docket No. 10-cv-22948-JLK (S.D. Fla., Aug., 2, 2013); *Wolfgeher* v. *Commerce Bank, N.A.*, Docket No. 10-cv-22017-JLK (S.D. Fla., Aug. 2, 2013); *McKinley* v. *Great Western Bank*, Docket No. 10-cv-22770-JLK (S.D. Fla., Aug. 2, 2013); *Eno* v. *M & I Marshall & Illsley Bank*, Docket No. 10-cv-22730-JLK (S.D. Fla., Aug. 2, 2013); *Blahut* v. *Harris Bank, N.A.*, Docket No. 10-cv-21821-JLK (S.D. Fla., Aug. 5, 2013); *Casayuran et al.* v. *PNC Bank, N.A.*, Docket No. 10-cv-20496-JLK (S.D. Fla., Aug. 5, 2013).

handful alleged to include cosmetic behavior modifications[13]—with one exceptional area of litigation.[14] In my view, critics have thus far not given us much reason to question the efficacy of specific deterrence in class actions.

But I will not discuss specific deterrence further here. In my mind, the more interesting debate in class action circles is about general deterrence.

2. THE THEORY OF GENERAL DETERRENCE

In the very first semester of the very first year in every law school in America, students have been taught for the last 50 years that the threat of a lawsuit deters misbehavior,[15] largely due to theories propounded by the famous "Chicago School" of law and

13. The only list of any sort I could find was an article by Erin Sheley and Ted Frank identifying less than 10 cases outside the merger litigation I discuss below. "Prospective Injunctive Relief and Class Settlements", *supra*, note 11, 779-784.
14. The exception is class action lawsuits brought to challenge corporate mergers. In recent years, the great majority of mergers have faced one or more of these lawsuits and the lawsuits nearly always settle for an order mandating that the companies give more information about the merger to their shareholders. See Sean GRIFFITH and Anthony RICKEY, "Who Collects the Deal Tax, Where, and What Delaware Can Do About It", in *Handbook on Shareholder Litigation*, Jessica ERICKSON *et al.* (eds.), Edward Elgar, forthcoming. Scholars have shown these ordered disclosures to be meaningless to shareholders. See Jill E. FISCH, Sean J. GRIFFITH and Steven DAVIDOFF SOLOMON, "Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform", (2015) 93 *Texas Law Review* 557-558. I agree these settlements should be rejected, and that is precisely what courts have started doing now that it has become known how meaningless these orders are to the class. See Sean J. GRIFFITH, "Private Ordering Post-*Trulia*: Why No Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't", in *The Corporate Contract in Changing Times*, Steven DAVIDOFF SOLOMON and Randall THOMAS (eds.), University of Chicago Press, forthcoming. Although these settlements have indeed been numerous in recent years, they are a very special—and very narrow—slice of our class action system. They are not a basis to conclude that most or even many behavior-modification orders are cosmetic.
15. Scholars have identified this fact as a key part of the justification for private enforcement. As John C. Coffee writes: "The conventional theory of the private attorney general stresses that the role of private litigation is not simply to secure compensation for victims, but is at least equally to generate deterrence, principally by multiplying the total resources committed to the detection and prosecution of the prohibiting behavior." "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working", (1983) 42 *Maryland Law Review* 218.

economics.[16] By now, most of us in the academy accept the theory of general deterrence without question.

It is easy to see why the theory is so powerful. All we have to do is assume people are rational. A rational person does not want to get sued. Lawsuits cost money. You have to pay lawyers, and, if you lose, you have to pay the plaintiff. This means that lawsuits are a great way to stop people from misbehaving when we don't want them to: all you have to do is set the damages awarded in a lawsuit equal to an amount related to the harm the misbehavior inflicts on the injured party.[17] If the misbehavior benefits the corporation less than the harm it inflicts on others, then the corporation will rationally choose not to engage in the misconduct. Indeed, the only time the corporation will rationally choose to engage in the misconduct is when the benefits outweigh the harm, but that's ok: we want people to do things that generate more benefits than costs if we can make the injured party whole in the process. This is what we call "internalization of costs."[18] The rational-actor model of cost internalization is at the core of "classical" law and economics.[19]

It is true that lawsuits are not the only way we can deter misbehavior. Relying on word of mouth in the marketplace can also be effective. If a company mistreats its customers, employees, or shareholders, then the customers, employees, and shareholders can tell

16. A description of the Chicago School's economic theory of deterrence can be found in William M. LANDES and Richard A. POSNER's landmark article "The Private Enforcement of Law", (January 1975) 4:1 *Journal of Legal Studies* 1-46. For a discussion of how the theory of general deterrence became a central part of modern law, one need only turn to a commonly assigned first-year torts textbook. See John C.P. GOLDBERG, Anthony J. SEBOK, and Benjamin C. ZIPURSKY, *Tort Law: Responsibilities and Redress*, New York, Wolters Kluwer, 2016, p. 211.
17. Gary S. BECKER first set forth a criminal law version of the theory in "Crime and Punishment: An Economic Approach", (March–April 1968) 76:2 *Journal of Political Economy* 169-217. But the theory has been applied many times over to civil liability, such as by LANDES in "Optimal Sanctions for Antitrust Violations Antitrust Damage Reform", (1995) 50 *University of Chicago Law Review* 657. There is debate over how exactly to set the relationship between damages and harm, see Amanda ROSE, "Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5", 108 (2008) *Columbia Law Review* 1328-1330.
18. See, *e.g.*, POSNER, "A Theory of Negligence", (1972) 1:1 *Journal of Legal Studies* 29-96.
19. See, *e.g.*, Claire FINKELSTEIN, "Legal Theory and the Rational Actor", in *The Oxford Handbook of Rationality*, Alfred R. MELE *et al.* (ed.), Oxford Oxford University Press, 2004, p. 399.

others to go elsewhere. But it should be noted that lawsuits *enhance* market feedback loops: lawsuits publicize wrongdoing to consumers, employees, and shareholders in a way that word of mouth does not on its own.[20]

Many scholars today do not fully accept classical law and economics because they think the underlying model of human behavior is inaccurate: people, it turns out, are not very rational.[21] There are

20. As Russell M. Gold explains, "litigation can and frequently does inflict nonlegal harms on defendants such as harm to their reputation" because "legal process draws attention to and is seen to substantiate allegations." "Compensation's Role in Deterrence", (1997) 91 *Notre Dame Law Review* 2007-2023. Indeed, a number of empirical studies have found that this risk of reputational harm from litigation is a more effective deterrent than the monetary penalties companies face from losing lawsuits. See Brent Fisse and John Braithwaite's case studies of major corporate scandals in the 1960s and 1970s, *The Impact of Publicity on Corporate Offenders*, Albany, NY, State University of New York Press, 1983, p. 243. See also Jonathan M. Karpoff and John R. Lott, Jr.'s research indicating that from 1978-1987, 93.5% of companies' stock price declines after initial press reports of alleged corporate fraud were attributable to reputational loss and only 6.5% was attributable to formal legal penalties. "The Reputational Penalty Firms Bear from Committing Criminal Fraud", (October 1993) 36:2 *Journal of Law and Economics* 784. Similarly, John D. Graham writes that "the indirect effect of liability on consumer demand—operating through adverse publicity ... is often the most significant contribution of liability to safety." "Product Liability and Motor Vehicle Safety", in *The Liability Maze: The Impact of Liability Law on Safety and Innovation*, Peter W. HUBER and Robert E. LITAN (ed.), Washington D.C., Brookings Institution, 2010, p. 181-182. Joni Hersch's research has found that the average drop in the equity value of a firm the day an employment discrimination class action is announced is triple the direct costs of settling the case. "Equal Employment Opportunity Law and Firm Profitability", (1991) 26:1 *Journal of Human Resources* 152. See also Jonathan M. Karpoff, D. Scott Lee and Gerald S. Martin's research indicating securities enforcement proceedings generate reputational losses seven and a half times larger than the legal penalties produced by the same proceedings. "The Cost to Firms of Cooking the Books", (September 2008) 43 *Journal of Financial and Quantitative Analysis* 581-612. See also KOKU, "An analysis and the effects of class-action lawsuits", (2006) 59 *Journal of Business Research* 508 (finding that stock-price "reactions to the announcement of class-action lawsuits are larger in magnitude" than non-class-action lawsuits).

21. As Nobel Prize winning economists Daniel Kahneman and Amos Tversky write: "In making predictions and judgments under uncertainty, people do not appear to follow the calculus of chance or the statistical theory of prediction. Instead, they rely on a limited number of heuristics which sometimes yield reasonable judgments and sometimes lead to severe and systematic errors." "On the Psychology of Prediction", (1972) 8:4 *Psychological Review* 237. See also KAHNEMAN and TVERSKY, "Prospect Theory: An Analysis of Decision Under Risk", (1979) 47:2 *Econometrica*.

now countless studies[22] and even popular books[23] showing how all of us make the same types of mistakes over and over again when we try to process information; we do not simply add up the costs and compare them to the benefits before we act. These so-called "behavioral" economists seek to update the classical rational-actor model with findings from these studies.[24] The behavioral findings are admittedly powerful, but none of them suggest that the usual defendants in class actions—corporations—are predictably irrational in the same way the rest of us are.[25]

So why do critics think that the theory of general-deterrence-through-lawsuits is wrong when the lawsuits are class action lawsuits? There are two reasons.

22. For a sense of the scope of this field, in July 2017, Google Scholar counted approximately forty-five thousand academic citations to Kahneman and Tversky's 1979 article on prospect theory alone.
23. See Dan ARIELY, *Predictably Irrational: The Hidden Forces that Shape our Decisions*, HarperCollins, 2008; Daniel KAHNEMAN, *Thinking Fast and Slow*, Farrar, Straus and Giroux, 2011; Richard H. THALER and Cass R. SUNSTEIN, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, Yale University Press, 2008.
24. See Justin FOX, "From 'Economic Man' to Behavioral Economics", (May 2015) *Harvard Business Review* 79-85.
25. Stefano DellaVigna explains why this is: "Unlike individual consumers, firms can specialize, hire consultants, and obtain feedback from large data sets and capital markets. Firms are also subject to competition. Compared to consumers, therefore, firms are less likely to be affected by biases ... and we expect them to be close to profit maximization." "Psychology and Economics: Evidence from the Field", (June 2009) 47:2 *Journal of Economic Literature* 361. It is true that there has been some research that indicates that firms are sometimes not perfectly rational actors. See Ulrike MALMENDIER and Geoffrey TATE, "CEO Overconfidence and Corporate Investment", (2005) 60:6 *Journal of Finance*. However, there are three good reasons to think that firms behave more rationally than individuals. First, firm decision making tends to be done by groups, and group decision making tends to be more rational than individual decision making. See Tamar KUGLER *et al.*, "Are Groups more Rational than Individuals? A Review of Interactive Decision Making in Groups", (2012) 3:4 *Wiley Interdisciplinary Review: Cognitive Science* 425. Second, much of the literature identifying irrational corporate behavior does so by finding circumstances in which certain firms deviate from the rational behavior of other firms—suggesting the default is rational behavior, punctuated by occasional failures. See Malmendier and Tate, above. Third, and perhaps most importantly, research indicates firms are consistent about pursuing their rational self-interest, unlike individuals who are often more concerned with non-rational considerations. Phanish PURANAM *et al.*, "Modelling Bounded Rationality in Organizations: Progress and Prospects", (2015) 9 *Academy of Management Annals* 392.

The first reason is "principal-agent costs": the corporations (and, ultimately, the shareholders) pay the bills, but the corporate executives make the decisions, and sometimes the twain shall not meet.[26] But this is a problem only if corporations do not try very hard to align the interests of corporate officers and the corporation. Much of the concern with principal-agent costs comes from the fact that corporate officers may have left the corporation by the time the bills for their decisions come due.[27] But companies can delay or rescind their compensation in such circumstances to equalize the corporate and officer time horizons, for example with vesting stock options.[28] Indeed, most companies already do this.[29] In theory, almost any agency problem can be solved with a well-designed contract.[30]

Indeed, one sign that principal-agent costs are weak reasons to doubt the theory of deterrence for class actions is what the implications are *beyond* class actions. The exact same principal-agent problems that critics say make corporate executives unresponsive to class action lawsuits would make them unresponsive to every

26. This is an especially popular critique in the securities fraud literature. As Coffee explains, "the efficacy of deterrence ... rests on the validity of enterprise liability: that is, on the claim that by imposing large penalties on the corporation, society induces increased monitoring of the corporate officials..." "Reforming the Security Class Action", (November 2006) 106 *Columbia Law Review* 1553. Coffee argues, however, that "securities litigation is distinctive [because corporate managers have] stock options. [As such,] enterprise liability may work less well than a strategy that focuses directly on the managers themselves." "Reforming the Security Class Action", 1562-1563.
27. See, for example, Daniel A. Crane's analysis: "[T]he average CEO holds her job for about six years. Mid-level executives, such as divisional managers, typically hold their jobs for an even shorter period, perhaps less than four years. Thus, most of the executives responsible for an antitrust violation will no longer be with the firm by the time a damages award is entered against the company." "Optimizing Private Antitrust Enforcement", (April 2010) *Vanderbilt Law Review* 677, 693.
28. Coffee's analysis is helpful here as well. "[E]conomic theory suggests that vicarious liability is efficient so long as the principal and agent can enter into contracts that reduce the probability of the wrong that is to be deterred. Even given the 'final period' problem, there are conceivable means by which the corporation could write such contracts with its managers, for example, by restricting stock options and other incentive compensation." *Supra*, note 26, 1565.
29. As many as 90% of major publicly traded American companies have compensation recoupment policies—often termed "clawback" policies—that permit them to recover bonuses and other performance incentives under certain circumstances. PriceWaterhouseCoopers, "Executive Compensation: Clawbacks 2014 Proxy Disclosure Study", January 2015.
30. See Posner's conclusion that "[a] corporation has effective methods of preventing its employees from committing acts that impose huge liabilities on it." *Antitrust Law*, 2nd ed., Chicago, University of Chicago Press, 2011, p. 271.

other type of lawsuit as well; are critics saying the *entire* theory of general deterrence is wrong? Indeed, not only does this criticism suggest that the theory of deterrence is wrong, it also suggests that the theory of market feedback loops is wrong as well. If we cannot make corporate executives respond to the threat of lawsuits, then why would we think we can make them respond to the threat of consumer, employee, or shareholder boycotts?[31] That is, if class action lawsuits can't deter corporate misconduct because of agency costs, then nothing else that costs the corporation money can either. Thus, if we contend that class action lawsuits are failures, then we have to admit that other lawsuits and the market feedback loops are, too. But no one wants to admit all that.

This brings me to the second reason some critics say class actions don't generate deterrence: corporations cannot avoid the misconduct that leads to class actions because corporations cannot predict which of their activities will lead to class actions.[32] Class actions, they say, target behavior at random; no corporate executive can guess why he will be sued. But, if you can't predict beforehand why you will be sued, then you can't change your behavior to avoid the lawsuit.

There is no doubt that there is uncertainty in our system of justice. Some of this uncertainty is a good thing: we don't want rigid rules in place that box companies in and prevent them from innovating; we'd rather let companies do what they want to do and make

31. Robert H. Land and Joshua P. Davis highlight this inconsistency: "[T]here is an odd—and usually unexplained—inconsistency when proponents of the free market claim that corporations should not be subject to civil liability ... : if the free market works in the sense that corporations respond in an efficient manner to market incentives, including by encouraging corporate representatives to act for the benefit of the corporation, why shouldn't the same be true of legal sanctions?" "Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws", (2011) 2 *Brigham Young University Law Review* 316.

32. For example, Walter K. Olson complains that litigation has become "essentially a random matter", *The Litigation Explosion: What Happened When America Unleashed the Lawsuit*, New York, Talley, 1992, p. 176–77. Similarly, the U.S. Chamber of Commerce has claimed: "[t]he class action ... does not impose burdens only on businesses that engage in wrongful conduct. Instead, the burdens of class actions are chiefly a function of who plaintiffs' lawyers choose to sue..." Letter to Consumer Financial Protection Bureau 53 (December 11, 2013), available online: <http://blogs.reuters.com/alison-frankel/files/2013/12/mayerbrown-chamberletter.pdf>. See also E. Donald Elliott's argument that tort law may not be predictable enough to shape how activities are undertaken; only how often they are undertaken. "Why Punitive Damages Don't Deter Corporate Misconduct Effectively", (1989) 40 *Alabama Law Review* 1058.

them pay the costs later if they harm people. Uncertainty means flexibility.

But uncertainty also means that it is sometimes hard to predict what will happen when a company does something new. But hard to predict does not mean impossible. If there is a 50-50 chance a company might lose a lawsuit, then the corporate executives do not just throw up their hands and say "we don't know what will happen so let's not worry about it." They do what any other rational person would do: they discount the amount of money they would pay out if they lose the lawsuit by the 50% chance they might *not* lose the lawsuit.

But this assumes the company knows it might be sued to begin with. What if it is impossible for the company to know which of its business decisions might get it into trouble? Is it supposed to assume every decision might lead to a lawsuit? How does the company figure out what the damages would be in the lawsuit if it can't even figure out what it might be sued for to begin with?

These are all hard questions, but corporations long ago found a solution to them: they hire lawyers. Yes, they hire dozens or even hundreds of them, pay them big salaries, and ask them to do something called "risk assessment." I am most familiar with risk assessment departments in the automotive industry because one of my colleagues, Kip Viscusi, has chronicled them in great detail,[33] but every other industry does the same sort of thing in one way or another with their in-house legal departments.[34] And it is not only in-house lawyers that do this: companies rely on outside counsel to do it as well. For example, my old law firm sent around this apropos missive not so long ago: "Mitigating Consumer Fraud Class Action Litigation Risk: Top Ten Methods for 2015."[35]

33. Viscusi comprehensively outlines extensive and pervasive safety design risk analyses done at Ford, Chrysler, and GM in "Pricing Lives for Corporate Risk Decisions", (2015) 68:4 *Vanderbilt Law Review* 1117. See also Graham's claim that "[a]ccording to one large vehicle manufacturer, in 1960 the typical in-house liability spent 5 percent of his time working with design engineers. Today such an attorney spends 40 to 50 percent..." *The Liability Maze: The Impact of Liability Law on Safety and Innovation*, *supra*, note 20, p. 126.
34. As Richard Marcus notes, "articles about the importance corporations place on compliance are rife in the professional literature." "Revolution v. Evolution in Class Action Reform", (preprint, submitted April 2017) *North Carolina Law Review*.
35. See Sidley Austin LLP, email to clients, "Mitigating Consumer Fraud Class Action Litigation Risk: Top Ten Methods for 2015" (January 5, 2015).

Of course, all these lawyers are expensive, and it may be that deterrence through litigation comes with greater transaction costs than deterrence through other means. Moreover, I will admit that sometimes even all these lawyers are completely hopeless at seeing what the future might hold. In some physical injury cases where the harm caused by a company's products does not manifest itself for decades after the company sold the product, I admit that it may be impossible for a company to anticipate that it might be sued.[36] Who knows what law and even science will look like 20 years from now? On the other hand, there are almost no class action lawsuits of this sort anymore; physical injury cases must be brought individually today.[37] Thus, to the extent the 20-years-later problem is a problem, it is not a problem with our class action system.

But you do not have to take my word that corporations can anticipate class action lawsuits. A legal scholar at Suffolk Law School, Linda Simard asked the corporate executives directly.[38] She sent a questionnaire to the general counsel at every company in the Fortune 500,[39] asking them about the class action lawsuits they had faced, and whether they had any ability to predict the lawsuits at the time their corporations made the business decisions giving rise to the class actions.[40] They responded that their ability to predict the class actions they had faced varied based on what kind of lawsuits they were. For some class actions, over 90% of the time they said they had "moderate" or "high" ability to predict that they would be sued.[41] But even for the wiliest class actions of all—those resting on a completely "novel" legal theory—still 25% of the corporate lawyers said

36. Viscusi makes precisely this argument, positing that, in some cases, constant changes in the law and the lag between when a product is manufactured and when a company may face liability mean that "the tort liability system cannot create effective risk reduction incentives for producers." *Reforming Products Liability*, Cambridge, MA, Harvard University Press, 1991, p. 158.
37. See, for example, Robert Klonoff's findings: "A few courts have been willing to certify personal injury class actions for settlement purposes. Examples include the National Football League concussion litigation and the *Deepwater Horizon* case. For the most part, however, personal injury mass torts continue to be adjudicated outside of the class action arena." "Class Actions in the Year 2026: A Prognosis", (2011) 6 *Emory Law Journal* 1600.
38. See Linda Sandstrom SIMARD, "A View From Within the Fortune 500: an Empirical Study of Negative Value Class Actions and Deterrence", (2014) 47:3 *Indiana Law Review* 739.
39. See *ibid.*, 750.
40. See *ibid.*, 757-761.
41. See *ibid.*, 760.

they had a "moderate" or "high" ability to predict they were coming.[42] Our system is hardly random if even the *new* legal theories can be anticipated 25% of the time. Professor Simard is not the only person corporate lawyers have told such things to.[43]

Of course, this survey also shows that even though some corporate lawyers knew they might be sued in a class action lawsuit, their companies did not always decide to refrain from the behavior; they sometimes went ahead and harmed people anyway. You might be asking yourself: how are class actions deterring anything if corporations are committing misconduct even when they know they might be sued? One answer is that even if the deterrence is imperfect (*e.g.*, maybe damages are set too low by the substantive law), it is better than nothing. But another answer goes back to the cost-benefit analysis I described earlier: we do not always want to stop corporations from harming people because sometimes the benefits to society outweigh the harms. What we do want, however, is for corporations to know they will pay for the harms before they decide to act so they only act when the benefits outweigh the harms. Class actions help corporations know that.

We law professors have not been misleading our students for the past 50 years: the theory of general deterrence is sound. We still

42. See *ibid.*, 757.

43. George C. Eads and Peter H. Reuter interviewed corporate product safety officials and found "[o]f all the various external social pressures, products liability [lawsuits] ha[ve] the greatest influence on product design decisions," and also found that corporations deal with the uncertainty of liability by "monitoring the development of the law in many jurisdictions." *Designing Safer Products: Corporate Responses to Product Liability Law and Regulation*, Santa Monica, CA, RAND Corporation, 1983, pp. vii–ix. Similarly, when Andrew Popper conducted a survey of in-house counsel at Fortune 500 businesses, "73% [of respondents] agreed that a tort judgment against a company in the same line of commerce would prompt their company to 'examine methods of production ... and, if needed, quietly take steps to make sure our products are in compliance...'" "In Defense of Deterrence", (2012) 75:1 *Albany Law Review* 197. E. Patrick McGuire's survey of 500 CEOs found similar results; lawsuits caused 35% of the surveyed CEOs to improve safety, 47% to improve warnings, 36% to close companies or discontinue products, 15% to lay off workers, and 8% to close plants. *The Impact of Product Liability*, New York, Conference Board Research Reports, 1988. Small business owners also report that fear of litigation has caused them to change their business practices; E. Christopher J. S. Hodges's survey of small businesses found that 26% said fear of liability kept them from releasing new products or services. *Law and Corporate Behavior: Integrating Theories of Regulation, Enforcement, Compliance and Ethics*,Portland, OR, Hart Publishing, 2015, p. 79.

have every reason to think that lawsuits—including class action lawsuits—deter corporate misconduct.

3. THE DATA ON GENERAL DETERRENCE

Thus far, my defense of general deterrence has been theoretical. It is a strong theory, as even many class action critics admit[44]—this, again, is why every law school teaches it to every incoming class of students every single year—but it is still a theory. Naturally, the critics of class actions have picked up on this fact. Thus, the last argument critics raise about deterrence is this one: the theory may be good, but you have no evidence that it actually works in practice.[45] Until we have some evidence, they suggest, we cannot assume class actions generate any deterrence. As Professor Linda Mullenix at the University of Texas puts it:

> [T]he deterrence theory suffers from a lack of empirical evidence and is based on conjectured hypotheses about corporate behavior ... [S]ocial scientists have not been able to empirically measure ... the deterrent effect of class litigation ... Thus, judicial and scholarly arguments relating to the deterrent effect of class litigation are largely theoretical, conclusory pronouncements.[46]

This criticism is a bit unfair. We have a strong theory that class action lawsuits generate deterrence. The critics do not have a strong theory that they do not. If anyone should have the burden of coming up with some evidence, it should be the people without a theory, not the people with a theory.

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44. As Sheley and Frank concede, "it seems intuitive that the prospect of litigation might deter potential defendants from misconduct." "Prospective Injunctive Relief and Class Settlements", *supra*, note 11, 827.
45. See, for example, Michael S. Greve's claim: "we have strikingly little evidence that torts acts as a deterrent..." *Harm-Less Lawsuits?: What's Wrong With Consumer Class Actions*, Washington D.C., AEI Press, 2005, p. 16. Hodges expands on this line of argument: "There is almost no direct evidence on the actual effect of private enforcement of law, or on how litigation actually affects corporate decisions. The basic assumption is that since economic theory postulates that the imposition of a financial penalty will deter later wrongdoing, it must be so." *Law and Corporate Behavior*, *supra*, note 43, p. 67. Popper notes this line of argument in his study as well, writing that "the deniers believe there is insufficient empirical evidence to prove the power of deterrence..." "In Defense of Deterrence", *supra*, note 43, 195.
46. Linda S. MULLENIX, "Ending Class Actions as We Know Them: Rethinking the American Class Action", (2014) 64 *Emory Law Journal* 23.

But, in fact, there is indeed evidence that general deterrence works. There now are several studies of the theory. They span different time periods and involve different types of class actions, and, with one exception, they all say the same thing: class actions deter misconduct.

These are just the class action studies. There are far more studies showing that other types of lawsuits deter misconduct. These other studies are not as uncontroverted as the class action studies, but there are many, many more studies finding that lawsuits generate deterrence than finding that they don't. These other studies are important because, as I noted above, some of the arguments critics raise about the theory of deterrence are not specific to class action lawsuits: if the evidence shows corporate executives respond to the threat of individual lawsuits, then there is reason to think they respond to the threat of class action lawsuits, too. I will discuss these other studies after I discuss the class action studies:

But before I do, one note about these studies: many of them do not measure misconduct directly. That is because it is often impossible to measure misconduct directly. For example, it is impossible to observe whether companies are secretly conspiring with one another to fix prices—they do it in secret. Thus, most of the studies below measure deterrence by looking at proxies for misconduct rather than misconduct itself—for example, for price fixing, the studies look at whether prices go up or down. It's not perfect, but it is the best science can do right now. That is, that the best science can do suggests that lawsuits deter misconduct.

In 1981, several economists set out to examine whether increasing the threat of an antitrust enforcement action by the federal government deterred companies from price fixing.[47] The economists examined the white bread industry. They looked at the "markup" (the price above the price of the ingredients) on a loaf of white bread in various places in the United States between 1965 and 1976; the markup was their proxy for potential price fixing.[48] They compared these markups to the enforcement budget of the U.S. Department of Justice's Antitrust Division over time. They hypothesized that

47. See Michael Kent BLOCK, Fredrick Carl NOLD, and Joseph Gregory SIDAK, "The Deterrent Effect of Antitrust Enforcement", (June 1981) 89:3 *Journal of Political Economy* 429.
48. See *ibid.*, 437.

the more money the federal government devoted to enforcement, the greater the threat of an enforcement action against price fixers; thus, if federal enforcement deterred price fixing, the markups would be smaller when the federal government's enforcement budget was bigger.[49]

That's not what they found. The federal government's enforcement budget had no effect on price markups until 1972; only then did a bigger budget lead to lower prices.[50] Why? The economists concluded that only after 1972 did companies face the threat of private antitrust class action lawsuits (only in 1966 was the modern money damages class action created) and *it was the private lawsuits that the companies were afraid of!*[51] They found that "settlements in class actions for price fixing in the bread industry were almost 10 times greater than government-imposed fines," and that "the deterrent effect of DOJ's enforcement efforts came not from the threat of publicly imposed fines or imprisonment, but from the likelihood of an award of private treble damages..."[52] In other words: "class actions represent the effective penalty in price-fixing cases."[53]

There have been several more recent studies, all of them concerning securities fraud class actions or their close cousins corporate derivate lawsuits, and, with one exception, all of them likewise finding that, the greater the threat of a class action lawsuit, the less corporate misconduct.

Two of these studies examined what happened when a U.S. Supreme Court decision in 2010 insulated some foreign companies from American securities fraud class action lawsuits. The securities fraud laws make it illegal for companies to misrepresent or hide relevant information from shareholders. When the threat of class

49. As Block, Nold and Sidak write, "[o]ur theoretical model suggests that increases in enforcement levels or penalties for price fixing generally reduce collusive markups." (*Ibid.*, 434).
50. See *ibid.*, 443. It should be noted that another economist found the DOJ's budget had a weaker deterrent effect when other variables were included in the analysis, but this study did not challenge the original findings regarding the class-action effect. See Craig M. NEWMARK, "Is Antitrust Enforcement Effective?", (1988) 96:6 *Journal of Political Economy* 1315.
51. Block, Nold and Sidak write that "only in the latter period, when class actions represented a credible threat, did a significant deterrent effect result..." *Supra*, note 47, 443.
52. *Ibid.*, 440–41.
53. *Ibid.*, 443.

action lawsuits went away, did the companies disclose less information to their shareholders than they had before? Both studies found that the answer was a resounding "yes": the threat of a class action lawsuit had induced the companies to be more forthcoming to their shareholders.[54]

A third study examined disclosures to shareholders over a larger set of companies and over a longer time period, 1996 to 2010.[55] The authors attempted to compare disclosure made by companies at a higher risk of facing securities fraud class actions to those at a lower risk; the authors identified which companies faced higher risks with a model that depended on the size of the company, the company's industry (e.g, was it a software company or a biotechnology company), and a host of other variables.[56] They found that companies at higher risk of being sued disclosed more information to shareholders, updated their disclosures more often, and rendered those disclosures in more readable language than companies at lower risk![57] They also examined whether this "disclosure gap" narrowed after 2005 when the Securities and Exchange Commission started requiring all companies—whether they were at high or low risk of being sued—to disclose all the same information on the forms they file every year with the federal government.[58] The authors found that the gap did indeed narrow when the companies no longer had any choice but to make the disclosures.[59] This means that, when the companies did have a choice, it was the threat of a securities fraud class action that made them do it.

A fourth study looked at what influenced corporate decisions to misrepresent their earnings to shareholders in the years 1997

54. See James P. NAUGHTON *et al.*, "Private Litigation Costs and Voluntary Disclosure: Evidence from the Morrison Ruling" (Working paper, last updated February 2017), online: <https://ssrn.com/abstract=2432371>. See also Anywhere SIKOCHI, "The Effect of Shareholder Litigation Risk on the Information Environment" (Working paper, Harvard Business School, last updated September 4, 2016), online: <http://www.hbs.edu/faculty/Publication%20Files/17-048_413e9658-649c-4904-8d49-6779f11910ac.pdf>.
55. Karen K. NELSON and A.C. PRITCHARD, "Carrot or Stick? The Shift from Vocabulary to Mandatory Disclosure of Risk Factors", (2016) 13:2 *Journal of Empirical Legal Studies* 266.
56. See *ibid.*, online appendices A, B and C: <http://onlinelibrary.wiley.com/store/10.1111/jels.12115/asset/supinfo/jels12115-sup-0001-suppinfo.pdf?v=1&s=76449fae2e3ccb147074d3b2224d45fb071b5742>.
57. See *ibid.*, 295.
58. See *ibid.*, 267.
59. See *ibid.*, 295.

through 2008. Did the fact that a company got sued in a securities fraud class action for earnings manipulation discourage *other companies* in that same industry or geographic region from manipulating their own earnings? Here again, after controlling for numerous other variables, the authors concluded that the answer was "yes": class actions deter misbehavior.[60]

A fifth study looked at whether corporate derivative liability deterred executives from introducing measures to entrench themselves in management. A corporate derivative lawsuit is much like a shareholder class action: one shareholder sues corporate executives, but instead of suing on behalf of other shareholders, the shareholder technically sues on behalf of "the corporation."[61] Beginning in 1989, roughly half of the states in America adopted a legal change that made it much more difficult to win a derivative lawsuit. When derivative liability went down in those states, did corporate executives adopt fancy measures (with names like "poison pills" and "blank check stock") to entrench themselves in management over the wishes of shareholders? You bet they did.[62]

Against these six class action studies, I have found only one study that points in the opposite direction. Three scholars examined whether American corporations disclose more information to shareholders than Canadian corporations do.[63] Because American securities fraud laws are more robust, that is what the deterrence theory would suggest. But they found precisely the opposite: more disclo-

60. See Simi KEDIA, Kevin KOH, and Shivaram RAJGOPAL, "Evidence on Contagion in Earnings Management", (2015) 90:6 *Accounting. Review* 2337, 2363-2367.

61. See Deborah A. DEMOTT and David F. CAVERS, *Shareholder Derivative Actions: Law and Practice*, Eagan, Minnesota, Clark Boardman Callaghan, September 2016, Westlaw edition.

62. The author, Ian Appel, found a higher use of anti-takeover provisions such as poison pills, blank check stock, classified boards, and supermajority voting requirements. "Governance by Litigation", available online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532278>, p. 21-22. He surmises that the decline of derivative liability led to these changes through channels of both specific and general deterrence: "First, the drop in the prevalence of litigation may lead to fewer settlements containing governance reforms. Second, weakened deterrence effects may lead managers to deploy governance provisions for the purpose of entrenchment..." *Ibid.*, 23. Because the changes he observed occurred so quickly after derivative liability declined—i.e., too quickly for there to have been many derivative lawsuits filed and settled—he suspects the changes came about more from general than specific deterrence. *Ibid.*

63. Stephen BAGINSKI *et al.*, "The Effect of Legal Environment on Voluntary Disclosure: Evidence from Management Earnings Forecasts Issued in U.S. and Canadian Markets", (2002) 77 *The Accounting Review* 25-50.

sure in Canada.[64] I do not put as much stock in this study as I do the others because it is very hard to do cross-country empirical studies; it is impossible to control for all the ways in which different countries differ from one another. And this study is directly contradicted by the several American-only studies, above, that show more liability leads to more disclosure. Nonetheless, for sake of completeness, I include this study here. But, as I said, it is the *only* contrary study I have found.

What about studies of other lawsuits? These studies are even more numerous. For decades and decades, scholars have studied the data on deterrence, and, for decades and decades, the studies have generally corroborated what the class action studies show: the threat of a lawsuit deters misconduct.

The studies outside the class action realm are too numerous to discuss comprehensively here. And not all of them deal with misconduct by corporations. But I will summarize them to give you a taste of what they say:

- *Tort liability and safety research*: scholars have found that the industries that face more tort liability spend more money researching safety measures for their products.[65]

- *Workers' compensation and workplace injuries*: scholars have found that, when the benefits employers would have to pay out for workplace injuries increased, fewer workplace deaths followed.[66]

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64. *Ibid.*, 43-47.
65. Viscusi and Moore found that industries with higher tort liability loss ratios spent more on product-related research and development, and concluded that "tort liability does ... have safety incentive effect." "An Industrial Profile of the Links Between Product Liability and Innovation", in *The Liability Maze*, *supra*, note 20, p. 114. However, Viscusi and Moore establish in other scholarship that this effect may taper off or become negative if liability grows too large. VISCUSI and MOORE, "Product Liability, Research and Development, and Innovation", (February 1993) 101:1 *Journal of Political Economy* 161-184. Furthermore, Viscusi's scholarship also casts doubt on the effectiveness of punitive damages, finding that they do not affect the incidence of chemical accidents, chemical releases, accident fatalities, or increase insurance premiums. "The Social Costs of Punitive Damages against Corporations in Environmental and Safety Tort", (November 1998) 87:2 *Georgetown Law Journal* 296–98.
66. See MOORE and VISCUSI, *Compensation Mechanisms for Job Risks: Wages, Workers' Compensation, and Product Liability*, Princeton, NJ, Princeton University Press, 1990, 133; James R. CHELIUS, "Liability for Industrial Accidents:

- *Bartender liability and alcohol-related traffic deaths*: scholars have found that, when liability was imposed on bartenders for inebriated driving by their patrons, fewer alcohol-related traffic deaths followed.[67]

- *Medical malpractice liability and negligence, deaths, and defensive medicine*: scholars have found that, when liability for medical malpractice decreases, doctors and hospitals spend less time and money on patients,[68] and more medical negligence and deaths follow.[69]

A Comparison of Negligence and Strict Liability Systems", (June 1976) 5:2 *Journal of Legal Studies* 303-306.

67. See SLOAN *et al.*, *Drinkers, Drivers, and Bartenders: Balancing Private Choices and Public Accountability*, Chicago, University of Chicago, 2000.

68. A number of scholars have found similar results supporting this conclusion. Daniel Kessler and Mark McClellan's research finds that medical malpractice reforms reduce hospital expenditures. "Do Doctors Practice Defensive Medicine?", (May 1996) 111:2 *Quarterly Journal of Economics* 353. Patricia M. Danzon has outlined the evidence indicating that liability induces physicians to spend more time per patient visit. "Liability for Medical Malpractice", (1991) 5:3 *Journal of Economic Perspectives* 62. Similarly, Donald N. Dewees *et al.* has outlined the evidence showing greater malpractice insurance premiums are associated with more diagnostic testing. *Exploring the Domain of Accident Law Taking the Facts Seriously*, New York, Oxford University Press, 1996, 104-105. However, there is scholarship that points the opposite direction. Danzon reviews the evidence that medical malpractice liability is negatively correlated with frequency of lab tests. "Liability for Medical Malpractice", *ibid.*, 62. Michael Frakes recites conflicting studies on whether malpractice liability is associated with more c-sections, "Defensive Medicine and Obstetric Practices", (2012) 9 *Journal of Empirical Legal Studies* 457-462.

69. As with the previous footnote, a number of scholars have found results that support this conclusion, though this view is not unanimous. Zenon Zabinski and Bernard S. Black find that medical malpractice tort reforms increase the incidence of adverse outcomes other than death. "The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform" (Working paper, Northwestern University, last updated February 15, 2015), online: <https://ssrn.com/abstract=2161362>. Michelle Mello and Troyen Brennan present evidence that liability for medical malpractice reduced negligence rates. "Medical Malpractice and the Tort System: What Do We Know and What (If Anything) Should We Do About It?" (2002) 80 *Texas Law Review* 1598. Joanna M. Shephard found that medical malpractice tort reforms increased deaths. "Tort Reforms' Winners and Losers: The Competing Effect of Care and Activity Levels", (2008) 55 *UCLA Law Review* 905. Paul C. Weiler *et al.* concluded that "the more malpractice suits that are brought ... the fewer the number of negligent medical injuries", despite the fact that "this result did not reach the conventional level of statistical significance", *A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation*, Cambridge, MA, Harvard University Press, 1993, p. 129. However, as in the previous footnote, there is scholarship that points in the other direction. Kessler and McClellan

- *Tort reform and traffic accidents*: scholars have found that, when liability for traffic accidents decreases, more traffic accidents follow.[70]

As I said, these studies are not uncontroverted, and I tried to cite opposing studies in the above footnotes.[71] But the important point is that the lion's share of studies *supports* the theory of general deterrence.

CONCLUSION

The primary justification for the class action lawsuit in the United States today is the deterrent effect it has on corporate misbehavior. In recent years, however, some critics have begun to

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found that malpractice tort reforms did not reduce mortality or medical complications. "Do Doctors Practice Defensive Medicine?", *supra*, note 68, 353. And Frakes and Anupam B. Jena find that malpractice tort reforms do not affect birth outcomes. "Does Medical Malpractice Law Improve Health Care Quality", (2016) 143 *Journal of Public Economics* 142-158.

70. Paul H. Rubin and Joanna M. Shepherd find that collateral source reforms increase vehicle accident deaths. "Tort Reform and Accidental Deaths", (2007) 50:2 *Journal of Law and Economics* 221. Michelle J. White finds that drivers take less care in comparative fault systems than in contributory negligence systems. "An Empirical Test of the Comparative and Contributory Negligence Rules in Accident Law", (1989) 20:3 *RAND Journal of Economics* 325–29. Michael L. Smith found that "[t]ests in the early studies produced mixed results, but later studies typically find that adoption of no-fault rules to replace common law tort liability leads to an increase in automobile accident fatality rates." "Deterrence and Origin of Legal System: Evidence from 1950-1999", (2005) 7 *American Law and Economic Review* 352. But see Rubin and Shephard's finding that other tort reforms than collateral source reforms decreased vehicle accident deaths. "Tort Reform and Accidental Deaths", 221. See also W. Jonathan Cardi *et al.*'s outline of conflicting studies on whether no-fault automobile accident compensation systems reduce or increase fatalities. "Does Tort Law Deter Individuals?: A Behavioral Science Study", (2012) 9 *Journal of Empirical Studies* 573-574, n. 31.

71. See also Robert A. Kagan's overview of the topic in *Adversarial Legalism: the American Way of Law*, Cambridge, MA, Harvard University Press, 2001, pp. 141-144. Some studies do not examine real-world data, but, rather, simulations, where survey takers are asked hypothetical questions about how they would respond to potential liability in certain situations. These studies have found mixed evidence of deterrence. See, for example, Cardi *et al.*'s finding that potential tort liability did not affect decisions to engage in potentially tortious behavior even though the threat of criminal sanctions did. "Does Tort Law Deter Individuals?: A Behavioral Science Study", *supra*, note 70, 567. Theodore Eisenberg and Christoph Engel found that damages liability deterred in public good experiments. "Assuring Civil Damages Adequately Deter: A Public Good Experiment", (April, 2014) 11 *Journal of Empirical Legal Studies* 301.

question even this justification. Some critics question the theory of general deterrence and others have said the theory lacks empirical evidence. But, as I have explained, the theory of deterrence is still sound. Moreover, there is in fact empirical evidence to support it, both for class actions as well as other lawsuits. As a result, I believe scholars and policymakers can still safely rely on deterrence as reason to retain class actions.

Class Actions are a Cornerstone of our Civil Justice System:

A Review of Class Actions Filed in 2009

February 27, 2015

The National Association of Consumer Advocates (NACA) is a nonprofit association of more than 1,500 consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

As the world's largest trial bar, the American Association for Justice (formerly known as the Association of Trial Lawyers of America) works to make sure people have a fair chance to receive justice through the legal system when they are injured by the negligence or misconduct of others—even when it means taking on the most powerful corporations.

Executive Summary

The 7th Amendment, which guarantees Americans the right to a jury trial to decide the facts of a civil case in court, is a fundamental principle of our democracy. A vital part of this right is class action litigation: it allows consumers to band together to enforce their rights against large corporate interests. Because consumers often lack the resources to take on a corporation alone, without class actions, many violations of the law would go unchallenged.

Thus, it is no surprise that powerful corporations seek to insulate themselves from liability by chipping away at this powerful tool. They have attacked from every conceivable angle, from advocating for amendments to weaken the procedural rule governing class actions,[1] to pushing Congress to enact laws that serve as hurdles to class formation to expanding the use of class actions bans in consumer and employment contracts.[2]

Corporations often use forced arbitration to avoid liability. Forced arbitration clauses compel Americans to give up the fundamental right to seek justice in favor of a system of private, secret arbitration where the arbitrators and the rules are chosen by the corporation. There are no due process standards, no guarantees that applicable laws will be upheld, and no public records of the proceedings. These clauses often go a step further, forcing Americans to give up even more - buried in the fine print are provisions that prohibit consumers from banding together to seek justice as a class.

Known as "class action waivers," these provisions prohibit consumers from joining together as a class to take on large and powerful corporations. In the recent past, many class action waivers in forced arbitration clauses were deemed illegal under state laws. That trend ended in 2011 when the Supreme Court held in *AT&T Mobility LLC v. Concepcion* that the Federal Arbitration Act (FAA) trumps the state law that would invalidate these waivers.[3] The Court dramatically expanded the reach of a federal law, wiping out state laws protecting the rights of consumers to participate in a class action.

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[1] In June 2002, the U.S. Judicial Conference's Committee on Rules of Practice and Procedure approved amendments to two subdivisions of Rule 23, as well as the addition of two new subsections. Comm. on Rules of Practice and Procedure, Minutes 10-18 (June 10-11, 2002), available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2002-min.pdf. These amendments took effect on December 1, 2003. *See* Fed. R. Civ. P. 23.

[2] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. The Class Action Fairness Act (CAFA) of 2005 expanded federal jurisdiction over class action lawsuits in the United States. It gives federal courts jurisdiction over class actions in which (1) the amount in controversy exceeds $5 million, and (2) any member of a class of plaintiffs is a citizen of a state different from any defendant, unless at least two-thirds of members of all proposed plaintiff classes and the primary defendants are citizens of the state in which the action was originally filed. As a result, meritorious class actions have not been proceeding in federal court. Many federal judges are "hamstrung by the increased attention to state law that these cases require" with no guidance on how to proceed when a case involves multiple state laws. *See* Testimony of Thomas M. Sobol, Partner, Hagens Berman Sobol Shapiro LLP, Subcommittee on the Constitution of the Committee on the Judiciary, U.S. House of Representatives, "Class Actions Seven Years After the Class Action Fairness Act," June 1, 2012.

[3] 563 U.S. 321 (2011).

There is hope, however. In the aftermath of the 2008 financial crisis, Congress created the Consumer Financial Protection Bureau (CFPB) to address the need for greater transparency and accountability from America's powerful financial institutions.[4] Recognizing that forced arbitration and class action waivers harm consumers, Congress explicitly empowered the Bureau to ban or limit the use of forced arbitration – including class action waivers – in contracts for financial goods or services.[5] Before it can act, however, the CFPB is required to study the use of forced arbitration in these contracts and report its findings to Congress.[6]

The preliminary results of the CFPB's study, released in December 2013, show that forced arbitration clauses impact tens of millions of consumers and deny relief to consumers harmed by illegal or abusive practices in the financial services industry.[7] The CFPB will release the full study in early 2015 and then may engage in rulemaking to address the issue.

At the same time that the CFPB released its preliminary findings, the U.S. Chamber of Commerce released a purported assessment, or memo, that concluded class actions "provide little or no benefit to consumers."[8] The memo was authored by the Chamber's lobbyists at law firm Mayer Brown and submitted to the CFPB for consideration as part of the Bureau's study of forced arbitration clauses in consumer financial services contracts.[9]

The memo's methodology was simple – look at class actions filed in 2009 and listed in the *BNA Class Action Litigation Reporter* and the *Mealey's Litigation Class Action Reporter*, choose 148 consumer class actions, and see how they were resolved.[10] From its analysis of these class actions, the Chamber concluded that "the real-world evidence shows that class actions provide little or no benefit, particularly in the consumer context."[11]

The Chamber represents the world's largest banks and credit card companies who stand to gain the most from the elimination of consumer class actions. It spent a great deal of resources to fight the creation of the CFPB, and continues to try to prevent the Bureau from functioning

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[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, Title X.

[5] *Id.* at Sec. 1028.

[6] *Id.*

[7] Consumer Financial Protection Bureau, Arbitration Study Preliminary Results (Dec. 12, 2013) *available at* http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

[8] Letter of David Hirschmann and Lisa Rickard, U.S. Chamber of Commerce, to Monica Jackson, Consumer Financial Protection Bureau, Dec. 11, 2013, p. 5 ("A new empirical assessment of class actions that the Chamber has commissioned demonstrates that the class actions studied provide little or no benefit to consumers.").

[9] See *supra* note 8.

[10] "Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions," Memorandum written by Mayer Brown LLP for U.S. Chamber of Commerce, *available at* http://blogs.reuters.com/alison-frankel/files/2013/12/mayerbrownclassactionstudy.pdf at Appendix C.

[11] See *supra* note 9, at 44.

effectively. Thus, it is unsurprising that a Chamber memo would conclude that class actions do not help consumers.[12]

We examined class actions filed in 2009, including the 148 cases the Chamber cited in its memo, and what we found was startling. These class actions often provided enormous benefits to consumers. Here is just a sampling:

- They empowered consumers. When the price of propane shot up in 2008, consumers filed suit against Ferrellgas for allegedly reducing the amount of propane in its tanks without notifying consumers or changing the labels. Through a class action settlement, consumers recovered up to $25 million for being overcharged.[13]

- They allowed victims of financial fraud to recover. Through a class action, $219 million was returned to investors whose retirement funds were devastated by Bernie Madoff's colossal Ponzi scheme. The judge in the case praised the equitable settlement, stating that nearly all class members were made whole.[14]

- They restored people's rights. Thousands of disabled residents living in New York City Housing Authority buildings could not go in and out of their housing due to widespread disrepair of elevators. Through a class actions, the residents forced the city to repair the elevators in a timely matter.[15]

- They restored employees' retirement funds. Level 3 Communications employees filed suit against employee retirement plan managers for withholding information about company troubles and continuing to invest in the overvalued company stock while employees lost their retirement funds. It took a class action to restore $3.2 million in lost retirement funds.[16]

- They addressed health and environmental harms. A dike at a coal plant operated by the Tennessee Valley Authority (TVA) burst, sending more than a billion gallons of highly toxic coal ash slurry into waterways and covering nearly 300 acres with sludge.[17] The coal

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[12] Reuters Legal Reporter Alison Frankel noted, "I would have been shocked if Mayer Brown's new study of 148 federal-court class actions filed in 2009 concluded that the cases are of any real benefit to class members. Mayer Brown Supreme Court litigator Andrew Pincus, remember, is not only frequently counsel to the U.S. Chamber of Commerce, but was also the winner of the U.S. Supreme Court's landmark 2011 endorsement of mandatory arbitration in *AT&T Mobility v. Concepcion*." Alison Frankel, Class action mystery: Where does the money go post-settlement?, Reuters, Dec. 11, 2013, *available at* http://blogs.reuters.com/alison-frankel/2013/12/11/class-action-mystery-where-does-the-money-go-post-settlement/.

[13] *Drucker v. Ferrellgas Partners L.P. et al*, No. 2:09-cv-02305 (D. Kan. 2009).

[14] *Bd. Of Trustees of Buffalo Laborers Security Fund et al v. J.P. Jeanneret Assocs. Inc. et al*, No. 09-cv-08362 (S.D.N.Y. 2009), *In re Beacon Assocs. Litig.*, No. 09-cv-00777 (S.D.N.Y. 2012) and *In Re J.P. Jeanneret Assocs.*, 769 F. Supp. 2d 340 (S.D.N.Y. 2011).

[15] *Brito et al v. New York City Housing Authority, et al*, 09-cv-01621 (E.D.N.Y.).

[16] *Walter v. Level 3 Communications, Inc.*, No. 09-cv-00658 (D. Colo. 2009).

[17] *Blanchard v. Tennessee Valley Authority*, No. 09-cv-00009 (E.D. Tenn. 2009).

ash at this plant was held in earthen dikes rather than lined landfills.[18] Leaks and seepage plagued the dikes at the TVA coal plant for years.[19] According to an inspection report, the TVA knew about leaks at the facility for more than two decades and opted not to pay for long-term solutions to the problem.[20] A class action was brought on behalf of property owners who suffered damages. The district court found in their favor on their claims of negligence, trespass, and private nuisance.[21] The case then went to mediation to determine appropriate damages, and on August 1, 2014, it was announced that TVA had agreed to pay $27.8 million to settle claims from property owners who suffered damages due to the 2008 spill of coal ash sludge.[22]

Corporations contend that consumers are better served by forced arbitration than class actions. Despite the fact that forced arbitrations clauses are standard in consumer financial products and services contracts however, the CFPB found that very few consumers arbitrate their claims.[23] Alternatively, the CFPB revealed that just 8 class actions yielded $350 million in payments to more than 13 million consumers.[24]

Class actions are an important — and often the only — path for consumers to access justice.

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] Consumer Financial Protection Bureau, Arbitration Study Preliminary Results (Dec. 12, 2013) at 80, *available at* http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.
[24] *Id.* at 104.

Table of Contents

I. CLASS ACTION PRIMER

A class action is a lawsuit that allows people with a common interest to seek justice as a group. It is often the sole means of enabling consumers to remedy injustices committed by powerful corporations. As stated by former U.S. Supreme Court Justice William O. Douglas, "The class action is one of the few legal remedies the small claimant has against those who command the status quo."[25]

Many classes are formed because the cost of individual lawsuits would be far greater than the value of each individual claim. The total value of the class members' claims, however, could be quite large. But for class actions, corporations would have incentive to continue their fraudulent conduct.

When corporations engage in a pattern of wrongdoing, a class action can provide an effective remedy for a group without incurring the costs of thousands of separate lawsuits and risking inconsistent decisions by the courts. State officials have acknowledged that private class action litigation is an important tool for consumers. A recent letter by several state attorneys general to the CFPB states, "In some cases, the aggregation of small consumer claims in the form of private class action lawsuits or at least class action arbitrations affords consumers the only opportunity to seek relief, due to the expense of individually bringing their own case or the inability to procure legal representation."[26] The letter adds that these consumer class actions complement public enforcement work of consumer protection laws. "Based on our experience, such litigation has the capability of providing real and meaningful benefit to harmed consumers and can result in injunctive relief mandating business reforms that are in the public interest. Our offices work together to ensure that such relief and redress are maximized."[27]

Before any class action settlements may occur, the judge presiding over the case must give notice of the settlement to the class, allow all who wish to be heard to state their positions, and approve the settlement, including the attorneys' fees.

Class actions have shaped history for the better:

- ***Brown v. Board of Education of Topeka*** – This class action led the U.S. Supreme Court to unanimously hold that the racial segregation of children in public schools violated the Equal Protection Clause of the Fourteenth Amendment, paving the way for desegregation.[28]

- ***Jenson v. Eveleth Taconite Co.*** – This was the first sexual harassment class action lawsuit in U.S. history. Its outcome not only changed state and federal laws protecting

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[25] *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 186 (1974).

[26] Letter by 16 State Attorneys General to Consumer Financial Protection Bureau, November 19, 2014 regarding a StudyPursuant to Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Page 3. http://www.attorneygeneral.delaware.gov/documents/20141119-AGs_Ltr_to_CFPB_re_Arb_Clauses_Final.pdf

[27] *Id.* at 3-4.

[28] 347 U.S. 483 (1954).

workers but also set precedence for more class actions demanding an end to harassment and discrimination on the job.[29]

- ***Morgan v. Hennigan*** – This class action took the Boston Public School system to task for allegedly creating de facto segregation through its drawing of school district lines and allocation of resources throughout the city. As a result of the suit, district court ordered the Boston School Committee to desegregate the schools.[30]

Class actions serve as the only means for many consumers to access justice, and they are under attack. In 2005, Congress passed the "Class Action Fairness Act" (CAFA), allowing defendants to "remove" or transfer state class actions into their often-preferred venue - the clogged federal court system. CAFA was supposed to make it easier for cases to proceed in federal court, but it has failed to live up to the promises of the Chamber of Commerce and other large business interests that insisted national class actions belonged in federal court. The reason is that there is no national federal tort law. Instead, federal courts hearing class actions brought under CAFA's expanded diversity jurisdiction must apply state law to the class members in the case. The courts often deny class certification because they are overburdened and lack resources, or the laws of more than one state apply.

Corporations are including class action waivers in their forced arbitration clauses, and the Supreme Court and several lower courts have chipped away access to this critical tool. In 2011, the Court dismissed a civil rights sex discrimination class action brought on behalf of more than one million female Wal-Mart employees in *Wal-Mart v. Dukes*.[31] Also that year, the Court upheld corporations' use of class action waivers in forced arbitration clauses in *AT&T v. Concepcion*.[32] In 2013's *American Express Co. v. Italian Colors Restaurant*, the Court held that a class action waiver is enforceable under the Federal Arbitration Act even if the cost of proving an individual claim in arbitration exceeds the potential recovery.[33]

Injured consumers cannot get relief. It is time to fight back.

II. CLASS ACTIONS FILED IN 2009 RESULTED IN ENORMOUS BENEFITS FOR CONSUMERS.

In its memo, the U.S. Chamber of Commerce looked at 148 class actions from 2009 and concluded that class actions "provide little or no benefit to consumers."[34] We examined the same 148 cases, and found quite the opposite – class actions filed in 2009 benefitted consumers. Here are some examples:

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[29] 130 F.3d 1287 (8th Cir. 1997).
[30] 379 F. Supp. 410 (D.C. Mass., 1974).
[31] 131 S.Ct. 2541 (2011).
[32] 131 S.Ct. 1740 (2011).
[33] 133 S.Ct. 2304 (2013).
[34] Letter from David Hirschmann and Lisa Rickard, U.S. Chamber of Commerce, to Monica Jackson, Consumer Financial Protection Bureau, Dec. 11, 2013, p. 5 ("A new empirical assessment of class actions that the Chamber has commissioned demonstrates that the class actions studied provide little or no benefit to consumers.").

a. They empowered consumers:

$4.8 billion in debt relief went to consumers victimized by a corrupt arbitration company.

As the largest consumer credit arbitration company in the nation, the National Arbitration Forum (NAF) held itself out to the public, courts and consumers as a neutral third party arbitration service.[35] It assured consumers that they could be confident that their disputes with creditors would be heard fairly, as would be the case if the dispute was resolved by a court of law.[36]

This class action alleged that NAF was anything but neutral, instead misleading consumers for years and conspiring behind the scenes with debt collectors to rig arbitrations against consumers.[37] According to Minnesota Attorney General Lori Swanson, who brought suit on behalf of the citizens of the state, there was no way to hold the company accountable, as it allegedly concealed its link to the credit agencies by making its corporate structuring opaque.[38]

The judge approved a settlement in August 2011 worth more than $4 billion to class members.[39] The settlement required NAF to dismiss all pending consumer arbitrations (valued at approximately $1 billion) and cease all collection activities arising out of NAF arbitrations (estimated to be worth about $3.8 billion to the class).[40]

Johnson & Johnson removed formaldehyde and other carcinogenic chemicals from its baby shampoo.

Johnson & Johnson marketed its children's bath products as safe and gentle when in fact they contained hazardous chemicals. In March 2009, the Campaign for Safe Cosmetics, a coalition of consumer, health, and environmental groups, issued a report revealing that the corporation's baby shampoo and body-care products contained formaldehyde and 1,4-dioxane, which are allergens and are categorized as "probable human carcinogens" by the Environmental Protection Agency.[41] The Campaign for Safe Cosmetics called for Johnson & Johnson to remove the chemicals from these products.[42]

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[35] Repairing A Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration, F.T.C., July 2010, *available at* ftc.gov/os/2010/07/debtcollectionreport.pdf.

[36] *Id.*

[37] Complaint at 3, *Anthony Magnone et al v. Accretive LLC et al*, No. 09-cv-06375 (C.D. Cal. 2009).

[38] Complaint at 1-3, *Swanson v. National Arbitration Forum, Inc.*, No. 27-cv-0918550 (D. Minn. 2009).

[39] Final Approval Order at 1-2, *In re: National Arbitration Forum Trade Practices Litigation*, No. 10-md-02122 (D. Minn. 2010)

[40] *Id.*

[41] Heather Sarantis et al., *No More Toxic Tub: Getting Contaminants out of Children's Bath & Personal Care Products*, The Campaign for Safe Cosmetics (2009), at 7, *available at* http://safecosmetics.org/downloads/NoMoreToxicTub_Mar09Report.pdf.

[42] Letter from The Campaign for Safe Cosmetics to Johnson & Johnson Company CEO William C. Weldon, May 26, 2009, *available at* http://safecosmetics.org/downloads/JNJ-sign-on-letter_May09.pdf.

The 2009 report from the Campaign for Safe Cosmetics formed the basis for multiple class actions, including this one, which alleged that the products do not live up to the company's baby-safe promises.[43] Initial efforts to dismiss the suits failed.[44] Based on mounting pressure, including this class action, Johnson & Johnson pledged to remove the chemicals at issue.[45]

Coca-Cola is addressing its labeling and marketing practices.

The Coca-Cola Company markets VitaminWater as a healthy alternative to soda by labeling its flavors with such health buzz words as "defense," "rescue," "energy," and "endurance."[46] The corporation makes a wide range of dramatic claims, including that its drinks reduce the risk of chronic disease, reduce the risk of eye disease, promote healthy joints, and support optimal immune function.[47]

Consumer health advocacy group the Center for Science in the Public Interest (CSPI) filed this class action lawsuit against Coca-Cola Company, alleging that the corporation misled consumers about the nutritional benefits of the popular beverages.[48] The CSPI alleged that the corporation promoted the beverage as a health drink despite the fact that it contains 33 grams of sugar — nearly the amount contained in most sodas.[49] Coca-Cola Company, however, claims that consumers should assume that the product is unhealthy, despite its labeling to the contrary, stating that "no consumer could reasonably be misled into thinking VitaminWater was a healthy beverage."[50]

The lawsuit, still moving forward as a class action, is bringing attention to the issues of deceptive labeling and marketing.

Ferrellgas was forced to refund customers for providing less product than the customers purchased.

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[43] *See Sarjent v. Johnson & Johnson Consumer Companies, Inc. et al.*, No. 09-cv-00343 (S.D. Ind. 2009), *Vercellono v. Gerber Products Co et al.*, No. 09-cv-2350 (D. N.J. 2009), and *Levinson v. Johnson & Johnson Consumer Cos Inc.*, No. 09-cv-3317 (D. N.J. 2009).

[44] Susan Todd, *Lawsuit proceeds on Johnson & Johnson's baby shampoo*, N.J. STAR-LEDGER, Feb. 9, 2010, *available at* http://www.nj.com/business/index.ssf/2010/02/lawsuit_proceeds_on_johnson_jo.html.

[45] Katie Thomas, *The 'No More Tears' Shampoo, Now With No Formaldehyde*, N.Y. TIMES, Jan. 14, 2014 *available at* http://www.nytimes.com/2014/01/18/business/johnson-johnson-takes-first-step-in-removal-of-questionable-chemicals-from-products.html?action=click&contentCollection=Television&module=MostEmailed&version=Full&region=Marginalia&src=me&pgtype=article.

[46] *Coke Sued for Fraudulent Claims on Obesity-Promoting "VitaminWater,"* Center for Science in the Public, Jan. 15, 2009, *available at* http://www.cspinet.org/new/200901151.html.

[47] *Id.*

[48] *Koh v. The Coca Cola Company et al*, No. 3:09-cv-00182-VRW (N.D. Calif. 2009).

[49] *See* http://www.sugarstacks.com/beverages.htm.

[50] Eric Spitznagel, *Drink Deception and the Legal War on VitaminWater*, BLOOMBERG BUSINESSWEEK, July 26, 2013, *available at* http://www.businessweek.com/articles/2013-07-26/drink-deception-and-the-legal-war-on-vitaminwater.

When energy prices soared in 2008, the price of propane gas skyrocketed. Instead of passing along the price hike to consumers, Ferrellgas simply reduced the amount of propane in its tanks.[51] The corporation allegedly failed to disclose the actual net weight or level of propane in the tanks, and the reduced volume was undetectable to consumers.[52]

This class action alleged that the corporation, which does business as Blue Rhino, deceived and overcharged consumers who bought Blue Rhino 20-pound propane tanks that were filled with only 15 pounds of propane.[53] The settlement provided up to $25 million for customers who bought certain propane tanks.[54]

Amazon was forced to reimburse Kindle owners for deleting digital content from their Kindles.

Amazon angered customers and drew severe criticism from consumer advocates when it deleted *1984* and George Orwell's other well-known book *Animal Farm* from Kindle e-book readers without notifying their owners.[55] When Amazon deleted those copies, it allegedly also removed one of Kindle's most touted features – consumers' notes that were attached to the text.[56]

The suit, which never reached class action designation, sought to prevent Amazon from again deleting books from Kindles, as well as monetary relief for people who lost work from the incident.[57] The lawsuit alleged that deleting content remotely is a breach of contract and violation of Amazon's terms of service, which says that Kindle users have a right to keep a permanent copy of the digital content they purchase, and view it as many times as they want.[58]

After the lawsuit was filed, the parties reached a settlement. As part of the settlement, the company publicly clarified the policy that will govern any future deletions.[59]

b. They allowed those impacted by financial crime to recover:

$219 million was returned to investors and retirement funds ripped off by Bernie Madoff.

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[51] *Lawsuit claims Ferrellgas shortchanged customers*, KANSAS CITY BUSINESS JOURNAL, June 12, 2009, *available at* http://www.bizjournals.com/kansascity/stories/2009/06/08/daily43.html.

[52] *Id.*

[53] *Drucker v. Ferrellgas Partners L.P. et al*, No. 2:09-cv-02305 (D. Kan. 2009).

[54] Settlement Order at 7, *In re: Pre-Filled Propane Tank Marketing & Sales Practices Litigation*, No. 09-02086-MD-W-GAF (W.D. Mo. 2009).

[55] Antone Gonsalves, *Amazon Kindle E-book Deletion Prompts Lawsuit*, INFORMATIONWEEK, July 31, 2009, *available at* http://www.informationweek.com/amazon-kindle-e-book-deletion-prompts-lawsuit-/d/d-id/1081884

[56] *Id.*

[57] *Gawronski v. Amazon.com*, No. 2:09-cv-01084 (W.D. Wash. 2009).

[58] *Id.*

[59] Mariel L. Belanger, *Amazon.com's Orwellian Gaffe: The Legal Implications of Sending E-Books Down the Memory Hole*, 41 SETON HALL L. REV. 368 (2011).

Bernie Madoff orchestrated the largest Ponzi scheme in history, stealing an estimated $64.8 billion and leaving more than 10,000 victims in his wake.[60] While he serves a 150-year prison term, those he swindled are fighting back.

Some of those victims were union members who performed the hard, dangerous work that has built our nation's infrastructure. Investment manager John Jeanneret persuaded the Buffalo Laborers Security Fund as well as three dozen other labor funds to invest in Bernie Madoff's hedge fund.[61] These union members lost hundreds of millions of dollars in investments due to Madoff's fraud, and faced the possibility that they would no longer be able to retire with dignity.[62] The Funds sued J.P. Jeanneret Associates, Inc., alleging breach of fiduciary duty and improper investment of monies with Bernard Madoff, causing the Funds substantial losses.[63]

The class action settled, providing more than $219 million to defrauded investors.[64] The judge praised the result: "The settlement, coupled with the recoveries these investors can anticipate from the bankruptcy estate, is expected to return to the Private Plaintiffs collectively all or nearly all of the money they invested with Madoff...The settlement, taken as a whole, is fair, reasonable, and adequate."[65]

Stanford International Bank, Ltd., exposed as one of the most criminal enterprises in history, was held accountable by swindled customers.

In February 2009, the SEC charged that Sir R. Allen Stanford had been running a giant $7 billion Ponzi scheme out of the Caribbean island of Antigua.[66] Stanford was convicted of a criminal fraud involving approximately 30,000 investors in 113 countries through fraudulent high-return certificates of deposit (CDs) issued by the Stanford International Bank of Antigua.[67] This fraud was the second largest in history, trailing only Bernie Madoff in size.

The class action was brought on behalf of an estimated 28,000 Stanford International Bank Ltd. depositors and investors from 113 different countries, seeking damages from Antigua for its

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[60] http://en.wikipedia.org/wiki/Madoff_investment_scandal

[61] Stan Linhorst, *How warning signs eluded Bernard Madoff's man in Syracuse*, SYRACUSE.COM, Mar. 29, 2009, *available at* http://www.syracuse.com/news/index.ssf/2009/03/how_warning_signs_eluded_berna.html.

[62] *Id.*

[63] *Bd. Of Trustees of Buffalo Laborers Security Fund et al v J.P. Jeanneret Associates Inc. et al*, No. 09-08362 (SDNY 2009), *In re Beacon Associates Litigation*, No. 09-cv-0777 (SDNY 2009) and *In re J.P. Jeanneret Associates, Inc. et al.*, No. 09-cv-3907 (SDNY 2009).

[64] Tim Knauss, *Syracuse-area unions to share in $219 million payout from firm that steered money to Madoff*, SYRACUSE.COM, Nov. 13, 2013, available at http://www.syracuse.com/news/index.ssf/2012/11/investment_firms_to_pay_219_mi.html.

[65] Decision and Order Approving Settlement, *In re Beacon Associates Litigation*, No. 09-cv-0777 (SDNY 2013).

[66] Scott Cohn, *Allen Stanford Found Guilty in Ponzi Scheme Case*, CNBC.COM, Mar. 6, 2012, *available at* http://www.cnbc.com/id/46630391.

[67] Clifford Krauss, *Stanford Convicted by Jury in $7 Billion Ponzi Scheme*, N.Y. TIMES, Mar. 6, 2012, *available at* http://www.nytimes.com/2012/03/07/business/jury-convicts-stanford-in-7-billion-ponzi-fraud.html?pagewanted=all&_r=0.

alleged role in the scheme.[68] The class claimed that Stanford's massive fraud would not have been possible without the active and knowing assistance of Antigua – its regulators allegedly failed to conduct audits of the corporation, gave it access to confidential documents, and accepted monetary bribes.[69]

This class action was not dismissed; rather, it was transferred to another jurisdiction and is ongoing.[70]

c. They restored lost income, changed employment practices, and enabled mobility:

$50 million went to retired football players whose images were allegedly used by NFL Films for years without their permission.

Retired players allege that the National Football League (NFL) used their names, images, and likenesses to promote the league, generating an estimated $6.9 billion in 2008 alone.[71] The retired players claim that they neither gave consent nor received compensation.[72] These players played when salaries were much lower than they are today, and because many of them suffer physical ailments or disabilities, they also struggle financially.[73] Fred Dryer and five other former players sued[74] the NFL on behalf of all retired players demanding that they be paid for the use of their images by the league.

The settlement the parties reached established a $42 million Greater Good Fund for programs and benefits for retired football players, as well as a licensing agency to help former players monetize their names, images, and likenesses.[75] The settlement also created a partnership between the NFL and its former players, giving the retired player community a seat at the table.[76]

The judge who approved the settlement lauded it as "a boon to those thousands upon thousands of former NFL players who can now reap the collective benefit of a large financial payout to a fund organized solely for their benefit, overseen by their comrades-in-arms. That former players will also finally have an avenue to pursue commercial interests in their own images as well as part of their former teams, for the first time in conjunction with the NFL's copyrights and

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[68] *Joan Gale Frank et al v. The Commonwealth of Antigua and Barbuda*, No. 4:09-cv-02217 (S.D. Tex. 2009).
[69] *Id.*
[70] Brent Kendall, *Supreme Court Rules Allen Stanford Ponzi Victims Can Sue Third Parties*, WALL ST. J., Feb. 26, 2014, *available at* http://online.wsj.com/news/articles/SB10001424052702304709904579406962894463586.
[71] Am. Class Action Compl. 1, 8. *Dryer v. Nat'l Football League*, No. 09-cv-02182 (D. Minn. 2010).
[72] *Id.*
[73] *Id.* at 2.
[74] *Dryer v. Nat'l Football League*, No. 09-cv-02182 (D. Minn. 2010).
[75] Press Release, Pro Football Retired Players Assoc., Retired NFL Players Believe Preliminary NFL Publicity Rights Settlement Takes Care of the Greater Good of Retired NFL Players, June 3, 2013, *available at* http://www.profootballretiredplayersassociation.com/#!untitled/c1rs2.
[76] Amy Forliti, *Judge approves $50M settlement*, AP, Nov. 1, 2013, *available at* http://espn.go.com/nfl/story/_/id/9913169/judge-approves-50m-settlement-nfl-retiree-case

trademarks, is icing on the cake for those players and indeed for all former players.[77] Jim Brown, a Hall of Fame running back, called the deal a "landmark for those who really need it."[78]

3M paid more than $12 million to older employees it allegedly discriminated against and was forced to change its practices to prevent future employment discrimination.

According to the Equal Employment Opportunity Commission (EEOC), 3M unlawfully laid off hundreds of employees over the age of 45 during a series of reductions in force for more than three years.[79] The agency alleged that 3M focused on highly paid older employees, among others, to save money.[80] The EEOC also asserted that older employees were laid off to make way for younger leaders.[81]

Harmed employees pushed to hold the corporation accountable. The class action[82], alleging that 3M's actions violated the Minnesota Human Rights Act, comprised more than 7,000 salaried employees in Minnesota over the age of 45.[83] 3M settled and agreed to pay at least $12 million to workers.[84] 3M's settlement of the federal suit was contingent on a state suit asserting related claims settling. The state suit settled for $12 million.[85] 3M later agreed to pay an additional $3 million to employees as part of a settlement of an EEOC lawsuit regarding the same age discrimination practices.[86]

Following this class action and the EEOC's case, 3M changed its employment practices.

New York Housing Authority was forced to repair elevators in public housing building so that disabled and elderly residents could come and go from their homes.

Thousands of disabled residents living in New York City Housing Authority (NYCHA) building claimed they were denied the basic ability to go in and out of their housing because of widespread disrepair and dysfunction of elevators.[87] They were allegedly confined to their

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[77] Final Approval of Settlement, *Dryer v. Nat'l Football League*, No. 09-cv-02182 (D. Minn. 2013).

[78] Ken Belson, *N.F.L. Deal on Images Divides Retirees*, N.Y. TIMES, June 4, 2013, *available at* http://www.nytimes.com/2013/06/05/sports/football/nfl-deal-on-use-of-images-divides-retirees.html?pagewanted=all&_r=0.

[79] Press Release, EEOC, 3M to Pay $3 Million to Settle EEOC Age Discrimination Suit, Aug. 22, 2011, *available at* http://www.eeoc.gov/eeoc/newsroom/release/8-22-11a.cfm.

[80] *Id.*

[81] *Id.*

[82] *Garcia v 3M*, No. 09-01943 (N.D. Cal. 2009). Case was transferred to D. Minn., No. 09-cv-03495-SRN-FLN.

[83] Susan Feyder, *3M may settle age bias suit for $12 million*, STARTRIBUNE, March 18, 2011, *available at* http://www.startribune.com/business/118246714.html.

[84] Mike Mullen, *3M settles a second class-action lawsuit for age discrimination*, MINNEAPOLIS CITY PAGES, Aug. 22, 2011, *available at* http://blogs.citypages.com/blotter/2011/08/3m_settles_age_discrimination_lawsuit_class_action_suit.php.

[85] *Id.*

[86] Press Release, *supra* note 77.

[87] Manny Fernandez, *Suit Says Faulty Elevators in Public Housing Violate Rights of Tenants*, N.Y. TIMES, Apr. 20, 2009, *available at* http://www.nytimes.com/2009/04/21/nyregion/21elevators.html?ref=nyregion&_r=0.

apartments for days at a time, forced to hobble down multiple flights of stairs in a leg brace, or stuck for hours in wheelchairs in building lobbies.[88] When elevators malfunctioned, they would often stop above or below floor level, which meant people in wheelchairs could not get out.[89] The class of more than 7,000 people brought suit,[90] asserting that the NYCHA failed to maintain its more than 3,300 elevators in violation of the Americans with Disabilities Act.[91]

The parties agreed to a settlement under which NYCHA had a timeframe to make repairs and is required to conduct "rigorous preventive maintenance" to avoid elevator breakdowns. The Housing Authority also agreed to approve transfer requests from mobility-impaired tenants to lower floors, where they will be less affected by elevator outages."[92]

A class action suit was the only way residents could hold NYCHA accountable for its failure to act. As one of the attorneys involved said, "Let's face it. If million-dollar co-ops had these elevator problems, there would be outrage. Because these elevators are in housing for the poorest among us, there's no action."[93]

d. They restored retirement funds:

$2.5 million in lost retirement funds was restored to employees of Colonial BancGroup.

Colonial BancGroup executives allegedly mismanaged the company, driving it into bankruptcy. The Alabama company, with 346 branches spread across five southern states, is the sixth largest bank failure in U.S. history and by far the largest failure of 2009.[94] Colonial Bancorp was heavily invested in risky subprime mortgages, a practice that sparked a credit crisis leading to the worst financial meltdown since the Great Depression.[95] Prior to its failure, the bank was under criminal investigation by the U.S. Department of Justice for alleged accounting irregularities at the company's mortgage warehouse lending division.[96]

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[88] Press Release, New York Legal Assistance Group, Sept. 5, 2012, available at http://nylag.org/press/september-5-2012.

[89] Compl. at 12, *Brito et al. v New York City Housing Authority, et al*, No. 09-01621 (EDNY 2009).

[90] *Brito et al. v New York City Housing Authority, et al*, 09-01621 (EDNY 2009).

[91] Press Release, New York Legal Assistance Group, Court Approves Settlement Suit to Force Housing Authority to Fix Its Elevators, Sept. 5, 2012, *available at* http://nylag.org/news/2012/09/court-approves-settlement-of-suit-to-force-housing-authority-to-fix-its-elevators.

[92] Press Release, *supra* note 86.

[93] Fernandez, *supra* note 85.

[94] Chris Isadore and Julianne Pepitone, *BB&T buys Colonial bank; 4 other banks fail*, CNN MONEY, Aug. 15, 2009, *available at* http://money.cnn.com/2009/08/14/news/companies/colonial_bancgroup/?postversion=2009081500.

[95] Binyamin Appelbaum, *Are Subprime Mortgages Coming Back?*, N.Y. TIMES MAGAZINE, Sept. 9, 2014, *available at* http://www.nytimes.com/2014/09/14/magazine/are-subprime-mortgages-coming-back.html?_r=0.

[96] Bill Donahue, *Colonial Bank Execs Pay $2.5M To Dodge ERISA Claims*, LAW360, June 18, 2012, *available at* http://www.law360.com/articles/350930/colonial-bank-execs-pay-2-5m-to-dodge-erisa-claims.

During its downfall, it allegedly knowingly put its employees' retirement assets in jeopardy.[97] Even after the housing market cratered and the bank knew its mortgages were worthless, it allegedly continued to direct employee retirement funds into the company stock, violating fiduciary duties under the Employee Retirement Income Security Act (ERISA).[98] Plaintiffs brought this class action lawsuit,[99] charging that because of the fiduciary breach, bank employees lost $50 million in retirement assets after the bank's stock gave up 99.7% of its value.[100]

The bank's executives settled the suit, likely anxious to keep the facts from seeing the light of day in a courtroom. Law 360 described the settlement as follows: "A group of officers from defunct Colonial BancGroup Inc. cut a $2.5 million deal Friday to end a consolidated class action accusing them of badly mismanaging the bank's employee retirement plans."[101]

$4.375 million in lost retirement funds was restored to employees of Textron.

The financial crisis hit Textron, the world's largest corporate jet manufacturer, hard.[102] Prior to the financial crisis, Textron executives allegedly mismanaged a number of contracts and engaged in wrongdoing, causing the company's share price to plummet.[103] For instance, the corporation reported in public statements and SEC filings that its Cessna division was financially strong.[104] However, it was allegedly artificially inflating its backlog by accepting orders from financially distressed companies that did not have the ability pay for them.[105] Eventually, Textron was forced to repeatedly lower its earnings projections as customers cancelled a large number of planes that had been on the backlog.[106]

Textron was also forced to settle a suit with federal securities regulators for $3.5 million after an executive officer of a Textron subsidiary uncovered fraud on U.S. government contracts.[107] The corporation also lost a $6.2 billion U.S. Army contract due to scheduling and quality problems and had to agree to a reduced profit on other contracts.[108]

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[97] Compl. at 2, *In Re Colonial Bancgroup, Inc. ERISA Litigation*, No. 2:09-cv-792 (M.D. Ala. 2010).

[98] Fred Schneyer, *Ala. Bank Hit with Stock Drop Charges*, PLANSPONSOR.COM, Sept. 2, 2009, *available at* http://www.plansponsor.com/NewsStory.aspx?Id=4294982881.

[99] *McKay v. Colonial BancGroup Inc.*, No. 09-00806 (M.D. Ala. 2009).

[100] Schneyer, *supra* note 96.

[101] Bill Donahue, *Colonial Bank Execs Pay $2.5M To Dodge ERISA Claims*, LAW360, June 18, 2012, *available at* http://www.law360.com/articles/350930/colonial-bank-execs-pay-2-5m-to-dodge-erisa-claims.

[102] *Textron shares climb amid takeover chatter*, REUTERS, Apr. 6, 2009, *available at* http://www.reuters.com/article/2009/04/06/us-textron-shares-idUSTRE5355Q420090406.

[103] Jeff Bounds, *Ex-CEO sues Bell over firing*, DALLAS BUS. J., Oct. 22, 2009, *available at* http://www.bizjournals.com/dallas/stories/2009/10/26/story3.html?page=all.

[104] Compl. at 22-23, *In re Textron Litigation*, No. 09-383-ML (D. R.I. 2010).

[105] *Id.* at 21.

[106] *Id.* at 26-27.

[107] Litigation Release, SEC, SEC Files Settled Books and Records and Internal Controls Charges Against Textron Inc. For Improper Payments to Iraq Under the U.N. Oil for Food Program, Aug. 23, 2007, *available at* http://www.sec.gov/litigation/litreleases/2007/lr20251.htm.

[108] Gina Cavallaro, *Armed Reconnaissance Helicopter canceled*, ARMY TIMES, Oct. 16, 2008, *available at* http://www.armytimes.com/article/20081016/NEWS/810160324/Armed-Reconnaissance-Helicopter-canceled.

Based on Textron's reassurances that the corporation was healthy, employees invested their retirement funds in their stock. After the company's alleged mismanagement was discovered, the employees sued, asking the court to determine whether the Employee Retirement Income Security Act (ERISA) required Textron to disclose damaging information about the company in order to warn employees against investing in the shaky stock. [109] The court approved a $4.375 million cash settlement.[110] No claims process was required, and checks were mailed to plan beneficiaries.[111]

$500,000 in lost retirement funds was restored to employees of International Game Technology.

Executives of International Game Technology (IGT), a casino supply corporation, invested employees' retirement funds in company stock while allegedly misleading employees about the risk.[112] IGT stock moved from about $45 in November 2007 to about $49 in March 2008, tumbling to less than $8 in November 2008 as sales prospects dimmed due to the recession hitting the gaming industry.[113]

Due to reliance on the integrity of the market, the class alleges that it paid artificially inflated prices for IGT common stock.[114] Further, during this time, company insiders sold shares of their personal IGT stock for nearly $29 million – at the same time as the retirement plan participants were buying the stock on the company's growth story.[115]

A class of employee retirement plan participants filed suit for violations of the Employee Retirement Income Security Act (ERISA).[116] Due to IGT's failures, the participants alleged that they suffered substantial losses, resulting in the depletion of millions of dollars of the retirement savings and anticipated retirement income of the plan's participants.[117] The court approved a settlement in which the defendants paid $500,000 back to employees who had lost funds.[118]

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[109] *Sheets v. Textron Inc.*, No. 09-00412 (D. R.I. 2009), *In re Textron, Inc. ERISA Litigation*, No. 09-00383 (D. R.I. 2010).

[110] *Milberg LLP announces a proposed $4.375 million cash settlement of an ERISA class action on behalf of certain participants in the Textron Savings Plan*, PR NEWSWIRE, Sept. 30, 2013, *available at* http://www.prnewswire.com/news-releases/milberg-llp-announces-a-proposed-4375-million-cash-settlement-of-an-erisa-class-action-on-behalf-of-certain-participants-in-the-textron-savings-plan-225814351.html.

[111] *Id.*

[112] Steve Green, *Suit claims IGT employees harmed by retirement plan*, LAS VEGAS SUN, Oct. 5, 2009, *available at* http://www.lasvegassun.com/news/2009/oct/05/suit-claims-igt-employees-harmed-retirement-plan/.

[113] Steve Green, *Class-action lawsuit filed against IGT*, LAS VEGAS SUN, July 31, 2009, *available at* http://www.lasvegassun.com/news/2009/jul/31/class-action-lawsuit-filed-against-igt/.

[114] *Id.*

[115] *Id.*

[116] *Carr v Int'l Game Technology*, No. 09-00584 (D. Nev. 2009).

[117] *Id.*

[118] Matthew Loughran, *Court Allows Contract Breach Claims Alleging Failure to Defend Stock-Drop Case*, BLOOMBERG BNA, Sept. 2, 2014, *available at* http://www.bna.com/court-allows-contract-n17179894300/.

$3.2 million in lost retirement funds was restored to employees of Level 3 Communications.

Level 3 Communications employee retirement plan managers allegedly withheld information about company troubles and breached their fiduciary duty to members by continuing to invest in the overvalued company stock.[119] Plan members brought suit, alleging violations of Employee Retirement Income Security Act (ERISA).[120] Specifically, they alleged that plan managers: (1) allowed participants to continue to elect to invest their retirement monies in Level 3 stock, (2) had the employer matching contribution be in the form of Level 3 stock when it was imprudent to do so, and (3) failed to provide the participants with timely, accurate and complete information concerning the company as required by applicable law.[121]

According to the plan members, investing in Level 3 shares was particularly risky at the time because the company was having trouble integrating the eight smaller telecommunications companies that it had purchased into the company.[122] The plaintiffs claimed that Level 3 concealed the problems and offered misleading information about its ability to successfully manage the new acquisitions, and the stock price plummeted when the problems came to light.[123]

The judge approved a settlement in which the management agreed to pay $3.2 million to employees who had been harmed.[124]

AK Steel Corporation paid employee class members "virtually all the funds" it was accused of shortchanging them in their pensions.

AK Steel Corp. allegedly shortchanged its union retirees by improperly calculating their pension plan payments, violating the Employee Retirement Income Security Act (ERISA).[125] According to the retirees, the corporation failed to employ a "whipsaw" when calculating the retirees' lump-sum distributions.[126] ERISA requires use of the "whipsaw" calculation which imposes the plan rate of interest in determining account balances at retirement age and then using a lower rate in reducing the amount to present value.[127] The retirees brought suit.[128]

AK Steel Corp. agreed to pay 42 retirees approximately $650,000 to make up for the difference between their lump-sum distributions and what they would have been paid had the company used

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[119] Abigail Rubenstein, *Level 3 Strikes $3.2M Deal to End ERISA Action*, LAW360, Nov. 14, 2011, *available at* http://www.law360.com/articles/285665/level-3-strikes-3-2m-deal-to-end-erisa-action.

[120] *Walter v. Level 3 Communications, Inc.*, No. 09-00658 (D. Colo. 2009).

[121] *Id.*

[122] Rubenstein, *supra* note 117.

[123] *Id.*

[124] *Id.*

[125] Samuel Howard, *AK Steel Settles Class Action Over Pension Payments*, LAW360, Nov. 24, 2010, *available at* http://www.law360.com/articles/211337/ak-steel-settles-class-action-over-pension-payments.

[126] *Id.*

[127] Compl. at 13, *Schmidt v. AK Steel Corp. Pensions Agreement Plan et al*, No. 1:09-cv-00464-SSB-KLL (S.D. Ohio 2009).

[128] *Schmidt v. AK Steel Corp. Pensions Agreement Plan et al*, No. 1:09-cv-00464-SSB-KLL (S.D. Ohio 2009).

the "whipsaw" when calculating the retirees' payments.[129] Under the settlement, the plaintiffs obtained virtually all of the funds they sought for AK Steel's alleged failure.[130]

e. They addressed health and environmental harms.

The Tennessee Valley Authority was forced to answer for allegedly failing to maintain a coal ash containment dyke, leading to a massive spill of coal ash sludge.

According to the Chamber, "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."[131]

The Chamber was wrong, however. One of the class actions was successfully brought on behalf of property owners who suffered damages from a massive spill of coal ash sludge.[132]

In December 2008, a dike at a coal plant operated by the Tennessee Valley Authority (TVA) burst, sending more than a billion gallons of highly toxic coal ash slurry into waterways and covering nearly 300 acres with sludge.[133] The coal ash was held in earthen dikes rather than lined landfills, [134] and leaks and seepage had plagued the dikes at the TVA coal plant for years.[135] According to a February 2008 inspection report, the TVA knew about leaks for more than two decades and opted against long-term solutions.[136]

In August 2012, a district court found in favor of plaintiffs on their claims of negligence, trespass, and private nuisance.[137] According to the court, "TVA's conduct in regard to its mandatory policies, procedures, and practices for coal ash management compounded the location, design, and operation causes [for the dike failure] and had TVA followed its own mandatory policies, procedures and practices, the subsurface issues underlying the failure of the North Dike would have been investigated, addressed, and potentially remedied before the

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[129] Howard, *supra* note 123.

[130] *Id.*

[131] "Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions," Memorandum written by Mayer Brown LLP for U.S. Chamber of Commerce, at p. 3. (emphasis in original).

[132] *Blanchard v. Tennessee Valley Authority*, No. 3:09-cv-00009 (E.D. Tenn. 2009).

[133] TVA Kingston Disaster and Federal Coal Ash Regulations Timeline, p. 1, Earthjustice, *available at* http://earthjustice.org/sites/default/files/files/TVA_DISASTER_COAL_ASH_TIMELINE_2014.pdf.

[134] Shaila Dewan, *Tennessee Ash Flood Larger Than Initial Estimate*, N.Y. TIMES, Dec. 26, 2008, *available at* http://www.nytimes.com/2008/12/27/us/27sludge.html?_r=0.

[135] *Review of the Kingston Fossil Plant Ash Spill Root Cause Study and Observations about Ash Management*, Tenn. Valley Authority Office of the Inspector General Report, No. 2008-12283-02, July 23, 2009, *available at* http://oig.tva.gov/PDF/09rpts/2008-12283-02.pdf.

[136] *Id.* at 18-21.

[137] Andrew M. Ballard, *Federal District Court Rules TVA Liable For Damages in 2008 Coal Ash Slurry Spill*, BLOOMBERG BNA, Aug. 24, 2012, *available at* http://www.bna.com/federal-district-court-n12884911399/.

catastrophic failure of December 22, 2008."[138] The TVA agreed to pay $27.8 million to settle claims from property owners who suffered damages due to the 2008 spill of coal ash sludge.[139]

The Pennsylvania Department of Public Welfare (DPW) was forced to provide timely medical care to thousands of low-income and disabled residents.

Narcisa Garcia and elderly advocacy groups sued the DPW for allegedly failing to make timely payment of Medicare premiums for thousands of low-income elderly individuals and individuals with disabilities.[140] This caused alleged delays, meaning low-income elderly and disabled people in Pennsylvania had to pay Medicare premiums themselves or go without care they were entitled to receive under the law for months or years.[141] The advocacy groups alleged that these delays by DPW violated the Social Security Act and other federal regulations.[142]

Less than a year later, the case settled. The Judge approved a class of all persons living in Pennsylvania who were eligible to have their Medicare premiums paid but whose benefits were denied or delayed unlawfully by DPW.[143]

DPW agreed to change its practices to provide timely health care to Pennsylvania low income elderly and disabled residents.[144] In particular, it agreed to begin submitting MSP enrollment requests on a daily basis (already happening in other states) and to begin accepting responses to its MSP enrollment requests on a daily basis.[145] It agreed to new protocols and timeframes for case workers to resolve data errors in enrollment submissions.[146] In short, the state revamped the way it enrolls people in Medicare.[147] The Garcia settlement will lower the cost of Medicare and increase access to Medicare-covered services and benefits for low-income older people and people with disabilities in Pennsylvania.[148]

Kellogg, Brown & Root LLC (KBR) and Halliburton are being forced to answer for operating open air burn pits in Afghanistan and Iraq, jeopardizing the health and safety of thousands of American service members.

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[138] Elizabeth A. Alexander, *Federal Court Finds TVA Responsible For Nation's Largest Coal Ash Spill Ever*, MARTINDALE.COM, Aug. 28, 2012, *available at* http://www.martindale.com/environmental-law/article_Lieff-Cabraser-Heimann-Bernstein-LLP_1577322.htm.

[139] Travis Loller, *Utility to Pay Tennessee Coal Ash Victims $27.8 Million*, AP, Aug. 4. 2014, *available at* http://www.memphisdailynews.com/news/2014/aug/4/utility-to-pay-tennessee-coal-ash-victims-278-million/.

[140] *Garcia v Johnson*, No. 09-01747 (E.D. Pa. 2009).

[141] Compl. at 1-2, *Garcia v Johnson*, No. 09-01747 (E.D. Pa. 2009).

[142] *Id.* at 2.

[143] Press Release, Pennsylvania Lawsuit Increases Access to Medicare for Low-Income Beneficiaries, Center for Medicare Advocacy, Inc., Apr. 29, 2010, *available at* http://www.medicareadvocacy.org/InfoByTopic/MedicareSavingsPrograms/10_04.29.GarciaSettlement.htm.

[144] *Id.*

[145] Joint Motion for Approval of Settlement Agreement at 2, *Garcia v Johnson*, No. 09-01747 (E.D. Pa. 2009).

[146] Press Release, supra note 141.

[147] *Id.*

[148] *Id.*

Since the beginning of our military presence in Afghanistan and Iraq, the military has contracted with KBR and Halliburton to provide waste disposal and water treatment services on military bases in the Middle East.[149] The corporation established open air burn pits to dispose of hazardous waste, allegedly exposing service members and civilian workers to smoke, ash and fumes for a prolonged period of time.[150] This exposure allegedly led to chronic ailments including respiratory illnesses and cancer.[151]

Service members filed 58 class action and individual suits, including the suit at issue, alleging that the defendants had a duty to warn U.S. service members and civilians working and living around burn pits of the health and safety issues but failed to do so.[152] The lawsuits, filed across the country, were consolidated in *In re KBR Inc. Burn Pit Litigation.*[153] Most recently, the Court of Appeals for the Fourth Circuit held that the lawsuits can proceed forward.[154]

III. OUR ANALYSIS DIFFERS GREATLY FROM THAT OF THE U.S. CHAMBER OF COMMERCE

a. The Chamber mischaracterized cases in its memorandum.

The Chamber characterized some class actions as providing "little in the way of benefit flows to class members."[155] Only an intentionally deceptive description of the cases could support such an assertion. In support of its claims, it cited the following cases:

- ***Dryer v. Nat'l Football League.*** The Chamber claimed that "Lawyers (as opposed to class members) were the principal beneficiaries of the remaining settlements in our

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[149] Kate Donovan Kurera, *Military Burn Pits in Iraq and Afghanistan: Considerations and Obstacles for Emerging Litigation*, 28 PACE ENVTL. L. REV. 288, 289 (2010).

[150] Compl. at 4-5, *Green v. KBR Inc.*, No. 4:09-cv-00459 (N.D. Okla. 2009).

[151] Ken Bastida, *Veterans Returning Home From Iraq, Afghanistan Point To Open Air Burn Pits As New 'Agent Orange,'* CBS SAN FRANCISCO, May 20, 2014. *available at* http://sanfrancisco.cbslocal.com/2014/05/20/veterans-returning-home-from-foreign-wars-falling-ill-dying-from-new-agent-orange-iraq-afghanistan-war-soldier-soldiers-chemical-cancer-garbage-incinerator-service-va/.

[152] Patricia Kime, *Federal court allows burn-pit lawsuit to advance*, MILITARY TIMES, Mar. 7, 2014 *available at* http://archive.militarytimes.com/article/20140307/BENEFITS06/303070020/Federal-court-allows-burn-pit-lawsuit-advance.

[153] Andrew Zajac, *KBR, Halliburton Not Immune From Burn-Pit Suits, Court Says (2)*, BLOOMBERG BUSINESSWEEK, March 6, 2014, available at http://www.businessweek.com/news/2014-03-06/kbr-halliburton-not-immune-from-burn-pit-suits-court-says-1.

[154] Allissa Wickham, *4th Circ. Revives Burn-Pit Suits Against KBR, Halliburton*, LAW360, Mar. 6, 2014, *available at* http://www.law360.com/articles/516013/4th-circ-revives-burn-pit-suits-against-kbr-halliburton.

[155] Letter of David Hirschmann and Lisa Rickard, U.S. Chamber of Commerce, to Monica Jackson, Consumer Financial Protection Bureau, Dec. 11, 2013, p. 5 ("A new empirical assessment of class actions that the Chamber has commissioned demonstrates that the class actions studied provide little or no benefit to consumers.").

study," citing this case an example.[156] Yet, the facts lead to a different conclusion. Under the settlement, $42 million went to retired NFL players whose images were used, while $7.7 million went to pay the lawyers. In fact, the article cited by Mayer Brown made this explicitly clear.[157]

- The Chamber criticized the result because "Named plaintiffs object to the settlement."[158] It failed to note that the judge – whose job it is to look out for the interests of the entire class – expressly addressed those objections and concluded that the settlement was "a boon to those thousands upon thousands of former NFL players who can now reap the collective benefit of a large financial payout to a fund organized solely for their benefit, overseen by their comrades-in-arms."[159]

- ***McKay v. Colonial BancGroup Inc.*** The Chamber cited this case as an example of a class action in which lawyers (as opposed to class members) were the principal beneficiaries of a settlement.[160]" That characterization is wrong.

  - As described in Section II, Colonial Bank executives allegedly mismanaged the company and drove it into bankruptcy. During its downfall, it put its employees' retirement assets in jeopardy, continuing to direct employee retirement funds into the company stock.[161] According to the complaint, "Colonial held employee meetings and disseminated internet postings throughout the spring and summer of 2009, telling Plan participants that everything was 'hunky dory' at Colonial and that Plan participants should continue to invest in Colonial stock. This message persisted until Friday, August 14, 2009, when the Alabama State Banking Department physically took control of the Bank's various offices and locked its doors, appointing the Federal Deposit Insurance Corporation as receiver."[162] Ultimately, the class action succeeded in obtaining from the bank $2.5 million for employees who had lost their retirement funds.[163]

  - The class members received 74% of the fund created by the settlement. The plaintiffs' attorneys received fees amounting to 26% of the fund.

  - The Chamber report criticizes the settlement because the injured employees recouped only 5% of their losses. To be sure, in a perfect world, the employees would have been made whole. In a more perfect world, company executives

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[156] "Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions," Memorandum written by Mayer Brown LLP for U.S. Chamber of Commerce, available at http://blogs.reuters.com/alison-frankel/files/2013/12/mayerbrownclassactionstudy.pdf at 15-16.

[157] *Id.* at 16.

[158] *Id.*

[159] Order at 2, *Dryer v. Nat'l Football League*, No. 09-cv-02182 (D. Minn. 2010).

[160] Mayer Brown, LLP, *supra* note 154, at 15-17.

[161] Schneyer, *supra* note 96.

[162] Compl. at 3, *McKay v. Colonial BancGroup Inc.*, No. 2:09-cv-00806 (M.D. Ala. 2009).

[163] Donohue, *supra* note 99.

would not have plunged their employees' retirement contributions into worthless stock. But here, because mismanagement had left the company bankrupt, the employees were unlikely to recover more had they proceeded to trial. Furthermore, without the class action, the vast majority of employees would have received nothing.

b. Defense counsel often caused the delays criticized by the Chamber.

The Chamber criticized class actions because "[a]pproximately 14 percent of all class action cases remained pending four years after they were filed."[164] It is unsurprising that complex litigation involving hundreds of thousands of injured consumers or investors can be a lengthy endeavor, especially when corporate defense strategies involve purposefully delaying the case. And class action litigation is not unique in this regard, as complex civil litigation typically lasts years.

Often, the corporate defendant delays and draws out a class action. For example, filed in 2009, *Samuel Troice, et al v. Proskauer Rose LLP* is a class action regarding the "mini-Madoff" investment fraud scandal in which Allen Stanford and his firm Stanford Financial ran a massive Ponzi scheme, defrauding investors of hundreds of millions of dollars.[165] Lawyers for Stanford Financial allegedly assisted in the scheme by hindering an SEC investigation.[166] The defendants moved to dismiss, claiming that they could not be sued for aiding and abetting securities fraud. They lost before the U.S. 5th Circuit Court of Appeals, pursued the issue to the U.S. Supreme Court, and lost there in 2014.[167] Then, five years after it began, the case returned to the trial court to be litigated.

Hennigan v General Electric is a class action involving defective General Electric (GE) microwave ovens that could turn on spontaneously and catch fire.[168] According the complaint, GE fraudulently concealed this dangerous defect from consumers for almost a decade.[169] The case was profiled in Consumer Reports.[170] GE took many actions to delay the litigation, from filing motions to dismiss to failing to disclose documents until ordered to do so by the court. In fact, the judge found that GE's failure to comply with orders to disclose consumer complaints about burning microwaves so egregious that he ordered GE to pay plaintiffs' attorneys fees and costs for pursuing a motion to compel.[171] The litigation continues.

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[164] Mayer Brown, LLP, *supra* note 154, at 1.

[165] No. 09-cv-01600 (N.D. Tex. 2009).

[166] Murray Waas, *Insight: How Allen Stanford kept the SEC at bay*, REUTERS, Jan. 26, 2012, *available at* http://www.reuters.com/article/2012/01/26/us-sec-stanford-idUSTRE80P22R20120126.

[167] *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014).

[168] No. 2:09-cv-11912 (E.D. Mich. 2009).

[169] Complaint at 5, No. 2:09-cv-11912 (E.D. Mich. 2009).

[170] *Appliance fires: Is your home safe?*, CONSUMER REPORTS MAGAZINE, March 2012, *available at* http://www.consumerreports.org/cro/magazine/2012/03/appliance-fires-is-your-home-safe/index.htm.

[171] Order at 5, *Hennigan v General Electric*, No. 2:09-11912 (E.D. Mich. 2010) "Even giving GE the benefit of the doubt, it offers no legitimate reason for its failure to timely provide the Safety Database documents, which required no search terms and was organized in such in a way that GE could have easily produced, in accordance with Judge

c. The Chamber's criticism of claims-made settlements is misleading.

According to the Chamber, "While some may argue that parties should use automatic distribution mechanisms instead 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."[172]

First, our review of the Chamber's list of cases showed that, among those that settled on a class basis, the cases were about equally divided between those that required class members to send in claim forms and those that did not, with slightly more *not* requiring a claim form. The cases that required no claim ranged from settlements related to retiree pensions, to defrauded investors, to defective automobiles.

More generally, consumer financial services class actions often result in automatic distribution.[173] Indeed, the only consumer financial services class action discussed in the Chamber's memo notes that the payment to class members was made through automatic distribution. Automatic distribution settlements, in which the identity of class members and the value of their claims can be ascertained without a claims notice process, result in recoveries to a high percentage of the class.[174]

The Chamber described the case as follows: "[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.[175] The Chamber failed to report the amount of money returned to defrauded consumers – $100

Roberts' Order, the narrow category of responsive documents that it has advocated to be the proper scope of discovery in this case."

[172] Mayer Brown, LLP, *supra* note 154, at 11-12.

[173] Consumer Financial Protection Bureau, Arbitration Study Preliminary Results (Dec. 12, 2013) at 107-108, *available at* http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

[174] Alison Frankel, *Class actions deliver more money to more people than arbitration: CFPB*, REUTERS, Dec. 12, 2013, available at http://blogs.reuters.com/alison-frankel/2013/12/12/class-actions-deliver-more-money-to-more-people-than-arbitration-cfpb/.

[175] Mayer Brown, LLP, *supra* note 154, at 12.

million.[176] In addition, Chase was forced to change its business practices.[177] This settlement provided $100 million to defrauded credit card customers.[178]

Class actions effectively fight fraud and misconduct committed by large financial institutions for a variety of reasons:

- **They often involve small-dollar harm committed against large groups of people.** For example, millions of people were harmed by the banking industry's practice of re-ordering checking account transactions so as to maximize overdraft fees. But the typical overdraft fee is only around $25, far too small an amount to be worth an individual lawsuit. The Supreme Court has noted that it is for precisely this type of harm that the class action device exists: "[A]t the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[179]

- **It is often easy to determine the amount of the harm.** Because these cases involve banks and their relationships with customers, when there is harm to the customer, the loss suffered is evident from bank records. If the case involves an illegally-assessed fee, for instance, the amount of the fee is known. If the case involves an illegally-high interest rate, it is possible to figure out what the finance charges would have been but for the illegal interest.

- **No claims process is typically required.** Most of these cases involve situations in which class members are in an ongoing relationship with the defendant. Class members may be credit card or checking account holders, or debtors who owe a lender. Accordingly, once a settlement is negotiated, the money can be paid back directly to those harmed. The offending bank can simply mail a check, direct deposit money into class members' accounts, or eliminate debt. Even when a claims process is required, notice is easier to give because the financial institution has the contact information of the harmed class members.

Two recent cases show – yet again – how class actions hold financial fraudsters accountable:

In December 2013, a judge approved a settlement in *Edwards v. Geneva-Roth Capital Inc.*,[180] a payday loan case in which the lender allegedly violated state lending laws by charging

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[176] Jonathan Stempel, *JPMorgan in $100 million credit card settlement*, REUTERS, Jul. 24, 2012, available at http://www.reuters.com/article/2012/07/24/us-jpmorgan-creditcard-settlement-idUSBRE86N13O20120724.

[177] For those who chose an alternative offer after the minimum monthly increases, such as a higher APR, Chase agreed not to increase their APR. The bank also agreed to maintain the previous 2% minimum monthly payment requirement for class members with alternative offer accounts, so long as the customer does not default. *See* Settlement Summary, Lieff Cabraser Heimann & Bernstein, *available at* http://www.lieffcabraser.com/Case-Center/Chase-Check-Loan.shtml.

[178] *Id.*

[179] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

[180] No. 49C01-1003-PL-013084 (Cir. Ct. Ind. 2013).

sometimes more than 1000% annual interest rate on payday loans to people in severe financial distress.[181] The lender also automatically renewed loans, resulting in thousands of dollars due in just a few months.[182] The lender tried to force the case into individual arbitration.[183] When that motion was denied and affirmed on appeal, the lender exhausted all further avenues of appeal. Once arbitration was denied, the case settled for $1.35 million in cash and cancellation of over $5 million in amounts owed on outstanding loans.[184] As a result of the settlement, more than 6,000 class members received relief.[185]

In May 2014, a judge approved a settlement in *Yarger v. ING Bank.*[186] This class action alleged that ING Direct repeatedly failed to honor mortgage financing guarantees it made to tens of thousands of customers.[187] Instead of honoring the guarantees, ING added qualification requirements not described in its advertising.[188] Borrowers suffered damages when they had to pay more than they had been promised.[189] The settlement requires ING to pay $20,350,000 in cash, plus all costs of notice and claims administration.[190] It will be direct, monetary relief in the form of an automatic cash payment to every member of the class.[191] All class members who do not opt out will receive a check in the mail.[192]

IV. ANALYSIS OF CLASS ACTIONS FILED IN 2009 SHOWS THAT ARBITRATION IS EASILY CORRUPTIBLE AND DENIES ACCESS TO JUSTICE FOR CONSUMERS WITH VALID CLAIMS.

a. The 2009 class action challenging the corrupt National Arbitration Forum shows that arbitration is fundamentally susceptible to corruption.

The Chamber introduced its "study" with a claim to objectivity: "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."[193] Having examined that set of class actions, the Chamber concluded that they "provide

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[181] Id.

[182] *Geneva-Roth, Capital, Inc. v. Edwards*, 956 NE 2d 1195, 1197 (Ind. Ct. App. 2011).

[183] *Geneva-Roth, Capital, Inc. v. Edwards*, 956 NE 2d 1195, 1198 (Ind. Ct. App. 2011).

[184] Order Granting Final Approval to Class Action Settlement Agreement, *Edwards v. Geneva-Roth Capital, Inc.*, No. 49C01-1003-PL-013084 (Cir. Ct. Ind. 2013).

[185] *Id.*

[186] No. 11-cv-00154-LPS (D. Del. 2014).

[187] Andrew Scurria, *ING Can't Slip False Ad Suit Over Mortgage Rate Renewals*, LAW360, Sept. 23, 2013, available at http://www.law360.com/articles/474525/ing-can-t-slip-false-ad-suit-over-mortgage-rate-renewals.

[188] *Id.*

[189] *Id.*

[190] Settlement Agreement at 55, *Yarger v. ING Bank*, No. 11-cv-00154-LPS (D. Del. 2014).

[191] *Id.* at 52.

[192] *Id.*

[193] Mayer Brown, LLP, *supra* note 154, at 1.

little or no real benefit to consumers."[194] However, the single largest consumer class action filed in 2009 provided over $4 billion in financial relief to consumers.[195]

The National Arbitration Forum (NAF), named as the arbitration-administering organization for consumer disputes in tens of millions of credit card agreements nationwide, portrayed itself as independent and neutral when in fact it allegedly worked closely with creditors and debt collectors.[196] Consumers formed a class, seeking to invalidate arbitration awards and obtain disgorgement of all amounts collected from persons against whom NAF issued an arbitration award.[197]

The case was consolidated with others as part of a multidistrict litigation (MDL).[198] The court approved a settlement requiring NAF to dismiss all pending consumer arbitrations (valued at an estimated $1 billion), and debt collection firm Mann Bracken to cease all collection activities arising out of NAF arbitrations (valued at approximately $3.8 billion).[199] NAF also agreed to stop handling consumer arbitrations for ten years.[200]

This for-profit arbitrator can no longer harm consumers. However, its legacy likely lives on, in other privately-held corporate arbitration companies that conduct unreviewable arbitrations. Today's economic uncertainty means that more consumers will have more debt, leading financial giants to seek out arbitrators to act as an arm of the debt collection industry. A situation like the one described above could easily happen again, and it would be difficult to uncover.

b. None of the successful class actions chronicled would have been possible under forced arbitration.

Despite the fact that forced arbitration clauses in consumer financial services contracts govern the rights of tens of millions of consumers, arbitration provides relief to almost no consumers harmed by illegal or abusive practices in the financial services industry.

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[194] Letter of David Hirschmann and Lisa Rickard, U.S. Chamber of Commerce, to Monica Jackson, Consumer Financial Protection Bureau, Dec. 11, 2013, at 45.
[195] *In re: Nat'l. Arb. Forum Trade Practices Litigation*, No.10-md-02122 (Dist. Ct. Minn. 2011).
[196] *Magnone et al. v. Accretive LLC et al.*, No. 09-cv-06375, (C.D. Cal. 2009). The Minnesota Attorney General also sued NAF, alleging in particular that it concealed its financial ties to a New York hedge fund that owned one of the country's largest debt collection operations, and that nearly 60% of the 214,000 consumer disputes arbitrated by NAF in 2006 were filed by law firms controlled by the hedge fund. According to the Attorney General, NAF generated additional revenue by convincing creditors to place mandatory pre-dispute arbitration clauses in their customer agreements and to appoint NAF as the arbitration administrator for any disputes, soliciting creditors with promises that consumers would be more willing to resolve their debts because they do not know what to expect from arbitration and because creditors retain all the leverage in arbitration.
[197] *Magnone et al. v. Accretive LLC et al.*, No. 09-cv-06375, (C.D. Cal. 2009).
[198] *In re: Nat'l. Arb. Forum Trade Practices Litigation*, No.10-md-02122 (Dist. Ct. Minn. 2011).
[199] Final Settlement Approval at 1, *In re: Nat'l. Arb. Forum Trade Practices Litigation*, No.10-md-02122 (Dist. Ct. Minn. 2011).
[200] Chris Herring, *In Settlement, Arbitration Company Agrees To Largely Step Aside*, WALL ST. J., Jul. 20, 2009, available at http://blogs.wsj.com/law/2009/07/20/in-settlement-arbitration-company-agrees-to-largely-step-aside/.

The total number of consumer arbitrations is startlingly small. The CFPB looked for all the credit card, checking, and payday loan disputes filed by consumers with the American Arbitration Association (AAA) over the three year period 2010-2012 and found approximately 900 claims.[201] Despite the pervasiveness of forced arbitration clauses, that means that, across the entire country, only around 300 consumers pursue arbitration against their financial services providers each year. The total amount in dispute in the arbitrations examined was only $15 million.[202]

In contrast, the CFPB notes that the result of just eight class action litigations was financial relief for more than 13 million people.[203] The Bureau wrote: "More than 13 million class members made claims or received payments under these settlements. Total payments or debt relief to the classes are in excess of $350 million, exclusive of attorneys' fees and the value of injunctive relief."[204]

The study shows that certain types of claims are simply never vindicated in arbitration:

- Virtually no one brings small dollar claims (generally considered less than $1,000) in arbitration.[205] These are the very types of claims that the U.S. Supreme Court has said are properly suited for class actions, whereby many consumers' small dollar claims are aggregated.[206]

- Despite widespread abuse by banks in the ordering and timing of overdraft charges, only two people brought arbitration claims for the practice.[207] In contrast, the study showed that just three class actions provided relief to over 6 million people for abuses in the ordering and timing of overdraft charges.[208]

- Despite the fact that payday lenders often charge interest above what is legally allowed, only 11 people brought arbitration claims for charging of interest and fees above a state cap.[209] Were the CFPB to review litigation challenging the charging of such illegal rates, it would likely find class actions that provided relief to thousands.

- Claims under the Equal Credit Opportunity Act (ECOA) are not vindicated in arbitration. Over the entire three-year period examined by the CFPB, only one ECOA claim was brought in arbitration.[210] This suggests that civil rights claims – where a consumer may not know he or she has been discriminated against – are not suitable for arbitration.

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[201] Consumer Financial Protection Bureau, Arbitration Study Preliminary Results (Dec. 12, 2013) at 13, *available at* http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.
[202] *Id.* at 80.
[203] *Id.* at 104.
[204] *Id.*
[205] *Id.* at 82.
[206] *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 186 (1974).
[207] Consumer Financial Protection Bureau, Arbitration Study Preliminary Results (Dec. 12, 2013) at 89-90, *available at* http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.
[208] *Id.* at 108-109.
[209] *Id.* at 91.
[210] *Id.* at 86.

V. CONCLUSION

Class actions are often the sole means of enabling consumers to remedy injustices committed by powerful corporations. When corporations engage in wrongdoing that affects large numbers of people, class actions allow individuals to hold them accountable without incurring the costs of thousands of separate lawsuits. This tool is an essential element of the civil justice system. The simple truth is that class actions work, and they work on behalf of people who are otherwise powerless to hold corporations accountable..