LAW AND ECONOMICS SEMINAR **Professor Polinsky**
Winter Quarter 2017

Thursday, February 2, 2017
4:15 - 5:45 p.m.
Stanford Law School
Room 285

"High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions under Federal Consumer Protection Statutes"

by

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<u>Note</u>: It is expected that you will have reviewed the paper before the Seminar. Because this paper is a bit longer than usual, the author was asked to provide a "reader's guide." He wrote: "Read the introduction, pp. 4-7, and pp. 13-50. This is much less than it seems as there are a large number of graphs, histograms and the like."

High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions under Federal Consumer Protection Statutes

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©August 10, 2016. Revised, January, 2017.

Abstract

Working from a sample of all consumer class actions filed in the Northern District of Illinois over the period 2010–2012 (totaling 510), this paper reports and analyzes data on class actions under four federal consumer protection statutes, the Electronic Funds Transfer Act (EFTA) the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA), and the Telephone Consumer Protection Act (TCPA). Even coding all TCPA cases as alleging actual harm to the named plaintiff, over half the cases in the sample analyzed here seek statutory damages without an allegation of harm to the plaintiff. Especially in large class actions, only 10% to 15% of the class receive compensation, and the aggregate compensation paid to the class is far less than the stated or nominal class settlement fund amount. Because courts award attorneys' fees based on the nominal settlement amount, attorneys' fees are a very large fraction of the amount paid to the class and for some case types attorneys' fees average 300%-400% of the amount paid to the class. With low class compensation rates and attorneys' fees to class counsel that often dwarf total class compensation, such class actions are a highly inefficient means of awarding compensation to consumers. As the actual harm in such cases is at best small, consumers would likely have little ex ante demand for insurance against such harm. As statutory damages are far higher than the actual harm and relatively uniform and independent of actual harm, the system likely leads to a misallocation of efforts of class counsel toward such high statutory damage cases and away from cases with bigger harm but smaller statutory damages.. In *Spokeo, Inc. v. Robins*, 578 U.S. __ (2016), the Supreme Court has recently articulated a test for standing in actions brought under precisely the sort of no harm, statutory damage provisions studied here. The article concludes by evaluating possible solutions to socially wasteful no harm causes of action under federal consumer protection statutes. One is the possibility that under *Spokeo*, courts could screen true no harm cases from the costly class action process. Another is that through better monitoring of class settlement terms, district courts could lower the costs of class actions and restore balance between costs and benefits. The final reform possibility analyzed is Congressional amendment of no harm statutory damage provisions.

* Thanks for detailed comments on this paper go to Richard Hynes, Louis Kaplow and Steve Shavell. Useful comments on this paper were made by participants in law and economics workshops at the law schools of George Mason University and Harvard University, and in the summer faculty workshop at the University of Virginia Law School. I am especially grateful to University of Virginia Law School student research assistants William Jordan, Lauren Kramer, Levi Swank and Joseph Hykan, all of whom were crucial to the success of this project, and to Jon Ashley of the University of Virginia Law Library, who helped with early stages of data collection.

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I. Introduction

Suppose someone proposed a hypothetical system of compensatory wealth redistribution to consumers where the fees paid to the intermediaries accomplishing the distribution often dwarf the amount paid to consumers. Suppose that in this system, the redistribution was so random that only a small fraction of consumers ever received any payments at all. Suppose that this same person proposed a hypothetical system of deterrence in which the conduct being deterred with civil damages more often than not causes no harm to anyone. And now suppose, finally, that someone proposed to combine all these systems into a single complex and exorbitantly expensive institution.

One might well suppose that no rational person would actually support the creation of this institution. And yet—based on data my research assistants and I have collected on all consumer class actions filed in the Northern District of Illinois during the period 2010 through 2012 (the "Illinois Data")—class action lawsuits under federal consumer protection statutes constitute precisely such a system.

Our sample of consumer class actions is the largest yet studied whose results can be subject to replication.[1] In brief summary, the empirical findings that we describe and analyze below show that in at least half of the class actions in our sample, the plaintiff does not allege injury. Instead the plaintiff relies solely on statutory damage provisions dispensing with the need to allege harm. With or without harm allegations, over 80% of filings end in settlement. Individual settlement—where the named plaintiff settles and dismisses the individual action with prejudice—occurs in over 50% of cases. By comparison, class settlement rates range from 20% to almost 40% and generally compensate only a small fraction of the class. Compensation rates—the fraction of class members who actually receive compensation—vary tremendously across case types even for cases brought under the same statute. However, the biggest class actions, seeking statutory damages with no allegation of injury to the plaintiff, have compensation rates of 10% to 15%. Only in a very small number of class settlements do a majority of class members receive compensation.

Our research shows that the cost of using the consumer class action procedural device to compensate such a small fraction of consumer class members outweighs the aggregate amount delivered as compensation to consumers. Because few class members fill out valid claim forms, the aggregate amount that class members typically receive comprises a small fraction of the nominal or stated settlement amount. Since courts base attorneys' fees on the nominal or stated settlement amount and not the actual money paid to class members, attorneys' fees are a very large fraction of the actual class recovery. As a result, attorneys' fees often equal 300%–400% of the actual aggregate class recovery. Such disproportionate attorneys' fee awards mostly arise in settlements that award a very small fraction of consumers any compensation and where the harm to consumers is very small or even arguably nonexistent.

Thus the 2010–2012 Illinois Data depicts class action settlements under federal consumer protection statutes as a mechanism of compensation whose cost far exceeds actual class recovery

[1] Upon publication, all of our data on case filings, coding and class settlements will be publicly available in an online archive currently under construction at the University of Virginia Law School. The Consumer Financial Protection Bureau's dataset on class actions, discussed infra, is not and likely will not be publicly available.

and which award recovery only to a small fraction of class members.[2] Moreover, the Illinois Data shows a remarkable frequency of class settlements where the wrongful conduct was a failure to follow notice and disclosure formalities—as under the Fair Debt Collection Practices Act (the "FDCPA") or the Electronic Funds Transfer Act (the "EFTA")—or a harmless clerical error—as in Fair Credit Reporting Act (the "FCRA") cases, where a merchant-printed credit card receipt contains a credit card's full expiration date. Most defendants who settle such cases are small or medium sized firms who have clearly violated a statutory provision of whose existence they may well have been completely unaware.

The empirical findings about class settlements presented in this article illuminate a longstanding and increasingly important debate about the performance of the consumer class action. Few civil justice institutions have been subject to as much praise and criticism as the consumer class action. To supporters, the consumer class action is essential to the vindication of consumers' rights in cases involving widespread harms that may be large in the aggregate but which are too small individually to be viable as individual lawsuits. Arguing that such small dollar claims represent "most" consumer claims, Adam Levitin[3] argues that preventing such class actions "is a license for unscrupulous businesses to steal from their customers." Without the class litigation device, he argues, court opinions that produce legal precedents will not be written, leaving both businesses and trial attorneys in the dark as to consumer legal rights.

Critics question these supposed merits of class actions. For example, George Priest argues that class actions threaten firms with massive discovery costs and induce them to settle claims for huge amounts of money "where there appears to be no substantive basis for defendant liability."[4] Martin Redish argues that, as in many class settlements, the actual class members receive hardly any true compensation and attorneys' fees dwarf aggregate class compensation, class actions represent a "wholly improper and unacceptable departure from the fundamental precepts of American democracy." [5]

The findings here confirm the view that class action settlements are more effective in transferring money from the defendant to class counsel than in compensating class members. But the findings go beyond this conclusion by showing how consumer protection statutes that allow statutory damages with no allegation of harm in class actions may seriously distort private enforcement of the law. With these harms, most of which have statutory damages ranging up to $1000 per plaintiff (or per violation), federal consumer protection statutes incentivize class counsel to bring suits based on easy-to-prove violations of statutory formalities, regardless of the

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[2] To be sure, some class action settlements allege very concrete harm to consumers, such as where a debt collector harassed a debtor in violation of the Fair Debt Collection Practices Act (FDCPA) or where a telemarketer made repeated unconsented autodialed phone calls to the plaintiff's cellphone in violation of the Telephone Consumer Protection Act (TCPA).

[3] Adam J. Levitin, *Mandatory Arbitration Offers Bargain-Basement Justice, American Banker* (May 13, 2014), http://www.americanbanker.com/bankthink/mandatory-arbitration-offers-bargain-basement-justice-1067419-1.html [https://perma.cc/7H57-BP55].

[4] George Priest, Center for Legal Policy at the Manhattan Institute, *What We Know and Don't Know About Modern Class Actions: A Review of the Eisenberg-Miller Study*, Civil Justice Report No. 9 (Feb. 2005).

[5] *See* Martin H. Redish, *Class Actions and the Democratic Rethinking of the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 81 (2003). For a further elaboration of the view that contemporary class actions lack both democratic and constitutional legitimacy, see Martin H. Redish, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT [NOTE TO STAFFER: confirm after Interlibrary Loan Request completed].

magnitude of harm to consumers. One must question whether this is what Congress intended when it passed such statutes.

Over the past several years, class action settlements under such no-harm consumer-protection statutory provisions have been the focus of actions by both Congress and the courts. Both houses of Congress have recently passed legislation requiring class members to have sustained an actual injury of the same sort alleged by the named plaintiff.[6] During its 2015–2016 term, the United States Supreme Court heard two cases—*Campbell-Ewald Co. v. Gomez*[7] and *Spokeo, Inc. v. Robins*[8]—arising under two of the federal consumer protection statutes discussed below.[9] *Campbell-Ewald* involved the procedural question of whether a class defendant can effectively moot a class action by offering to pay full judgment to the named plaintiff before that plaintiff moves to certify the class. As discussed below, defendants used this tactic in one type of case in the Illinois Data, one where the plaintiff alleged that an ATM provider violated the EFTA by failing to have a notice of fees "on or at" the ATM machine.[10] But this tactic disappeared from use once class counsel avoided the problem by moving quickly to certify the class or simply telling the court that they would soon do so.

If our data reveal that the *Campbell-Ewald* offer of judgment/mootness issue may be of little practical significance, the same is not true of the issue in *Spokeo v. Robins*.[11] Plaintiffs in *Spokeo* sought statutory damages of $100 to $1000 under FCRA against a "people search engine" website that allegedly misstated information about the plaintiffs' age, marital status, education, and professional experience. FCRA permits statutory damages without requiring proof of harm for the publication of a false report. The defendant in *Spokeo* argued that such no-harm class actions cannot be brought unless the plaintiff establishes Constitutional Article III standing by alleging that she suffered an actual injury. The Court held that the alleged injury must be both "particularized" and "concrete" to satisfy Article III standing requirements but that such a concrete injury could include "intangible" harm. Our empirical findings show that class actions under no-harm provisions—such as that in *Spokeo*—make up about half of all filings under federal consumer protection statutes and thus show the significance of the standing decision in *Spokeo*. After presenting the evidence, this article evaluates the possibility that courts might use *Spokeo's* standing test to improve the performance of class actions under federal consumer protection statutes such as FCRA.

The empirical findings in this article also bear on the major market alternative to class action litigation: mandatory consumer arbitration. For years, state courts and consumer advocates have decried clauses in consumer contracts requiring consumers to arbitrate disputes and prohibiting consumers from bringing (or joining) class actions. State courts and consumer advocates have argued that arbitration cannot adequately substitute the class action as an instrument of compensation and deterrence. For example, in *Discover Bank v. Superior Court*, the California Supreme Court reasoned that because "damages in consumer cases are often

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[6] The Fairness in Class Litigation and Furthering Asbestos Claim Transparency Act of 2016, H.R. 1927, 114th Cong. (2016).
[7] 136 S. Ct. 663 (2016).
[8] 136 S. Ct. 1540 (2016).
[9] *See infra* notes 10–11 and accompanying text.
[10] See the discussion infra at fn 56 and accompanying text.
[11] *Campbell*, 136 S. Ct. at []. [NOTE TO STAFFER: please correct/confirm after we confirm fn10]

small," the unavailability of class actions would not deter companies from wrongfully extracting small amounts from consumers.[12]

In recent years, the Supreme Court has repeatedly ruled that federal law preempts state court holdings that class action waivers in consumer contracts are against public policy. In *AT&T Mobility v. Concepcion,* the Court held that by forbidding arbitration clauses that preclude class-wide civil and arbitral relief, the *Discover Bank* approach runs afoul of and is preempted by the Federal Arbitration Act.[13] Two years after *Concepcion*, in *American Express v. Italian Colors Restaurant*, (*Amex II),* the Court enforced a clause mandating arbitration and waiving class-wide relief for claims alleging violations of federal antitrust law.[14]

However, in its March, 2015 Arbitration Study (the "Arbitration Study"), the Consumer Financial Protection Bureau (the "CFPB") presented data that many interpreted as showing that class actions are much more effective than arbitration at compensating injured consumers and deterring misconduct by consumer financial products and services providers. With the 2015 Arbitration Study as its primary supporting evidence, in May, 2016, the CFPB issued a proposed rule banning arbitration clauses in consumer financial contracts if they prohibit the consumer from filing or participating in a class actions.[15] The findings of this Article on the performance of one type of consumer class action are thus relevant to the fate of this proposed rule and to the continuing debate over mandatory arbitration in consumer contracts.

The next section of this article describes the method of data collection and contextualizes the filings studied in detail in this paper within the larger, full sample of consumer class actions that we gathered from the Northern District of Illinois. It then reports on class action outcomes under different statutes and causes of action within statutes. The final two sections sketch implications of the empirical findings for the social utility of consumer class actions and suggest some possible policy responses to the problems with consumer class action identified in our data.

II. The Northern District, Illinois Evidence

A. Federal Statutory Consumer Class Action Case Types and Outcomes

This section clarifies how we constructed our sample and shows the overall distribution of case types—those brought under both federal and state law—within the sample. I then show the distribution of outcomes for the federal statutory case types that I discuss in more detail later in the Article.

1. The Data Underlying This Study

The class action sample studied here was drawn from cases filed in the Northern District of Illinois between January 1, 2010, and December 31, 2012. The Northern District was chosen because prior work by Fitzpatrick suggested that this court sees a fairly large number and broad range of types of consumer class actions. All data come from the federal court PACER electronic

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[12] Discover Bank v. Superior Court, 113 P.2d 1100, 1109 (Cal. 2005).
[13] 563 U.S. 333, 351 (2011).
[14] 470 U.S. 213 (2013).
[15] CFPB, Proposed Rule Banning Certain Arbitration Agreements, 81 Fed. Reg. 32829 (proposed May 5, 2016) (to be codified at 12 C.F.R. pt. 1040).

database of docket sheets.[16] Appendix 2 describes the search terms used in identifying consumer class actions in the Illinois Data. Our search criteria defined "consumer class actions" so as to exclude securities class actions and antitrust class actions. On the other hand, we included any other type of class action brought on behalf of consumers under both federal and state laws, including the common law. The federal consumer protection laws define "consumer" more broadly than does the dictionary. Under the FCRA, an employment background check is a "consumer report." For this reason, we included FCRA cases involving employment background checks in our sample. Similarly, doctors and dentists with small offices often receive unauthorized telemarketing faxes, and such doctors and dentists are "consumers" protected under the under the Telephone Consumer Protection Act's (the "TCPA") prohibition on sending such unauthorized communications. Thus, we included in our data set cases where defendants allegedly sent unauthorized faxes to doctors and dentists.

In gathering information about the type and resolution of consumer class actions, we worked directly with docket sheets and the documents to which such sheets provide links. We identified the type of class action—both legally and factually—and amount claimed by reading eaach complaint.[17] We identified the resolution of each case by relevant docket entries. Many of these are straightforward. If, for example, a case ended when the court granted the defendant's summary judgment motion, that would clear from the docket sheet entry and there would typically be an opinion written to justify the summary judgment order.

Similarly, class action settlements must be approved by the court as fair, and class counsel submit memoranda in support of both preliminary and final approval of the class action settlement. Class counsel also submit memoranda in support of attorneys' fees awards. The exhibits attached to these memoranda virtually always include affidavits from the settlement administration company reporting the number of class members that it notified, the number of valid claims, and similar information. If the exhibits do not contain such information, we looked at memoranda written to justify an award of attorneys' fees. These memoranda typically include the number of hours spent on the case, the proportional relationship between attorneys' fees and the nominal settlement amount typical of similar cases in the Northern District of Illinois and elsewhere around the country, and other information detailing how the settlement funds will be distributed. These memoranda and their supporting exhibits are our primary source for information about class settlements.

Rarely did district courts write opinions explaining why they found a class settlement to be fair. For a small number of class action settlements, no formal memoranda from counsel justify the settlement's fairness. Instead, the dockets included only an order from the court approving the settlement. It is noteworthy that in our entire sample of about 500 consumer class action filings, we found not a single district court opinion ultimately declining to approve a class action settlement.

Individual settlements were more difficult to identify. In some dockets, entries indicated that the parties had discussed settlement and/or had reached an individual settlement. In such instances, the case is resolved with the entry of an order dismissing the individual claim with prejudice and the class claims without prejudice. In a minority of cases, a final order is stipulated

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

[17] In some filings under multiple statutes, we used the entire history of the case, as drawn from docket sheets, to categorize the case under the statute under which the action actually proceeded.

to and entered, but no prior entries state that the case had settled individually. We count all of these case types as an "individual settlement."

2. Relationship to Prior Empirical Studies of Consumer Class Actions

We know little about the performance of consumer class actions as an instrument of compensation or deterrence. Indeed, the only other systematic study of class actions drawn from a search of case filings (as opposed to reported opinions and other selective reports) appeared in the March 2015 Arbitration Study.[18] The CFPB attempted to identify all consumer class actions filed in federal court (and for selected state courts) over the period 2010–2012 that involved one of six product categories that the CFPB categorized as a "financial product." The CFPB looked at all federal courts, whereas this study is based on a sample from one court, the Northern District of Illinois. The CFPB looked at the same time period examined here, and its methodology was similar to that employed here, in that the CFPB searched complaints and other docket items that are available electronically.[19] However, the CFPB's focus was to find all federal filings involving one of its six consumer financial product categories, whether brought as an individual action or a class action. Here, the objective was to identify all consumer class actions. As the CFPB's is a very large study, which employed a similar search methodology to that used here, at several points below I compare the CFPB's findings to ours.[20] In my discussion of the policy implications of our findings, I argue that the way the CFPB chose to categorize case filings and the kind of aggregate data that it reported are seriously misleading for purposes of policy design.

The only other study of consumer class actions that gathered data directly from docket sheets was done recently by Fitzpatrick and Gilbert.[21] That study, however, looked at only fifteen class action settlements in class actions challenging bank overdraft on a variety of state law theories. The cases were chosen simply because one of the authors was a coordinating lead class counsel in one of the cases. The Fitzpatrick and Gilbert study does not purport to be representative. As explained below, the overdraft fee class action settlements are indeed highly unrepresentative when viewed within the context of the much larger and more representative sample studied here.

A recent 2016 study by Shepard is closely related to the present Article.[22] Shepherd's team used a variety of search criteria to identify 2,158 class action settlements over the period 2005–2015 in cases involving no injury allegation, where statutory damages provided the sole

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[18] CFPB, *Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (2015), http://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015 [https://perma.cc/2DN2-TU52].

[19] In the LexisNexis Courtlink electronic database, which includes the docket entries found in PACER that were used in this paper.

[20] Appendix 2 includes other differences in search methodology between this study and the CFPB's.

[21] Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, N.Y.U. J.L. & BUS. 767, 775 (2015), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2577775 [https://perma.cc/G2V9-P5DV].

[22] Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions*, Emory University Legal Studies Research Paper No. 16-402 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905 [https://perma.cc/7H9E-E3JF]. [NOTE TO STAFFER: Cite as Working Paper. Confirm]

ground for relief. As explained in the introduction, by looking at all consumer class actions,[23] the present study shows that such no-injury class-action settlements make up a very large fraction of all consumer class settlements under the federal statutes. This study includes the same types of settlements as Shepherd discussed in addition to others.

Moreover, this Article discusses how class action outcomes and settlements vary across statutes and across case types under the same statute. I focus on three aspects of such settlements: the actual aggregate payout to the class; how it compares to the nominal settlement amount and to attorneys' fees; and the actual fraction of the class that receives compensation (the compensation rate). Shepherd does not break out these variables by case type but reports only "percentage to class members" and other payouts across the four primary no-injury federal statutes (FDCPA, TCPA, FCRA, and EFTA). For this reason, one cannot compare outcomes discussed in this article with those that Shepherd reports.

Authors of earlier empirical work on consumer class action settlements focused on much smaller and more selective samples than those discussed here. Fitzpatrick[24] included consumer class action settlements in a more general study of federal class action settlements over the years 2006–2007. However, he identified cases with class settlements from highly selective lists, such as published class action reporters and district court opinions, and only then turned to electronic docket sheet data for class settlement details. Fitzpatrick focused on the determinants of attorneys' fees in class settlements and the size of such fees relative to the class settlement. As Fitzpatrick found little variation in fees relative to settlements—with a ratio clustering around 25% to 30%—he did not obtain and analyze data on the aggregate payout to the class. That is, his work focused only on the nominal settlement amount, which is the amount stated in the settlement agreement and court order and which is almost always much greater than the actual payout to the class.

The law firm of Mayer Brown LLP published a more thorough attempt to identify the actual aggregate payout to the class.[25] However, that study looked at a very selective sample based on reports of class action settlements, and therefore is not comparable to the Illinois Data. As with the CFPB and Shepherd studies, this Article discusses below the differences between the findings in this earlier work and this Article's findings.

Before the electronic availability of full federal court docket sheets, as a practical matter empirical studies of class action outcomes were impossible. For example, in a 2008 study, Pace and Rubinstein[26] attempted to determine the value of class action settlements actually to the

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[23] There seem to be differences in how Shepherd's team identified and gathered information on class settlements. She reports that the team got data on class settlements from "final orders, settlement agreements, and various other court documents such as those approving settlements and attorneys' fee awards." In our own work with PACER docket sheets, we discovered that information on key features of class settlements, such as attorneys' fees and the actual compensation rate for the class, is generally not included in final orders or opinions (indeed there are few opinions approving class settlements, just uninformative orders). Such information is available in the memoranda and supporting exhibits that class counsel submit when they move to have the class settlement and attorney fee request approved. It is not clear whether Shepherd's team accessed such memoranda and exhibits.

[24] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 1, (2010).

[25] Mayer Brown LLP, *Do Class Actions Benefit Class Members* (2013), https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf [https://perma.cc/JW6J-KNKR].

[26] Nicholas M. Pace & William B. Rubinstein, *How Transparent Are Class Action Outcomes?*

plaintiffs. Pace and Rubinstein reviewed the official case files in thirty-one federal class-action settlements and interviewed judges, lawyers, and settlement administrators involved with fifty-seven class-action resolutions. The authors found their task difficult, as just six of the thirty-one cases files contained information on either the number of claims paid or the total amount of compensation. Further, only fourteen out of 222 (6%) of the lawyers, judges, and claims administrators who the authors contacted provided relevant information, covering only eleven out of fifty-seven cases.

Pace and Rubinstein say they learned "very little" from the six case files, concluding that only a small fraction of class members received compensation when not automatic. The authors discovered that in the four cases with automatic distribution (mailing a check to a known class member), a high percentage of victims received compensation (ranging from 76% to 99% of the class). However, where plaintiffs had to complete a form to receive compensation, only 4% of the class received a small recovery (of $30 per victim) and only 20% received a much more significant amount ($1,000).[27] This second group of class actions comprised the majority of the cases for which Pace and Rubinstein did not have distribution data, suggesting that compensation rates in the typical class action is in the lower range (approximately 4%–20%).

As for the nine class actions about which Pace and Rubinstein received claims distribution information from attorneys, judges, and claims administrators, three cases had distribution rates below 5%, four between 20%–40%, and two with rates above 50% (with a maximum of 82%).[28] Distribution rates were the lowest in the largest class actions, with hundreds of thousands or millions of class members, even when recovery amounts were as high as $1,500.

While not based on a large, representative sample of class actions, Pace and Rubinstein's conclusion is consistent with other findings on class action compensation rates. For example, in a study of insurance class actions, Pace et al.[29] received survey responses from fifty-seven large insurance companies, who reported data on 748 distinct class actions, 89% of which had been filed in state court. In seven of twenty-three cases with complete payout and attorney fee information, the median distribution rate to actual plaintiffs was 79%. However, in another quarter of cases, the distribution rate was 13%. In 3% of cases, the plaintiffs received only 4% of the net compensation fund. In ten cases where sources reported potential class size and the number of claims paid, 100% of the class members received any compensation; however, in the worst case, only and estimated 1% of class members received compensation. In the median case, just 15% of the potential class received any compensation.[30] In another study, Hensler et al.[31] reviewed ten class-action settlements in detail and found a range of class settlement distribution rates: from 100% to only 30%. In some subclasses, less than 1% received compensation. As did Pace and Rubinstein, Hensler et al. concluded that plaintiffs tended to receive higher distribution rates in cases with automatic payout, while plaintiffs tended to receive lower distribution rates when class members actually had to fill out a form. Hensler et al.'s conclusion squares with Pace and Rubenstein's.

Empirical Research on the Availability of Class Action Claims Data 9 (Rand Institute for Civil Justice, Working Paper 17.4, 2008)

[27] *Id.* at 24.

[28] *Id.* at 32.

[29] NICHOLAS M. PACE, ET AL., INSURANCE CLASS ACTIONS IN THE UNITED STATES xvii-xviii (2007).

[30] Pace et al., *supra* note 26.

[31] DEBORAH HENSLER, ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS 445 (2000).

3. Class Actions Under Federal Consumer Protection Statutes Within the Universe of Consumer Class Action Filings

This article analyzes case types comprising an important fraction of all consumer class-action filings in the Illinois Data. Figure 1 below shows the frequency distribution for the 506 class-action filings in the Illinois Data. As shown, Plaintiffs made 131 filings under the FDCPA, 127 filings under the TCPA, fifty-three filings under the FCRA, and forty-three under the EFTA. Of the twenty cases brought under privacy protection statutes other than FCRA, twelve were brought under federal privacy protection statutes such as the Video Privacy Protection Act.

The 366 filings under federal consumer protection statutes comprise 72% of all filings in the sample. Filings under such federal consumer protection statutes made up 71.7% of all filings in the CFPB's much larger 2010–2012 dataset discussed in its Arbitration Study.[32] This indicates that in terms of the frequency of federal statutory causes of action, the case types found in the Illinois Data are likely typical of consumer filings in other federal courts.

One difference between the case types indicated in Figure 1 and the case types found in the CFPB Arbitration Study is the absence from Figure 1 of cases brought under the federal Truth in Lending Act (TILA). The Illinois Data contained eleven cases in which the complaint included an alleged TILA violation. In three of those cases,[33] the TILA allegation was secondary to an alleged violation of a different federal consumer protection statute, such as the FDCPA. In such instances, we coded the case as arising under the different statute. In another seven cases, the plaintiffs did not pursue the TILA allegation, as the case involved alleged wrongdoing in mortgage origination or servicing. These cases were resolved on state law grounds, and we coded them under the mortgage-related categories.[34] The plaintiffs actively pursued a TILA allegation in only one case.[35]

Complaints also alleged violations of state consumer protection laws or wrongful behavior triggering common law liability.[36] Figure 1 describes some state law case types, such as those involving products liability (defective products) claims and those alleging false and deceptive advertising. Other types require quick clarification. Those categorized as involving "fees and charges" challenge the imposition of such fees and charges in various consumer contracts on a variety of state common law and statutory theories. HAMP mortgage modification failure cases arose from the federal Home Affordable Mortgage Program and alleged that financial defendants were liable for failing to modify mortgages as promised pursuant to that program. "Other mortgage" claims include a congeries of alleged violations arising from

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[32] CFPB, Arbitration Study, *supra* note 18, at 21.

[33] Greene v. Direct TV, No. 10-cv-00117 (N.D. Ill. 2010) (coded as TCPA), Wysocki v. City National Bank, No. 10-cv-03850 (N.D. Ill. 2010) (coded as FDCPA), and Velasquez v. THD At-Home Services, No. 12-cv-03125 (N.D. Ill. 2012) (coded as FDCPA).

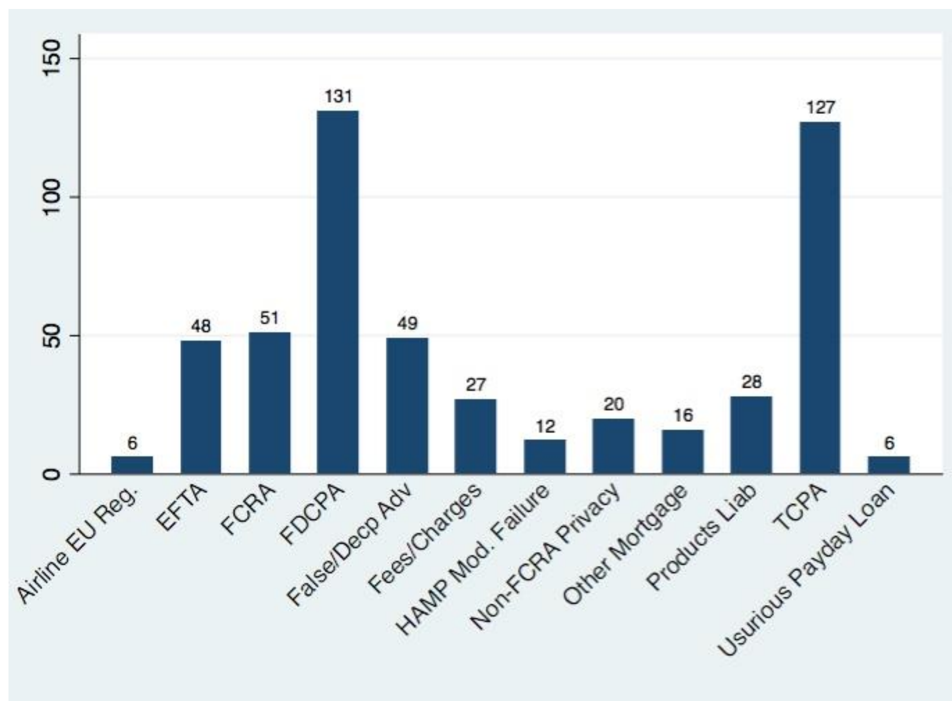
[34] Such cases are either in the "HAMP Mortgage Failure" or "Other Mortgage" categories and include Smith v. Residential Services, No. 10-cv-05440 (N.D. Ill. 2010), Boyden v. BMO Harris Bank, No. 11-cv-00061 (N.D. Ill. 2011); Kesten v. Ocwen Loan Servicing, No. 11-cv-06981 (N.D. Ill. 2011); Sindler v. Saxon Mortgage, No. 12-cv-07224 (N.D. Ill 2012); Walton v. Diamond, Urban Financial Services et al., No. 12-cv-044493 (N.D. Ill. 2012). Two such cases, Benn v. Surgery Group, No. 10-V-05922 (N.D. Ill 2010) and Battle v. Chicago Cycle, No. 10-cv-06983 (ND. Ill. 2010) are in the "fees and charges" category.

[35] Swanson v. Argent, No. 10-cv-01039 (N.D. Ill. 2010) (allegations that defendant failed to notify plaintiffs of their right to rescind, as required by TILA).

[36] These state law consumer class actions will be discussed and analyzed in detail in a subsequent article.

mortgage origination and servicing. Usurious payday loan claims alleged precisely that. The final category of claims arose under European Union Regulation 261. In that category of cases, plaintiffs alleged that various airline defendants failed to compensate passengers for international flight delay or cancellation.

FIGURE 1. NUMBER OF CONSUMER CLASS ACTION FILINGS, N.D. ILL. 2010–2012, BY CASE TYPE



4. Outcomes in Class Actions under Federal Consumer Protection Statutes

As this article is the first in a series analyzing the Northern District of Illinois consumer class action types depicted in Figure 1, this article analyzes only class actions under federal consumer protection statutes. A brief description of these statutes follows, in order of frequency, from most common to least.

The most frequently occurring federal consumer protection class actions are brought under the FDCPA. That statute imposes various formal requirements on debt collectors, such as registration and disclosure of identity as a debt collector. The FDCPA also contains substantive protections for consumer debtors. It bars a variety of abusive debt collector practices, such as dunning consumers on time-barred debts without disclosure of that fact, making harassing phone calls (sometimes using auto-dial and pre-recorded messages) attempting to collect debts, using false and misleading information about the balance of the debt, and attempting to embarrass debtors by calling third parties.

Second, cases brought under the TCPA allege that the defendant sent unauthorized and unsolicited automated text messages, phone calls, or emails to the plaintiffs' cell phones or sent one or more unauthorized faxes. Plaintiffs allege that defendants initiated contact with plaintiffs either as part of a debt collection process or as part of a telemarketing program.

Third, cases brought under EFTA allege that the defendant failed to post a physical notice of the fees charged for use of an automated teller machine ("ATM").

Finally, cases brought under FCRA most commonly allege that the defendant printed out the expiration date of a credit card on a retail receipt, a violation of FCRA's privacy protection provisions. FRCA cases also involved alleged violations in the use of an employment background check report (a consumer report under FCRA) and, less often, an allegation that information was disclosed in violation of FCRA's statutory privacy protections.

Putting aside the category of "non-FCRA privacy,"[37] by February 2016, most—338 out of 365 or 93%—cases filed under the four main federal consumer protection statutes (FDCPA, TCPA, FCRA, and EFTA) had terminated. The distribution of outcomes under these four primary federal consumer protection statutes is depicted in Table 1 and graphically in Figure 2 below.

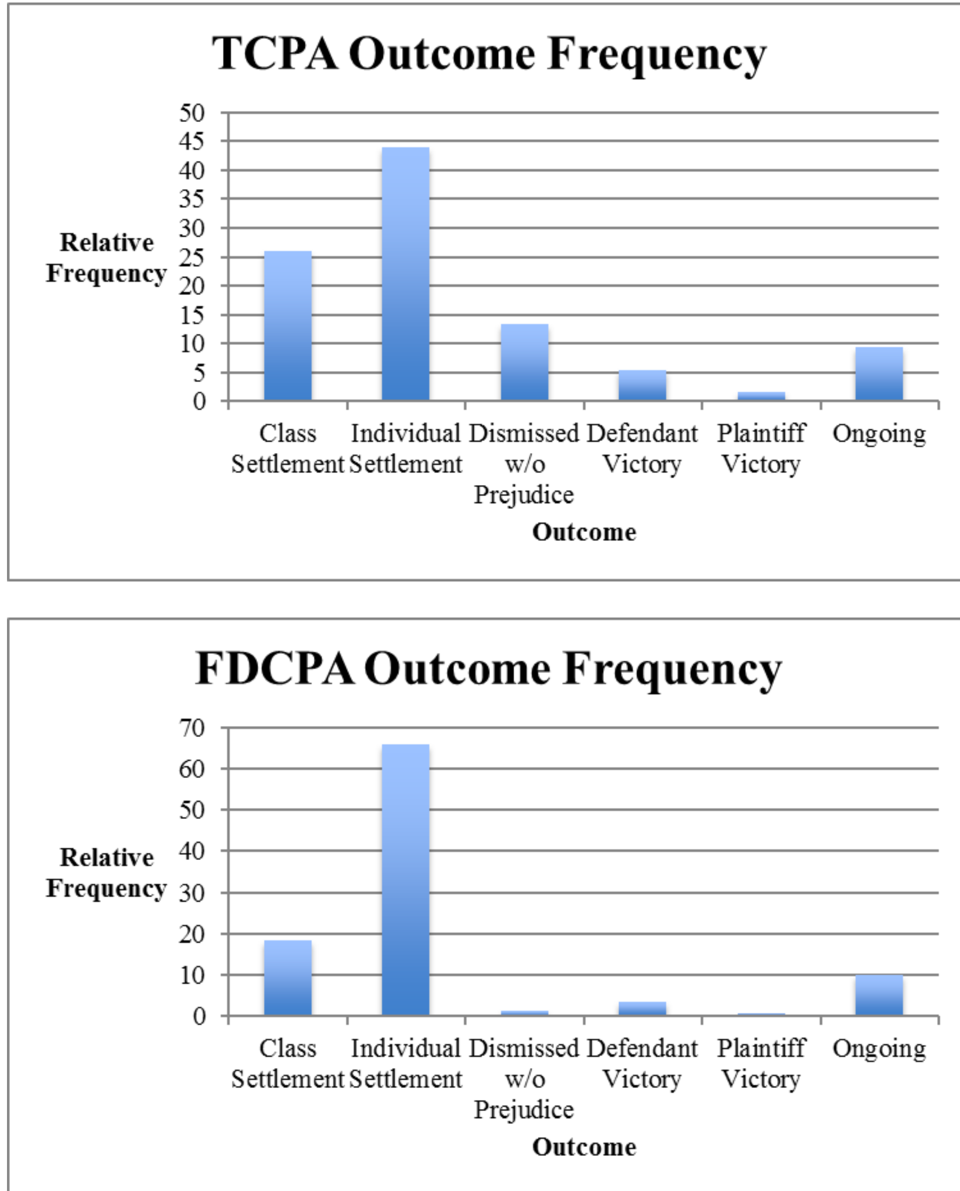
TABLE 1. OUTCOME PROBABILITIES BY STATUTORY CASE TYPE

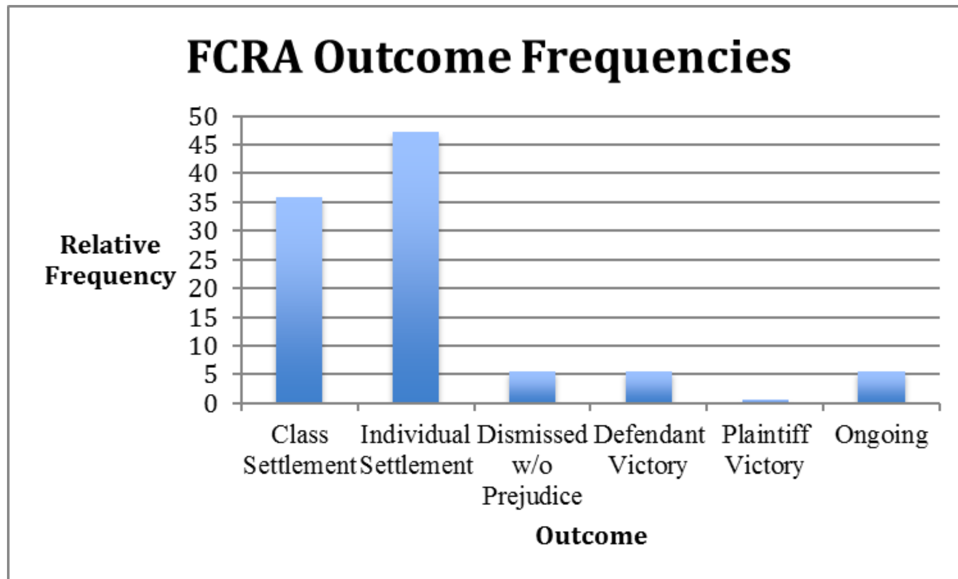
Case Type	Total Resolved Cases	Class Settlement	Individual Settlement	Dismissed Without Prejudice	Defendant Victory	Plaintiff Victory
TCPA	113	.28	.51	.15	.06	.00
FCRA	51	.37	.50	.06	.06	.00
FDCPA	122	.21	.70	.06	.02	.01
EFTA	43	.19	.59	.00	.20	.02

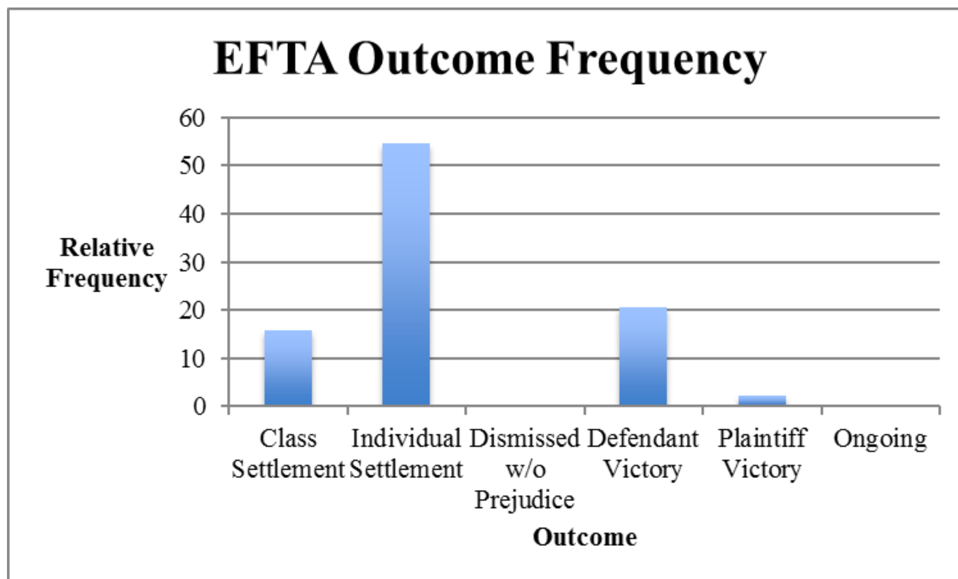
Table 1 shows substantial variation across case types in the relative frequency of each outcome. As discussed in the substantive discussion below, this variation is largely due to differences in statutory causes of action. However, for the only three statutory claim types that still exist today,[38] between 87% and 93% of all claims are resolved in either an individual or class settlement. Such high settlement rates are indicative of civil litigation generally. However, in another respect, they seem very different. In only four cases did the plaintiff achieve a judgment in its favor (two TCPA cases, one FDCPA case, and one EFTA case). All of these cases were default judgments. In this sample, plaintiffs *never* actually had their substantive claim adjudicated on the merits by a judge or jury. Finally, defendant victories were judgments on Federal Rule of Civil Procedure ("FRCP") 12(b)(6) motions to dismiss or on motions for summary judgment. In the roughly 370 resolved cases discussed in this paper, no case ever went to trial before a judge or jury.

[37] As there were only 12 privacy violation cases arising under various federal privacy protection statutes, those cases will be discussed in a separate paper on consumer privacy class actions under both state and federal law.
[38] *See supra* section II. B. for a discussion of Congress' elimination of the ATM notice failures as a cause of action under EFTA.

FIGURE 2. OUTCOME FREQUENCY ACROSS DIFFERENT STATUTORY CASE TYPES







B. Lessons from an Extinct Cause of Action: ATM Notice Failures under the EFTA

In an ATM notice failure case, the plaintiff alleged that an ATM provider failed to post a notice of the fees charged "on or at" an ATM as was then required by EFTA. As the CFPB explained in a 2013 rulemaking,[39] Congress amended section 904(d)(3) of the EFTA in 1999 to require notices of the fee charged to the consumer digitally on the ATM screen and "on or at" the machine. The "on or at" notice "usually involved a sticker placed on the machine by the ATM

[39] *See* CFPB, Amendments to Disclosure at Automated Teller Machines (Regulation E), 12 C.F.R. Part 1005 (2013). [not actually sure how to cite this and whether this is a citation to the rule or the description] http://files.consumerfinance.gov/f/201303_cfpb_Final-Rule-Amendment-to-Reg-E-re-ATM-Disclosures.pdf.

operator."[40] Under EFTA section 916, failure to provide the required notice could trigger liability in an individual or class action for actual damages; costs and attorneys' fees; and statutory damages between $100 and $1000 per plaintiff without proof of harm.[41] Under section 910(d), ATM operators could escape such liability only if they could show that the "on or at" ATM notice had been damaged or removed by a third party.[42]

In December 2012, Congress voted to eliminate the ATM "on or at" notice requirement from the EFTA.[43] As a result, cases alleging that the failure of an ATM to comply with this notice requirement violates the EFTA are now extinct. However, in several respects, these extinct ATM cases perfectly illustrate a class action case type that still survives under many federal consumer protection statutes: a case where no class member has actually suffered any injury but which is nonetheless settled, where the nominal settlement is far less than the actual amount paid to class members, and where that amount—the actual compensation received by the class—is dwarfed by the attorneys' fees received by class counsel. For this reason, ATM notice failure class action settlements are an interesting and important case study.

Between 2010–2012, plaintiffs filed forty-three ATM notice failure class actions in the Northern District of Illinois. In each case, the complaint alleged that an ATM machine in metropolitan Chicago failed to have the required "on or at" notice on a date when the named plaintiff used the machine. Such complaints were supported by photos allegedly showing the state of the machine on the date it was used by the plaintiff. Each case invariably sought statutory damages of up to $1,000 per class member, plus attorneys' fees and costs. As shown in Table 2 below, the outcomes of such litigation quite clearly evolved over the sample period. However, 74% of the ATM notice failure cases ended in either a class or individual settlement. In this sense, the cases were very successful.

TABLE 2. ATM NOTICE CLASS ACTION RESOLUTION

Year	ATM Notice Class Actions Filed	Cases Dismissed without Settlement (defendant victories)	Class Settlements, % of ATM notice filings	Individual Settlements, % of Individual ATM Notice Filings
2010	18	6, 33%	3, 18%	9, 50%
2011	16	3, 19%	5, 31%	9, 56%
2012	9	2, 22%	0, 0%	7, 78%

As no court scrutiny is required for individual plaintiff settlements, the dockets generally do not contain details about their terms. The single exception is the docket entry for *Stilz v. ATM National Solutions, LLC* attorneys' fees. In that case, the court entered a default judgment order awarding the plaintiff statutory damages of $1,000 and $10,905.50 in attorneys' fees and costs to class counsel. This ratio of attorneys' fees and costs to plaintiff recovery of 10:1 means that the attorneys' fees are equal to 1,000% of the relief obtained.

As noted above, the requirement that judges approve class settlements as fair does generate information about class settlements. Appendix 1 details the class settlements in ATM

[40] *Id*. at 3.
[41] However, class damages are capped at the lesser of 1% of the defendant's net worth or $500,000.
[42] 15 U.S.C. § 1693m(a), h(d). [3.3(b)]) [NOTE TO STAFFER: Confirm 3.3(b) is accurate formatting]
[43] In Public Law 112-216, deleting the "on or at" requirement plus some other obsolete language from section 904(d)(3) of EFTA.

notice failure cases. To understand Appendix 1 and the subsequent analysis of class settlements under the other federal consumer protection statutes found in the sample, one must understand a few basic features of class action settlements. Class settlements generally have a stated or nominal settlement amount. In virtually all cases, that nominal amount caps the amount that the defendant pays out pursuant to the settlement. Such payouts go first as attorneys' fees to class counsel and then as incentive awards to named plaintiffs and as fees to the settlement administrator (the company that sends out notices to the class of their rights under the settlement). Next, actual class members who qualify (typically by filling out a valid claim form) receive compensation. In some cases, a provision in the settlement is made for some portion of the remaining funds to be paid out as a cy pres award. In the Illinois Data, such cy pres awards always went to legal aid organizations of one sort or another. With rare exceptions (in so-called non-reversionary settlement funds), after all these payouts are made, the defendant keeps whatever funds remain from the nominal settlement. Thus, for example, if the nominal settlement amount was $100,000 but only $50,000 was paid out to class counsel, named plaintiffs, the class, the settlement administrator, and the cy pres recipient, then the defendant would only pay out a total of $50,000, not the $100,000 nominal settlement amount.

The existing empirical literature on class action settlements does not share a common investigative goal; therefore, different studies report different class action settlement measures. The most recent such study, by Shepherd,[44] reports on how class settlement payouts are divided among the class, attorneys, settlement administrators, and cy pres awards to charities. Fitzpatrick's 2010 paper is concerned primarily with discussing how attorneys' fees as a fraction of the nominal payout vary across case types.[45] The CFPB Arbitration Study reports on aggregate attorneys' fees, payouts to the class, and compensation rate by product-category type.[46]

This Article focuses on evaluating the efficiency of the class action as an instrument of compensation to class members and potential deterrence of harm-causing behaviors. My measure of the cost of compensation via class action settlements is the absolute amount paid to class counsel as fees. Note that this is clearly a substantial underestimate of the total social cost of awarding compensation via class action settlements, for it ignores the attorneys' fees charged by defendant's counsel and also the cost of devoting the scarce time and resources of the federal courts to resolving class actions. As a measure of compensatory efficiency, I report attorneys' fees relative to both the nominal settlement and actual aggregate payout to the class. I also report the compensation rate: the fraction of the class that actually receives compensation.

As Appendix 1 shows, even the nominal class settlements in ATM notice failure class settlements were not large, ranging between $40,000 and $150,000. The actual aggregate payout to the class was even smaller, ranging between $8,000 and $79,000. On average,[47] the actual aggregate class recovery—the total amount received by class members—in the ATM notice failures was only 46% of the nominal settlement amount. On average, although individual class members who were paid each received $880, only 8.5% of the class received any compensation. By contrast, attorneys' fees averaged 55% of the nominal settlement amount but *200%* of the actual aggregate payout. In other words, class counsel received twice the amount paid to the

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[44] *See Shepherd*, *supra* note 22.
[45] See Fitzpatrick, supra note 16
[46] See CFPB, supra note 19.
[47] Unless otherwise noted, only unweighted, numerical averages are reported.

class. In aggregate, rather than in average numbers, across all ATM notice failure settlements, the class compensation rate was a slightly higher 10%. However, the total payout to all class members was $169,500, with total attorneys' fees of $198,000. Thus, even in aggregate, attorneys' fees were larger than the amount paid to class members.

Despite their relatively small payouts, the ATM notice failure cases demonstrate the behavior that Congress incentivized through statutory causes of action combining statutory damages without proof of harm with the class action procedural device. In general, the incentives cause a feeding frenzy of class action filings even though the allegedly illegal behavior caused no actual harm. Congress recognized that the ATM notice failure cases involved no consumer harm when in December 2012, that body voted to eliminate the "on or at" ATM notice requirement. As the CFPB noted in its 2013 rulemaking, consumer groups had argued against this elimination on the ground that the "on or at" notice may have been a consumer's only indication that the ATM would charge a fee-for-use. In the end, Congress agreed with the ATM providers' commonsensical argument that since every ATM had an on-screen fee notice, the "on or at" notice provided no social utility.[48]

Second, the now-extinct ATM notice failure class actions demonstrate that class compensation rates in class settlements—the fraction of a class that actually get any money from the settlement—are sometimes low simply because the class actions involve small stakes. For small stakes class actions to be economically attractive to class attorneys, courts must ensure a sufficiently low cost of notifying class members of settlements. But low-cost notice is more often than not ineffective notice. In the case of ATM notice failure settlements, the average compensation rate that was reported was only 8.5%.[49] This low compensation rate did not result

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[48] Zero social utility had to be balanced against the facts that not only was it costly for ATM owners to maintain such notices, but the tidal wave of ATM notice litigation was adding to financial institution costs with some of such litigation (at least according to the banking industry) manufactured by plaintiffs whose banks believed (but had difficulties proving) had deliberately removed ATM notices just to generate a cause of action. *See* CFPB Amendments to Disclosures at Automated Teller Machines 6.

[49] As Appendix 1 reports, in *Barreto v. Center Bank,* the compensation rate was 5% and in *Loewy v. RBS Citizens Bank,* the class compensation rate was 12%. The average compensation rate for these two ATM "on or at" notice cases is 8.5%, and that is the number reported above in the text. This rate is consistent with what one would infer from the information reported about other ATM "on or at" notice cases. As can be seen from Appendix 1, in several ATM "on or at" notice cases (*Goldshteyn, Nguyen,* and *Louisma*), class counsel did provide an estimate of the number of allegedly un-noticed ATM transactions. Over the three cases, this number was large, averaging 19,400 for the three cases. To convert the number of ATM transactions into a rough estimate of the number of actual class members, one can divide the total number of transactions challenged by the number of months during which the ATM was allegedly un-noticed and then divide that by an estimate of the number ATM uses per month per user. If we assume that each person using an ATM used that machine on average 5 times per month (a seemingly large number), then we arrive at an estimate of the number of class members of 772 for *Goldshsteyn*, 171 for *Nguyen* and 400 in Louisma. As 42 class members were compensated in *Goldshteyn,* 75 in *Nguyen* and 44 in *Louisma*, the rough estimate of compensation rates in these three class settlements would be (respectively) 5%, 44% and 11%. Two of these estimates are almost identical to the actual class compensation rates of 5% and 12% in *Barreto* and *Loewy*. The estimated 44% compensation rate in *Nguyen* is so much higher than in any other ATM "on or at" notice case that one suspects that the assumption that users of an ATM use the machine on average 5 times per month must be incorrect for the ATM machines at issue in that case. Further evidence that the 8.5% class compensation rate in Table 2 may be generally valid for ATM "on or at" notice cases is provided by a report from class counsel in *Barreto* that "as the claim form return rate in consumer class action settlements is known to be between 2 and 20%," the 5% rate in *Barreto* (a total of 18 claimants) was "well within the average return rate in the consumer class action context." In addition, class counsel in *Baretto,* reported that "there are usually between 20 and 40 claimants in cases involving one ATM." Finally, class counsel's estimate of an ATM "on or at" notice filing rate of between 2 and

from the technical impossibility of determining who used a particular ATM machine on a particular date. In each of the settlements in Appendix A, class counsel submitted an affidavit from the same Senior Vice President at First American Bank explaining the procedure to identify who used a particular ATM on a given day. First, one could obtain the bank routing number associated with each ATM transaction. Using those routing numbers, one can cross-reference and identify which financial institution issued each ATM card. Finally, one could contact each financial institution to identify the ATM card-holder.[50] No court disputed that the Senior Vice President's affidavit showed that with enough effort, the precise identity of each ATM user could be learned. But in every such case, given the enormous cost of actually undertaking this procedure, the court agreed with class counsel that notice to the class via a general public newspaper notice and a website would comport with due process.

As indicated by the low compensation rate, such public notice was glaringly ineffective. District courts approved such a notice method because, given the small stakes in these cases, actual individualized notice would have been cost prohibitive. In other words, actual individualized notice would have cost far more than the maximum expected recovery. As a result, such cases would never have been brought because they would be economically unattractive to plaintiffs' attorneys.

While as cautioned at the outset, I have not attempted to confirm the representativeness of the Illinois Data, compensation rates in the Illinois Data seem likely to be typical of rates in ATM "on or at" notice failure cases more generally. In certain cases, class counsel filed memoranda in support of their motions for class settlement approval showing typical nationwide payout rates for ATM notice failure cases. For example, in *Barreto v. Center Bank,*[51] counsel reported that 5% of the settlement class received compensation. Class counsel also reported[52] that because the claim form return rate in consumer class action settlements is typically between 2% and 20%, the 5% rate in *Barreto* (a total of 18 claimants) was "well within the average return rate in the consumer class action context." In addition, class counsel in *Barreto*[53] reported that "there are usually between 20 and 40 claimants in cases involving one ATM." The claim filing rate of 2%–20% in consumer class actions, comes from an article written by a claims administrator with Rust Consulting.[54] That settlement administrator reports that: "With their broad range of subject matter, benefit types and amounts, and class member demographics, as well as the "hit-or-miss" availability of mailing lists, consumer settlements can draw a filing rate between 2 and 20 percent."

20% in consumer class actions was drawn from an article written by a claims administrator with Rust Consulting.[49][Can't find correct citation] The full statement by that claims administrator reads as follows: "With their broad range of subject matter, benefit types and amounts, and class member demographics, as well as the 'hit-or-miss' availability of mailing lists, consumer settlements can draw a filing rate between two and 20 percent."

[50] See the affidavit of Euerdo Monteagudo, the bank vice president mentioned in the text. Exhibit D to Class Counsel's Mem. in Supp. of Final Approval of the Class Action Settlement 3, *Goldshteyn*, Docket No. 55. [NOTE TO STAFFER: Please confirm formatting]

[51] Pl.'s Suppl. Mem. in Supp. of Final Approval of the Parties' Class Action Settlement Agreement at 1, *Barreto v. Ctr. Bank,* 10-cv-06544 (N.D. Ill. 2010), ECF No. 30.

[52] *Id.*

[53] *Id.* at 2.

[54] Tiffany Allen, *Anticipating Claims Filing Rates in Class Action Settlements*, FEDERATION OF DEFENSE AND CORPORATE COUNSEL (2013), http://www.thefederation.org/documents/16.Class%20Action%20Perceptives.pdf [https://perma.cc/89TM-WE2P].

Finally, ATM notice failure cases demonstrate that even in seemingly simple cases, defendants will not settle until they exhaust every legally plausible defense making economic sense. Indeed, evolution of the potential legal defenses to ATM notice failure cases explains the evolution in outcomes in such cases over the 2010–2012 period. During 2010, defendants won fully a third of the ATM notice cases by making an offer of judgment to the named plaintiff and then moving to dismiss the case as moot.[55] This tactic—buying out the named plaintiff and therefore mooting the class action—was possible under the Seventh Circuit precedent, *Damasco v. Clearwire Corp*.[56] Once the defendant "offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright under [FRCP] 12(b)(1) because . . . he has no remaining stake." As the plaintiff in *Clearwire* pointed out, other circuits had created a rule that allows named class plaintiffs to avoid mootness by expeditiously moving to certify the class even after being offered complete relief.[57] The Seventh Circuit held that such an exception to mootness in class actions was unnecessary because class counsel could move to certify the class at the same time they file the complaint. Class counsel could also request that the court delay ruling on the motion to certify the class until close of substantial discovery on the class certification issue.

In 2010, plaintiffs lost many of the ATM notice class actions. In some instances, defendant established the affirmative defense that it had posted the required notice but the notice was removed through no fault of the defendants. Most, however, were lost because defendants made offers of full judgment before plaintiffs had requested class certification, thus mooting these cases under the Seventh Circuit's *Clearwire* decision. However, as one can discern from the pleadings, by 2011, class counsel had learned how to deal with the mootness problem by filing motions for class certification early on, or telling the court that they were going to do so. And class counsel had learned how to better prove notice violations: they took photos of ATMs over the course of several days before the named plaintiffs tried to use an ATM without the "on or at" notice. As a result, ATM notice class actions almost always succeeded in generating some kind of settlement for the individual plaintiff and/or the class: 92% of the cases filed in 2011 and 83% of the cases filed in 2012 resulted in a settlement.

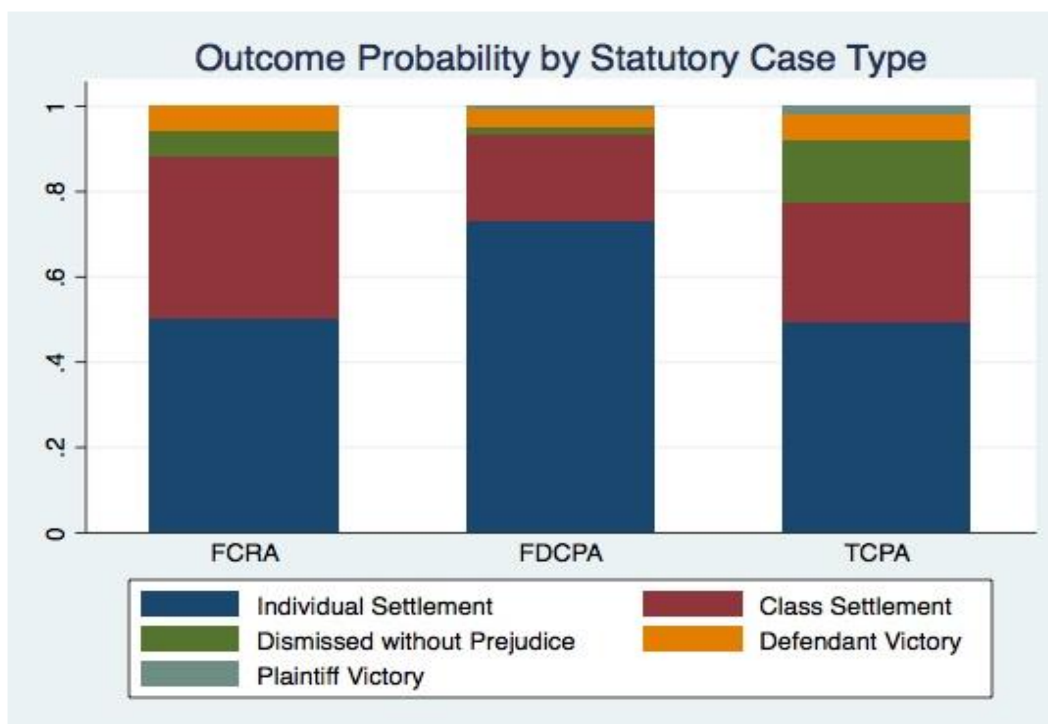
Admittedly, as we see from Table 1, the type of settlement was radically different between cases filed in 2011 and those filed in 2012. In 2011, 38% of the ATM notice failure class action filings resulted in class settlements. None of the ATM notice failure class actions filed in 2012 resulted in class settlements; parties agreed only to individual settlements. The reason undoubtedly is that by the time the 2012 filings reached the point where settlement discussions could begin, all parties recognized that Congress was soon to amend the statute to eliminate the basis of the cause of action for all future cases. Congressional elimination of the cause of action would likely have made it difficult to justify the fairness of a class action settlement to the court.

C. Class Actions under the Other Major Federal Consumer Protection Statutes

[55] Cases with this outcome included Stiltz v. Blackstone ATM LLC, 10-cv-01997 (N.D. Ill. 2010), Stiltz v. Standard Bank & Trust Co., 10-cv-01996 (n.D. Ill 2010) and Stiltz v. Global Cash Network, Inc., 10-cv-01998 (N.D. Ill. 2010).
[56] Damasco v. Clearwire Corp., 662 F.3d 891, 895 (7th Cir. 2011) (quoting Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991)).
[57] Clearwire, 662 F.3d at 895–96.

ATM notice failure class actions under EFTA are now extinct, but consumer class actions survive across the country under the FCRA, FDCPA, and TCPA. As illustrated by Figure 2 (reproducing graphically the data from Table 1 above), the frequency of various outcomes differs across case type. In particular, the distribution of outcomes under the FDCPA involves a much higher probability of an individual settlement (and hence overall settlement rate) than occurs under both the TCPA and FCRA. As a statistical matter, the difference between the outcome distribution under the FDCPA is significantly different than the outcome distribution under both the FCRA[58] and under the TCPA.[59] The qualitative discussion of outcomes under the various statutes that follows below sets out some potential explanations for the distinctiveness of FDCPA outcomes.

FIGURE 2. OUTCOME PROBABILITY, BY STATUTORY CASE TYPE



The FCRA has created the same sort of problem as in the old ATM notice failure cases: a feeding frenzy of case filings with easy-to-prove statutory violations and statutory damage rights available without even an allegation of harm.

[58] With the FDCPA distribution taken as the null, $F(4,n) = 15$, allowing one to reject the hypothesis of identical distributions with $p < .01$.

[59] Again with the FDCPA distribution taken as the null, $F(4,n) = 121$, which allows one to reject the hypothesis of identical distributions with $p < .001$.

1. The Fair Credit Reporting Act

Passed in 1970, in the heyday of federal consumer protection legislation, Congress enacted FCRA[60] to ensure that the information held by consumer reporting agencies was both accurate and kept private and to be used only for certain authorized purposes. FCRA imposes potential liability on both users and providers of consumer credit reports. Under FCRA, employment background checks are included within the regulated category of "consumer reports." An employer who uses such a report in its hiring decisions is thus regulated under FCRA as a user of a consumer report. FCRA requires that an employer comply with several procedural steps in using an employment background check.[61] First, the employer must tell the prospective employee that it might use the information in the report in an employment decision and it must ask the employee for written permission before getting the report. Once the employer gets the report, if the employer believes the report might influence its decision, then it must give the prospective employee a copy of a standard "Summary of Rights" produced by the Federal Trade Commission. If the employer bases a decision on data contained in the report, such as criminal or credit history, then it must give the prospective employee contact information for the report provider and an explanation that the report provider did not make the actual employment decision. The explanation must also state that the report provider will not be able to explain the decision and that the prospective employee has an opportunity to dispute the information in the report before the employer takes action based on it.[62] If the employer takes an adverse action based on the background report, then it must notify the applicant within a reasonable time.

In 2003 FACRA was amended by the passage of the Fair and Accurate Credit Transactions Act (the "FACTA"). Intended to better ensure consumer privacy and standardized reporting, FACTA did two things of relevance to the class action filings in the Illinois Data. First, it added a liability provision. If a consumer can establish a "willful" FCRA violation, he or she may recover attorneys' fees, costs, punitive damages, and statutory damages between $100 and $1,000 without the need to prove actual injury. A consumer may also recover damages and attorneys' fees and costs for bad faith conduct.[63] Second, FACTA regulated credit card receipts issued by retail merchants, providing that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction."[64]

Much early litigation under FACTA involved the question of whether defendants who claimed to be unaware of the statutory requirement to remove expiration dates from receipts could nonetheless be held liable for a "willful" violation of that law. Federal courts established various standards for FACTA willfulness. Amid inconsistency among circuits, in the 2007 *Safeco* decision, the Supreme Court partially clarified the issue when it stated that under FCRA (and therefore FACTA) willfulness meant an objective "reckless disregard" standard. The Court also held that "the negligence/recklessness line need not be pinpointed here."[65]

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[60] 15 U.S.C.A. § 1681.
[61] *See* FTC, Background Checks, CONSUMER INFO. (Nov. 2016), https://www.consumer.ftc.gov/articles/0157-background-checks [https://perma.cc/VW9H-3A76].
[62] *Id*.
[63] 15 U.S.C.A. §§ 1681n, o.
[64] 15 U.S.C.A. § 1681c.
[65] Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007).

Hundreds of FACTA class actions were filed after *Safeco.* Class counsels argued that the discovery cost of determining what a business knew or did not know about its receipts would only be economically feasible if plaintiffs could recover for the entire class. Businesses rebutted, opposing class certification on the ground that class certification risked imposing crushing billion-dollar liability for harmless technical FACTA violations. [66]

In 2008, Congress amended FACTA by passing the Credit and Debit Card Receipt Clarification Act.[67] According to Congress, this law was prompted by the "hundreds of lawsuits" filed against merchants who had mistakenly believed that FACTA compliance required them only to truncate credit card numbers and not the expiration date.[68] Congress found specifically that "experts in the field agree that proper truncation of the card number . . . regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identify theft or credit card fraud."[69] Congress retroactively shielded merchants from statutory liability damages even though they had violated FACTA by printing an expiration date on a receipt (between December 4, 2004 and June 3, 2008) because it "deemed these lawsuits to be a significant burden on businesses, without any corresponding consumer benefit."[70] Despite its finding that printing an expiration date alone did not increase the risk of credit card fraud, Congress retained potential FACTA willful violation liability for statutory damages for such an error on any receipt printed after June 3, 2008.

The Illinois Data confirms that there continue to be a constant stream of class action filings for violations of FCRA's employment background check procedural requirements and violations of FACTA by merchants who printed a credit card expiration date on the receipt. Of the fifty-three FCRA class actions filed between 2010–2012 in the Northern District of Illinois, twenty-seven (51%) alleged that a card expiration date was illegally printed on a receipt. Seventeen (32%) alleged a failure to follow FCRA employment background check procedures. The remaining nine (or 17%) FCRA filings alleged an actual breach of privacy through the release of personally identifying information by a merchant. However, only one of the nineteen class settlements of FCRA cases involved the release of personally identifying information. Eleven (58%) and seven (37%) involved expiration date and employment background check cases, respectively.

Viewing FCRA class settlements in aggregate, \$3,816,535 of attorneys' fees were incurred to generate \$6,056,909 in aggregate payouts to class members. A much smaller proportion of aggregate payouts were paid to class members here than ATM notice failure class actions. In addition, FCRA cases involved much bigger settlements, with an average settlement class of 45,715, an average nominal settlement of \$775,645, and an aggregate payout of \$413,052. Thus, in FCRA class settlements, the actual aggregate payout to class members averaged only 37% of the nominal settlement amount. Attorneys' fees averaged \$185,803. On average, it takes about thirteen months from the case filing date for such settlements to receive final judicial approval.

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[66] *See* Bruce L. McDonald, *Congress Restricts FACTA Statutory Damage Class Actions*, LEXOLOGY (Nov. 23, 2016), http://www.lexology.com/library/detail.aspx?g=464e8ebe-7ca0-4fa5-a3c7-677143dfdce4, [https://perma.cc/V8NN-CCVC].

[67] Public Law 110-241, 122 Stat. 1565 (2008).

[68] *Id.*

[69] *Id*.

[70] Long v. Tommy Hilfiger U.S.A., Inc., 671 F.3d 371, 374 (3d Cir. 2012) (citing Clarification Act § 2(a)(7), 1122 Stat. at 1565-66; § 3(a), 15 U.S.C. §1681n(d), 122 Stat. at 1566).

The high frequency of all types of FCRA class actions and the rapid finalization of class settlements in FCRA expiration date and employment background check litigation reflects the fact that such violations are easy to prove.[71] Plaintiffs could easily prove the FCRA violation by the receipt (in expiration date cases) or by the failure of the employer to be provide the required notices and reports to the prospective employee (in the employment report cases).

In both case types, the "willfulness" standard for the award of the statutory, non-injury damages of $1000 has proven to be easy for class counsel to meet. Through countless websites and blogs, attorneys and regulators have created sufficient general awareness of FCRA's requirements to establish statutory willfulness. For example, by 2010, plaintiffs in FACTA expiration date class actions routinely alleged that the willfulness requirement was met because credit card companies advised and contractually required merchants to truncate expiration dates. International consumer protection conventions also required such truncation.[72] Defendants argued that such allegations were mere boilerplate, contained in every FACTA expiration date complaint, and that they did not establish recklessness as required by Supreme Court interpretations of FACTA.[73]Courts rarely ruled on such arguments, usually made on FRCP 12(b)(6) motions to dismiss. Instead, at an identical mean time to settlement of thirteen months, parties reached both FCRA expiration date and background report class settlements. This suggests that the FACTA willfulness requirement has in practice provided very little protection for businesses under FACTA. Like the ATM "on or at" notice cases, FACTA expiration date cases are relatively easy for class counsels.

Perhaps the most important respect in which the FCRA expiration date and employment background report cases resemble the ATM "on or at" notice cases is that neither type of violation involves any actual injury to a plaintiff. As for the expiration date cases, Congress found in 2008 that experts did not believe that the risk of credit card fraud decreases when a merchant prints out the expiration date but truncates the actual credit card number, as FACTA requires. Plaintiffs in FACTA expiration date cases do not allege that they have suffered harm, but seek statutory damages for willful violations. Federal courts who have found standing for plaintiffs alleging such FACTA violations have reasoned that the mere statutory violation itself can establish "injury" sufficient to meet constitutional standing requirements.[74] And the injury in employment background reports—a failure to follow process—is precisely the type that at least in the constitutional standing area the U.S. Supreme Court has found not to constitute an actionable injury.

[71] Indeed, only 7 such cases ended in dismissal and only two of these dismissals were with prejudice; at least one of these two may have been an individual settlement.

[72] An example is provided by the discussion in the defendant's motion to dismiss for failure to state a claim in Redman v. Take Care Health Sys., LLC, Case No. 11-cv-09044 (filed March 19, 2012), ECF No. 22.

[73] In Safeco Ins. Co. v. Burr, 551 U.S. 47, 57, 68-71 (2007), the Supreme Court held that "willfulness" under FCRA means that the defendant's conduct was reckless. Since that decision, lower courts have routinely understood this as a standard that asks whether a defendant's interpretation of FCRA's requirements was "objectively reasonable." These requirements very often involve technical questions of what information may and may not be contained in employment background check disclosures. See, for example, Jones v. Halstead Management Co. LLC, No. 14-CV-3125 VEC (S.D.N.Y. Jan. 27, 2015); Miller v. Quest Diagnostics, No. 2:14-cv-04278-SRB (W.D. Mo. Jan. 28, 2015).

[74] *See, e.g.*, Hammer v. Sam's E., Inc., 754 F.3d 492 (8th Cir. 2014).

As shown by Figure 3, which considers class settlements in all types of FCRA cases, the (smoothed)[75] compensation rate distribution has a double-peaked shape, with compensation rates around 10% being most frequent but very high compensation also being relatively frequent.

FIGURE 3. DISTRIBUTION OF COMPENSATION RATE IN FCRA CLASS SETTLEMENTS

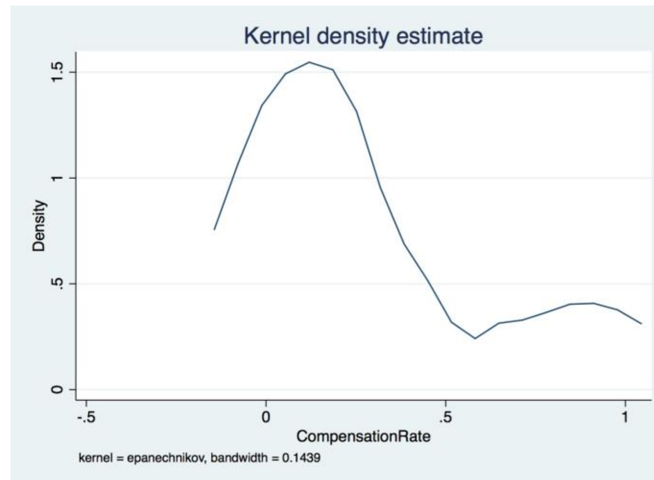
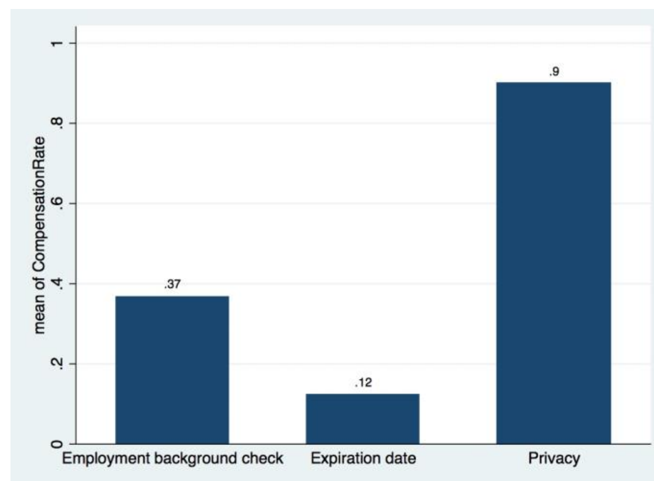


Figure 4 below helps to explain the double-peaked distribution of FCRA class compensation rates. The 37% class compensation rate in employment report class settlements is over three times the 12% compensation rate in expiration date cases.[76]

FIGURE 4. FCRA MEAN COMPENSATION RATE, BY CASE TYPES



Tobit regression results, however, suggest that case type may have little independent role in explaining class compensation rates in FCRA class settlements.[77] As we can see by comparing

[75] It is the smoothing that creates the appearance of a potentially negative value of the compensation rate.
[76] Note that there is a single FCRA privacy settlement in the Illinois Data, and the reason that the compensation rate is so high in that case is because the relief there was free credit monitoring made available to the entire class.

Tables 3A and 3B below, if one regresses the compensation rate only on the case type (expiration date or not), then case type is statistically significant at conventional .05 levels, with expiration date settlements having a lower compensation rate. However, from Table 3B, we can see that when class size and the nominal settlement amount are added as explanatory variables, case type is no longer significant. Moreover, the regression results indicate that big classes have lower compensation rates, while the compensation rate increases, the larger is the nominal settlement.

These results must be interpreted cautiously. They do not necessarily indicate a causal relationship. While it may be that it is harder to effectively notify bigger classes, leading to lower compensation rates, it may be that the likely difficulty of notifying the class influences the negotiated nominal settlement. The average class size in an employment background check FCRA class settlement is only 22,364, almost one-tenth of the average class size of 262,377 in FCRA expiration date settlements. Tables 3A and 3B suggest that the large difference in average compensation rate in these two types of FCRA settlements reflects largely the difference in class size. Moreover, the fact that case type is no longer statistically significant class size and the nominal settlement amount are considered is consistent with the view that both expiration date and employment background check FCRA cases are similar in that neither involves significant harm to class members.

TABLE 3A. TOBIT REGRESSION OF FCRA CLASS SETTLEMENT COMPENSATION RATE ON CASE TYPE ONLY

COMPENSATION RATE	COEF.	STD. ERR.	T	P>T	[95% CONF.	INTERVAL]
FCRAEXPIRATION DATE DUMMY	-.3570139	.1461044	-2.44	0.027	-.6667414	-.0472864
CONSTANT	.435	.1042454	4.17	0.001	.2140097	.6559903

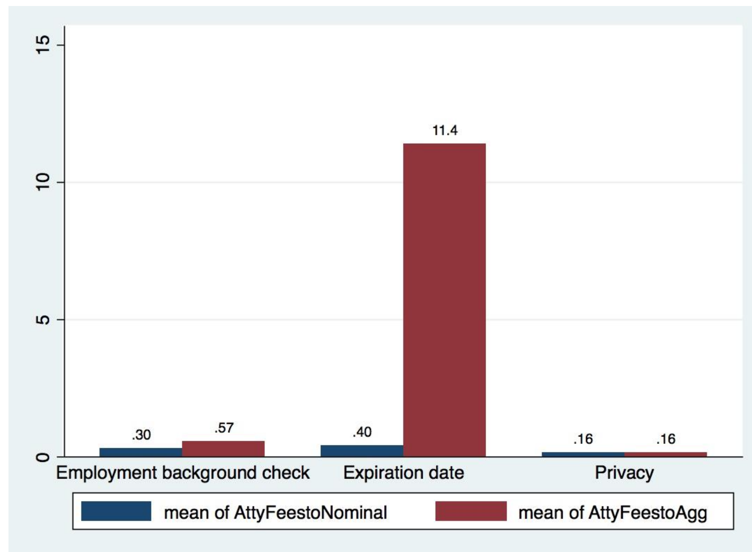
[77] As the variable to be explained is a rate which, in this dataset, often takes on values below .1, Tobit regression is likely to give better estimates than ordinary least squares. Still, with only 19 observations, even testing four explanatory variables means there are very few degrees of freedom. The log of class size and the nominal settlement amount are included to capture the likely non-linear relationship between class size, the nominal settlement and the compensation rate.

TABLE3B. TOBIT REGRESSION OF FCRA CLASS COMPENSATION RATE ON CASE TYPE, CLASS SIZE AND NOMINAL SETTLEMENT AMOUNT

Compensation Rate	Coef.	Std. Err.	t	P>t	[95% Conf.	Interval]
FCRAExpiration Date Dummy	.0563445	.1643303	0.34	0.737	-.2961089	.4087979
ClassSizelog	-.1325772	.0428068	-3.10	0.008	-.2243886	-.0407658
NominalSettle. Log	.1745585	.0539582	3.24	0.006	.0588296	.2902873
Constant	-.8226893	.4920796	-1.67	0.117	-1.878095	.2327164

Perhaps most noteworthy about the FCRA class settlements is the enormous disproportion between attorneys' fees and the aggregate class recovery for expiration date cases. As Figure 5 depicts, if one considered attorneys' fees in such cases only relative to the nominal settlement, they would appear to be quite reasonable. But at an average of 1,100% of the amount that the class actually recovers, attorneys' fees dwarf any actual recovery by the class. Attorneys' fees are actually likely to be even more disproportionate relative to class recovery in expiration date cases than Figure 5 depicts, for several such settlements involved in-kind relief to the class—things like coupons or sale days—that may well have generated zero compensation.

FIGURE 5. FCRA ATTORNEYS' FEES AS FRACTION OF NOMINAL AND AGGREGATE SETTLEMENT AMOUNTS, BY CASE TYPE



2. The Fair Debt Collection Practices Act

The most common class action filing in the Illinois Data was under the Fair Debt Collection Practices Act (the "FDCPA"). Enacted as one of the core vintage 1970 federal consumer protection statutes, Congress intended the FDCPA to stop various abusive debt

collection practices. Successful FDCPA plaintiffs are entitled to a broad range of compensatory damages, including damages for lost wage, physical and mental distress, and statutory damages up to $1,000 without proof of harm.[78] In a class action, FDCPA limits statutory damages recovered on behalf of absent class members to the lesser of $500,000 or 1% of the debt collector's net worth.[79] The FDCPA, as amended, includes six main sections that prohibit a variety of actions by debt collectors. Our FDCPA filings can be categorized into several functional categories that cut across these statutory provisions.

a) Formality Failure

The FDCPA imposes a number of formal disclosure requirements on debt collectors. The most numerically important cases in the Illinois Data include those that allege a failure to follow one or more of these formalities, which make up fully 50% of all FDCPA filings (seventy-one out of 141[80]).

Formality failures fall into three distinct sub-categories. The first type, phone identification, describes cases where a debt collector did not properly identify himself or herself when contacting the debtor.[81] These cases often involved debt collectors leaving phone messages asking the consumer to call back without giving the necessary warning.

The second type of FDCPA formality failure, a letter notice, describes cases where a debt collector sends a letter notice to the consumer that violates the requirements in 15 U.S.C. § 1692(g). Examples of this subcategory include letter notices that (1) did not provide effective notice of the 30-day verification period, (2) that failed to effectively identify the name of the creditor, (3) that failed to include that any dispute or request for name of the original creditor must be in writing, and (4) that failed to include the principal and interest amounts, stating only the total amount due.

The third subcategory of FDCPA formality violations describes cases in which a debt collector violated a state law requirement ("State Law Violations"). Most commonly, these violations occur when a party attempts to collect debt without being properly licensed as a collection agency under state law. [82]

b) Bad Debt

Bad Debt cases comprise the second-highest number of FDCPA filings in the Illinois Data (thirty-nine of 141 or 28%). These cases can be broken down into three sub-categories. The first, bad debt interest, describes cases where a party impermissibly adds interest to the debt principal. In the typical case, a debt purchaser retroactively adds interest that should have

[78] 15 U.S.C. §1692k(a).
[79] 15 U.S.C. § 1692k(a)(2)(B).
[80] The denominator is larger than the number of actual FDCPA filings because ten FDCPA cases included alleged violations in several categories.
[81] The failure by a debt collector to disclose in the initial communication with the consumer that he or she is a debt collector, and that the debt collector is attempting to collect a debt, and that any information gathered in the communication will be used for that purpose, is in violation of 15 U.S.C. § 1692e (2012).
[82] These cases alleged that engaging in this action constituted a false, deceptive, or misleading representation or means in connection with the collection of any debt under 15 U.S.C. § 1692e (2012).

accrued before the purchase, despite the original creditor's refusal to do so.[83] The second subcategory of bad debt filing, time-barred, refers to cases where a debt collector attempts to collect a debt after the date that it is no longer collectable. [84]

The last bad debt subcategory, bad affidavit, describes cases where a debt purchaser provides a fraudulent affidavit to consumers in violation of 15 U.S.C. § 1692(e). In the typical case, the purchaser falsely represents to consumers that it could prove the debt. Oftentimes, the purchaser concealed documents containing express disclaimers about the enforceability and validity of the debt ("as is" clauses). Other cases involving fraudulent affidavits include the impermissible modification of an affidavit after affiant signed it.

c) Litigation Threat

A relatively small fraction (seven out of 141, or 5%) were based on an alleged threat by the debt collector that it would take legal action against the consumer if the debt was not paid off, despite the fact that legal action would not be taken. Often, these cases involved debt collectors who routinely do not file suit to collect on small debts yet represented to the consumer that they would do so. Under 15 U.S.C. § 1692(e), a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. This includes the threat to take any action that the debt collector cannot legally take or does not intend to take.

d) Harassment

The final FDCPA category, called harassment, includes cases alleging egregious behavior by the party attempting to collect the debt. For example, a debt collector might repeatedly and continuously call a consumer without prior authorization to do so and with intent to annoy, abuse, or harass. The debt collector might also attempt to embarrass the consumer by calling third parties related to the consumer, often using inappropriate methods such as auto-dial and pre-recorded messages. Some of these cases involved debts the consumer did not owe.[85] There were sixteen cases in the harassment category (11% of all FDCPA filings).

e) Other

Two cases that did not appear to fall under any of the previous four categories were placed in the "other" category. These included a case where the debt collector reported false information about the debt to consumer reporting agencies, and a case where a debt collector

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[83] The FDCPA prohibits the use of "unfair or unconscionable means to collect or attempt to collect any debt," including "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f (2012). As such, any addition of interest to the debt outside of the original agreement creating the debt is a possible violation.

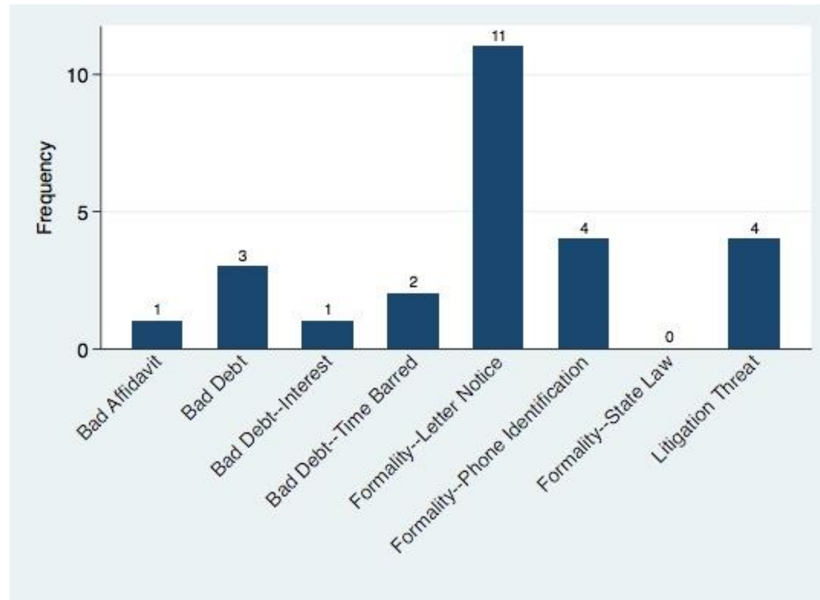
[84] Under §1692f, the FDCPA prohibits a debt collector from using any unfair or unconscionable means to collect or attempt to collect a debt. Attempting to collect a debt that is time-barred, or, in the alternative, wrongly indicating that a debt is time–barred, is an unfair or unconscionable means to collect a debt. 15 U.S.C. §1 692f (2012).

[85] These attempts may be in violation of 15 U.S.C. § 1692b, c, d, and e.

purchased healthcare debts and then purported that payments on those debts constituted acceptance of a revolving credit line from the debtor.

As can be seen from Figure 6 below, class settlements by FDCPA case type closely track the filings sample proportions with filings/class settlement proportions being 51/54% for formalities, 23/28% for bad debt, the two main case types. At 15% versus 5%, only for litigation threat type cases was the class settlement proportion far above the proportion of filings.

FIGURE 6. FDCPA CLASS SETTLEMENTS, BY CASE TYPE



In aggregate, attorneys' fees of $787,525 were incurred to generate FDCPA class settlement payouts of $1,365,662. On average, FDCPA are small class action settlements for small classes, with an average class size of 4,882, an average nominal settlement of $58,724, and average attorneys' fees of $31,500. The small size of even nominal settlements reflects the small number of class members and the FDCPA's statutory limitation on statutory damages in class action cases. These settlements take some time to achieve. On average final judicial approval takes seventeen months after the complaint is filed. The mean aggregate payout to the class in FDCPA class settlements is $54,626, a full 88% of the nominal settlement. Moreover, on unweighted average, 25% of the class receives compensation in a FDCPA class settlement.

FIGURE 7. FDCPA COMPENSATION RATE DISTRIBUTION

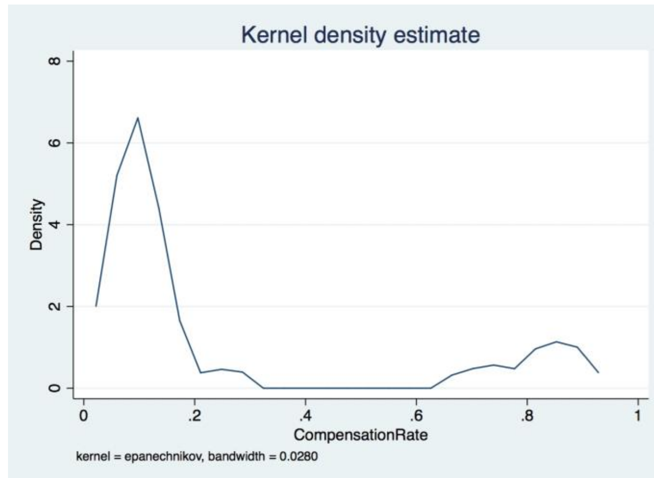
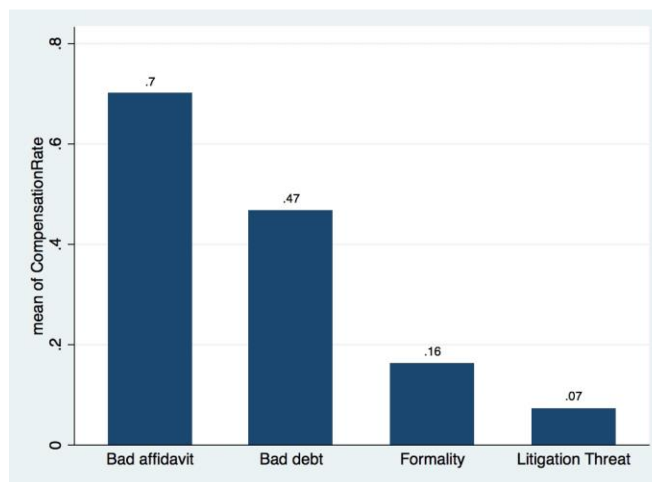


Figure 7 shows the (smoothed) distribution of the compensation rate across all FDCPA case types. Figure 8 breaks out the compensation rate by FDCPA case type. As Figure 7 shows, the majority of FDCPA settlements involve a class compensation rate of less than 20%. The compensation rates across types of FDCPA cases in Figure 8 shows that the mean compensation rate in FDCPA cases varies by an order of magnitude across case types, from 7% for the three cases alleging unlawful litigation threats to 70% for the one settlement in a case alleging a bad affidavit. Restricting attention to the two most frequent FDCPA settlement types, those alleging a failure of the debt collector to follow a required formality, and those alleging attempts to collect on a bad debt shows that the mean compensation rate varies from 47% for the bad debt settlements to 16% for the formality settlements. The difference in the compensation rate across case types is statistically significant (with $F(3,21) = 9.8$, $p < .007$).

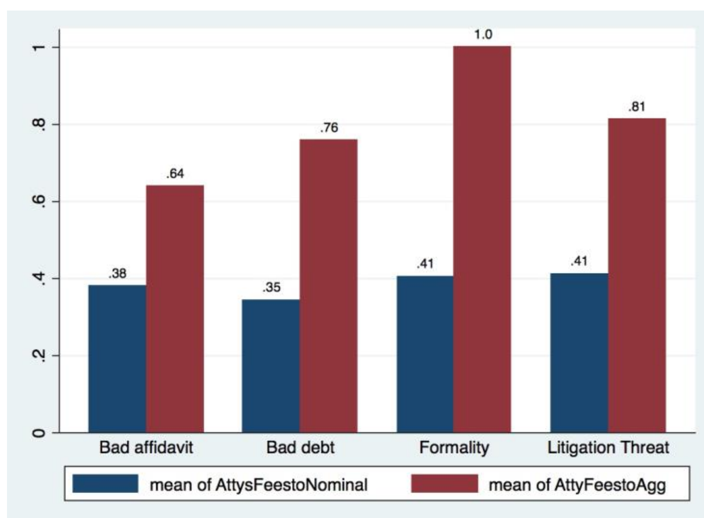
FIGURE 8. FDCPA COMPENSATION RATES, BY CASE TYPES



Unlike compensation rates, as Figure 9 shows, attorneys' fees relative to the nominal class settlement amounts and aggregate payouts do not vary as much across FDCPA case types, ranging only from .35 to .42. Aside from formality FDCPA cases, the ratio of attorneys' fees to the aggregate payout to the class varies less. But fees are high, averaging at least 64% of the

class payout for all case types. These high fees reflect the fact that courts award attorneys' fees based on the reasonable value of class counsel's time spent on the case. Courts do not base attorneys' fees by comparing attorneys' fee to the recovery (on a common fund theory of fee recovery) because the FDCPA limits actual recovery to the lower of $500,000 or 1% of the defendant's net worth. This net worth consideration likely explains why attorneys' fees in formality FDCPA cases are higher than other FDCPA case types. On average, attorneys' fees in formality FDCPA cases equal the actual aggregate amount paid to the class.[86]

FIGURE 9. FDCPA ATTORNEYS' FEES AS FRACTION OF NOMINAL SETTLEMENT AMOUNT AND ACTUAL AGGREGATE COMPENSATION PAID TO CLASS MEMBERS



3. Telephone Consumer Protection Act

The TCPA prohibits autodialed telephone calls, faxes, and emails if the recipient has not given prior consent.[87] Such communications are allowed under the TCPA in two discrete circumstances: if the recipient voluntarily gave the sender her phone number within the context of an already-established business relationship or if the recipient published its fax number on an internet site. Importantly, like the other federal consumer protection statutes discussed in this article, the TCPA allows class action plaintiffs to claim either actual damages or statutory damages of $500 without proof of injury. The TCPA gives the trial court the discretion to award treble damages, up to to $1,500 per violation if the plaintiff can prove that the defendant

[86] The net worth limitation was mentioned in memoranda arguing for judicial approval of the class settlement in 87% of FDCPA formality violation class settlements, versus in only 33% of the other types of FDCPA class settlements. With z = 2.06, this difference is significant at the .02 level.

[87] With exceptions discussed below, the TCPA makes it unlawful to "make any unauthorized call using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, . . . [and] to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1).

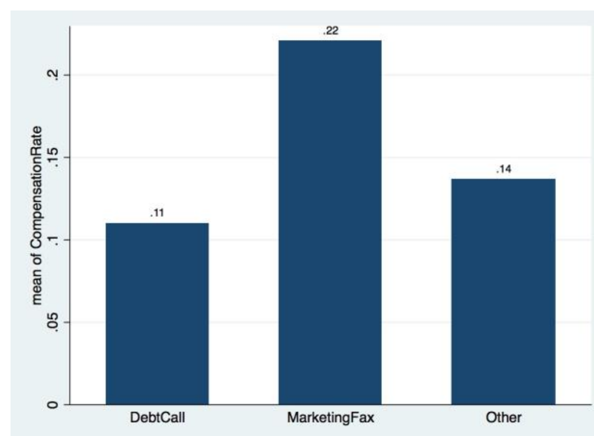
"willfully or knowingly" violated the statute. Importantly, under the TCPA, statutory damages accrue per violation.

Unlike the other statutory causes of action discussed here, because TCPA damages aggregate across thousands and in some cases millions of unconsented autodialed communications, TCPA class actions are often huge. On average, each TCPA class action settlement in the Illinois Data contained 1,901,402 class members. TCPA settlements on average produce a nominal settlement of $7,377,495 and an aggregate payout of $6,293,547 (or 85% of the average nominal settlement). Attorneys' fees average $2,225,213; however, the time between case filing and judicial approval of a final settlement is on average 26 months. Moreover, the unweighted average compensation rate in TCPA settlements is only 19%. As far as the aggregate performance goes, in TCPA class settlements, attorneys' fees of $76,945,118.49 were incurred to generate nominal settlements totaling $223,032,294. As actual aggregate payouts total $188,964,180, attorneys' fees in TCPA class settlements were 41% of the aggregate class payout.

The TCPA cases fall into three broad case types: those involving autodialed phone calls (or, less often, a text message) made as part of the debt collection process (42% of all TCPA filings); those involving an unauthorized marketing fax (31% of all filings); and those involving a marketing text, call, or email (27% of all filings). However, at 44% each, debt call and marketing fax case types account for the vast majority of TCPA class settlements (with marketing call, text or email cases making up the remainder of class settlements).

Debt call and marketing fax class settlements are at opposite ends of the TCPA spectrum. Of the marketing fax class settlements, 87% involved doctors' and dentists' offices or other businesses who received unsolicited telemarketing faxes. Class settlements in marketing fax cases involved moderately large to small classes averaging 14,717 members. As Figure 10 shows, at .11, the average compensation rate in debt call TCPA class settlements was only one-half of the .22 compensation rate in marketing fax class settlements.

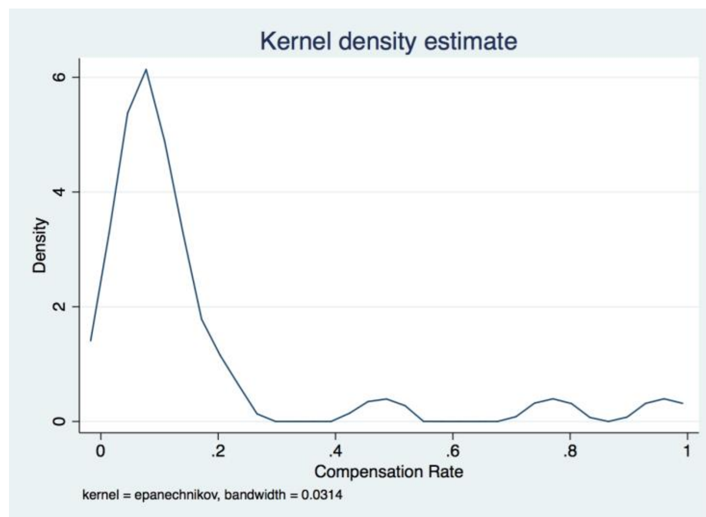
FIGURE 10. TCPA CLASS COMPENSATION RATES, BY CASE TYPE



If we look at the (smoothed) distribution of the claims rate across all TCPA case subtypes, then as depicted in Figure 11 below, we see that as with all other case types, the distribution is highly skewed, with most settlements involving a claims rate of less than 20%. If we compute the compensation rate weighted by the relative class size compensated, we find that

the weighted compensation rate in TCPA debt call class settlements is only 4%. The weighted compensation rate in TCPA marketing fax settlements is 21%.

FIGURE 11. TCPA COMPENSATION RATE DISTRIBUTION



Some evidence on the relative significance of case type in explaining TCPA compensation rates is supplied by Table 4, That table presents the results of tobit regressions of the TCPA compensation rate on case type (debt call or not) and the log of class size.[88] Table 4 below suggests that TCPA case type may indeed play an independent role in explaining compensation rates, with non-debt call TCPA settlements having significantly higher compensation rates. The table also shows bigger classes are marginally statistically significant (at the 10% level) in having lower compensation rates.

TABLE 4. TOBIT REGRESSION RESULTS FOR TCPA COMPENSATION RATE

COMPENSATION RATE	COEF.	STD. ERR.	T	P>T	[95% CONF.	INTERVAL]
DEBTCALLDUMMY	.0301517	.1021462	0.30	0.770	-.1802223	.2405257
CLASSSIZELOG	-.0248445	.0138755	-1.79	0.085	-.0534215	.0037326
CONSTANT	.3876595	.1229676	3.15	0.004	.1344031	.640916

Reviewing the average class sizes in marketing fax versus debt call settlements explains the rationale for controlling for class size in attempting to explain variation in the compensation

88 The rationale for running tobit regressions with the TCPA compensation rate (supported by Figure 1, which of course mispresents the frequency of extreme values due to the smoothing function) is the same as for the FCRA compensation rate. Note that unlike FCRA class settlements, where the correlation between the class size and the nominal settlement is relatively low, class size and the nominal settlement are highly correlated (.89) in TCPA cases, so that both variables cannot be included on the right hand side in the TCPA compensation rate regressions.

rate. Debt call settlements had an average class size of 5,905,313, while marketing fax classes were much smaller, averaging 22,090 members.[89] In debt call class settlements, the mean aggregate payout to the class was $12,156,263, almost six times larger than the mean aggregate payout of $2,255,563 in all other TCPA class settlements.[90] Moreover, the average individual payout to class members actually receiving compensation in TCPA debt call settlements of around[91] $289 was much smaller than the average payout of $453 in marketing fax settlements.

Importantly, the $289 payout in debt call settlements is an unweighted average. Two of the class settlements in the Illinois Data, *Patterson v. Capital Management* and *Martin v. Leading Edge Recovery Solutions, Inc.,* were part of the settlement of three class actions consolidated under the caption *In Re Capital One.* That litigation included almost half of all class members in the Illinois Data (17,522,049). Further, the individual payout to members in *Capital One* who actually received compensation was only $40. Moreover, in the largest TCPA class settlement, *Gehrich v. J.P. Morgan Chase Bank*, with over 19,000,000 class members (over half of the class members in my sample if one counts the *In re Capital One* as a single settlement) the class settlement was approved without *any* information given regarding the individual payout that class members could expect.

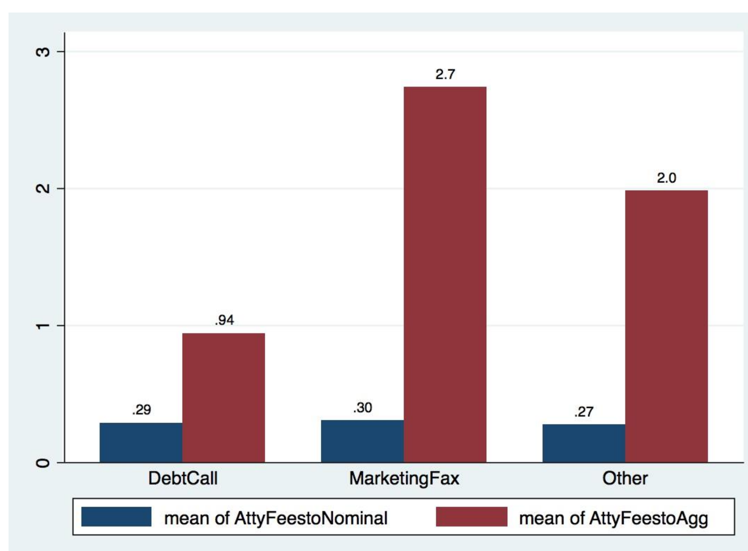
In terms of how the cost of achieving a class settlement compares with the actual results for class members, TCPA class settlements seem to be almost as bad as FCRA and the old ATM EFTA notice failure class settlements. As Figure 12 shows below, other than for debt call settlements, attorneys' fees as a fraction of the nominal class settlement are right around the contingency fee standard of 33%. However, for every type of TCPA class settlement, attorneys' fees are greater than or (roughly) equal to the actual aggregate class recovery. For marketing fax settlements, which as noted above make up almost half of all TCPA class settlements, class counsel are awarded fees that are on average equal to 260% of what the class members actually receive in compensation.

[89] There were 70,863,754 class members in debt call settlements and 309,260 class members in marketing fax settlements, counting Martin and Patterson as separate settlements.

[90] A difference that with $F(1,26) = 3.26$ has $p < .08$.

[91] This is the minimum because in some settlements, only the amount paid per fax was reported in the settlement, making it possible that some class members may have received compensation for multiple unsolicited faxes.

FIGURE 12. TCPA ATTORNEYS' FEES AS FRACTION OF NOMINAL SETTLEMENT AND AGGREGATE PAYOUT



It is true that attorneys' fees in some of the largest TCPA class settlements are a much lower fraction of the aggregate class recovery. For example, in the *In re Capital One* litigation, which included two class settlements in the Illinois Data, attorneys' fees comprise only 29% of the amount actually paid to the class. However, while one can identify statistically the factors that influence judges to give big attorneys' fees, I have so far found no statistically significant relationship between attorneys' fees as a fraction of class recovery and any other descriptive or outcome variables.

This is shown by Tables 5 and 6 below, which present the results of ordinary least squares regression runs. Table 5 shows that as one would expect, attorneys' fees increase with both the size of the nominal settlement and the size of the class (with the effect statistically significant at the 7% and 5% levels, respectively). It is noteworthy that the variables describing how the class fared under the settlement—the compensation rate and the aggregate compensation—do not approach statistical significance.

TABLE 5. ATTORNEYS' FEES REGRESSION RESULTS

AttyFees	Coef.	Std. Err.	T	P>t	[95% Conf.	Interval]
Duration	-38138.71	24466.9	-1.56	0.135	-89175.77	12898.34
Comp. Rate	101043.4	613931.5	0.16	0.871	-1179595	1381682
MarketFax	-519589.5	289635.8	-1.79	0.088	-1123759	84580.26
ClassSize	.1233503	.0601498	2.05	0.054	-.0021199	.2488206
NominalSettle	.2436162	.1269004	1.92	0.069	-.0210934	.5083257
AggPayout	-.0933392	.1831329	-0.51	0.616	-.4753478	.2886694
Constant	1264462	575598.1	2.20	0.040	63785.26	2465139

In a regression on the same explanatory variables, where the variable to be explained is not the absolute magnitude of attorneys' fees but the ratio of such fees to the actual aggregate

payout to the class, there are no relationships that even approach statistical significance. This is shown by Table 6. Table 6 also confirms what is clear to anyone who reads the memoranda that class counsel submit in support of approval of class settlements and attorney fee awards: in determining whether to approve a fee award, the court does not consider the actual amount paid to the class.

TABLE 6. RATIO OF ATTORNEYS' FEES TO AGGREGATE PAYOUT REGRESSION

AttyFeest to Agg. Payout Ratio	Coef.	Std. Err.	t	P>t	[95% Conf.	Interval]
Duration	.0880711	.1335203	0.66	0.517	-.1904474	.3665896
Com. Rate	-3.924143	3.350336	-1.17	0.255	-10.91282	3.064536
MarketFax	2.379641	1.580595	1.51	0.148	-.9174233	5.676705
ClassSize	-1.97e-07	3.28e-07	-0.60	0.556	-8.81e-07	4.88e-07
NominalSettle	4.91e-07	6.93e-07	0.71	0.486	-9.53e-07	1.94e-06
AggPayout	-7.52e-07	9.99e-07	-0.75	0.460	-2.84e-06	1.33e-06
Constant	-.7224982	3.141144	-0.23	0.820	-7.274809	5.829813

III. Implications of the Northern District of Illinois Evidence for the Social Utility of Class Actions under Federal Consumer Protection Statutes

One must be cautious in drawing general implications from any particular sample. However, the evidence from the Northern District of Illinois over the period 2010–2012 suggests several implications for the performance of class actions under federal consumer protection statutes. Importantly, these implications only apply to cases brought under those statutes discussed in this Article. As a subsequent paper will explain, consumer class action filings in the Northern District brought under state statute and common law have somewhat different implications for consumer class actions.

A. Social Welfare Implications of Incentivizing Class Action Settlements Where There May be No Harm to Consumers

As noted in the introductory discussion of the Court's recent decision in Spokeo v. Robins, class actions with no allegation of actual harm to the plaintiff may lack constitutional standing per Supreme Court precedent. As also discussed above, Congress has recently passed bills banning such no-harm claims by legislation. The data presented here, however, show that almost half (45%) of all filings and an even higher fraction of all class settlements (47%) under federal consumer protection statutes involve cases without allegations of harm to consumers. Even if such settlements were compensating consumers efficiently, they would be doing so where there may be little or no harm to compensate or to deter in the future.

To measure the significance of no-allegation-of-injury (or "no injury") class actions in the Illinois Data, we need to identify relevant cases, for example, by examining whether the plaintiff alleged and/or attempted to prove that he or she suffered injury. Under this criterion, three types of cases qualify: EFTA ATM "on or at" notice failures; FCRA expiration date and employment background check formalities cases; and FDCPA cases alleging a failure to follow formalities. This leaves TCPA cases.

In passing the TCPA, Congress found that unconsented autodialed communications cause at least some annoyance to the recipient and that lack of consent was crucial to consumer harm. All TCPA filings in the Illinois Data allege that autodialed calls were made to the plaintiff

without consent. For this reason, TCPA cases are not categorized as no-injury cases. As discussed in more detail below, however, courts have shifted to TCPA defendants the burden of proving that the plaintiff did consent. Thus, TCPA plaintiffs merely must allege that they did not consent to the autodialed communication. Many TCPA cases may involve consent and no harm as Congress understood it. For this reason, I also consider the proportion of no injury filings and class settlements with TCPA filings removed from the sample.

Consider first the numbers on no-injury filings, including TCPA cases. Of 327 total filings, a total of 148, or 45% contain no allegation of plaintiff injury.[92] Thus even including all TCPA cases, no-injury cases comprise almost half of the cases in the Illinois Data. As for the class settlement outcome, the question is whether no-injury cases occur with a statistically significant higher probability among filings ending in class settlement than filings ending in other ways. No injury cases make up 47% of the cases ending in class settlement (forty out of eighty-five), and 49% of cases that do not end in a class settlement (118 out of 242). This difference is not statistically significant, and in any event, no-injury cases are more likely in the set of filings that do not end in class settlement than in those that do.[93]

These numbers are derived under the assumption that all TCPA cases are properly included as cases involving an allegation of harm. After excluding TCPA filings, 216 filings remain, of which 158, or 73%, are cases with no allegation that the plaintiff suffered harm. In the sample with TCPA filings excluded, where 80% of the class settlements involved cases with no-injury allegations, only 72% (or 118 out of 164) of cases that did not end in class settlement were no-injury cases. Thus, with TCPA filings excluded, no-injury cases are significantly more likely to end in class settlement than other types of filings.[94]

What is perhaps most striking about the Illinois Data is the high fraction of cases without any allegation of actual harm. Excluding TCPA cases, the data shows that no-harm class actions are significantly more likely to end in class settlement than otherwise. Some of these settlements seem clearly to involve payments to class counsel and consumers where no consumer has even suffered harm. Under FCRA, it is now widely acknowledged that printing an expiration date on a credit card receipt cannot compromise cardholder identity. Many believe that failure of an employer to comply with the various disclosures and other formalities required by FCRA of employers who use employment background checks causes no harm to any employment applicant. The same is true for the most commonly occurring class settlement under the FDCPA, those involving a failure to follow various disclosure formalities, a failure that does not cause harm to any debtor.

On the other hand, it may be argued that even if the FCRA expiration cases are conceded to involve no harm to consumers, failures to follow disclosure requirements under FRCA and the

[92] There are 43 ATM no-harm filings, 44 FCRA expiration date or background check filings and 71 FDCPA formality filings, for a total of 148 no harm filings. Or 148/327 = 45% no allegation of harm filings.

[93] In the full sample, with TCPA cases included as cases alleging harm, we have 327 total cases with 158 or a fraction of .48 involving no harm. Of the 242 cases not ending in class settlement, 118 (or .49 of the total) were cases were no injury cases as categorized in the text. Of the 85 cases ending in class settlement, 40 (or .47 of this sample) involved no harm. With a z statistic of only .33, the difference between the .49 rate at which no injury cases appear in the sample that does not end in a class settlement and the .47 rate at which they appear in the sample ending in class settlement is not statistically significant (we cannot reject the null of equal proportions).

[94] With the overall probability of a no injury case in the non-TCPA sample at .72, and such cases occurring in the class action settlement sub-sample of size 52 with probability .8 and in the no class settlement sub-sample of size 164 at probability .74, the z statistic equals 16, which is significant at the .0001 level.

FDCPA may sometimes lead to harm. A consumer properly informed of a background report could discover and report errors and persuade a prospective employer to look past the report in making its hiring decision. If a consumer knows that debt collector is attempting to communicate, she might be able to quickly inform the debt collector that the debt has actually been paid.

While these are possibilities, the existing literature on disclosure indicates that they are very low probabilities. There is little evidence that mandatory consumer disclosures are effective in actually informing consumers. [95] In light of this evidence, the expected harm to consumers from violation of disclosure and other formalities is likely low. On the basic economic model of optimal compensation, one is led to ask whether the harm being compensated is one that the consumer would insure against if offered such insurance at a price equal to the insurer's expected payout plus a competitive profit (an actuarially fair rate).[96] Because the cost of delivering compensation through class action settlements is so high, a consumer would pay a relatively high price for such compensation. With such high costs, relative to very small coverage amounts, even a very risk averse consumer would turn down such insurance.

Given the questionable utility of compensating consumers for such harms, the private enforcement incentives created by no harm class actions become especially troublesome. Simply by allowing the consolidation and joint pursuit of thousands or millions of small claims, class actions incentivize private enforcement of violations generating such claims. Our data show that statutes with statutory damages up to (in the case of the TCPA) $1,500 per violation without even an allegation of harm to class members creates an extraordinarily powerful incentive for class counsel to pursue such cases. Moreover, again as our data confirm, the extra incentive generated by statutory damages likely has its biggest marginal impact in cases where the class of consumers is relatively small.

To see this, consider first a TCPA class action with one million class members each of whom suffers on average $10 of annoyance when bothered by an autodialed call to her cellphone. If recovery is limited to actual damages suffered, such a suit offers $10,000,000 of actual damage recovery. A class action with such an easy-to-prove violation of the law would likely be attractive to plaintiffs' attorneys even without statutory damages that boost the potential recovery to $1.5 billion.

By contrast, consider next an FDCPA case with only 1,000 class members suing for violation of statutory formalities that harmed each in the amount of $10. If recovery is limited to actual damages, such a class action would hold out the prospect of only $10,000 in aggregate damages. Such a case might interest relatively few plaintiffs' attorneys. However, the same suit offering statutory damages of $1,000 per class member would have a potential aggregate recovery of $1,000,000. With such potential liability, the class action would seemingly be considerably more attractive to class counsel.

It may well be that Congress fully intended to use statutory damages with no allegation of harm to work such a massive boost of the private enforcement incentives of class counsel. However, a necessary consequence of such no harm statutory damage claims is to divert the efforts of class counsel away from other case types where the harm to consumers may be larger but statutory damages smaller. Statutory damages are relatively uniform across all our case

[95] For a survey of the empirical literature indicating the ineffectiveness of consumer disclosure,, see Omri Ben-Shahar and Carl E. Schneider, More than you Wanted to Know: The Failure of Mandated Disclosure 33-118 (2014).
[96] *See* Steven Shavell, Economic Analysis of Accident Law at ch. 5, p. 4 (Nat'l Bureau of Econ. Research, Working Paper No. 9694, 1988).

types; class members virtually always ask for roughly $1,000 per class member. When statutory damages do not vary with the harm suffered by consumers, class counsel have no incentive to choose to pursue cases where the harm to deter is the greatest. Instead, their incentive is to pursue the cases that are easiest to establish, such as those where a credit card receipt contains the expiration date. One must wonder whether Congress intended this result.

B. Attorneys' Fees to Class Counsel that Often Exceed Total Class Compensation Suggest that Consumer Class Actions are a Highly Inefficient Method of Compensation

In class settlements under the TCPA and FCRA expiration date cases—the largest class settlements—attorneys' fees equal or exceed, often by a multiple, the aggregate class compensation. Indeed, of all TCPA and FCRA class settlements, only for FCRA employment background check settlements are attorneys' fees significantly less (at 57%) than aggregate class compensation. For many commonly occurring class action settlements—such as in FCRA expiration date cases and TCPA cases involving marketing faxes—attorneys' fees range from four to nine times class compensation.

Of course, the fees paid to class counsel are only one part of the total cost of achieving a class action settlement. Defense counsel fees may be at least as high. Additionally, there is an opportunity cost to operating the court system to pursue class action settlements rather than adjudicating other types of cases. Based on the Illinois Data, the total cost of achieving class action settlements is typically equal to many times the total amount recovered by the class. Were these individual lawsuits instead of a class action, only a person motivated by spite and not by purely financial concerns would ever pursue a lawsuit that costs several times potential recovery. Nor could the plaintiffs find value in establishing a precedent to justify incurring such high fees, as class action settlements establish no legal precedent.

The only exception to the pattern of attorneys' fees that may be several times as high as the class recovery is for settlements under the FDCPA. However, as Figure 9 shows, attorneys' fees in FDCPA class settlements are always at least two-thirds of the class recovery. For the most commonly occurring such settlement—involving a failure of FDCPA formalities—attorneys' fees are on average equal to the class recovery. Even in FDCPA cases, viewed purely as an instrument for mass compensation, class action settlements are enormously inefficient.

C. Data Showing that Only a Small Fraction of the Class Receives Compensation in the Largest Class Action Settlements Further Shows the Inefficiency of the Consumer Class Action as an Instrument of Compensation

This inefficiency would be true even if class action settlements actually compensated most class members. But for only one type of class settlement—an FDCPA settlement involving a bad affidavit—were the majority of class members compensated. For all other case types, at most one-third or one-half of the class were compensated. And for the largest class settlements—involving debt calls in violation of the TCPA, FCRA expiration date violations, and FDCPA formality violations—only 10% to 15% of class members ever receive even one dollar under a class action settlement. Class action settlements do generate some plaintiff compensation, but especially in the largest class actions, about 90% of class members receive nothing.

D. As there are No "Small Dollar" Consumer Class Actions under Federal Consumer Protection Statutes with Statutory Damages, the Basic Economic Justification for Claims Aggregation in the Class Action May Fail to Hold

As discussed in the introduction, the basic economic rationale for consumer class actions is that when individual consumer harm is small, even though efficient deterrence requires forcing firms to pay for the harm they have caused, no consumer will find it in her self-interest to pursue a lawsuit. By aggregating claims via the class action device, class counsel have an incentive to bring suits that force firms to internalize the harm they have caused. Whether or not deterrence is optimal—in the sense of imposing liability equal to the actual harm caused if and only if the firm has actually caused harm—the class action at the very least forces firms to internalize some of the harm they cause at least some of the time.

The federal consumer protection statutes discussed here award statutory damages of at least $500 and more typically $1,000 or $1,500, without proof of harm. In each of the 327 cases in the Illinois Data, the plaintiff asked for at least statutory damages. Thus, there are no truly small dollar claims under the federal consumer protection statutes studied here. The Illinois Data is insufficient to demonstrate whether or not $1,000 in statutory damages incentivizes an individual lawsuit. However, the Illinois Data does provide evidence that federal consumer protection statutes have eliminated the very small $20 or $30 claim that is often taken to epitomize and justify consumer class actions.

E. Consumer Class Actions Under Federal Consumer Protection Statutes are Never Tried, Rarely Generate Binding Legal Precedent, and May Well Be Individually Viable

The data also show that the value of consumer class actions in setting binding legal precedent that may guide future behavior may be more limited than some commentators assume. Some published opinions do emerge from the kind of class action litigations studied here. Courts have, for example, clarified in published opinions that the defendant in a TCPA case has the burden of showing that the consumer consented to be called. But while courts do issue opinions when they rule on motions to dismiss and summary judgment motions, very few such opinions are published. Nonetheless, precisely zero cases in the sample of 327 consumer class actions ever went to trial. The rare plaintiff judgments were all default judgments. The data suggest that consumer class actions under federal consumer protection statutes rarely involve a formal vindication of consumer rights.

Most of the time, consumer class actions generate an individual settlement. About half of the TCPA, FCRA, and EFTA cases in the Illinois Data settled individually. A full 70% of all FDCPA cases ended in an individual settlement. Somewhat ironically, consumer class actions under these statutes seem to do quite well at compensating the individual named plaintiff. We do not know the terms of the individual settlements. However, in the three default judgments in our sample, the plaintiffs were awarded maximum statutory damages of $1,000, with attorneys' fees of roughly $10,000 also awarded. If the terms of these default judgments were similar to the terms of individual settlements, then at the very least, class counsel are being fully compensated for their efforts in obtaining such individual settlements. It may well be that without the threat of proceeding to discovery in an attempt to certify the class, such individual settlements would not occur. However, the ubiquity of such settlements strongly suggests that the fees awarded for obtaining individual settlements are sufficient to incentivize class counsel in these types of

federal consumer protection cases. This suggests that consumer class actions under these statutes may not be vital to either compensation or deterrence.

F. Even Cases with Allegations of Harm May Actually Involve No harm to Anybody

Other types of class settlements in the Illinois Data do involve behavior that Congress deemed harmful. The FDCPA is premised on the finding that when debt collectors attempt to collect on bad debts and threaten debtors with groundless litigation, they cause harm to debtors. Some FDCPA class actions allege such harmful behavior. The TCPA is premised on the Congressional finding that consumers are harmed when they are bothered by receiving an automatic phone call, voicemail, text, email or fax that they never consented to receive.

Observe, however, that the harm from such practices depends upon individually specific circumstances. Debt collectors are not prohibited from attempting to collect valid debts that are not time barred, and debt owners and collectors are legally permitted to and do bring lawsuits to collect on such debts. Consumers do consent to some autodialed calls, as when an insured gives her phone number to her insurance company so as to be alerted to changes in her health insurance plan, or a patient gives her phone number to her dentist so as to be alerted that it is time for her teeth to be cleaned by a hygienist. Thus, the question for class action settlements is whether settlements occur when they should—when the individual circumstances are such that the harm Congress cared about actually occurred, so that settlements may serve a valuable deterrent function—or instead are random, as likely to occur when there is no harm as when there is harm.

Cases in the Illinois Data provide reason for concern on this score. Consider the TCPA class settlements. Over the period 2010–2012, TCPA class settlements generated $188 million in aggregate payouts. Even allowing for the inclusion in the Illinois Data of one large multi-district consolidated class action, were one to extrapolate from the total payout in TCPA class settlements, if there are even ten district courts with the volume of consumer class actions as the Northern District, nationally there would have been at least $1.9 billion in TCPA payouts over just a three-year period. This is not a trivial aggregate amount.

The non-trivial payouts in TCPA cases may well be justified on deterrence grounds because unlike the FCRA expiration date cases and FDCPA and FCRA cases alleging a failure to comply with formalities, a typical TCPA class action filing alleges the defendant engaged in conduct that Congress specifically found to be harmful to consumers. As the Ninth Circuit explained in *Satterfield v. Simon and Shuster*, Congress passed the TCPA "in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls.[97] The consumers complained that such calls are a 'nuisance and an invasion of privacy.'" The TCPA's goal was to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate inter-state commerce by restricting certain uses of facsimile machines and automatic dialers."[98] With the obvious difficulty of precisely valuing the cost of such privacy invasions, the TCPA's $500 statutory damage provision—rising to $1500 for willful violations—can be justified as a way to

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[97] Scatterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009).

[98] *Id*. (citing S. REP. NO. 102-178, at 1 (1991), reprinted in 1991 U.S.C.C.A.N. 1968.) [NOTE TO STAFFER: CONFIRM]

deter privacy invasions without getting bogged down in a likely fruitless attempt to precisely value the harm they cause.

As the harm caused by an autodialed cellphone call or text—an invasion of privacy and annoyance—itself depends on the communication being unwanted by the consumer, the TCPA logically enough allows autodialed calls that are made with the "express consent" of the "called party," and fax advertisements from senders with an "established business relationship" to recipients who have "voluntarily" communicated or made available to the sender their fax number.[99] Thus the TCPA explicitly recognizes that sometimes consumers may actually want to receive certain autodialed calls or fax advertisements. In these cases, there is, almost tautologically, no harm to the consumer in receiving something that she has explicitly authorized (in the case of calls) or might well expect (in the case of faxes).

Inasmuch as the harm from a TCPA violation depends upon whether a particular consumer consented to the communication or had an ongoing business relationship with the defendant, one might argue that a class action is not an appropriate way to adjudicate alleged TCPA violations. Under FRCP 23(b), a court is to certify a class action seeking individual damages only if it finds that "questions of law or fact common to class members predominate over any questions affecting only individual members." However, whether the plaintiff in a TCPA action expressly consented to be called involves an individualized, fact-specific inquiry making class certification for such actions inappropriate under FRCP 23. Three cases in the Illinois Data contain evidence that the defendant made this argument.[100] In one case, class counsel overcame this argument simply by defining the class to be all those consumers who received the allegedly unlawful communication without consent. However, in a thoughtful opinion, Judge Kendall found that decisions from around the country on this issue had generated a rule that when a defendant set forth specific evidence "showing that a significant percentage of the putative class consented to receiving class on their cellphone," the issues of individualized consent predominated, making class certification inappropriate.[101] The Illinois Data shows that the vast majority of TCPA class actions may survive without serious inquiry into the predominance of class issues.

Defendants also once made the argument that a plaintiff alleging a violation of the TCPA must also prove that he or she did not consent to receiving the cellphone call or fax (the latter by having an existing business relationship). Judicial interpretations of TCPA have said to the contrary that "prior express consent" under the TCPA is an affirmative defense on which the

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[99] More specifically, §§ 227(b)(1)(A) and (B) allow autodialed phone calls made with "express consent" from the recipient and § 227(b)(1)(C) permits unsolicited fax advertisements from "a sender with an established business relationship with the recipient . . ." where "(ii) the sender obtained the number of the telephone facsimile machine through—(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or (II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution."
[100] Balbarin v. N. Star Capital Acquisition LLC, No. 10-cv-01846 (N.D. Ill.), ECF No. 144 (memorandum granting class certification); Jamison v. First Credit Servs., 12-cv-4415 (N.D. Ill. 2012), Docket No. 79 (defendant's response in opposition to motion to certify the class, arguing that whether putative class members consented was an individualized issue of fact which predominates over any questions common to the class members, making class certification inappropriate). [ECF is docket number? NOTE TO AUTHOR: NEED ECF NO.]; Hanley v. Fifth Third Bank, No. 12-cv-01612 (N.D. Ill. 2012), ECF No. 1I8 (defendant's answer and affirmative defenses).
[101] Jamison v. First Credit Servs., 12-cv-4415 (N.D. Ill. 2012) (finding class certification inappropriate where Honda showed that 1,200 out of 2,887 class members had provided their phone numbers and where individualized inquiry into Honda's records would be required to determine whether the remaining class members had consented).

defendant bears the burden of proof; it is not a required element of the plaintiff's claim."[102] The Federal Communications Commission (FCC), which administers the implementation of the TCPA, has agreed that the defendant has the burden of establishing that the plaintiff "expressly consented" to the communication.[103] Filings in the Illinois Data show that defendants do sometimes succeed in carrying this burden. Indeed, of the six TCPA cases that defendants won, only two were won on substantive grounds. However, in both of these, the defendant established the affirmative defense of prior express consent by showing that the plaintiff had provided her phone number as part of an ongoing business relationship, knowing that it would be used by defendant or others[104] to contact her.

These decisions were consistent with most earlier judicial decisions and FCC regulations as they existed at the time. Both had said that by proving that a consumer gave his or her number to a business with whom he or she had an existing business relationship, a TCPA defendant established express consent. The burden then shifts to the consumer to show that she had revoked that consent by requesting no further calls.[105]

Following some district courts (including one decision in the Illinois Data),[106] the FCC has recently promulgated a rule under which TCPA defendants may no longer establish express consent to an autodialed call or fax by showing that the plaintiff provided her cellphone number under an established business relationship. Under a rule that took effect on October 16, 2013,

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[102] *See* Thrasher-Lyon v. Ill. Farmers Ins. Co., 861 F. Supp. 2d 898, 905 (N.D. Ill. 2012); D.G. v. Diversified Adjustment Serv., Inc., No. 11-cv-2062, 2011 WL 5506078, at *3 (N.D. Ill. Oct. 18, 2011); Martin v. Bureau of Collection Recovery, No. 10-cv-7725, 2011 WL 2311869 at *1 (N.D. Ill. June 13, 2011); *see also* Grant v. Capital Mgmt. Servs., L.P., 449 F. App'x 598, 600 n.1 (9th Cir. 2011); Pinkard v. Wal-Mart Stores, Inc., No. 3:12-cv-2902, 2012 WL 5511039, at *2 (N.D. Ala. Nov. 9, 2012).

[103] In re Rules & Regs. Implementing Tel. Consumer Prot. Act of 1991, 23 FCC Rcd. 559, 565 ¶ 10 (Jan. 4, 2008) ("Should a question arise as to whether express consent was provided, the burden will be on the creditor to show it obtained the necessary prior express consent.").

[104] In Elkins v. Medco Health Solutions, Inc., 12-cv-5617 (N.D. Ill. 2012), *transferred on Nov. 15, 2012,* Elkins v. Medco Health Solutions, 12-cv-2141 (E.D. Mo. 2012), summary judgment for defendant, Elkins v. Medco Health Solutions, 12-cv-2141, Docket No. 92, (E.D. Mo., April 25 2014). [This is all the information that there is, not sure about the format but I'll leave that to you all. NOTE TO AUTHOR: NEED CITATION], the court found that the plaintiff expressly consented to receive telephone calls from her health plan's pharmacy benefits manager advising her of cheaper prescription renewal options when she provided her phone number when she enrolled in a health plan agreement stating that the plan provider may use or share the information provided by the subscriber for "other businesses who work for the Plan . . . to tell you about treatment options or health related services." In Greene v. Direct TV, 10-cv-117 (N.D. Ill. 2010), the court found when she provided her cellphone number to Equifax knowing that potential creditors would use it as a contact number for potential fraud alert notifications, the plaintiff provided express consent for the defendant to use that number to contact her to verify her identity.

[105] According to a decades-old FCC rule, "[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached." *In re* Rules & Regs. Implementing Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752, 8769 ¶ 31 (Oct. 16, 1992). *See also* Elkins v. Medco Health Solutions [NOTE TO STAFFER: CORRECT CITATION] (citing *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C.R. 8752, 8779 n. 47 (Oct. 16, 1992) ("[S]ubscribers may sever any business relationship, i.e., revoke consent to any future solicitations, by requesting that they not receive further calls from a telemarketer, . . .")).

[106] Edeh v. Midland Credit Mgmt. Inc., 748 F. Supp. 1030, 1038 (D. Minn. 2010); Thrasher-Lyon v. Illinois Farmers Commercial Ins. Co. and CCS Commercial, 861 F. Supp. 2d 898 (N.D. Ill. 2011) (holding that while providing a phone number to a creditor may establish consent for auto-dialed calls from the creditor, this does not establish express consent to receive such calls from a debt collection company acting as an agent of the creditor).

TCPA defendants[107] must produce a "prior written consent," where the "[t]he term *prior express written consent* means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered."[108] Such written agreement must include a "clear and conspicuous disclosure" to the consumer she is not required to sign the agreement as a condition to receiving any good or service but that by signing she consents to receiving telemarketing calls.[109]

A final commonly occurring problem with the consent defense to a TCPA robocall violation arises when the defendant was provided the cellphone number by a customer but that customer no longer owns the number, which the phone company has in the meantime assigned to a different person. Cellphone number reassignments occur with perhaps surprising frequency, totaling about 37 million in 2011.[110] Several plaintiffs in the TCPA cases in the Illinois Data were called on cellphone numbers that had been given to defendants not by the plaintiffs but by previous holders of that number.[111] In such cases, defendants argued that they have "consent" under the TCPA to make such calls. Plaintiffs argued that when in the TCPA Congress allowed robocalls made with the prior express consent of the "called party,"[112] it meant the party actually called. Plaintiffs also argued that Congress did not create an implicit exception for calls inadvertently made to people who had never actually consented. Thus far, the federal courts of appeals have sided with the plaintiffs, uniformly holding that when Congress said that the "called party" needs to have consented, it meant the current phone subscriber.[113]

Such decisions may seem relatively straightforward as a matter of statutory interpretation, but they raise deeper issues regarding the normative desirability of TCPA liability. Prominent commentators[114] have argued that by threatening companies with the kind of multi-million-dollar class action settlements found in the Illinois Data, TCPA liability for robocalls inadvertently made to the wrong person will chill valuable communications, such as calls sending fraud and identify theft alerts and reminders of appointment and due dates. Other commentators have found it "amazing" that TCPA liability in this situation is even a "topic of debate," reflecting the current "zeitgeist" in which the potential for liability to increase firm costs and prices itself counts as an argument against liability.[115] Still, the inadvertent wrong number TCPA debt collection calls are yet another indication of the questionable utility on deterrence grounds of many TCPA class settlements.

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[107] Other than calls and texts sent for debt collection purposes, provided that such calls or texts include or introduce any type of advertisement or marketing materials.
[108] 47 C.F.R. § 64.1200(f)(8).
[109] 47 C.F.R. § 64.1200(f)(8)(i)(A), (B).
[110] Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling*, WALL ST. J., Dec. 1, 2011, http://www.wsj.com/articles/SB10001424052970204012004577070122687462582 [https://perma.cc/EG3T-BG94].
[111] *See, e.g.*, Soppet v. Enhanced Recovery Cor., No. 10-cv-5469, 2011 WL 3704681 (N.D. Ill. 2010).
[112] In 47 U.S.C. § 227(b)(1)(A)(iii) (2006).
[113] *See* Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014); Soppet, 679 F.3d 637.
[114] *See* Adonis Hoffman, *Sorry, Wrong Number, Now Pay Up*, WALL ST. J., (June 15, 2015), http://www.wsj.com/articles/sorry-wrong-number-now-pay-up-1434409610?KEYWORDS=sorry+wrong+number [https://perma.cc/JSM6-EU53].
[115] Lincoln Caplan, *Paying for Robo-Calls*, N.Y. TIMES (May 18, 2012), http://takingnote.blogs.nytimes.com/2012/05/18/paying-for-robo-calls [https://perma.cc/CCD7-9NEP].

IV. Improving Consumer Class Actions under Federal Consumer Protection Statutes

A. The Impact of *Spokeo* in Screening No-Harm Cases

As discussed in the Introduction, *Spokeo v. Robins* was a class action seeking statutory damages of $100 to $1,000 under FCRA against a "people search engine" website that allegedly misstated information about the plaintiff's age, marital status, education, and professional experience. As described earlier, FCRA permits statutory damages without requiring proof of harm for the publication of a false report. The Supreme Court allowed the *Spokeo* case to proceed but held that the Ninth Circuit confused the particularity requirement for standing with the requirement that the plaintiff show that "the particular [FCRA] procedural violations entail a degree of risk sufficient to meet with concreteness requirement."[116] While providing little guidance as to the sufficient degree of risk, the Court's decision in *Spokeo* nonetheless provides an avenue for courts to screen out consumer class actions where there truly is no harm or risk of harm.

The most glaring no-harm cases in our sample are those involving the printing of an expiration date on a receipt in violation of FCRA and the violation of various formalities in employment background checks under FCRA and in various communications by debt collectors, where a violation of the FDCPA is alleged. In the expiration date cases, the existing evidence is that there is neither harm nor risk of harm. Under *Spokeo*, a plaintiff's inability to produce an affidavit testifying that the printing of an expiration date could cause harm could quickly end such cases at the standing stage. As such cases are not insignificant in the sample studied above, that alone would be a salutary impact from *Spokeo.* As for the cases involving violations of various formalities, it would be of great interest to see whether plaintiffs could produce affidavits testifying even to a risk of harm to the consumer. If they could consistently do so, then it would be surprising in light of the mass of empirical evidence showing the general ineffectiveness of disclosure formalities in particular. Still, if plaintiffs could produce such evidence, then such cases would proceed as they do now. If, however, such affidavits could not consistently be produced, then *Spokeo* would have been of social value in screening out true no harm cases from the expensive class action process.

B. Better Judicial Monitoring

How, one might ask, could the current class action system have evolved to become one in which the amount paid in attorneys' fees is often equal to or greater than the amount of compensation actually received by class members and in which very few class members receive anything? By hypothesis and by fact, class actions involving numerous plaintiffs with small injuries do not have an actual plaintiff group who will monitor class counsel. Judges are supposed to monitor class actions, ensuring that a class action is legally justified, and also in ensuring also that any settlement in a class action actually promotes the interests of the absent class members. The idealized judicial role is described by Hensler:

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[116] *Spokeo*, 136 S. Ct. at 1543.

> Judges play a unique role in damage class actions: Without the judge's decision to grant certification, a class action lawsuit does not exist. Without the judge's approval, a lawsuit cannot be settled. Without a judge's decision to award fees, the class action attorneys cannot be paid. . . . Even after a case is resolved, judges may continue to play a role by overseeing the disbursement of settlement funds.[117]

However, a very basic economic model of judicial preferences suggests that judges may have little incentive to conform to this ideal. Judges likely value not only leisure but also prestige—their standing with other judges and the public at large.[118] Assuming that prestige declines both when a trial judge is reversed on appeal and when court queues grow too long (partly because of the direct implication that the judge is lazy in failing to resolve cases, and partly because long queues lead to public pressure to increase the number of judges, which lowers the prestige of being a judge), trial judges will be attracted to case resolution methods that keep queues from getting too long but also minimize the chance of a potentially embarrassing reversal. Approving class action settlements is an ideal method of case resolution from this judicial point of view: dockets are cleared with a very low probability of reversal.

As part of approving such class action settlements, judges also approve fees to the plaintiffs' attorneys. While trial judges may be reversed on appeal for failing to certify a class, they are rarely, if ever, reversed for approving a settlement and its attendant attorneys' fees award.[119] Thus what Helland and Klick call "judicial expediency" predicts that judges would routinely approve class action settlement with relatively large attorneys' fees but little actual compensation to class member.

The rough data is consistent with this judicial expediency story, as Eisenberg and Miller's update to include cases from 2003 to 2008 found, judges granted the requested attorneys' fees in 70% of cases.[120] More careful statistical analysis also has tended to confirm the judicial expediency hypothesis. Working with the Eisenberg and Miller dataset, Helland and Klick add to the list of explanatory variables a measure of court congestion (annual case terminations by judge) and find a significant relationship between court congestion and attorneys' fees, with the fee increasing by .15% for every 1% increase in terminations.[121]

Whatever may be the explanation, judges are not monitoring class action settlements in a way that ensures that compensation is actually paid to class members and that attorneys' fees bear a reasonable relationship to the amount actually received by class members. A simple way to improve the performance of consumer class action settlements would be for federal trial judges to wait to approve attorney fee awards until class counsel submit an accounting showing the actual compensation rate and the aggregate amount paid to the class and then base attorneys' fees on both the aggregate payout and the compensation rate. Rather than basing attorneys' fees on the customary range of attorneys' fees to nominal settlement for a particular case type (i.e. TCPA debt call), district judges would award attorneys' fees that increase with the compensation rate and the aggregate compensation. Attorneys would receive, for example, 33% of the nominal

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[117] HENSLER ET AL., *supra* note 31, at 445.
[118] Eric Helland and Jonathan Klick, *The Effect of Judicial Expedience on Attorneys' Fees in Class Actions*, 36 J. LEGAL STUD. 171, 173 (2007).
[119] *See id.* at 175–76.
[120] Theodore Eisenberg and Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 250 (2010).
[121] Helland & Klick, *supra* note 118 , at 181.

settlement only if aggregate compensation paid equaled the full amount called for under the terms of the nominal settlement. For typical class settlements, attorneys' fees would be lower, the lower is the aggregate compensation actually paid to the class. The goal would be to ensure not only that the cost of generating the common fund recovery is less than the fund, but also to ensure that the bigger the fraction actually paid to class members, the bigger is class counsel's compensation.

The justification for such a relationship between attorneys' fees and the actual aggregate class recovery lies in the basic economic idea that if a class action were instead an individual suit, then no rational plaintiff would agree to pay fees exceeding her own recovery. But such a plaintiff would agree to pay counsel more, the greater is her own recovery. This arrangement describes how contingency fees work in individual personal injury actions. The class action is essentially a substitute, employed in cases where individual damages are too small for the typical contingency fee to create adequate incentives for lawsuits. But the individual contingency fee would provide the model for class action fees.

Some may object that the class action is more than a substitute for an individual action; that class actions generate external benefits; and that individual actions do not and that relative to all benefits, attorneys' fees are not disproportionate. The Illinois Data does not generally support these arguments. In terms of contributing to the stock of legal capital, consumer class actions under federal consumer protection statutes generate few legal precedents that guide future behavior and are never tried on the merits. As far as future deterrent value, as argued above relatively uniform statutory damage provisions that do not require allegations or proof of harm make class counsel incentives indifferent to the amount of actual harm suffered by the class and which might be deterred in the future. Cases that do involve actual individual harm, such as attempts by debt collectors to collect on bad debts that are not legally collectible, usually end in individual settlements that provide no external benefits.

C. Congressional Action to Repeal Some Statutory Damage, No-Harm Causes of Action

On grounds of both deterrence and compensation, the least justifiable class actions in the Illinois Data are those where the behavior, while it may violate the statute, causes no harm, such as FCRA expiration date cases. Congress acted in 2012 to repeal one such provision: the EFTA provision requiring a notice of ATM fees "on or at" the machine. Likewise, Congress could repeal similar provisions, such as the FCRA expiration date prohibition.

Somewhat more broadly, Congress should act to repeal or limit many of the statutory formalities whose violation so often provides the basis for a class action settlement. The most ubiquitous such formality is a disclosure requirement. Cases alleging violation of a statutory disclosure requirement generate a large number of class action settlements under both FCRA and the FDCPA. As there is substantial evidence that such disclosure requirements fail to inform consumers,[122] their violation arguably causes no harm to consumers. As it is small and medium sized firms most likely to be without the continuing legal advice that would allow them to avoid formality violations, it is such small and medium sized firms that are the most likely to violate these statutes. Eliminating the statutes would ease one of the burdens on such businesses, who are a primary source of jobs and job growth in the American economy.

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[122] *See* OMRI BEN-SHAHAR & CARL SCHNEIDER, MORE THAN YOU WANTED TO KNOW (2010).

APPENDIX 1
CLASS SETTLEMENTS IN EFTA ATM NOTICE FAILURE CASES

Case Name (date filed–date settled)	Nominal Class Settlement	Attorneys' Fees	Claims Submitted, Actual Class Payout & as Fraction of Class Settlement Fund	Payout per Class Member	Attorneys' Fees as Fraction of Settlement	Attorneys' Fees as Fraction of Actual Class Payout
Goldshteyn v. Argonne Credit Union, 10-cv-05402, 8/10–4/12	$150,000	$50,000	Only net of $100,000 available for class, 42 class members certified receiving payout of $1000 each = $42,000 = 28% Settlement Fund (SF). "Hundreds" of class members, 46,292 ATM transactions during relevant period	$1000	33%	119%
Barreto v. Center Bank, 10-cv-06554, 10/10–8/11	$40,000 (balance cy pres to Chicago Bar Fdn).	$12,000	18 valid claims = 5% of total class, $1000 each, $18,000 total = 45% of SF	$1000 plus $2000 to named plaintiff; $7181 in notice and admn costs	30%	66%
Louisma v. Automated Financial LLC, 11-cv-02104, 3/11–9/12	$53,000 (not incl. class counsel attys' fees) so including fees, total of $110,000	$57,000	44 claims forms submitted (23 late)@$900 = $39,600 = 79% of SF. Balance cy pres to Chicago Bar Fdn. More than 20,000 ATM transactions during period	$900 plus $1500 each to two named plaintiffs; $2548 settle. Admn. costs	57%	144%
Nguyen v. South Central Bank, 11-cv-02612, 4/11–9/12	$150,000	$50,000	12,000 transactions at un-noticed ATM, but only 75 valid claims submitted aggregated payout of $75,000 = 50% nominal fund.	$1000 plus $1500 per x 2 named plaintiffs + $2657 notice costs	33%	66%
Cole v. Automated Financial LLC, 11-cv-03299, 5/11–9/12	Consolidated with *Louisma,* supra, same settlement	n/a	n/a	n/a	n/a	n/a

Case Name (date filed–date settled)	Nominal Class Settlement	Attorneys' Fees	Claims Submitted, Actual Class Payout & as Fraction of Class Settlement Fund	Payout per Class Member	Attorneys' Fees as Fraction of Settlement	Attorneys' Fees as Fraction of Actual Class Payout
Jones v. South Central Bank, 11-cv-04389, 6/11–9/12	Consolidated with *Nguyen,* supra, same settlement	n/a	n/a	n/a	n/a	n/a
Loewy v. RBS Citizens Bank , 11-cv-04872, 7/11–3/12	$100,000	$30,000	26 valid claims/210 class members = 12%; @$150 x 26 = $3900 = 4% SF. SF Balance, 27% to Legal Clin. NWU Law Sch. 13% to Chicago Legal Clin.	$150 + $1000 to named plaintiff	30%	770%

APPENDIX 2
Class Action Search Methodology

In identifying consumer class actions filed in the Northern District of Illinois between 2010 and 2012, we used Bloomberg Law's Docket Search of the PACER federal courts filing database, limiting the search to the U.S. District Court for the Northern District of Illinois and selecting a date range between January 1, 2010 and December 31, 2012. Several keyword and string searches were then run to identify consumer class action filings.

First, we used the search strings "'class action' OR similarly /s situated," and the somewhat broader term "class." This search returned most of our cases, although some complaints had to be manually excluded since the search was too broad. We excluded all class action complaints brought by a corporation rather than a consumer, shareholder derivative actions, complaints brought under the Securities & Exchange Act or the Commodities Futures Trading Act, employment-related class actions, and claims under the Civil Rights Act (though almost every one of these complaints was an employment-related class action anyway). We also excluded complaints that were brought on behalf of the named plaintiff and others "similarly situated," but where the complaint was not seeking class certification and did not describe class damages. This happened most often in mass tort or products liability cases where a number of plaintiffs were joined to the action but the case was not proceeding as a class action.

We also ran a keyword search within the database describe in the first paragraph; the search term was "class action" and "Consumer Credit" was selected as the "Nature of Suit." This added many results that did not appear when we searched for just "class action" complaints.

This search was too narrow for class actions filed under federal consumer protection statutes, as it failed to pick up actions filed by businesses – such as the TCPA filings brought by doctor's and dentist's offices who received junk faxes – and employment background check class actions under FCRA. Both types are, under the relevant statutes, consumer class actions. Hence we ran searches using statutes as the search term, for example, "FCRA" and "Fair Credit Reporting Act." This brought up every filing under such statutes, and we manually identified which of these filings were class actions.

Our methodology was similar to that employed by the CFPB in gathering data on class actions for its 2015 Arbitration Study in that we searched electronically available docket sheets. Our methodology differed from the CFPB's in other respects. The CFPB searched a slightly different source of docket sheet information, LexisNexis's Courtlink database, and its automated search used as search strings the six product categories it had defined as the subject of its study.[123] For example, the CFPB searched for complaints with terms "'credit card' or 'credit cards' or 'charge card' or 'charge cards.'" Thus the primary difference between this study and the CFPB's is that we were interested in finding all consumer class actions filed during our study period, regardless of whether they involved a financial product or service, whereas the CFPB was interested in finding all filings involving one of the financial product and service categories it was studying. Within its product-centered database, the CFPB then seems to have proceeded, as did we, to manually inspect the docket sheet entries, identifying the dispute type from the complaint, and the outcome and other variables of interest from the docket sheet entries. In

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[123] See CFPB Arbitration Study, supra note __ at Appendix L: Section 6.

identifying the existence and terms of a class settlement,[124] the CFPB looked at the some of the same docket-available sources we considered – settlement agreements, final or preliminary approval orders – but apparently did not look carefully at the memoranda in support of preliminary and final approval or class settlements. On the other hand, the CFPB sometimes apparently interviewed settlement administrators to get further settlement details, something that we did not do.

[124] See CFPB Arbitration Study, supra note ___ at Appendix S: Section 8.