Statement of

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"The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?"

Hearing Before The Senate Committee on the Judiciary

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Chairman Leahy, Ranking Member Grassley, presiding Member Franken, and members of the Committee:

My name is Archis Parasharami, and I am a partner in the law firm Mayer Brown LLP, where I am also co-chair of the Consumer Litigation and Class Actions practice. Thank you for the opportunity to testify before the Committee today.

My legal practice involves defending businesses against class action lawsuits in courts around the country. In that context, I focus on strategy, critical motions, appeals, and—in a number of situations—resolving class actions through settlements. I also counsel businesses on the adoption of arbitration programs and assist them in defending the enforceability of their arbitration agreements. Among other things, I was one of the lawyers who represented AT&T in *AT&T Mobility LLC v. Concepcion*. In addition, I represent clients on policy issues relating to defending the enforceability of arbitration agreements. My practice thus gives me first-hand experience both with how arbitration agreements work and how class actions function in reality.

Based on that experience, I'd like to offer my views on why arbitration provides consumers and employees with a fair and accessible means of resolving the types of disputes they are most likely to have—and does so more effectively than our overburdened court system. Arbitration before a fair, neutral decisionmaker leads to outcomes for consumers and individuals that are comparable or superior to the alternative—litigation in court—and that are achieved faster and at lower expense. And the cost savings of arbitration over litigation benefit individuals and businesses alike.

For these and other reasons, the Arbitration Fairness Act ("AFA"), S. 878, should not be adopted. Despite its title, the proposed Act would effectively eliminate hundreds of millions of pre-dispute arbitration agreements. If enacted, the bill would eliminate the ability of consumers, workers, and businesses with modest-sized claims to access an inexpensive and easy-to-use dispute resolution system.

What is more, the bill would impose unjustified litigation costs on individuals and businesses alike at a time when consumers and businesses are already struggling, and when our overburdened court system cannot handle the massive influx of cases.

***For the ordinary consumer or employee, the elimination of arbitration will do far more harm than good*.**

The plain fact is that fair arbitration—and current law requires that arbitration be fair (with courts enforcing that requirement vigorously)—significantly increases access to justice for consumers, employees, and others as compared to the incontrovertible reality of today's courts, which unfortunately differs dramatically from the transaction cost-free, theoretical judicial system that some imagine.

My testimony focuses on several fundamental points:

- Arbitration enables consumers and employees with grievances to obtain redress for the vast majority of disputes they are likely to have—small, individualized claims for which litigation in court is impractical. This access to an inexpensive and simple system of dispute resolution is a very significant benefit that is often ignored in the debate over arbitration.
    - For consumers' and employees' typical claims, these individuals are unlikely to be able to hire an attorney to navigate the court system. And those claimants who do brave the courts find that a hearing on their claims is long delayed by overcrowded dockets in our underfunded courts.
- Empirical studies have repeatedly demonstrated that arbitration is at least as likely, and often more likely, than litigation in court to result in positive outcomes for consumers and employees.[1]
    - Arbitration is more user-friendly and inexpensive than litigating in court—especially when (as is increasingly common) parties' arbitration agreements include provisions for shifting costs and attorney's fees.
    - In addition, arbitration agreements offer fair and simplified procedures for individuals—something that is ensured by the protections of generally applicable state unconscionability law as well as the due process safeguards of the nation's leading arbitration providers, most prominently including the American Arbitration Association.
- The arguments advanced by critics of arbitration do not stand up to scrutiny.

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[1] *See* discussion *infra* at pp. 8-10 and materials cited.

- The "option" of post-dispute arbitration is illusory. It would be economically irrational for a company to agree to maintain a dual-track dispute resolution system in which it subsidizes consumer arbitration on one track while being subjected to the costs of litigation in court on the other track. Permitting only post-dispute agreements would have the real-world effect of eliminating arbitration—and thus relegate consumers, employees, and others to burdensome and overcrowded courts.

- Class action proponents decry the fact that arbitration typically takes place on an individual basis. But their position rests on theoretical arguments about the supposed virtues of class actions. In reality, most class actions deliver (at best) benefits that are received by very few class members.

  - A new empirical assessment conducted by my law firm reviewed a robust sample of class actions filed in or removed to federal court in 2009, and found that the vast majority of them provide little or no benefit to class members.[2]

  - Furthermore, claimants can vindicate their rights effectively without class proceedings. The dissenting Justices in the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant* specifically recognized that "non-class options abound" for effectively pursuing claims individually.

- If class procedures were required, companies would not be willing to absorb the additional costs of arbitration ***and*** the huge legal fees associated with defending class actions. Arbitration would not be available.

- Consumers and employees would be worse off from losing the ability to pursue individualized claims that cannot be realistically litigated in court. The only beneficiaries of such a requirement would be lawyers—plaintiff's lawyers ***and*** defense lawyers—who are the only clear winners in class action litigation.

- The preliminary results of the CFPB's study of arbitration are just that—preliminary—as the CFPB itself has repeatedly made clear. They do not come close to providing meaningful support for eliminating pre-dispute arbitration agreements.

[2] See discussion *infra* at pp. 16-18 and Exhibit A.

I. ARBITRATION BENEFITS CONSUMERS BY PROVIDING A FAIR MEANS OF RESOLVING DISPUTES THAT CONSUMERS, EMPLOYEES, AND OTHERS CANNOT PRACTICALLY PURSUE IN COURT.

Arbitration enables consumers, employees, small businesses, and others to obtain redress for a large number of claims for which litigation is impractical. It benefits these individuals by providing a fair means of adjudicating claims that would go entirely unredressed if the Arbitration Fairness Act were enacted.

Recourse to the judicial system is not a realistic option for most injured consumers and employees. Most claims are individualized and too small to attract the legal representation needed to navigate the complex procedures that apply in court. In addition, the costs of litigating are too high for many claims, and the courts—even many small claims courts—impose requirements (such as appearing in person during the working day) that make litigating there burdensome and costly. These costs are multiplied by the myriad inefficiencies of the judicial system.

Wrongs suffered by consumers typically are small and individualized—excess charges on a bill, a defective piece of merchandise, and the like. These claims are too small to justify paying a lawyer to handle the matter; in any event, most consumers do not have the resources to do so. As Justice Breyer has recognized—in a decision joined by Justices Stevens, Souter, and Ginsburg—"the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)" would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."[3]

Employees face similar difficulties with bringing claims in court. In the employment context, for instance, it has been estimated that the potential recovery is too small in 72% of the cases currently resolved using pre-dispute arbitration[4] and in 95% of all potential claims[5] to justify litigation in court and the retention of counsel. Thus, as one scholar has put it, for most employees the choice is

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[3] *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995).

[4] Jyotin Hamid & Emily J. Mathieu, *The Arbitration Fairness Act: Performing Surgery with a Hatchet Instead of a Scalpel?*, 74 Alb. L. Rev. 769, 785 (2010/2011); *accord* Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 Wm. Mitchell L. Rev. 313, 318 (2003); Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems And Alternatives*, 67 Disp. Resol J. 32, 37 (2012).

[5] Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 790 (2008).

"arbitration—or nothing."[6] The same conclusion applies to consumers with small claims.

Claims that are modest in size do not—and could not—attract lawyers willing to work on a contingency-fee basis, because the fees earned would be far too low. Yet the complexities of judicial litigation make it difficult, if not impossible, for most individuals to represent themselves effectively in court. Small claims courts were designed to allow individuals to proceed without representation, but they offer no realistic alternative. Budget cuts have severely hobbled these courts, leading to interminable delay.

Some claims are large enough to support contingency fees that would attract the interest of plaintiffs' lawyers. But litigation in court involves costs and delay that make litigation in court impracticable for all but the highest value claims.

The starting point for understanding our dysfunctional court system is the fact that they are plagued with funding problems. To take one example, after "California's courts . . . lost about 65% of their general fund support from the state during the last five years," delays have come to define the judiciary. As the *Los Angeles Times* reported, "[a]t least 53 courthouses have closed," and "[c]ourts in 20 counties are closed for at least one day a month." These and other "court closures have forced some San Bernardino [county] residents to drive up to 175 miles one way to attend to a legal matter."[7] To take another example, budget cuts led to "shortened hours" in the New York City courts that have proven to be a "hardship" for litigants—especially the "economically distressed and working poor people" who face "less flexibility in getting to the court."[8]

Although most civil claims are filed in state courts, federal district courts have experienced extraordinarily high caseloads and lengthy delays, as well. The Brennan Center for Justice reported "a 20 percent increase" in the average caseload for a federal district judge from 1992 to 2012.[9] Budget constraints have led to reductions in a wide range of court services. In the Eastern and Southern Districts

[6] *Id.* at 792 (discussing analogous situation of employees with low-dollar claims).

[7] Maura Dolan, *Budget cuts force California courts to delay trials, ax services*, L.A. Times, Apr. 9, 2013, http://articles.latimes.com/2013/apr/09/local/la-me-court-cutbacks-20130410.

[8] *At a Standstill: Budget Cuts Have Brought New York's Court System to a Crawl*, NYPress.com, Dec. 5, 2012, http://nypress.com/at-a-standstill-budget-cuts-have-brought-new-yorks-court-system-to-a-crawl/.

[9] Alicia Bannon, *Federal Judicial Vacancies: The Trial Courts* 5, Brennan Ctr. for Justice, 2013, http://www.brennancenter.org/publication/federal-judicial-vacancies-trial-courts.

of New York, for example, reductions have included staffing furloughs, "curtail[ing] [courts'] hours of operation," and "slower processing of civil and bankruptcy cases."[10]

These trends can have serious consequences for consumers, employees, and small businesses. As delays drag on, businesses can become insolvent and judgment-proof, making it impossible for individuals to obtain relief.[11] Budget cuts have also forced underfunded courts to supplement their revenue by increasing fees, raising the cost of accessing justice through courts.[12]

Simply put, the situation for litigants in the underfunded and understaffed courts is grim; and because the trend is toward more cutbacks, the situation will likely get worse.

II. ARBITRATION PROVIDES A FAIR AND EFFECTIVE MEANS OF DISPUTE RESOLUTION FOR CONSUMERS AND EMPLOYEES FOR WHOM THE JUDICIAL SYSTEM IS NOT A REALISTIC OPTION.

Arbitration has a number of advantages over pursuing litigation in our overburdened court system.

To begin with, arbitration offers ***flexible proceedings at lower cost***. Under the American Arbitration Association's consumer procedures, for example, consumers cannot be asked to pay more than $200 in total arbitration costs; businesses shoulder all remaining fees.[13] (That same $200 cap applies to employees in employer-promulgated arbitration programs,[14] as compared with arbitration agreements in the individually negotiated employment contracts typical of the highest-paid employees.) And many businesses agree to pay all of the costs of

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[10] New York County Lawyers' Association, *Report on the Continuing Effect of Judicial Budget Cuts on The U.S. District Courts for the Southern and Eastern Districts of New York* 11, Sept. 4, 2013, http://www.nycla.org/siteFiles/Publications/Publications1637_0.pdf.

[11] *See, e.g.,* Constitution Project, *The Cost of Justice: Budgetary Threats to America's Courts* 8, 2006, http://www.constitutionproject.org/wp-content/uploads/2012/10/36.pdf (citing Washington Courts, Bd. for Judicial Admin., Court Funding Task Force, *Justice in Jeopardy: The Court Funding Crisis in Washington State* 36, 2004, http://www.courts.wa.gov/programs_orgs/pos_bja/-wgFinal/wgFinal.pdf).

[12] *See, e.g.,* Chief Justice Eric Magnuson, *The State of the Judiciary: 2009 – Building a 21st Century Judiciary*, Bench&Bar of Minn., Aug. 1, 2009, http://mnbenchbar.com/2009/08/the-state-of-the-judiciary-building-a-21st-century-judiciary/.

[13] Am. Arb. Ass'n ("AAA"), *Costs of Arbitration (Including AAA Administrative Fees*) 1, March 1, 2013, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=-ADRSTAGE2009593&RevisionSelectionMethod=LatestReleased.

[14] AAA, *Employment Arbitration Rules and Mediation Procedures* 24, Nov. 1, 2009, http://www.adr.org/aaa/faces/aoe/lee/lee_search/lee_rule/lee_rule_detail?doc=ADRSTG_004366.

arbitration for consumer and employee claims. By comparison, the cost of filing a civil suit in a federal district court has recently risen to $400 or more.[15]

Arbitration does not require individuals to make personal appearances (although they typically can have in-person hearings if they wish). Instead, claims can be adjudicated on the papers of on the basis of a telephone conference, so claimants need not miss work or return another day due to court delays. And, in contrast to the delays typical of overburdened courts—such as the 25.7 months that pass before the average civil lawsuit in federal court reaches trial—consumer arbitrations administered by the AAA are typically resolved in four to six months.[16]

Although arbitration proceedings can be navigated without a lawyer, claimants with more complicated claims may obtain representation to assist them if necessary—but the cost is less due to the more informal nature of arbitration. Furthermore, parties can (and often do) agree to include fee-shifting provisions in their arbitration agreements that make it less expensive to resolve disputes in arbitration. That was the case with the arbitration provision that the Supreme Court approved in *AT&T Mobility v. Concepcion*. As the Court explained, the claim was "most unlikely to go unresolved" because "the arbitration provision provide[d] that AT&T [would] pay [the Concepcions] a minimum of $7,500"—now $10,000—"and twice their attorneys fees if they obtain[ed] an arbitration award greater than AT&T's last settlement offer."[17]

Most importantly, ***studies show that consumers and employees who use this efficient dispute-resolution system prevail in arbitration at least as frequently as—and often more frequently than—they do in court***. As I will explain, a wealth of scholarship comparing outcomes of consumers' and employees' claims in arbitration and in litigation reveals that arbitration provides a realistic and fair opportunity for individuals to seek justice before a neutral decisionmaker.

- A recent study by scholars Christopher Drahozal and Samantha Zyontz of claims filed with the AAA found that consumers win relief 53.3% of the

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[15] Judicial Conference of the United States, *District Courts Miscellaneous Fee Schedule* (approving a $50 "administrative" filing fee on top of the previous $350 filing fee), http://www.uscourts.gov/FormsAndFees/Fees/DistrictCourtMiscellaneousFeeSchedule.aspx.

[16] AAA, *Analysis of the AAA's Consumer Arbitration Caseload* (2007), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325; *see also* David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1572-73 (2005) ("few dispute the assertion that arbitration is faster than litigation"); *U.S. District Court—Judicial Caseload Profile* (2012), http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx.

[17] *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1753 (2011) (noting that "aggrieved customers who filed claims would be 'essentially guarantee[d] to be made whole," and that "the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action") (quoting *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.9 (9th Cir. 2009)).

time.[18] By contrast, empirical studies that have sampled wide ranges of claims have similarly reported that plaintiffs win in state and federal court approximately 50% of the time.[19]

- ○ Drahozal and Zyontz found that "the consumer claimant[s] won some relief against the business more than half of the time," and were generally awarded between 42% and 73% of the amount they claimed, depending on the size of the claim and how average recoveries were calculated (mean or median). The authors found little evidence for a purported "repeat player" effect. Consumers prevailed more than half the time against repeat and non-repeat businesses alike; prevailing claimants were "awarded on average an almost identical percent of the amount claimed" (approximately 52%). The authors concluded that any discrepancy could be explained by businesses becoming better at screening cases ahead of time to "settle meritorious claims and arbitrate only weaker claims."[20]

- ● A study of 186 claimants who pursued employment arbitration in the securities industry concluded that employees who arbitrate were more likely to win their disputes than employees who litigate in federal court. The study found that 46% of those who arbitrated won, as compared to only 34% in litigation; the median monetary award in arbitration was higher; only 3.8% of the litigated cases studied ever reached a jury trial; and the arbitrations were resolved 33% faster than in court.[21]

- ● One study of 200 AAA employment awards concluded that low-income employees brought 43.5% of arbitration claims, most of which were low-value enough that the employees would not have been able to find an attorney willing to bring litigation on their behalf. These employees were often able to

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[18] Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010).

[19] *See, e.g.,* Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996) (observing that in 1991-92, plaintiffs won 51% of jury trials in state court and 56% of jury trials in federal court, while in 1979-1993 plaintiffs won 50% of jury trials).

[20] Drahozal & Zyontz, 25 Ohio St. J. on Disp. Resol. at 898, 912-13.

[21] Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003 - Jan. 2004).

pursue their arbitrations without an attorney, and won at the same rate as individuals with representation.[22]

- A later study of 261 AAA employment awards from the same period found that for higher-income employees, ***win rates in like cases in arbitration and litigation were essentially equal***, as were median damages. The study attempted to compare "apples" to "apples" by considering separately cases that involved and those that did not involve discrimination claims. With respect to discrimination and non-discrimination claims alike, the study found no statistically significant difference in the success rates of higher-income employees in arbitration and in litigation. For lower-income employees, the study did not attempt to draw comparisons between results in arbitration and in litigation, because lower-income employees appeared to lack meaningful access to the courts—and therefore could not bring a sufficient volume of court cases to provide a baseline for comparison.[23]
- Another study of arbitration of employment-discrimination claims concluded that arbitration is "substantially fair to employees, including those employees at the lower end of the income scale," with employees enjoying a win rate comparable to the win rate for employees proceeding in federal court.[24]
- In 2004, the National Workrights Institute compiled all available employment-arbitration studies, and concluded that employees were almost 20% more likely to win in arbitration than in litigated employment cases. It also concluded that in almost half of employment arbitrations, employees were seeking redress for claims too small to support cost-effective litigation. Median awards received by plaintiffs were the same as in court, although the distorting effect of occasional large jury awards resulted in higher average recoveries in litigation.[25]

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[22] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 785-88 (2003) (summarizing results of past studies by Lisa Bingham that lacked empirical evidence proving the existence of an alleged "repeat player" and "repeat arbitrator" effect).

[23] *See* Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J. 44, 45, 47-50 (Nov. 2003-Jan. 2004).

[24] *See* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. 9, 13 (May/July 2003) (reporting employee win rate in arbitration of 43 percent); *see also* Eisenberg & Hill, 58 Disp. Resol. J. at 48 tbl. 1 (reporting employee win rate in federal district court during the same time period was 36.4 percent).

[25] National Workrights Institute, *Employment Arbitration: What Does the Data Show?* (2004), https://web.archive.org/web/20090423052708/http://www.workrights.org/current/cd_arbitration.html.

- Critics of arbitration sometimes point to a now-discredited report from the advocacy group Public Citizen,[26] as purported support for the assertion that arbitration is unfair. That report shows the folly of examining outcomes in arbitration without comparing them to analogous outcomes in court.
    - Public Citizen examined data about claims brought by creditors against consumer debtors, and concluded from a high win rate for creditors that arbitration is biased. In those cases, however, the consumer often does not appear and does not contest the claim, and is therefore liable either because he has defaulted or "because he owes the debt."[27]
    - A more rigorous empirical study showed that "consumers fare better" in debt-collection arbitrations than in court: "creditors won some relief before the AAA in 77.8 percent of individual AAA debt collection arbitrations and either 64.1 percent or 85.2 percent of the AAA debt collection program arbitrations," depending on how the research parameters were defined. By contrast, in contested court cases creditors won relief against consumers between 80% and 100% of the time, depending on the court.[28]

As one study published in the *Stanford Law Review* explained in surveying the empirical research, "[w]hat seems clear from the results of these studies is that the assertions of many ***arbitration critics were either overstated or simply wrong***."[29] There simply is no empirical support for the contention that arbitration leads to unfair or subpar outcomes when compared with litigation in our overcrowded court system. Rather, the overwhelming weight of the available evidence establishes reflects that arbitration allows consumers and employees to obtain redress faster, cheaper, and more effectively than they could in court.

In addition to delivering results for consumers, employees, and other individuals that are as good, if not better, than litigation in court, the arbitration process is substantially fair: ***The rules of arbitration organizations along with existing law protect consumers and employees against unfair procedures and biased arbitrators.***

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[26] Public Citizen, *The Arbitration Trap* , Sept. 2007, http://www.citizen.org/documents/ArbitrationTrap.pdf.

[27] Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, 15 Disp. Resol. Mag. 30, 31 (Fall 2008).

[28] Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 91, 97, 111-16 (Winter 2011).

[29] Sherwyn et al., 57 Stan. L. Rev. at 1567 (emphasis added).

Critics of arbitration sometimes claim that consumers and employees are subjected to unfair arbitration procedures. But current law already contains clear and effective protections against unfair arbitration clauses, and state and federal courts consistently strike down those arbitration clauses that transgress those limits. Section 2 of the Federal Arbitration Act empowers courts to exercise their authority to review arbitration agreements for compliance with generally applicable state-law contract principles, including unconscionability.

When courts find arbitration provisions unfair to consumers or employees under generally applicable principles, they do not hesitate to invalidate the agreements. Thus, courts have repeatedly invalidated provisions of arbitration agreements that purported to impose:

- excessive costs and fees to the consumer or employee for accessing the arbitral forum;[30]
- limits on damages that can be awarded by an arbitrator when such damages would be available to an individual consumer or employee in court;[31]
- requirements that arbitration take place in inconvenient locations;[32]

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[30] The Supreme Court has held that a party to an arbitration agreement may challenge enforcement of the agreement if the claimant would be required to pay excessive filing fees or arbitrator fees in order to arbitrate a claim. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-92 (2000). Since *Randolph*, courts have aggressively protected consumers and employees who show that they would be forced to bear excessive costs to access the arbitral forum. *See, e.g., Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-25 (9th Cir. 2013) (refusing to enforce an arbitration agreement that required the employee to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the claim"); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013) (reaffirming that a challenge to an arbitration agreement might be successful if "filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable" for a plaintiff). Courts also have reached the same conclusion under state unconscionability law. *See, e.g., Brunke v. Ohio State Home Servs., Inc.*, 2008 WL 4615578 (Ohio Ct. App. Oct. 20, 2008); *Liebrand v. Brinker Rest. Corp.*, 2008 WL 2445544 (Cal. Ct. App. June 18, 2008); *Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766 (Idaho 2003).

[31] *See, e.g., Venture Cotton Coop. v. Freeman*, 395 S.W.3d 272 (Tex. Ct. App. 2013) (limit on damages and attorney's fees under state consumer protection law); *Mortg. Elec. Registration Sys., Inc. v. Abner*, 260 S.W.3d 351, 352, 355 (Ky. Ct. App. 2008) (limited to "actual and direct" damages); *see also Carll v. Terminix Int'l Co.*, 793 A.2d 921 (Pa. Super. Ct. 2002) (limit on damages for personal injury); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003) (limit on punitive damages); *Woebse v. Health Care & Retirement Corp. of Am.*, 977 So. 2d 630 (Fla. Dist. Ct. App. 2008) (limit on punitive damages); *cf. Am. Express Co.*, 133 S. Ct. at 2310 (explaining that federal law would require invalidating "a provision in an arbitration agreement forbidding the assertion of certain [federal] statutory rights").

- biased procedures for selecting the arbitrator;[33]
- unreasonably shortened statutes of limitations;[34] and
- "loser pays" provisions under which a consumer or employee might have to pay the full costs of the arbitration,[35] or must pay the drafting party's costs regardless of who wins.[36]

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[32] *See, e.g., Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208 (D. Or. 2012) (travel from Oregon to California); *College Park Pentecostal Holiness Church v. Gen. Steel Corp.*, 847 F. Supp. 2d 807 (D. Md. 2012) (travel from Maryland to Colorado); *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099 (D. Neb. 2007) (travel from Nebraska to Texas); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. Spotsylvania Cnty. 2001) (travel from Virginia to Los Angeles); *see also, e.g., Dominguez v. Finish Line, Inc.*, 439 F. Supp. 2d 688 (W.D. Tex. 2006) (travel from Texas to Indiana); *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) (travel from Missouri to Arkansas); *Pinedo v. Premium Tobacco Stores, Inc.*, 102 Cal. Rptr. 2d 435 (Ct. App. 2000) (travel from Los Angeles to Oakland).

[33] *See, e.g., Chavarria*, 733 F.3d at 923-25 (holding that an arbitration agreement was unconscionable and unenforceable when it "would always produce an arbitrator proposed by [the company] in employee-initiated arbitration[s]," and barred selection of "institutional arbitration administrators"); *see also, e.g., Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297 (4th Cir. 2002) (striking down an arbitration agreement that gave the employer the sole right to create a list of arbitrators from whom the employee could then pick); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999); *Newton v. American Debt Services, Inc.*, 854 F. Supp. 2d 712, 726 (N.D. Cal. 2012) (refusing to enforce a provision that would have granted a company sole discretion to choose an "independent and qualified" arbitrator for its consumer disputes because, under the circumstances, there was no guarantee that the arbitrator would be neutral); *Roberts v. Time Plus Payroll Servs., Inc.*, 2008 WL 376288 (E.D. Pa. Feb. 7, 2008) (refusing to enforce provision that would have given employer sole discretion to select arbitrator, and instead requiring parties to select arbitrator jointly); *Missouri ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006) (invalidating provision giving president of a local home-builder association sole discretion to pick arbitrator for disputes between local home-builders and home buyers).

[34] *See, e.g.*, *Zaborowski v. MHN Gov't Servs., Inc.*, 2013 WL 1363568 (N.D. Cal. Apr. 3, 2013); Adler v. Fred Lind Manor, 103 P.3d 773 (Wash. 2004) (180 days); *see also Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013) (refusing to enforce arbitration agreement in debt-collection contract that required debtor to present claim within 30 days after dispute arose); *Alexander*, 341 F.3d at 256 (same, for an employee); *Stirlen*, 60 Cal. Rptr. 2d at 138 (rejecting provision that imposed shortened one-year statute of limitations).

[35] *See Gandee*, 293 P.3d at 1197; *Alexander*, 341 F.3d at 256; *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996).

Of course, the vast majority of arbitration agreements do not exhibit these sorts of defects; and the clear trend has been for companies to make arbitration provisions ever more favorable to their customers and employees. But when courts find that overreaching occurs, they have not hesitated to strike down the offending provision.

In addition to the courts' oversight of arbitration provisions, the ***leading arbitration forums provide additional fairness protections***. The AAA and JAMS—the nation's leading arbitration service providers—recognize that independence, due process, and reasonable costs to consumers are vital elements of a fair and accessible arbitration system. They therefore adhere to standards that establish basic requirements of fairness that provide strong protections for consumers and employees—and refuse to administer arbitrations unless the operative clause is consistent with those standards.

Furthermore, ***companies increasingly are adopting consumer-friendly arbitration agreements***. In the wake of the Supreme Court's decision in *Concepcion*, an increasing number of arbitration agreements include consumer- and employee-friendly provisions modeled on the elements of the arbitration agreement upheld in that case. That should not be surprising. As the Solicitor General of the United States explained in its briefing before the Supreme Court in *American Express v. Italian Colors Restaurant*, "many companies have modified their agreements to include streamlined procedures and premiums designed to encourage customers to bring claims."[37] The government recognized that consumer-friendly clauses ensure that instances where individuals cannot bring their claims "remain rare." As the brief explained:

> AT&T Mobility modified its arbitration agreement during the course of the litigation to include cost- and fee-shifting provisions and premiums designed to ensure that ***customers could bring low-value claims on an individual basis***. These modifications left consumers '***better off under their arbitration agreement' than they would have been in class litigation***. And by obviating a potential objection to enforcement of the arbitration agreement, those modifications

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[36] *See, e.g., In re Checking Account Overdraft Litig.*, MDL No. 2036, 485 F. App'x 403 (11th Cir. 2012); *see also Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492 (Cal. Ct. App. 2012) (attorneys' fees).

[37] Brief for the United States as Amicus Curiae Supporting Respondents at 28-29, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (No. 12-133), 2013 WL 367051 (emphasis added).

simultaneously served the company's interest in avoiding litigation.

Consistent with these observations, arbitration agreements include a variety of consumer-friendly provisions:

- Many require businesses to shoulder all of the costs of arbitration, including filing fees and the arbitrator's compensation.
- Some agreements, such as the one the Supreme Court considered in *Concepcion*, provide for "bounty payments" as an incentive for an individual to bring a claim in arbitration, and agree not only to pay any attorney's fees that would be authorized by the underlying law, but double the attorney's fees if the arbitrator awards more than the company's last pre-hearing settlement offer.
- In some very complex cases, it is possible that a consumer or employee might require an expert witness or even complex discovery in order to pursue a claim against a company. Many agreements contain provisions that allow for such costs to be shifted to the company if the claimant prevails—even when the underlying law does not provide for such cost-shifting, which thus would not be available in a lawsuit in court.
- Agreements often adopt informal procedures that make it easy for claimants to pursue their disputes. For example, these agreements enable consumers and employees to choose whether the dispute should be resolved on the basis of a written submission, a telephonic hearing, or in-person proceedings.

In addition to all these direct benefits, ***consumers and employees also benefit*** through the systematic reduction of litigation-related transaction costs, which leads to ***lower prices for products and services*** and ***higher wages***.

How does this work? Businesses face many costs in bringing products and services to market. On top of the ordinary costs of running a business, they must absorb costs of litigating business-related claims. The transaction costs of litigation are high; they include settlements, judgments resolving meritorious claims, and the costs of defending against *all* lawsuits. Because those transaction costs are lower in arbitration, businesses can reduce costs that otherwise inflate product and service prices and reduce the availability of margins that could pay for wage increases.

III. THE ARGUMENTS ADVANCED BY ARBITRATION'S CRITICS DO NOT STAND UP.

Despite the advantages that arbitration offers over pursuing litigation, some argue that arbitration should be prohibited or restricted in various ways. But these critics' arguments do not withstand scrutiny.

To begin with, ***the 'option' of entering into a post-dispute arbitration agreement is illusory***. Some critics recognize that a generalized attack on arbitration flies in the face of alternative dispute resolution's widespread acceptance—and its role as an effective alternative to our overwhelmed and underfunded court system. They thus frame their attack as one on ***pre-dispute*** arbitration agreements—those that involve agreements to arbitrate future disputes that might arise—and contend, incorrectly, that "if arbitration is indeed … desirable, it will be readily accepted by claimants in the postdispute setting."[38] Following that logic, some critics of arbitration have promised that adoption of measures like the Arbitration Fairness Act will not bring an end to consumer and employment arbitration, and that consumers and employees will still be able to choose to arbitrate any disputes that they wish.

Nothing could be further from the truth. Once a particular dispute arises, studies show that the opposing parties will rarely if ever agree to arbitration.[39] That unwillingness has nothing to do with the relative benefits or burdens of arbitration or litigation in court, and instead has everything to do with the practical burdens of administering dual systems and the tactical choices of parties and lawyers—both on the plaintiffs' and defense side—in the context of particular cases.

A company that sets up an arbitration program incurs significant administrative costs that it will not incur in litigation in court. The AAA's Supplementary Procedures for consumer disputes, for example, require the company to pay at least $1,500 in filing fees. And a company that promises to shift attorneys' or even experts' fees is likely to take on an uncertain but possibly substantial additional amount of costs. Companies willingly incur these costs because, on average, the overall costs of resolving disputes in arbitration are lower than the costs of resolving disputes in litigation in court.

But companies will offer arbitration only if their agreements cover most or all possible claims. If the company cannot ensure that most or all of its dispute resolution will take place in arbitration rather than litigation, it will simply

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[38] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 567 (2001) (describing detractors' position and explaining why it is wrong).

[39] *See, e.g., id.* at 567 ("[I]n all but the rarest cases," post-dispute arbitration agreements "will not be offered by one party [and] accepted by the other."); Hamid & Mathieu, 74 Alb. L. Rev. at 785 ("Post-dispute agreements to arbitrate are extremely uncommon."); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 Berkeley J. Emp. & Lab. L. 1, 61-62 (2003) (finding that far less than 1% of employment disputes are resolved by post-dispute arbitration *even when a responsible state agency organizes an arbitration program and routinely makes that program available to parties*).

relegate all disputes to the court system, because that is the system that is not optional—leaving individual claimants far worse off.

There are other reasons that post-dispute arbitration agreements are illusory. Among other things, less rational factors—such as emotional investment in the parties' respective positions, hope that multi-tiered court proceedings will result in a victory, visceral dislike for an opponent, or an attorney's pursuit of ever-greater fees—can prevent parties from agreeing to resolve their disputes fairly, quickly and at low cost before a neutral decisionmaker: "parties are loathe to agree to anything post-dispute when relationships sour."[40]

A very significant reduction in access to justice would accordingly result from permitting only a post-dispute choice between arbitration and litigation—it would as a practical matter eliminate arbitration of consumer and employee claims—leaving most individuals with no meaningful access to a dispute resolution system. Pre-dispute agreements to arbitrate, which preserve that access to a simple and affordable forum, accordingly represent the only real-world option for addressing this very significant gap resulting from the court system.[41]

Perhaps the most vehement attack on arbitration stems from the fact that virtually all arbitration agreements require that arbitration proceed on an individual basis and bar class procedures in arbitration and in court. The Supreme Court upheld the use of such agreements in *AT&T Mobility v. Concepcion* and *American Express Co. v. Italian Colors Restaurant*. The elimination of class actions, the argument goes, deprives consumers of a procedural mechanism that supposedly provides enormous benefits by allowing the vindication of small claims that (according to the argument) would be too expensive for plaintiffs to arbitrate individually. Therefore, the critics contend, arbitration should be prohibited or, at a minimum, waivers of class procedure should be banned.

In fact, ***the claims of class action proponents are undermined by the reality of class actions***. Although the debate about class action has relied on competing anecdotes, my law firm conducted an empirical analysis of class actions that is attached as Exhibit A to this testimony. That study, which examined a sample set of 148 putative consumer and employee class action lawsuits filed in or removed to federal court in 2009, is attached to this testimony. The study revealed:

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[40] Amy J. Schmitz, *Building Bridges To Remedies For Consumers In International Econflicts*, 34 U. Ark. Little Rock L. Rev. 779, 785 (2012).

[41] Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping it Lawful*, 60 Case W. Res. L. Rev. 629, 636 (2010) ("All the statutory (or contractual) rights in the world mean nothing if they cannot be enforced. Both personal anecdote and more systematic studies indicate that access to the courts will not be easy for the usual lower-paid worker with an employment claim.").

- In the entire data set, ***not one of the class actions ended in a final judgment on the merits for the plaintiffs***. And none of the class actions went to trial, either before a judge or a jury.
- The vast majority of cases produced ***no benefits to most members of the putative class***—even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process (and the lawyers representing the defendants always did).
  - ***Approximately 14 percent of all class action cases remained pending four years after they were filed***, without resolution or even a determination of whether the case could go forward on a class-wide basis. In these cases, class members have not yet received any benefits—and likely will never receive any, based on the disposition of the other cases we studied.
  - ***Over one-third (35%) of the class actions that have been resolved were dismissed voluntarily by the plaintiff***. Many of these cases settled on an individual basis, meaning a payout to the individual named plaintiff and the lawyers who brought the suit—***even though the class members receive nothing***. Information about who receives what in such settlements typically isn't publicly available.
  - ***Just under one-third (31%) of the class actions that have been resolved were dismissed by a court on the merits***—again, meaning that class members received ***nothing***.
- ***One-third (33%) of resolved cases were settled on a class basis.***
  - This ***settlement rate is half the average for federal court litigation,*** meaning that a class member is far less likely to have even a chance of obtaining relief than the average party suing individually.
  - ***For those cases that do settle, there is often little or no benefit for class members***.
  - What is more, ***few class members ever even see those paltry benefits—particularly in consumer class actions***. Unfortunately, because ***information regarding the distribution of class action settlements is rarely available***, the public almost never learns what percentage of a settlement is actually paid to class members. But of the six cases in our data set for which settlement distribution data was public, ***five delivered funds to only miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%.*** Those results are consistent with other available information about settlement distribution in consumer class actions.

- Although some cases provide for automatic distribution of benefits to class members, automatic distribution almost never is used in consumer class actions—only ***one of the 40*** settled cases fell into this category.
- Some class actions are settled without even the potential for a monetary payment to class members, with the settlement agreement providing for ***payment to a charity or injunctive relief that, in virtually every case, provides no real benefit to class members***.

In short, class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys—both on the plaintiffs' and defense side.

The lesson that should be taken from this study: It would be irrational for any policymaker to rest a decision on the theoretical benefits of class actions, when the real-world evidence shows that class actions provide little or no benefit, particularly in the consumer and employment context.

Moreover, ***claimants can effectively vindicate in individual arbitration any claims that might be asserted through class actions***. Many arbitration provisions require businesses to pay costs of filing claims, to pay incentive or bonus payments to encourage arbitration of small claims, or to shift the costs associated with proving claims. And a number of other means for obtaining economies of scale—such as sharing the costs of proof across a set of individual arbitrations—are not only authorized by most arbitration agreements, but provide a fully viable model of effective dispute resolution.

The contention that class procedures are essential to permit vindication of small claims was specifically rejected by ***both the majority and the dissent*** in the Supreme Court's recent decision in ***American Express Co. v. Italian Colors Restaurant.***[42] The dissenting opinion, joined by Justices who also dissented in the *Concepcion* case, specifically identified several different ways in which consumers could effectively vindicate even small claims in arbitration without the use of class action procedures:

> In this case, . . . the [arbitration] agreement could have prohibited class arbitration without offending the effective-vindication rule *if* it had provided an alternative mechanism to share, shift or reduce the necessary costs. The agreement's problem is that it bars not just class actions, but also all mechanisms . . . for joinder or consolidation of claims, informal coordination among

[42] 133 S. Ct. 2304 (2013).

individual claimants, or amelioration of arbitral expenses.[43]

As the dissenters in *American Express* explained, any concerns about whether individuals can vindicate their small claims in arbitration without the class-device are eliminated when an arbitration provision "provide[s] an alternative mechanism to . . . shift . . . the necessary costs." A significant number of companies have adopted bonus/cost-shifting approaches similar to the one approved by the Court in *Concepcion*.

The *American Express* dissenters further stated that the concern about cost could be addressed through "***informal coordination among individual claimants***" to share the same lawyer, expert, and other elements required to prove the claim. For example, an entrepreneurial plaintiffs' lawyer can recruit large numbers of clients (via the internet, social media, or other similar means), file thousands of individual arbitration demands on behalf of those clients, and distribute common costs over all those claimants, making the costs for expert witnesses and fact development negligible on a per-claimant basis. ***This is not just theory: it is happening today.***

Indeed, given the low cost, efficiency, and fairness of arbitration, it is no surprise that some plaintiffs' lawyers are already beginning to recognize that pursuing multiple individual arbitrations (or small-claims actions) is an economically viable business model—especially in view of the ability to reach multiple, similarly situated individuals using websites and social media. Indeed, this strategy for spreading fixed litigation costs is an increasingly common means of pursuing disputes in arbitration.

There are thus multiple alternatives to private class action lawsuits in court brought by entrepreneurial plaintiffs' attorneys; these alternatives afford individual consumers and employees actual opportunities to pursue their disputes or otherwise vindicate their rights—in sharp contrast to the false promise of private class actions.

Furthermore, ***class actions are not needed to deter wrongdoing***. Deterrence theory holds that a party will not engage in wrongdoing if the party believes that it will incur costs for acting wrongfully that it will not incur if it complies with the law. If those costs are incurred without regard to the wrongfulness of the underlying conduct, there is no such deterrent effect.[44]

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[43] *Id*. at 2318 (Kagan, J., dissenting). The majority disagreed with the dissent's claim that the agreement at issue in that case barred informal coordination among individual claimants. *Id*. at 2311 n.4.

[44] For an analogous discussion of how a failure to distinguish adequately between the culpable and the innocent dilutes the deterrent effect of sanctions in the criminal-law

Plaintiffs' attorneys have little incentive to choose class action cases based on the merits of the underlying claims; rather, they seek to find a claim for which the complaint can withstand a motion to dismiss and that can satisfy the (legitimately) high hurdles for class certification. Once a class is certified, settlement virtually always follows, driven by the transaction costs that such actions impose. These burdens are unrelated to the merits of the lawsuit, and affect many businesses that do not engage in wrongful conduct. Because these burdens are a function of who plaintiffs' lawyers sue rather than who has engaged in actual wrongdoing, the threat of class actions cannot—and does not—generally deter wrongful conduct.

Businesses are far more likely to be deterred from wrongdoing by the reputational consequences of engaging in improper behavior, especially because reputational harm is often directly correlated to a business's success or failure. Especially in an age of social media, consumer complaints can quickly go viral on Facebook, Twitter, and change.org (to name a few examples). That phenomenon impacts companies immediately and directly leads to changes in practices that garner consumer opposition. Class actions, by contrast, rarely, if ever, have that effect.

Even though class-wide procedures are not necessary to vindicate small-value claims, ***some critics of arbitration have urged that arbitration agreements should be required to permit either class-wide arbitration or the filing of class actions in court***. But like the argument in favor of permitting only "post-dispute arbitration agreements," ***such a rule would eliminate consumer and employee arbitration***.

As explained above, companies incur substantial costs in setting up an arbitration system because arbitration offers transaction cost savings over the alternative—litigation in court. But they would not be able to minimize those costs—which are regularly passed along to consumers and employees in the form of lower prices and higher wages—if also forced to incur the substantial transaction costs associated with litigating class actions in court, or undertaking classwide procedures in arbitration. Indeed, many companies have publicly stated that they would abandon arbitration entirely if the class-action waivers contained in their arbitration agreements are rendered unenforceable.

In sum, class-wide proceedings do not deliver on the promises that their proponents have made. Their absence does not justify jettisoning arbitration, which (unlike litigation) creates an opportunity for consumers and employees to pursue their real-world disputes—ones that are often too small and individualized to ever qualify for class treatment anyway.

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context, see A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in 1 Handbook of Law and Economics 403, 427-29 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

IV. THE CONSUMER FINANCIAL PROTECTION BUREAU'S "PRELIMINARY RESULTS" FROM ITS ONGOING STUDY OF ARBITRATION PROVIDES NO EMPIRICAL BASIS FOR REGULATING ARBITRATION AGREEMENTS.

Under Section 1028 of the Dodd-Frank Act, the Consumer Financial Protection Bureau has been charged with conducting a study of the use of arbitration in connection with consumer financial products and services. On December 11, 2013 the CFPB issued a report containing some "preliminary results" relating to elements of its study. The Bureau expressly stated that:

- "Readers should not interpret this presentation as our assessment, preliminary or otherwise, of the relative importance of different areas to be covered in the statutory report to Congress. Rather, the subjects addressed here are those as to which we already have been able to obtain and analyze sufficient data in order to make some preliminary findings."

- "Because the Bureau's work on this study is ongoing, any of the findings presented here may be refined or modified when we issue our report to Congress."

- "This presentation focuses on the 'front-end' of formal disputes involving consumers"—the nature of formal filings; "[i]n later work, we intend to address the 'back-end' of formal disputes: what happens, in how long, and at what cost."

The Bureau also identified a variety of areas that it had not yet addressed, such as "the disposition of cases across arbitration and litigation (including class litigation), both in terms of substantive outcome and in terms of procedural variable like speed to resolution"; "consumer benefits and transaction costs in consumer class actions involving consumer financial services" including "whether class actions exert improper pressure on defendants to settle meritless claims"; and "the possible impact of arbitration clauses on the price of consumer financial products."

The key takeaway from the CFPB's announcement last week is that—as the agency itself made clear—the information released is "preliminary." That is putting it mildly; the study itself identifies a number of areas requiring a substantial amount of empirical work. And that is important, because the results announced so far provide little information about the central questions that the Bureau must address: For the kinds of injuries that most consumers are likely to experience, what is the real-world accessibility, cost, fairness, and efficiency of arbitration as compared to suing in court – and, therefore, how will consumers be harmed if arbitration is prohibited or subjected to regulation that eliminate arbitration's availability?

For the reasons explained above, the existing empirical evidence points in favor of arbitration rather than courts as the most accessible forum for consumer and employee dispute resolution.

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Thank you again for the opportunity to testify before the Committee today. I look forward to answering your questions.

Exhibit A

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

By Mayer Brown LLP

Executive Summary

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

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

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

Here's what we learned:

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

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1 For information about our methodology, see Appendix C.

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

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

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

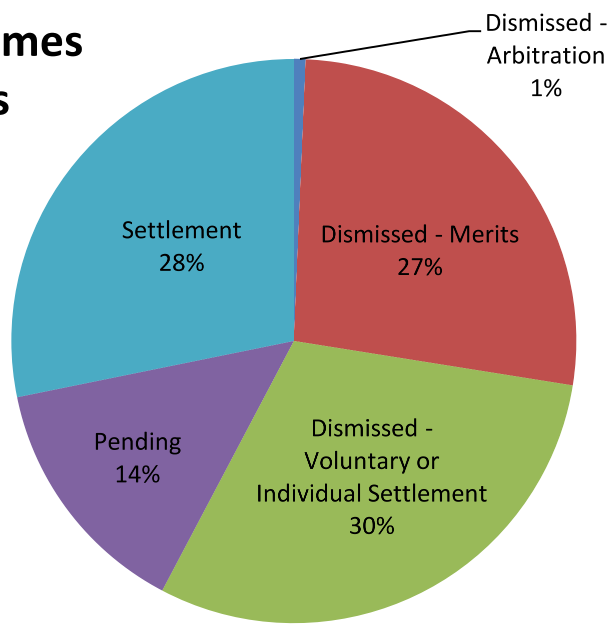
The bottom line: The hard evidence shows that class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys. Policymakers who are considering the efficacy of class actions cannot simply rest on a theoretical assessment of class actions' benefits or on favorable anecdotes to justify the value of class actions. Any decision-maker wishing to rest a policy determination on the claimed benefits of class actions would have to engage in significant additional empirical research to conclude—contrary to what our study indicates—that class actions actually do provide significant benefits to consumers, employees, and other class members.

Results

Overall Outcomes

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

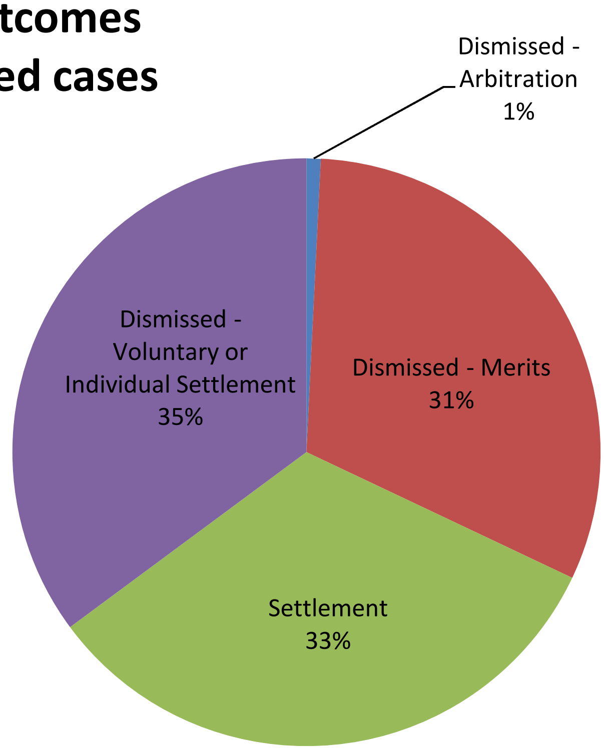
Figure 1: Outcomes in 148 cases



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

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

Figure 2: Outcomes in 127 resolved cases



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<u>*Class Settlements*</u>

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

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

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

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

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

13 *Id*. at 133.

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

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

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

- "Claims-made" settlements, under which class members are bound by a class settlement—and thereby release all of their claims—but only obtain recoveries if they affirmatively request to do so, usually through use of a claims form.[15] Funds not distributed to claimants are returned to the defendant or, in some cases, distributed to a charity via the *cy pres* process (which creates significant additional problems, as we discuss below). They are not given to class members. Most settlements fall into this category.

- Injunctive relief/*cy pres* settlements, in which the relief provided to settling class members involves only injunctive relief (which may provide little or no benefit to class members) or *cy pres* distributions (in which money is paid to charitable organizations rather than class members).

- "Automatic distribution" settlements, in which each class member's settlement is distributed automatically to class members whose

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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35 *Gianzero* Preliminary Approval Motion at 4.

36 *Id.* at 10.

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

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

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

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

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

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

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

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

43 *Colonial Bancgroup* Final Judgment at 8.

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

62 *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

72 *Id.* at 500.

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

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

Appendix C: Study Design and Methodology

Identifying the Study Sample

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

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

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

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

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

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

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

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

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

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

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

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

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

[80] As one academic study explained, securities class actions "are managed under a set of class action rules distinct from those used for other Rule 23(b)(3) classes—and . . . the plaintiffs with the largest losses have a significant role in the litigation (including choosing class counsel and defining the terms of the settlement) and can hardly be thought of [as] an 'absent' class member." Pace & Rubenstein, *supra* note 16, at 20; *see*, *e.g.*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-76, 109 Stat. 737 (1995); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998).

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

Constructing the Data Set

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

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

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

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

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

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

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