LAWYERS FOR CIVIL JUSTICE

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES and its
RULE 23 SUBCOMMITTEE

NINE PERCENT OF FOUR BILLION DOLLARS: NEW EMPIRICAL EVIDENCE THAT RULE 23 SHOULD BE AMENDED TO CURTAIL THE PROBLEMS OF "NO INJURY" CLASS ACTION CASES

March 14, 2016

A new empirical study conducted by Professor Joanna M. Shepherd of Emory University School of Law (the "Shepherd study")[1] reveals that no-injury class action cases resolved in the last decade resulted in approximately $4 billion worth of settlements and judgments, yet provided a mere 9 percent—or less—of that amount to class members. Lawyers for Civil Justice ("LCJ") respectfully submits the Shepherd study and this Comment to the Advisory Committee on Civil Rules ("Committee") and its Rule 23 Subcommittee ("Subcommittee") as the Subcommittee prepares a package of possible Rule 23 amendments for the Committee's consideration in April.

The Shepherd study analyzes 432 class action cases that were resolved between 2005 and 2015. It provides compelling evidence of the need to amend Rule 23 to address the fundamentally flawed phenomenon of no-injury cases as described in LCJ's earlier Comments to the Committee.

I. No-Injury Class Action Cases Are Inefficient and Highly Problematic.

A procedure that collects $4 billion dollars but delivers only 9 percent of that sum to the ostensibly aggrieved parties is indefensible. In addition, the average of 37.9 percent of total proceeds going to class counsel[2] demonstrates that no-injury cases are extraordinarily inefficient from a transaction cost perspective. These data describe a *rulemaking* problem because Rule 23 is the mechanism that allows them to proceed. Rule 23 causes the no-injury problem by permitting the subversion of a longstanding principle of the American legal system that courts decide only actual cases or controversies. As the Seventh Circuit Court of Appeals stated more

[1] The Shepherd study is attached hereto.
[2] *See* Shepherd study at 20.

than a decade ago in reversing a problematic certification of a "no injury" class, "No injury, no tort, is an ingredient of every state's law."[3]

No-injury cases are causing serious problems to the judicial system. As described in our prior comments to the Committee[4] and in recent testimony to the House Judiciary Subcommittee on the Constitution and Civil Justice,[5] the damage that no-injury class actions are doing to the machinery of justice is profound:

- The difficulty in identifying a concrete injury to most class members, together with the lack of interlocutory review of decisions to certify classes, often force the settlement of no-injury classes that survive dispositive motions on terms that most courts and commentators consider abusive. Not only—as the Shepherd study proves—do no-injury class actions provide only minimal compensation to absent class members and excessive attorneys' fees, but they also result in scattershot injunctive relief.

- No-injury class actions alter parties' substantive rights, thereby violating the Rules Enabling Act, by eliminating, in the class action context, universal legal requirements that individual plaintiffs prove either injury or causation to prevail on their causes of action.

- No-injury class actions create confusion about certification standards, and have led to inconsistency among federal circuits in decisions to approve or disapprove different kinds of class actions. Even when courts agree on a particular outcome (dismissing a "no injury" lawsuit or allowing it to proceed, certifying the suit or requiring it to proceed individually), they frequently disagree on their justifications for that treatment. As a result, courts need guidance from the Advisory Committee.

Moreover, no-injury class actions are counterproductive as a policy matter. Compensation for no-injury cases acts to deter legitimate behavior by the defendant. Indeed, a number of scholars

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[3] *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig*., 288 F.3d 1012, 1017 (7th Cir. 2002).

[4] In previous Comments, LCJ has urged the Committee to examine how the rapid expansion of Rule 23 since 1966 has led to a significantly reduced relationship between class members and their cases, a phenomenon demonstrated vividly by the rise of "no injury" class actions and the invention of *cy pres* payments to non-parties. *See*, LAWYERS FOR CIVIL JUSTICE, TO RESTORE A RELATIONSHIP BETWEEN CLASSES AND THEIR ACTIONS: A CALL FOR MEANINGFUL REFORM OF RULE 23 (Aug. 9, 2013), *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_class_action_reform_080913.pdf; LAWYERS FOR CIVIL JUSTICE, REPAIRING THE DISCONNECT BETWEEN CLASS ACTION AND CLASS MEMBERS: WHY RULES GOVERNING "NO INJURY" CASES, CERTIFICATION STANDARDS FOR ISSUE CLASSES AND NOTICE NEED REFORM (Aug. 13, 2014) *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_23_reform_8.13.14.pdf; LAWYERS FOR CIVIL JUSTICE, LOOKING AT THE BIGGER PICTURE: THE CONCEPTUAL SKETCHES IN THE CONTEXT OF MUCH-NEEDED RULE 23 REFORM (April 7, 2015), *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_23_conceptual_sketches_april_2015.pdf; and LAWYERS FOR CIVIL JUSTICE, FROM CONCEPTUAL SKETCHES TO A FORMAL PROPOSAL TO AMEND RULE 23: THOUGHTS ON THE SUBCOMMITTEE'S IDEAS FOR REFORM (October 9, 2015), *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_to_rule_23_subcommittee_10-9-2015.pdf.

[5] *See* Testimony of Andrew Trask before the Committee on the Judiciary Subcommittee on the Constitution and Civil Justice, United States House of Representatives, Apr. 29, 2015, available at http://judiciary.house.gov/_cache/files/e74c2bdd-6162-48e1-85fc-60dda4fdf36b/trask-04292015.pdf

have pointed out that private enforcement of regulation tends to overdeter legitimate behavior and can hamstring governmental attempts to regulate public risks.[6] Unchecked private enforcement can also disrupt the balance that regulatory agencies strive to achieve through their own regulation and enforcement. No-injury classes create windfall income for uninjured claimants, and inevitably inflate attorneys' fees, both of which needlessly increase costs for consumers.[7] The Shepherd study underscores this point by demonstrating the enormous amounts of money that are going into lawsuits in which no actual injury exists.

II. The Committee's Proposed Amendments to Rule 23 Should Address the Problems of No-Injury Cases.

As the Committee prepares to consider a package of potential Rule 23 amendments at its April meeting, it should include language to address the problems caused by no-injury cases. A number of options exist. In previous Comments to the Committee,[8] LCJ has suggested several much-needed Rule 23 reforms that, while generally applicable, would have a particularly beneficial effect on no-injury cases. These include:

- clarifying the role of the merits inquiry in class certification and providing a right to interlocutory appeal of decisions to certify, modify or de-certify a class;
- clarifying the standard applied in the "rigorous analysis" of Rule 23;
- making explicit the requirement that members of the class be ascertainable by objectively identifiable means;
- preventing the award of *cy pres* funds to non-class members;
- adopting an "opt-in" rule for Rule 23 (b)(3) cases;
- clarifying that judicial estoppel does not apply to class settlement negotiation positions;
- strengthening (or at least not eliminating) the predominance test to ensure that class are sufficiently cohesive to warrant representation of adjudication; and
- bringing Rule 23's typicality requirement into line with the Supreme Court's jurisprudence.

These proposals range from relatively far-reaching and bold changes (such as requiring plaintiffs to opt in) to more modest efforts to incrementally fix the problems inherent in the current class action rules. The Committee seems to have chosen a relatively modest, first-do-no-harm approach. While caution is certainly wise, LCJ urges the Committee to act on one modest change in particular that would alleviate aspects of the no-injury problem.

[6] David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 633-37 (2013).
[7] *See, e.g.*, *Willett v. Baxter Int'l, Inc*., 929 F.2d 1094, 1100 n. 20 (5th Cir. 1991).
[8] *See* sources cited *supra* note 1.

III. The Committee Should Include a Simple, 12-Word Amendment to Rule 23 Reinforcing the Typicality Requirement in Its Proposed Amendments for Public Comment.

One simple change to Rule 23 would reduce the incidence of inefficient no-injury lawsuits—those that fail, as the Shepherd study demonstrates, to deliver compensation despite imposing significant costs. The following 12-word amendment to Rule 23(a)(3) would do so by reinforcing the meaning of the typicality requirement:

> "One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
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> …
>
> (3) the claims, or defenses, and type and scope of injury of the representative parties are typical of the claims, or defenses, and type and scope of injury of the class …"

This amendment reflects H.R. 1927, a bill the House of Representatives passed in January 2016, which would ensure that injured and non-injured plaintiffs are not mixed into the same class. It would ensure that courts make the proper inquiry into whether the named plaintiff's claims actually represent the claims of the rest of the class. The typicality requirement is designed to ensure that the named plaintiff is equipped to bring a representative—rather than an individual—lawsuit.[9] As the Supreme Court has recognized, typicality "serve[s] as a guidepost for determining whether maintenance of class action is economical and whether [a] named plaintiff's claim and class claims are so interrelated that interests of class members will be fairly and adequately protected in their absence."[10] Amending Rule 23(a)(3) in this fashion would not affect those class actions that may be properly certified in accordance with the Supreme Court's dictates.[11]

This modest fix would affect only so-called "unicorn plaintiff" cases, those in which a plaintiff who has suffered actual injury seeks to bring an action on behalf of a large class that has not suffered any actual injury. Several notable cases have seen classes certified despite the problems with typicality and superiority such plaintiffs create. Unicorn plaintiffs—atypical plaintiffs with actual injuries—bring actions that would foreclose the rights of uninjured class members from suing in the future should they ever suffer the same injury. Such litigation often misallocates resources so that those who are injured recover less than the full value of their claims while those

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[9] *See, e.g., Deiter v. Microsoft Corp.*, 436 F.3d 461, 466–67 (4th Cir. 2006) ("The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members. For that essential reason, plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim."); *In re Am. Medical Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996) ("A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members.").

[10] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997).

[11] As an alternative, the Advisory Committee could amend Rule 23(b)(3) in the following fashion:

> (3) the court finds that the questions of law or fact common to class members, including but not limited to the type and scope of injury, predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

who have not been injured receive so minimal a recovery that it is not worth the time event to submit a claim. Meanwhile, the class counsel receive huge fees based on an artificially expanded class size. This proposed amendment would alleviate this problem by ensuring that class members' injuries are of a similar type and scope.

Conclusion

The Shepherd study demonstrates that no-injury cases permitted under current interpretations of Rule 23 are disproportionally inefficient—resulting in minimal recovery for class members while imposing high costs on defendants, consumers and the judicial system. The Committee should act on this empirical data by including one or more measures designed to reform no-injury cases in its package of proposed Rule 23 amendments. As discussed, a simple reform would be to reinforce the typicality requirement and ensure that class members have a cognizable cause of action under applicable substantive law. We urge the Committee to propose, and allow public consideration of, a simple amendment to Rule 23 as described above.

AN EMPIRICAL SURVEY OF NO-INJURY CLASS ACTIONS

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EXECUTIVE SUMMARY

American courts have long struggled with the propriety of "no-injury" claims by plaintiffs that have not suffered a concrete harm. Critics argue that these cases contravene the longstanding constitutional requirement that courts decide actual controversies, whereas supporters assert that the actions involve very real injuries that the law is designed to redress. Regardless of the validity of the arguments for or against no-injury class actions, one thing is clear: these actions only fulfill their compensatory purpose if plaintiffs receive an adequate share of the damages paid by defendants. In contrast, if the lion's share of the damage award is allocated to litigation expenses or attorneys' fees, the actions inefficiently compensate plaintiffs and instead, benefit primarily the lawyers.

This report empirically examines the allocation of no-injury class action awards among plaintiffs, attorneys, and other expenses. A team of independent researchers examined data in Westlaw and Lexis drawn from final orders, settlement agreements, and various other court documents such as those approving settlements and attorneys' fee awards in 2,158 cases. The researchers further narrowed down the pool using standards suggested by the defendants and amici in the recent briefs submitted in the *Spokeo v Robbins* case currently before the U.S. Supreme Court. We classified cases as no-injury actions if at least one of the four following conditions were met: (1) if the plaintiffs suffered no actual or imminent concrete harm giving rise to an injury-in-fact; (2) if the only harm was a technical statutory violation; (3) if any economic loss was negligible or infinitesimal; or (4) if the sought recovery was typically unrelated to compensating plaintiffs for economic or other harm. Restricting the pool of cases to these "no-injury" criteria and including only cases for which there was information on the amounts of both attorneys' fees and settlement funds yielded a final data sample of 432 cases resolved between 2005-2015.

The 432 no-injury cases in the sample data were brought in the federal and state courts located in 33 states. In the data, 155 cases involve claims brought under state statutes and 296 involve claims brought under a federal statute. The most common federal statutes giving rise to claims in the

data are the Fair Debt Collection Practices Act, the Telephone Consumer Protection Act, the Fair Credit Reporting Act, and the Electronic Funds Transfer Act. Of the 432 cases, only 2.5% of the cases were resolved at trial; the rest were resolved by settlement. The aggregate monetary value of the settlements and awards was approximately $4 billion. Estimated monetary awards ranged from $2,200 to $580 million; the average was $9.37 million.

In each case the total award was allocated to various combinations of class members, class representatives, attorneys' fees to class counsel, cy pres funds, other legal expenses, and the costs of administering the settlement fund. On average, 60 percent of the total monetary award paid by the defendants was allocated to the plaintiffs' class and 37.9 percent was allocated to attorneys' fees. However, the funds available to class members at the time of settlement may significantly overstate the actual amount class members ultimately receive. Many claims-made settlements with a fixed compensation per class member disperse the unclaimed portion of the settlement fund to a cy pres fund. As a result, the actual distribution to attorneys and plaintiffs may look very different than the relative funds available to each.

Although determining the claims rate is extremely difficult, previous studies suggest it is almost always less than 15 percent, and oftentimes less than one percent. In the sample data, if class members regularly claim less than 15 percent of these available funds, they would receive only 9 percent of the total monetary award paid by the defendant. That is, although 60 percent of the total award may be available to class members, in reality, they typically receive less than 9 percent of the total. In comparison, class counsel receives an average of 37.9 percent of available funds, over 4 times the funds distributed to the class. A result in which plaintiffs recover less than 10 percent of the award, with the rest going to lawyers or unrelated groups, clearly does not achieve the compensatory goals of class actions.

I. Introduction

For decades American courts have struggled with the propriety of "no-injury" claims by plaintiffs that have not suffered a concrete harm. The earliest no-injury claims were seen in "exposure-only" cases brought by plaintiffs who alleged exposure to toxic substances, but had not experienced any physical manifestations or symptoms. In addition to mass torts suits, exposure-only claims were made in product defect cases, environmental cases, and pharmaceutical litigation. More recently, no-injury claims have arisen in new areas of the law such as consumer fraud cases where consumer plaintiffs claim they were misinformed about purchases but were never harmed; invasion of consumer privacy cases where consumer plaintiffs claim their personal information was used inappropriately even though no harm resulted; and cases brought under numerous state and federal statutes for statutory violations that did not result in any tangible harm. Because only minimal damages are expected in cases with no concrete harm, the no-injury claims are often filed as class actions so that settlements can be pursued at a scale that justifies an award of substantial attorney fees. Such cases are rarely pursued individually because the potential damage awards would never justify the legal fees expended.

No-injury class actions have been the center of substantial debate. Critics argue that no-injury cases contravene the longstanding constitutional requirement in U.S. federal courts and similar requirements of state courts that courts decide actual controversies.[1] Generally, a plaintiff must demonstrate that they suffered a physical injury or foreseeable economic loss as a result of the defendants' conduct.[2] Such requirements preserve judicial resources for cases that involve actual injuries instead of cases that are speculative or involve intangible issues that are difficult to compensate. Tort law reserves liability for objectively genuine harms and Article III standing requires an "injury in fact" that will "likely . . . [be] redressed by a favorable decision."[3] Indeed, in addressing the propriety of a "no-injury"

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[1] Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation. Where Should Tort Law Draw the Line?*, 80 BROOK. L. REV. 599, 601 (2015).

[2] *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 165 (5th ed. 1984) ("Actual loss or damage resulting to the interests of another [is a necessary element of a negligence cause of action] . . . . The threat of future harm, not yet realized, is not enough.")

[3] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

class, the Seventh Circuit Court of Appeals concluded ""No injury, no tort, is an ingredient of every state's law."[4]

Supporters of no-injury class actions assert that the actions involve very real injuries that the law is designed to redress. They argue that consumers suffer a tangible loss when they purchase a product that has a latent defect or is different than advertised,[5] or that exposure to potentially harmful substances is a harm in itself, even without physical manifestations. Similarly, they maintain that Congress and state legislatures have determined that statutory violations are worthy of legal redress, and that courts must honor those resolutions.[6]

Regardless of the validity of the arguments for or against no-injury class actions, one thing is clear: these actions only fulfill their compensatory purpose if plaintiffs receive an adequate share of the damages paid by defendants. In contrast, if a sizable portion of the damage award is allocated to litigation expenses or attorneys' fees, the actions inefficiently compensate plaintiffs.

Moreover, although plaintiff compensation is irrelevant to whether defendants are deterred from future harmful behavior, achieving deterrence through private class actions is exceptionally imprecise and inefficient. Whereas actions brought by state attorneys general are typically brought in "the public interest" and designed to curtail future behavior that is harmful to the citizens of a state, actions brought by private attorneys in class actions are rife with conflicts of interest and unlikely to be in the public interest. For example, the redundant and indulgent provisions in many state consumer protection laws—such as guaranteed awards of attorneys' fees, mandatory trebling of damages, and no requirement of actual harm—create incentives for private attorneys to aggregate not only meritorious suits, but also frivolous suits in order to extort settlements.[7] Moreover, any claim brought under a statute allowing for the recovery of attorneys' fees is likely to achieve deterrence less inefficiently than a comparable pubic enforcement action;

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[4] In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012, 1017 (7th Cir. 2002)

[5] Public Citizen, *The Fiction of The "No-Injury" Class Action* 9-12 (2015), http://www.citizen.org/documents/the-fiction-of-no-injury-class-action.pdf

[6] Adam Klein, *Is Digital Injury "Real" Injury? Thoughts on* Spokeo v. Robins, LAWFARE (November 4, 2015), https://www.lawfareblog.com/digital-injury-real-injury-thoughts-spokeo-v-robins.

[7] *See* James Cooper & Joanna Shepherd, *State Consumer Protection Acts: An Economic and Empirical Analysis,* ANTITRUST LAW JOURNAL (forthcoming, 2016).

private attorneys in these actions have an incentive to maximize their hourly billing beyond the efficient level.[8]

Although all litigated claims produce litigation expenses and attorneys fees, the nominal or intangible harm to plaintiffs in no-injury class actions call into question the true function of these claims. Who are the true beneficiaries of no-injury claims if defendants pay millions of dollars for behavior that produced little or no tangible harm to plaintiffs, and attorneys receive the lions' share of the award?

This report addresses this question by empirically examining the allocation of no-injury class action awards among plaintiffs, attorneys, and other expenses. The results are based on my study of 432 no-injury class action settlements and trial awards from 2005-2015. The study finds that, on average, 60 percent of the total monetary award paid by the defendants was allocated to the plaintiffs' class and 37.9 percent was allocated to attorneys' fees. However, because many settlements disperse the unclaimed portion of the settlement fund to a cy pres fund, the funds available to class members at the time of settlement may significantly overstate the actual amount class members ultimately receive. Although 60 percent of the total monetary award may be available to class members, in reality, they typically receive less than 9 percent of the total. In comparison, class counsel receives an average of 37.9 percent of available funds, over 4 times the funds distributed to the class.

A result in which plaintiffs recover less than 10 percent of the award, with the rest going to lawyers or unrelated groups, clearly does not achieve the compensatory goals of class actions. Instead, the costs of no-injury class actions are passed on to consumers in the form of higher prices, lower product quality, and reduced innovation. As a result, much of the no-injury litigation harms consumers instead of helping them as intended.

[8] DEBORAH L. RHODE, ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 6 (2000) ("Under an hourly billing system, the temptation is to leave no stone unturned as long as lawyers can charge by the stone.") Herbert M. Kritzer et al., *The Impact of Fee Arrangement on Lawyer Effort,* 19 LAW & SOC'Y REV. 251 (1985); Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOFSTRA L. REV. 879 (2001).

II. Previous Empirical Class Action Research

To date, no study has empirically examined the structure and allocation of no-injury class action awards. However, previous studies have examined awards in other types of class actions.

A 2007 study by the Rand Institute for Civil Justice received survey responses from 57 large insurance companies who had been defendants in 748 distinct class actions.[9] Most of the class actions involved diminished value allegations, inadequate coverage claims, and various workers' compensation claims.[10] In 32 cases, Rand was able to collect information about the total settlement fund offered by defendants to pay both the class fund and the legal fees and expenses. The total fund ranged from $360,000 to $150,000,000 with a median fund size of $2,600,000.[11] The total settlement fund was less than $5 million in 63 percent of the cases. In 22 cases, Rand was able to determine the benefits paid to individual class members—the median class member collected $97.[12]

Rand was able to collect information on the attorneys' fees and legal expenses in 48 cases. These ranged from $50,000 to $50,000,000 with a median award of $554,000.[13] In 27 cases, Rand was able to estimate the percentage of the total settlement fund allocated to attorneys' fees and legal expenses. This percentage ranged from 12 to 41 percent with a median of 30 percent.[14] However, oftentimes the settlement fund is not completely distributed to class members; in these cases the actual distribution to the class may vary substantially from the funds available for distribution. Rand was able to collect information on the funds actually distributed to class members in 36 cases; in those cases the attorneys' fees and legal fees comprised a median of 47 percent of the total distributed funds.[15]

To examine how federal courts think about attorneys' fees, a 2010 study analyzed 688 class action settlements approved by federal judges during 2006 and 2007.[16] The most common cases were securities class

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[9] Rand Institute for Civil Justice, *Insurance Class Actions in the United States* 5 (2007), http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG587-1.pdf

[10] *Id.* at 35.

[11] *Id.* at 52.

[12] *Id.* at 53.

[13] *Id.*

[14] *Id.* at 54.

[15] *Id.* at 56.

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

actions, comprising well over one-third of the data sample.[17] The study found that 89 percent of class actions resulted in a cash payment to class members.[18] Nearly two-thirds of the sample resulted in settlements of less than $10 million. The median settlement was $5.1 million and the average, largely influenced by the $6.6 billion Enron settlement, was $54.7 million.[19] The study determined that the average percentage of the total award allocated to class counsel was 25.4 percent.[20] They further found that in 69 percent of the settlements, the federal courts adopted a percentage-of-the-settlement approach to determine fees, either alone or in conjunction with the lodestar method.[21]

Another 2010 study examined attorneys' fees in 689 class actions from 1993-2008.[22] The cases included several different types of claims, but were dominated by securities actions.[23] The average total award was $116 million and the median was 12.5 million. The average percentage to attorneys over the cases was 23 percent.[24] However, the researchers found that courts approved higher fee percentages for categories of cases where the risk of recovery was greater. Like the previous study, the authors found that courts typically use the percentage-of-the-settlement approach to allocate attorneys' fees—they did so in 73 percent of cases in the sample data.[25] The study also found that legal expenses averaged an additional 2.8% of the recovery.[26]

A recent study by Mayer Brown LLP examined settlements in 40 consumer and employee class actions initiated in federal courts in 2009.[27] The study did not compute statistics on the allocation of settlement funds, but provided a qualitative assessment of the outcomes. In 18 of the 40 settled cases, settlements required class members to file a claims request to obtain a recovery.[28] The authors were only able to collect information on the distribution of the settlement proceeds in 6 of the 18 cases. Five of the six

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[17] *Id.* at 818.
[18] *Id.* at 824.
[19] *Id.* at 828.
[20] *Id.* at 833.
[21] *Id.* at 832.
[22] Theodore Eisenberg & Geoffrey Miller, *Attorney's Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 251(2010).
[23] *Id.* at 262.
[24] *Id.*
[25] *Id.* at 268-269.
[26] *Id.* at 262.
[27] Mayer Brown, LLP, *Do Class Actions Benefit Class Members* 5 (2013), https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.
[28] *Id.* at 7.

cases had claims rates less than 12 percent indicating that less than 12 percent of the settlement fund was actually disbursed to class members.[29] The remaining case had a claims rate over 98 percent because it involved the Bernie Madoff Ponzi scheme and the average individual claim was over $2.5 million.[30]

In 13 of the 40 settled cases, the settlement proceeds were automatically distributed to class members.[31] The cases generally involved ERISA class actions or other actions in which the defendant could easily ascertain the class members' eligibility and damages. The remaining 9 cases were resolved with no monetary compensation to class members; these cases involved injunctive relief or cy pres distributions.[32] From this assessment, the authors concluded that most class settlements produce negligible benefits for class members and instead, primarily benefit the lawyers.[33]

A 2014 study by NERA Economic Consulting examined 479 consumer class actions resolved by settlement between 2010 and 2013.[34] The cases involved product liability, false advertising, violation of consumer privacy, inadequate warning, fraud, or antitrust claims. NERA was able to collect information about the settlement fund in 321 cases. The median size of the fund in these cases was $9.0 million,[35] with well over half of the settlement dollars paid to resolve antitrust class actions.[36] NERA did not examine relative allocations to class members, attorneys' fees, and legal expenses. However, they did determine that 84 percent of the 321 settlements included a monetary payment to plaintiffs as at least one component of the settlement; 26 percent of the settlements included some form of non-monetary compensation; and only 6 percent of settlements include a contribution to a cy pres fund.[37]

These studies offer insight into the size and structure of class action settlements in consumer, securities, employee, and insurance class actions.

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[29] *Id.*
[30] *Id.* at 20.
[31] *Id.* at 8.
[32] *Id.*
[33] *Id.* at 12.
[34] NERA Economic Consulting, *Consumer Class Action Settlements*, 2010-2013, at 2 (2014), http://www.nera.com/content/dam/nera/publications/archive2/PUB_Consumer_Class_Action_Settlements_0614.pdf.
[35] *Id.* at 11.
[36] *Id.* at 6.
[37] *Id.* at 7-8.

Other studies provide useful information on the best practices to control class action exposure and costs.[38] However, no prior study has empirically explored details of the settlements in no-injury class actions. In the next section, I describe the coding project undertaken to provide this information.

III. Description of No-Injury Class Action Coding Project

To determine the size and allocation of no-injury class action settlements and awards, a large coding project was undertaken by a team of independent researchers from Emory University School of Law.[39] The researchers examined data in Westlaw and Lexis drawn from final orders, settlement agreements, and various other court documents such as those approving settlements and attorneys' fee awards in 2,158 cases. The class actions were identified using search terms and statutes that are commonly associated with no-injury cases: medical monitoring, consumer, false advertising, misleading, misrepresentation, privacy, fraud, unfair, deceptive, defective, cy pres, inadequate warning, inadequate information, defect, fraudulent, Fair Debt Collection Practices Act, Telephone Consumers Protection Act, and Fair Credit Reporting Act. Ultimately, the researchers examined all class actions on Westlaw and Lexis with Trial or Settlement Award summaries that fit the search criteria between 2005-2015—2,158 cases in total.

The researchers further narrowed down the pool to include only those class actions fitting our no-injury criteria. The definition of "no-injury" is itself a matter of much debate: defendants often argue that plaintiffs suffered no injury whereas plaintiffs generally assert that even minor economic harms and technical statutory violations represent true injuries. There is no agreed-upon definition of what constitutes a no-injury case and there is certainly no court ruling identifying all the possible types of such cases. Nevertheless, to restrict the cases to some sort of meaningful definition, we used standards suggested by the defendants and amici in the recent briefs submitted in the *Spokeo v Robbins* case currently before the Supreme Court.[40] We classified cases as no-injury actions if at least one of the four following conditions were met: (1) if the plaintiffs suffered no actual or imminent concrete harm giving rise to an injury-in-fact; (2) if the only harm was a technical statutory violation; (3) if any economic loss was

[38] Carlton Fields Jorden Burt, *Class Action Survey* (2015), http://classactionsurvey.com.
[39] This coding project was supported in part by Lawyers for Civil Justice. However, the views expressed in this article are those of the author and do not necessarily reflect the position of Lawyers for Civil Justice.
[40] No. 13-1339, *cert. granted*, 135 S.Ct. 1892 (2015).

negligible or infinitesimal; or (4) if the sought recovery was typically unrelated to compensating plaintiffs for economic or other harm. Restricting the pool of cases to these no-injury criteria and including only cases for which there was information on the amounts of both attorneys' fees and settlement funds yielded a final data sample of 432 cases.

For each of the cases, the researchers coded information on the court and jurisdiction, allegations, claims under federal or state statutes, type of resolution, total award or settlement fund, awards to individual class members and class representatives, attorneys' fees and litigation expenses, and allocations to cy pres funds. The following examples illustrate the kinds of cases in the data:

- the settlement in *Levitt v. Southwest Airlines*,[41] in which Southwest Airlines agreed to replace drink vouchers they had stopped accepting in 2010 to customers that could produce unredeemed vouchers. Attorneys received $1.3 million in fees.
- a settlement in *Jay Clogg Realty v. Burger King*,[42] in which Burger King agreed to pay $ 8.5 Million to settle claims asserting it sent unsolicited fax advertisements in violation of the Telephone Consumer Protection Act. Of the $8.5 million, $2.8 million was allocated to attorneys' fees. An additional $250,000 was allocated to claims administration and the remainder of the fund would be divided between class members that made claims.
- a settlement in *Flores v. Diamond Bank*,[43] in which it was alleged that Diamond Bank did not have adequate notice on one ATM machine of its $2.00 withdrawal fee in violation of the Electronic Funds Transfer Act. Under the settlement, Diamond Bank agreed to establish a settlement fund of $75,000, of which $5,000 went to the class representative. An additional $170,000 was allocated to attorneys' fees.
- a trial verdict in *Gutierrez v. Autowest*,[44] in which it was found that Autowest's lease agreements failed to contain a separate statement labeled "itemization of Gross Capitalized Cost" as required by the California Consumer Legal Remedies Act. Autowest was ordered to pay $82,848 to the class, $70,278 to

[41] In re: Southwest Airlines Voucher Litigation, 799 F.3d 701 (7th Cir. 2015).
[42] Jay Clogg Realty Group, Inc. v. Burger King Corp., 298 F.R.D. 304, (D. Md. 2014).
[43] Flores v. Diamond Bank, No. 07 C 6403, 2008 WL 4861511 (N.D. Ill. Nov. 7, 2008).
[44] Verdict and Settlement Summary, Gutierrez v. Autowest, No. CGC05317755, 2009 WL 2736967 (Cal.Superior Feb. 25, 2009).

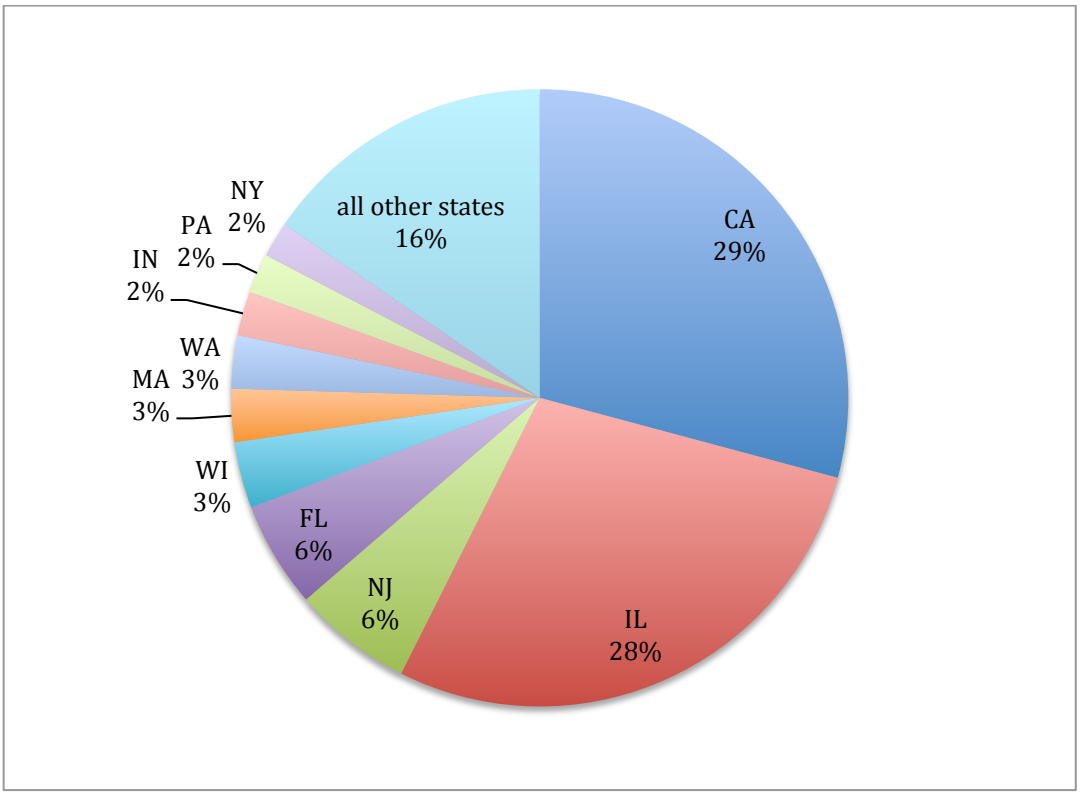
the two class representatives, $1,494,988 in attorney fees, and $63,265 in expenses.

- a settlement in *Knights v. Publix*,[45] in which plaintiffs claimed that Publix routinely violated Fair Credit Reporting Act protections by procuring background checks on employees and job applicants without providing a "stand alone" disclosure. Instead Publix used a background check authorization screen that contained extraneous information—a liability waver. Publix agreed to a settlement fund of $6.8 million, with $2.8 million of that going to attorneys' fees.
- a settlement in *Albanese v. Portnoff Law Associates*,[46] in which plaintiffs alleged that Portnoff Law, a debt collector, sent collection letters that did not state that it was sent by a debt collector, as required by the Fair Debt Collection Practices Act, nor did it contain a validation notice or verification language. Defendant agreed to settle the claims by paying $250,000: $160,000 to class counsel, $80,00 to a settlement fund, and $10,000 to the class representative.
- a settlement in *Kolinek v. Walgreens*,[47] in which plaintiffs alleged they received unsolicited prescription refill reminders from Walgreens pharmacies in violation of the Telephone Consumers Protection Act. To settle the dispute, Walgreens agreed to pay $11 million into a settlement fund, with $2.82 million of that going to attorneys' fees. The class representative was awarded $5,000. Disbursement of the settlement fund depended on claims made; if all class members submitted valid claims, each member would recover $1.20.

The aggregate dataset of 432 cases includes 367 claims resolved in federal court and 65 in state court. The cases were brought in the state and federal courts located in 33 states. Consistent with other class action studies,[48] the majority of the cases were heard in courts in California, Illinois, Florida, and New Jersey. Figure 1 reports the frequency with which the cases were resolved in different states, including both state courts and federal courts.

[45] Knights v. Publix Super Mkts., Inc., No. 3:14-cv-0072 (M.D. Tenn. 2014).
[46] Albanese v. Portnoff Law Assocs., 301 F. Supp. 2d 389 (E.D. Pa. 2004).
[47] Kolinek v. Walgreen Co., No. 13 C 4806, 2014 WL 3056813 (N.D. Ill. July 7, 2014).
[48] NERA Economic Consulting, *supra* note 34, at 5.

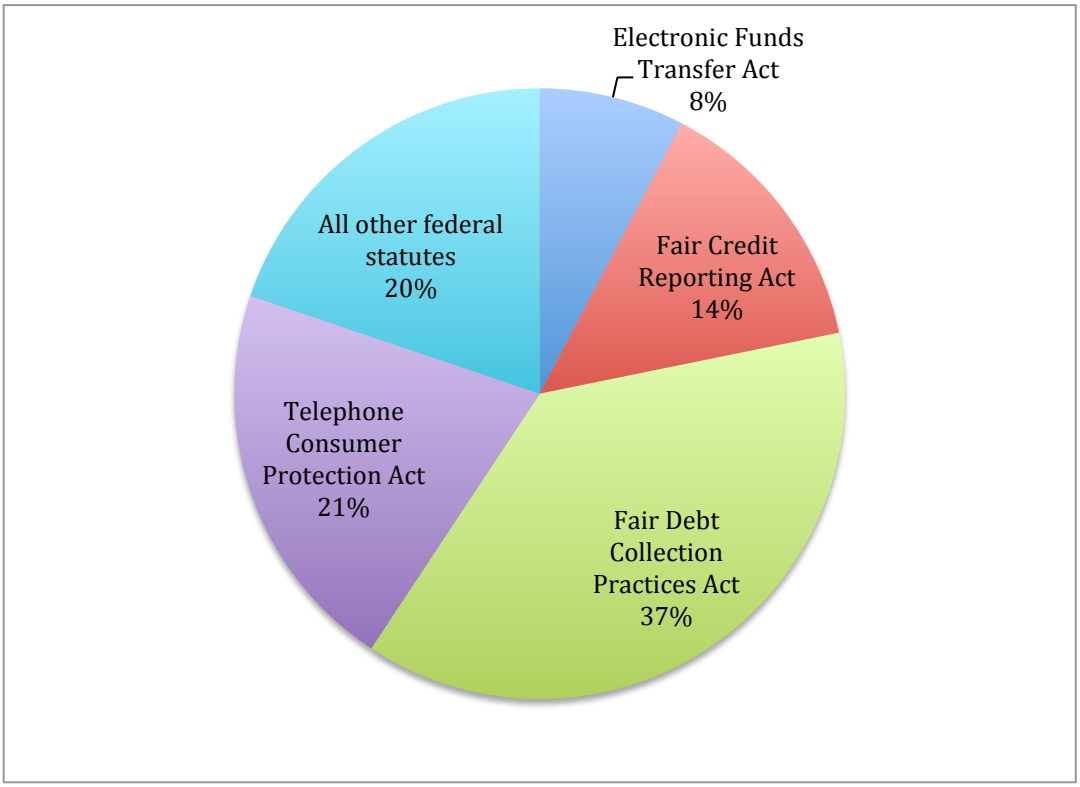
Figure 1: Location of Resolved Cases



In the data, 155 cases involve claims brought under state statutes. Claims brought under state laws in California and New Jersey account for almost two-thirds of the state law claims.[49] In 296 of the cases, claims were brought under a federal statute. Figure 2 reports the most common federal statutes under which claims in the sample data are brought.

[49] Note that the state law claims are not necessarily related to the location of resolved claims that is reported in Figure 1; some states, such as Illinois, may have experienced more resolved cases even though claims were not brought under that state's laws.

Figure 2: Most Common Federal Statutes giving rise to Claims in the Sample Data



Of the 432 cases, only 2.5% of the cases were resolved at trial. This low trial rate is consistent with other studies of class actions[50] and is likely the result of the significant risk defendants face at trial as well as class counsels' focus on fee recoveries as opposed to maximizing returns for clients. Claim aggregation in certain class actions, especially those with statutorily imposed damages like the TCPA,[51] exposes defendants to potentially ruinous judgments at trial, putting enormous pressure on defendants to settle cases.

[50] Carlton Fields Jorden Burt, *supra* note 38, at 23.

[51] Statutory damages under the Telephone Consumer Protection Act are $500 per text, call, or fax. 47 U.S. Code § 227. Thus, a mass marketing campaign conducted by text messaging can easily expose a defendant to hundreds of millions of dollars in damages.

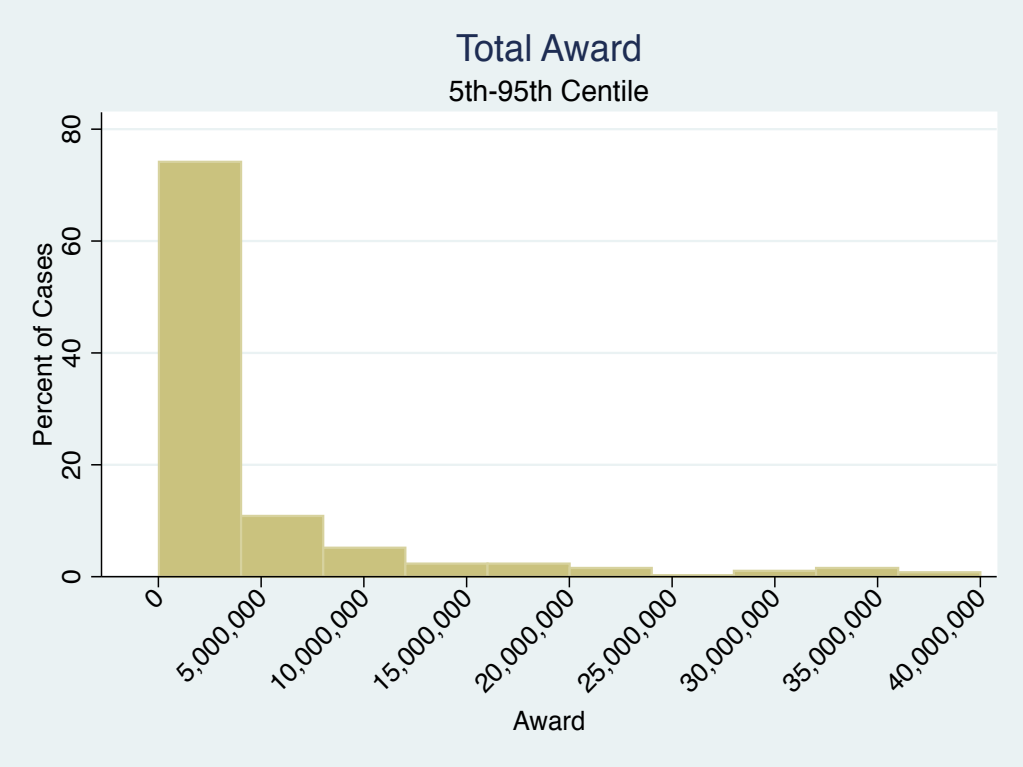
IV. Empirical Analysis of Settlement and Award Allocation

A. Total Awards and Settlements

In the sample data, the aggregate monetary value of the settlements and awards for the 432 no-injury cases was approximately $4 billion.[52] Estimated monetary awards ranged from $2,200 to $580 million; the average was $9.37 million and the median was over $960,000. That is, the defendant in the average no-injury case in the sample data paid over $9 million to the class, attorneys, and other fees.

However, the size of the monetary awards varied substantially. Many cases were resolved for less than $5 million, and only 10 percent of the cases had total awards greater than $20 million. Figure 3 shows the distribution of total awards between the 5th and 95th percentiles to discount any outlier awards.

Figure 3. Distribution of Total Awards in the Sample Data

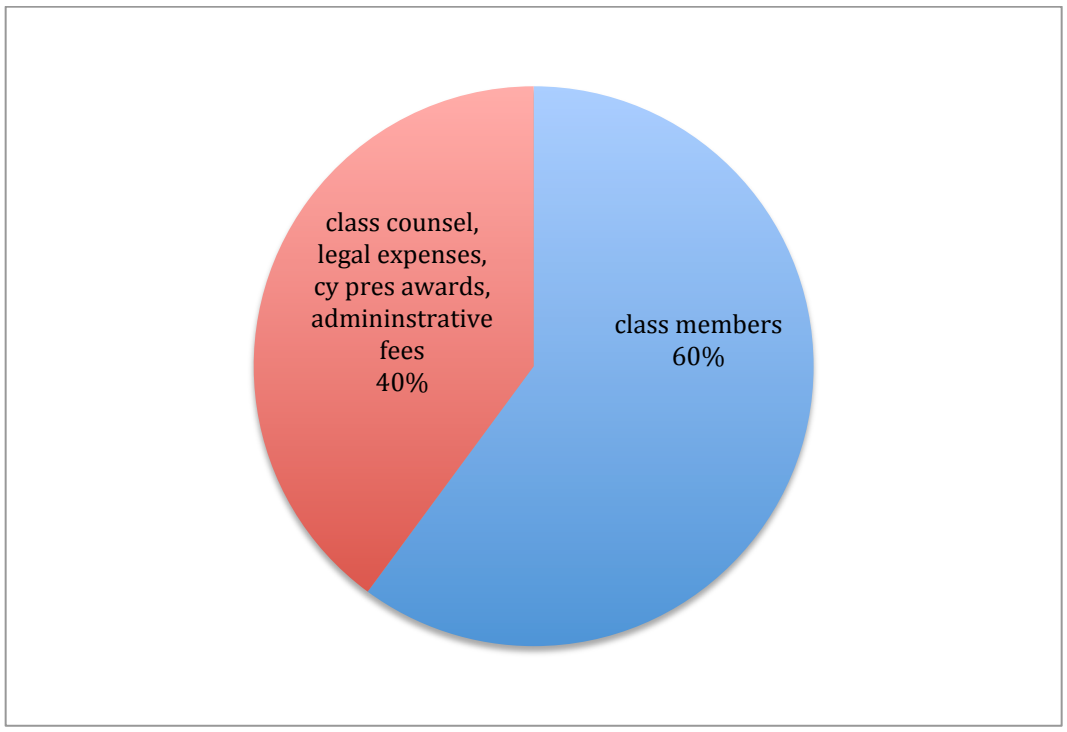


[52] Nonmonetary compensation that was not quantified or estimated in the legal documents was generally not included in the values of the total award.

B. Allocation to Class Members

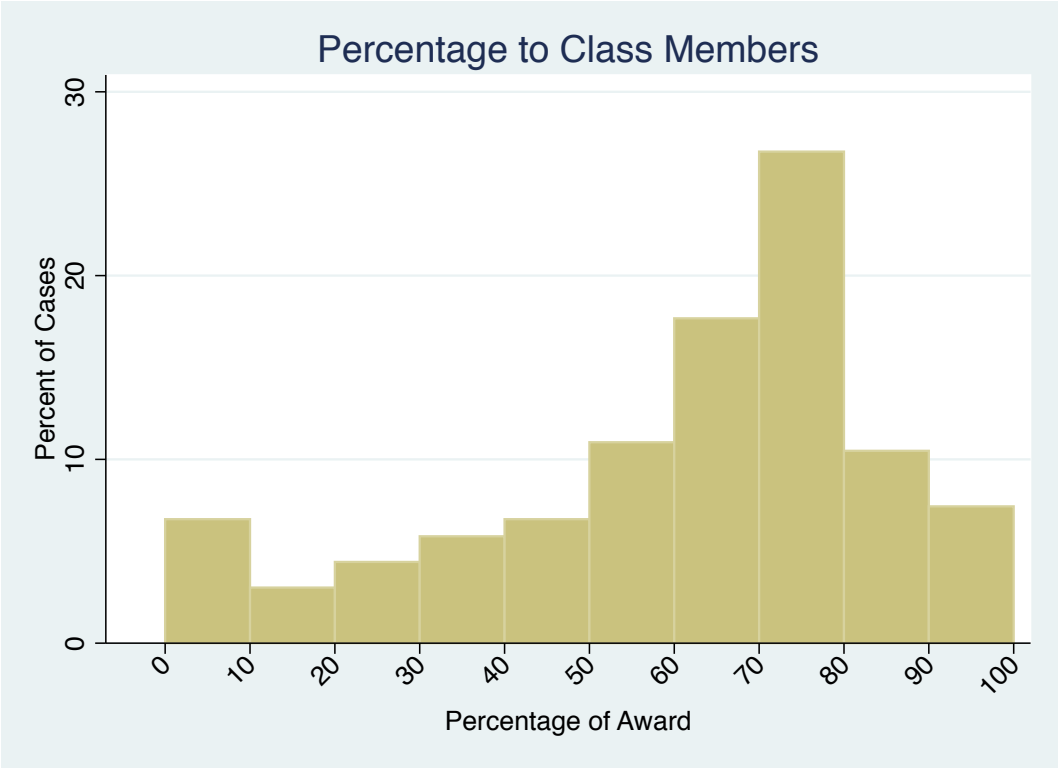
In each case the total award was allocated to various combinations of class members, class representatives, attorneys' fees to class counsel, cy pres funds, other legal expenses, and the costs of administering the settlement fund. On average, as reported in Figure 4, the plaintiffs' class was allocated only 60 percent of the total monetary award paid by the defendants; the median allocation was 67 percent.

Figure 4: Average Allocation to Class Members, Attorneys, Cy Pres Funds, Legal Expenses, and Administrative Costs



However, this percentage varies substantially across cases based on numerous factors, including the type of case, class size, and type of award. In some cases where the only compensation to the class is nonmonetary and not quantifiable, the class received none of the monetary payment by the defendant. In other cases where a very large award was paid to the class and attorneys' fees were severely restricted, the class members received the overwhelming majority of the defendant's payment. Figure 5 displays the distribution of the class members' allocation across all 432 cases.

Figure 5: Distribution of Percentage to Class Members Across All Cases



The allocation to class members also varies by the type of claims. Figure 5 shows the percentage of the total award available to class members' for various federal statutes.

Table 1: Allocation of Total Award to Class Members, by Federal Statute

	Percentage to Class Members	Percentage to Class Counsel Attorneys' Fees, Other Legal Expenses, Cy Pres Fund, or Administrative Costs
Fair Debt Collection Practices Act (112 cases)	51.8	48.2
Telephone Consumers Protection Act (63 cases)	70.1	29.9
Fair Credit Reporting Act (42 cases)	55.4	44.6
Electronic Funds Transfer (23 cases)	62.4	37.6

However, the funds available to class members at the time of settlement may significantly overstate the actual amount class members ultimately receive. The majority of class actions, especially class actions involving consumers, require class members to submit a claim form to receive compensation. Class members receive compensation only if they affirmatively make a claim in response to a class settlement notice and can prove they are entitled to recovery. Many class members do not pursue the claims, deciding that the modest award is not worth their time or that corroborating their entitlement is too burdensome. At the end of the claim period, the settlement fund may be divided between the class members that did make a claim. Alternatively, the class members may get a fixed amount and any leftover funds will be directed to a cy pres fund or, in some instances, returned to the defendant.

The actual amount disbursed to class members is rarely revealed. The information is not publicly available; defendants and defense lawyers do not want to reveal that only a small portion of the class actually received compensation; plaintiffs' attorneys do not want to reveal how sizable their fees are in comparison to the actual amount recovered by plaintiffs; and claims administrators are typically bound by a confidentiality agreement to keep the information private.

Nevertheless, some empirical research has attempted to estimate the claims rates in class actions. The RAND study of insurance class actions

found that in the 29 cases for which they could compute a claims rate, the median claims rate was 15 percent.[53] The Mayer Brown study of consumer and employee class actions found that in 5 of the 6 cases for which they could compute a claims rate, the claims rate was less than 12 percent.[54] Similarly, a federal court has observed that "'claims made' settlements regularly yield response rates of 10 percent or less."[55] In perhaps the most compelling piece of recent evidence, a declaration submitted in federal court by an executive with a leading administrator of consumer class actions reports that most class actions have a median claims rate of only 0.023 percent.[56]

Claims rates in no-injury cases are likely as low if not lower than these estimates. Extremely modest awards to class members that are often only coupons or discounts rarely justify the effort of submitting a claim. Nevertheless, even if we assume that the claims rates reach 15 percent—the highest claims rate in the aforementioned studies—the actual disbursement to the class is likely to be considerably less than the fees paid to counsel.

C. Allocation to Cy Pres Funds, Class Counsel, and Class Representatives

Oftentimes, when the compensation per plaintiff is expected to be miniscule, defendants pay a large chunk of the award into a cy pres fund instead of making it available to plaintiffs. A cy pres fund is typically a nonprofit charitable organization or similar entity that supposedly has some relationship with the claims at issue in the case. However, cy pres awards have also come under attack as serving primarily to inflate attorneys' fee awards.[57] Even though the cy pres funds may have little relationship to class members, they are claimed to provide a benefit for the class, justifying an award of attorneys' fees to class counsel.

In the sample data, only 37 cases allocated a set award to a cy pres fund in the initial settlement agreement or trial verdict. In several other cases, cy pres funds likely received the unclaimed portion of the settlement fund. In the 37 cases with a designated cy pres allocation, the average allocation was 21 percent of the total award. Figure 6 presents the distribution of the cy pres awards across the 37 cases.

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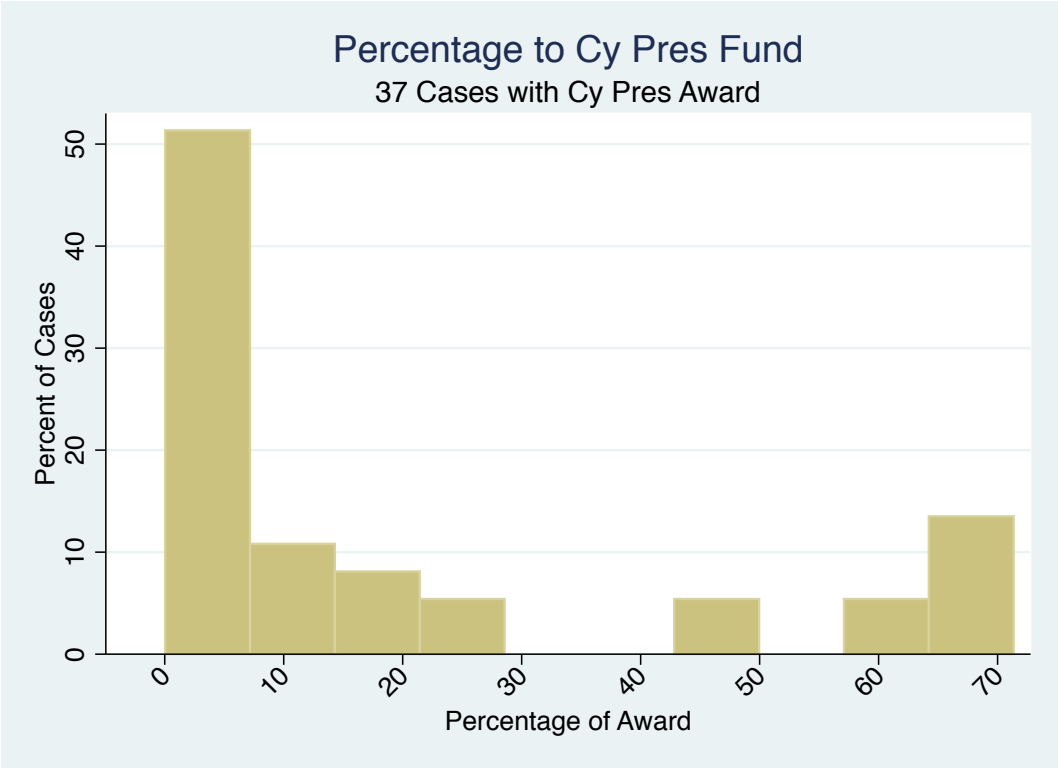
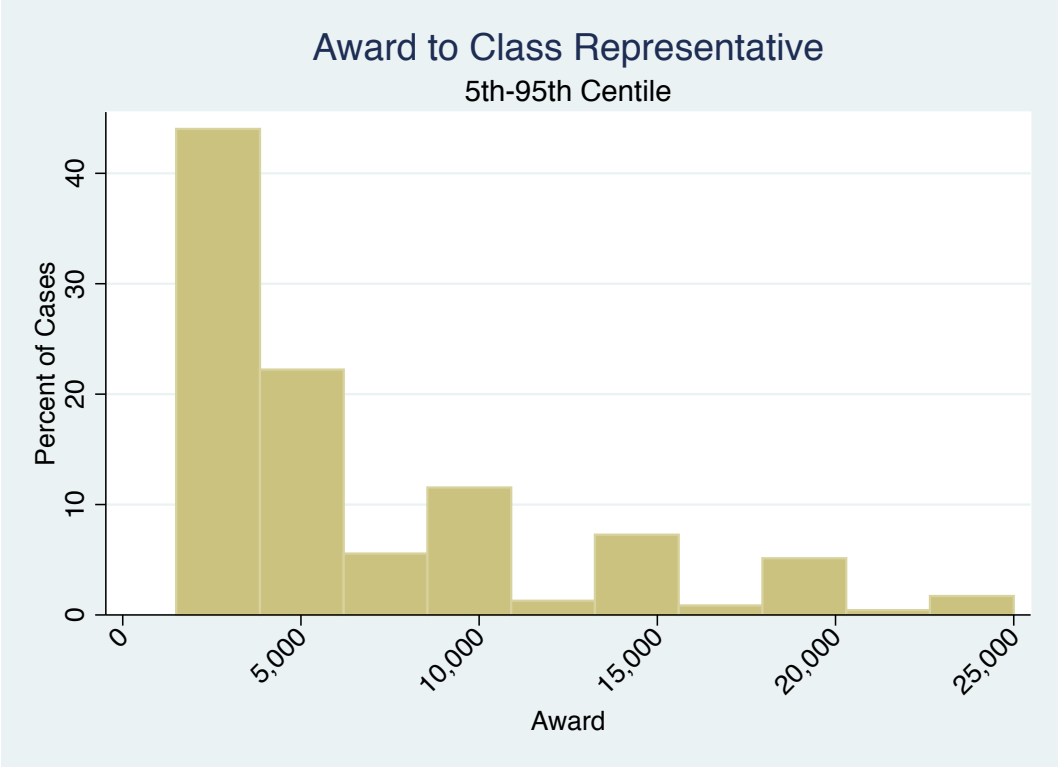
[53] Rand Institute for Civil Justice, *supra* note 9, at 55.
[54] Mayer Brown, LLP, *supra* note 27, at 10.
[55] Sylvester v. CIGNA Corp., 369 F. Supp. 2d 34, 52 (D. Me. 2005).
[56] Declaration of Deborah McComb Re Settlement Claims, Poertner v. Gillette, No. 6:12-CV-803-Orl-31DAB, 2014 WL 4162771 (M.D. Fla. Aug. 21, 2014), http://blogs.reuters.com/alison-frankel/files/2014/05/duracellclassaction-mccombdeclaration.pdf.
[57] Mayer Brown, LLP, *supra* note 27, at 13.

Figure 6: Distribution of Designated Cy Pres Awards



Class representatives are often given an incentive award for the time they expend initiating and monitoring the case, producing documents and other evidence, testifying at depositions or trial, and approving the settlement. Figure 7 presents the distribution of awards to class representatives for the 303 cases in which it was possible to determine the incentive award. The average incentive award in the cases was $8,620 and the median was $3,000.

Figure 7: Distribution of Awards to Class Representatives

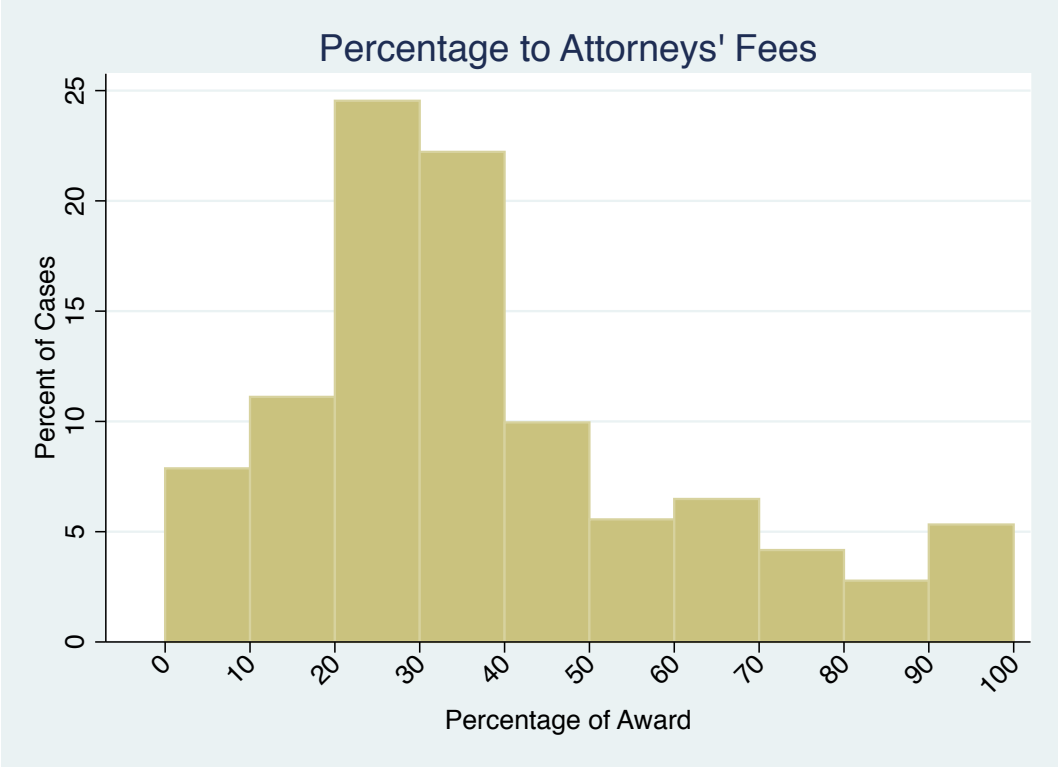


In every class action settlement or judgment, fees to class counsel must be approved by a judge. Judges typically use their authority under Rule 23 and the Class Action Fairness Act to determine what level of attorneys' fees would be "reasonable" in each case.[58] This is especially problematic in claims-made settlements, as reasonable attorneys fees may depend on how much compensation is paid to plaintiffs. Although courts use different methods, they frequently award plaintiffs' attorneys a percentage of the purported value of the settlement.

Figure 8 reports the distribution of the percentage allocated to attorneys' fees across all cases. In cases where a large portion of the compensation is nonmonetary or injunctive, attorneys receive a significant portion of the monetary award. In contrast, they may be allocated a lower percentage when the class size is significant or when courts using the lodestar approach determine that only a relatively small fee to attorneys is reasonable. The average percentage to class counsel in the 432 cases is 37.9 percent and the median is 30.9 percent.

[58] Fed. R. Civ. P. 23(h); 28 U.S.C. § 1712(a) (2005).

Figure 8: Distribution of Allocation to Class Counsel's Fees

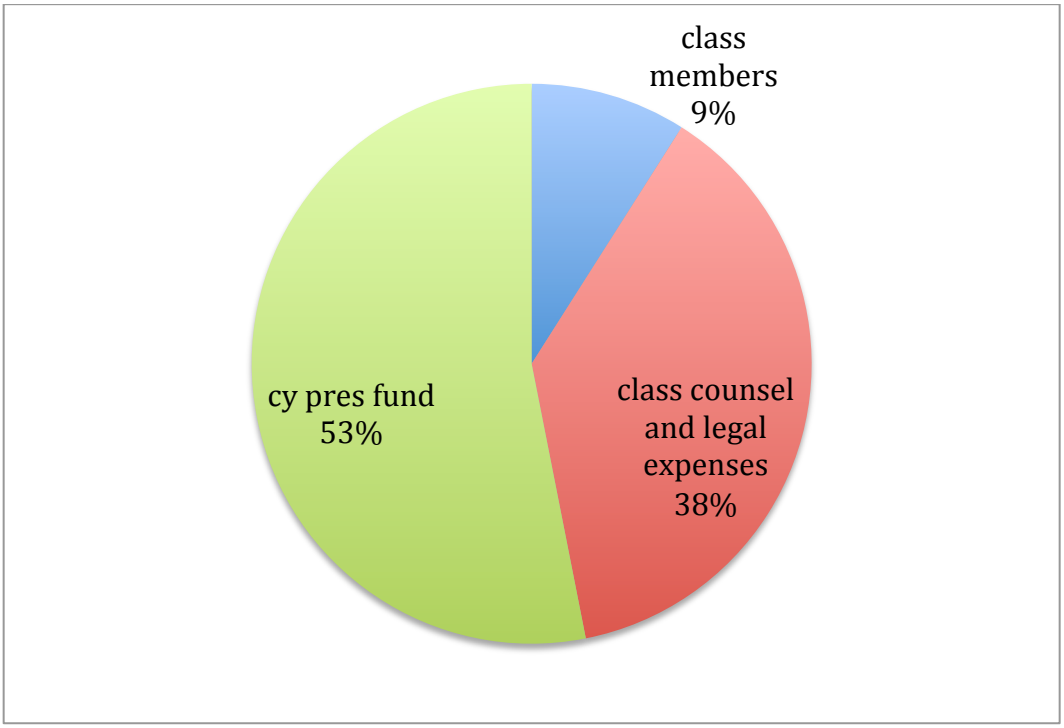


In some cases, the attorneys' fee percentage provides a basis of comparing the relative allocations to attorneys and plaintiffs. However, in many cases it overstates the relative benefits distributed to each group. As previously discussed, many claims-made settlements with a fixed compensation per class member disperse the unclaimed portion of the settlement fund to a cy pres fund. As a result, the actual distribution to attorneys and plaintiffs may look very different than the relative funds available to each.

Although determining the claims rate is extremely difficult, numerous souces suggest it is almost always less than 15 percent, and oftentimes less than one percent. In our sample data, the average settlement value is $9.37 million and the average percentage available to class members is 60 percent, or $5.6 million. However, if class members regularly claim less 15 percent of these available funds, they would claim less than an estimated $844,000, or only 9 percent of the average settlement of $9.37 million. That is, although 60 percent of the total award may be available to class members, in reality, they typically receive less than 9 percent of the total. Moreover, in many

cases the claims rate is less than one percent, in which case the plaintiffs claim less than $56,000. In comparison, class counsel receives an average of 37.9 percent of available funds, over 4 times the funds distributed to the class. Figure 9 reports the disproportionate distribution to attorneys, class members, and cy pres funds when plaintiffs claim 15 percent of the available funds—a claims rate that is likely much higher than the actual rate in many cases.

Figure 9: Estimated Actual Distributions in many Claims-Made Settlements



Thus, the average allocation available to class members in the no-injury class actions is 60 percent of the total award, but in many cases, the class members actually receive less than 9 percent. While even a 40 percent contingency fee is on the high end of the contingency fee spectrum, a result in which plaintiffs recover less than 10 percent of the award, with the rest going to lawyers or unrelated groups, clearly does not achieve the compensatory goals of class actions. Instead, as I explain in the next section, these cases impose costs on businesses that are ultimately passed on to consumers in the form of higher prices.

IV. Discussion: No-Injury Class Actions Harm Businesses and Consumers

Economic theory predicts that many no-injury class actions are of dubious social value and end up harming the very consumers they are meant to help. Both no-injury class action litigation and the threat of no-injury claims impose significant costs on businesses. Protracted adversarial litigation imposes significant costs on defendant businesses that must foot the costs of defending against, settling, and paying these claims. Even the possibility of a no-injury class action claim forces businesses to incur litigation expenses to determine the scope of the law and acceptable behavior. Moreover, the *in terrorem* effect of class action lawsuits triggers defendants' risk-aversion and motivates them to settle claims for more than their expected value, often inducing a quick but expensive settlement. [59]

The litigation expenses, attorneys' fees, and settlement costs are initially borne by businesses. However, they are soon passed on to consumers through increased prices, fewer innovations, and lower product quality. Indeed, several empirical papers confirm that businesses pass on litigation expenses to consumers across many different industries.[60]

Most consumers will receive little benefit in exchange for the higher prices, reduced innovation, and lower product quality. Many of the no-injury claims concern business practices that cause little concrete consumer harm. As a result, forcing compensation or deterrence through litigation produces little, if any, tangible benefit to consumers.

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[59] Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1370 (2003).

[60] SEARLE CIVIL JUSTICE INST., STATE CONSUMER PROTECTION ACTS AND COSTS TO CONSUMERS: THE IMPACT OF STATE CONSUMER ACTS ON AUTOMOBILE INSURANCE PREMIUMS (Preliminary Report) 4 (2011), http://www.masonlec.org/site/rte_uploads/files/CPA-Costs-Body-Sept-2011.pdf. *See* Henry N. Butler & Jason S. Johnston, *Consumer Harm Acts? An Economic Analysis of Private Actions Under State Consumer Protection Acts* 65 (Nw. Univ. Sch. of Law Faculty Working Paper No. 184, 2009) (suggesting through an empirical analysis of case law brought under State CPAs that the State CPAs are actually harming consumers and decreasing consumer welfare), http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/184/; Richard L. Manning, *Is the Insurance Aspect of Producer Liability Valued by Consumers? Liability Changes and Childhood Vaccine Consumption,* 13 J. RISK & UNCERTAINTY 37 (1996); Richard L. Manning, *Changing Rules in Tort Law and the Market for Childhood Vaccines*, 37 J. L. & ECON. 247 (1994); Robert Martin, *General Aviation Manufacturing: An Industry Under Siege*, in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 478-99 (Peter W. Huber & Robert E. Litan eds., 1991);

Furthermore, regardless of the harm imposed on consumers by the business practice, many no-injury class actions produce little compensation for class members. Individual compensation all too often amounts to more than a few dollars or a coupon. Moreover, few eligible class members—less than one percent in many cases—actually pursue claims to receive the modest compensation. In these cases, the true beneficiaries of no-injury class actions are the lawyers.

Thus, the costs of no-injury class actions—increased business litigation costs, higher consumer prices, and fewer product innovations—are established by data and economic theory. In contrast, the benefits of many marginal no-injury cases are few or nonexistent. As a result, much of the no-injury class action litigation harms consumers instead of helping them as intended.[61]