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AN EMPIRICAL LOOK AT COMPENSATION IN CONSUMER CLASS ACTIONS

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Consumer class actions are under broad attack for providing little in compensation to class members. One response to this charge is the argument that one of us has made elsewhere: consumer class actions should not be measured by their compensatory value, but by their deterrence value. But here we take up this critique of consumer class actions on its own terms: can they serve a meaningful compensatory role? Scholars have taken up this question before, but they have been stymied by the lack of available data. In this Article, we present original data on the distribution of class action settlements in fifteen related small-stakes consumer class action lawsuits against some of the largest banks in the United States. We obviously can make no claim that these settlements are representative of most consumer class actions. Nonetheless, we believe our findings support the notion that, under certain circumstances, consumer class actions can indeed serve a meaningful compensatory role: when they eschew claim forms in favor of automatic distributions, and when they rely on standard-sized checks (rather than the cheaper, postcard-sized variety) and especially direct deposits to make those distributions. We believe these circumstances will only grow in the future as the "big data" revolution continues to unfold and electronic banking continues to evolve.

 Professor of Law, Vanderbilt University Law School. We are grateful to the participants at the Center on Civil Justice at New York University School of Law's 2014 Fall Conference on *The Future of Class Action Litigation: A View from the Consumer Class* for helpful comments regarding the data we set forth in this Article. We also thank Dylan Jacobs for research assistance. Professor Fitzpatrick served as an expert in many of the settlements discussed in this Article. All opinions and errors are my own.

 Mr. Gilbert has served as Plaintiffs' Coordinating Counsel in the multidistrict litigation proceeding discussed in this Article. All opinions and errors are my own.

INTRODUCTION

Consumer class actions are under broad attack in the United States.[1] The principal charge against them is that they provide little compensation to class members, yet provide outsized compensation to the lawyers who bring them.[2] One response to this charge is the argument that one of us has made elsewhere: consumer class actions should not be measured by their compensatory value, but by their deterrence value.[3] But

1. *See, e.g.*, Letter from David Hirschmann, President and CEO of U.S. Chamber of Commerce, and Lisa A. Rickard, President of U.S. Chamber Inst. for Legal Reform, to Monica Jackson, Office of the Exec. Sec'y of U.S. Consumer Fin. Protection Bureau (Dec. 11, 2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/2013_12.11_CFPB_-_arbitration_cover_letter.pdf ("The claim that . . . class actions provide benefits to consumers . . . is not supported by the reality of class actions outcomes."). *See generally* Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731 (2013) ("The class action device, once considered a 'revolutionary' vehicle for achieving mass justice, has fallen into disfavor."); Linda Mullenix, *Ending Class Actions As We Know Them*, 64 EMORY L.J. 399 (2014).

2. *See, e.g.*, Letter from David Hirschmann and Lisa A. Rickard, *supra* note 1, at 5; Mullenix, *supra* note 1, at 419 ("[T]here is scant evidence upon which to conclude that class action litigation and settlement actually accomplishes the stated goal of compensating victims of wrongdoing."); John H. Beisner et al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1445 (2005) ("[O]ne of the most heavily criticized class action abuses has been the use of class action settlements to generate huge fees for lawyers and little or nothing for the allegedly injured consumers."); Third Circuit Task Force on Selection of Class Counsel, *Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 689, 692 (2001) ("[T]here is a perception among a significant part of the non-lawyer population and even among lawyers and judges that . . . class action plaintiffs' lawyers are overcompensated for the work that they do.").

3. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2047–69 (2010) [hereinafter Fitzpatrick, *Do Class Action Lawyers Make Too Little?*] ("[S]mall-stakes class actions serve no [useful com-

here we take up this critique of consumer class actions on its own terms: can they serve a meaningful compensatory role?

Scholars have taken up this question before, but they have been stymied by the lack of available data.[4] There are numerous empirical studies of class actions—including one authored by one of us[5]—and there is now considerable available data on the "face value" of class action settlements.[6] Scholars have found very little data, however, on how much of the "face value" actually finds its way into the hands of class members, how many class members receive it, and what portion of their damages class members recover. Consequently, scholars have not dedicated much time to what can be done to improve these issues.[7] Indeed, to the extent there are prior studies on these questions, they tend to be of class action settlements that require class members to file claim forms to receive payments and they tend to begin and end their analyses with the number of class members who are sent payments after filing such forms (what we call the "claiming rate"). Scholars have not studied what happens to the payments after class members receive them, nor have they studied in any detail so-called "automatic" settlements that distribute payments to class members without requiring any action on their part. If we care about delivering compensation to class members not only in theory, but in fact, then these other matters beg for examination, too.

In this Article, we try to begin filling some of these gaps in the literature. We present original data on the distribution of class action settlements in fifteen related, small-stakes consumer class action lawsuits against some of the largest banks in the United States. Thirteen of these lawsuits were consolidated pursuant to the multidistrict litigation (MDL) statute before one federal district court; two of them remained outside the

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pensatory] function. Rather, the only [useful] function they serve is deterrence.").

4. *See, e.g.*, Mullenix, *supra* note 1, at 419 ("[T]here are no empirical studies that have drilled down to ascertain what class claimants actually are paid individually for their claims as a result of the class litigation.").

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

6. *See, e.g.*, *id.*

7. *See infra* Part I.

MDL and before other federal district courts. We summarize our findings from this data here:

Between 1% and 70% of class members actually realized compensation in these settlements. We mean by this that class members had money deposited in their accounts or negotiated checks that were sent to them from the settlements. We call this the "compensation rate." The average payout ranged from $13 to $90, representing between 6% and 69% of average class member damages (even after deducting attorneys' fees). We call these latter percentages the "recovery rates." The recovery rates were largely dependent on the underlying strength of the class's claims.

The settlements with the highest compensation rates largely did not require class members to file claim forms. The parties were often able to use account information from the defendants to automatically calculate each class member's share of the settlement and deposit it into an existing bank account or mail a check to the class member once the case settled. In the two settlements with the lowest compensation rates, all class members were required to file claim forms to receive any compensation, and there was no automatic deposit into class members' accounts.

Even in the automatically distributed settlements, however, a significant portion of class members did not actually realize the compensation provided because they did not timely negotiate the checks they received. Class members in the automatic settlements negotiated checks at rates ranging from 37% to 75%. We call this the "check negotiation rate." By contrast, class members in claim-form settlements negotiated their checks at very high rates, above 90%.

The automatic settlements with the highest check negotiation rates sent standard-sized checks to class members rather than less expensive, postcard-sized checks. Moreover, a significant share of class members negotiated even the smallest denomination checks—those for less than $5. Even among the automatic settlements where class members received postcard-sized checks, more than 20% of class members negotiated checks for the smallest amounts. In the two claim-form settlements, the smallest checks were negotiated as often as 80% of the time.

As we will explain in detail, we believe these findings can inform many contemporary debates over consumer class actions. We briefly summarize our conclusions here:

First, we believe our findings show that, if we wish the consumer class action to serve a compensatory function—and, again, one of us does not think it needs to[8]—it is possible in at least some cases for it to do so. Although the critics of consumer class actions have not set forth their definition of compensatory success, we think a fair starting point is this one: to deliver to a significant portion of the class compensation commensurate with the strength their claims. In accordance with this definition, the majority of the settlements we study in this paper were successful.

Second, in light of the success of automatic distributions, courts and counsel interested in the compensatory side of class actions should make bolder efforts to find and preserve data on class members from the case's outset. Although the ALI and other commentators have also recently encouraged this,[9] we believe that there are more opportunities to effectuate these recommendations than even these commentators may have realized. For example, we find that even automatically sending class members payments may not be good enough because many class members do not negotiate unsolicited checks they receive in the mail. For this reason, we think courts and counsel interested in the compensatory side of class actions should make efforts to directly deposit settlement payments whenever possible. Although the opportunities to do so may be limited today, we believe they will only grow in the future as new forms of electronic banking are developed and as the so-called "big data" revolution continues to unfold. If we are correct about this, it suggests that the compensatory value of consumer class actions will be brighter in the future than in the past.

Finally, courts and class counsel should be mindful of appearances if they wish to maximize the compensatory side of consumer class actions: to the extent they must send checks, they should insist on standard-sized checks even if they might be slightly more expensive than postcard-sized checks. Moreo-

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8. *See* Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, *supra* note 3, at 2047–69.

9. *See infra* note 60.

ver, they should not be afraid to send checks of even the smallest denominations.

In Part I of this Article, we canvas the prior empirical literature on compensation in consumer class actions. In Part II, we describe the consumer class actions from which our data is drawn and set forth our data. In Part III, we analyze our data and assess the implications for compensation in consumer class actions. We end with our conclusions.

I.
The Prior Literature on Compensation in Consumer Class Actions

In 2008, Nicholas Pace and William Rubenstein set out to find data on how well class actions provided compensation to class members ("Pace-Rubenstein Study").[10] What they found was virtually nothing: "Our efforts demonstrate that it is very difficult, even for researchers with significant resources, to find distribution data in completed class action lawsuits."[11] Indeed, they devoted as much or more of their paper to calling for more transparency in class action settlement distributions as they did to describing and analyzing the data they found.[12] They urged courts to require class counsel and settlement administrators to make distribution data known.[13]

Things have not improved much over the last seven years.[14] As far as we are aware, there have been only two studies of compensation in class actions since the Pace-Rubenstein Study. Moreover, it appears that these studies—as well as the three that proceeded Pace-Rubenstein—have produced only a few handfuls of data points in small-stakes class actions like the consumer cases we study in this Article. Further, these studies

10. Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* (RAND Inst. for Civil Justice, Working Paper, July 2008) [hereinafter Pace-Rubenstein Study], *available at* billrubenstein.com/Downloads/RAND%20 Working%20Paper.pdf. We are extremely grateful to Bill Rubenstein for his thoughtful comments on earlier drafts of this paper.

11. *Id.* at 34.

12. *See id.* at 34–47.

13. *See id.*

14. *See* Mullenix, *supra* note 1, at 21 ("[T]here are no empirical studies that have drilled down to ascertain what class claimants actually are paid individually for their claims as a result of the class litigation.").

appear to have been mostly preoccupied with how often class members receive payments after filing claim forms; they do not often report findings on what happens after the payments are mailed, and they have not studied in any detail settlements that were distributed automatically and without any claim forms at all. In other words, in our view, the prior studies have been concerned more with whether class actions deliver compensation to class members in theory than they have with whether class actions deliver it in fact. We will take a different approach in this Article, and focus on whether class members actually realized compensation. Nonetheless, we summarize the prior literature and organize it as best we can below.

The earliest study on compensation in class actions of which we are aware was a 1986 article by Fred Gramlich, then an economist at the Department of Justice ("Gramlich Study").[15] He studied twenty antitrust settlements where class members had been paid with coupons; it appears he selected these settlements because they comprised all of the antitrust coupon settlements of which he was aware.[16] He surveyed the settlement administrators and the parties to ask them how frequently class members redeemed the coupons.[17] He was able to collect data in twelve cases, but the only data useful here was reported in the aggregate. He found an average redemption rate of 26.3%, and, although he did not report the denominations of the coupons, he noted that in ten cases the plaintiffs were consumers; he reported the average redemption rate in these settlements was 13.1%.[18] He did not report whether or not the settlements were automatically distributed, or how the coupons compared to the class's damages (i.e., what we define as the recovery rate).

The next study was a 1999 book by Deborah Hensler and others for the RAND Institute ("Hensler Study").[19] Professor Hensler and her co-authors performed case studies of ten class action settlements and found compensatory data useful here

15. *See* Fred Gramlich, *Scrip Damages in Antitrust Cases*, 31 ANTITRUST BULL. 261 (1986).

16. *See id.* at 262–64.

17. *Id.*

18. *Id.* at 274.

19. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 21 (RAND Inst. for Civil Justice 1999), *available at* http://www.rand.org/pubs/monograph_reports/MR969.html.

on six of them. The ten settlements were selected based on neutral, but idiosyncratic, criteria.[20] Most of the settlements awarded class members large payouts, but two of them were small-stakes settlements of the sort we are studying in this Article. The authors reported that in these two settlements 35% (of 4 million class members; average payout $5) and over 90% (of 60,000 class members; average payout $134) of the classes received compensation.[21] Although it is not entirely clear whether they meant by those figures the number of class members who were merely sent payments or the number of class members who actually realized compensation, our belief is that they meant the latter, which comports with our definition of "compensation rate." Both of these settlements were distributed, at least in part, through automatic distributions and without claim forms.[22] The authors did not report any information on check negotiation rates or recovery rates.

The other study that predated the Pace-Rubenstein Study is one that Nicholas Pace and others did in 2007, also for RAND ("Pace Study").[23] The Pace Study surveyed major insurance companies and asked them about the class action lawsuits they had defended in recent years.[24] One part of the study reported on the distribution of the monies from settlements in twenty-nine of these lawsuits.[25] Like the Gramlich Study, the Pace Study reported the data useful here only in the aggregate: in ten cases, 100% of the estimated class members received compensation; over the entire sample of twenty-nine cases, the average was 45% and the median was 15%.[26] Again, however, many of these settlements involved more money than the typical consumer case: the average class member payout in these cases was $4,000 and the median payout was $411.[27] Moreover, it is not clear again whether the figures reported

20. *See id.* at 12–13, 138–39.

21. *See id.* at 184, 204–05, 281, 310, 336, 359, 549–50.

22. In the settlement where only 35% of class members received compensation, payment was automatic for current and recent customers of the defendant. *Id.* at 276. Others were required to file claim forms. *Id.*

23. NICHOLAS M. PACE ET AL., INSURANCE CLASS ACTIONS IN THE UNITED STATES (RAND Inst. for Civil Justice 2007), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG587-1.pdf.

24. *Id.* at 55.

25. *Id.*

26. *Id.*

27. *Id.*

represented the number of class members who were merely sent payments or the number who actually realized compensation. The author likewise did not provide any information on how these payouts fared relative to class member damages (i.e., what we call the "recovery rate") and whether the distributions were automatic or used claim forms. Indeed, since the data was aggregated and not limited to consumer or small-stakes class actions, it is hard for us to make further use of it here.

The Pace-Rubenstein Study the following year took a somewhat randomized sample of thirty-one class action settlements in federal court and sought to find data on their distributions from the federal judiciary's electronic docket.[28] The authors were able to find this data in only six of the thirty-one cases.[29] In four of the cases, the settlement was distributed automatically, with compensation rates (their figures here appear to comport with our definition) ranging from 65% (of 7,400 class members; average payout $35) to 99.5% (of 200 class members; average payout $2,000).[30] In the two non-automatic distributions, the percentage of class members who received payments ranged from 20% (of 3,500 class members; average payout $1,000) and 4% (of 1 million class members; payout of software worth $20).[31] They did not report data on recovery rates or check negotiation rates.

Not satisfied with six data points, Pace and Rubenstein also surveyed the litigants in fifty-seven federal and state settlements they found on the websites of major settlement administration companies.[32] In nine cases, they received data on claiming rates: there were two settlements with rates below 1%, one between 1% and 5%, three between 20% and 40%, one at 35% (with roughly 1 million class members), one at 65% (with 431 class members and an average payout of $5,000), and one at 82% (with 350 class members and an average payout of $2,600).[33] We do not know how many class members actually realized compensation by negotiating the payments they received in these settlements. Moreover, there was no reporting

28. Pace-Rubenstein Study, *supra* note 10.
29. *Id.* at 23.
30. *Id.*
31. *Id.* at 24.
32. *Id.* at 30.
33. *Id.* at 32.

on how these average claim sizes translated into recovery rates. There was also no reporting on whether or not the distributions were automatic. Many of the data points from both halves of the Pace-Rubenstein Study involved much larger payouts—where payouts were reported to begin with—than are at issue in the small-stakes class actions we are studying here, but at least two of them clearly did not, and we include these two data points in the chart organizing the prior literature, below.

Things have improved only slightly in the years since the Pace-Rubenstein Study. We are aware of only two more studies over the last seven years.[34] The first was done two years go by the Mayer Brown law firm in Washington, D.C., at the behest of the United States Chamber of Commerce as part of the Chamber's advocacy against consumer class actions ("Mayer Brown Study").[35] In light of the duty of law firms to zealously represent their clients' viewpoints, we do not put the same stock in the Mayer Brown Study as we do in the other studies we discuss here. Nonetheless, the Study collected data using neutral criteria and we have no reason to believe that the data was reported in a biased manner.[36] It should be noted, however, that the claiming rates found in the Mayer Brown Study are much, much lower than the rates in other studies.

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34. Settlement administration firms have published promotional materials or given interviews that report broad ranges over which they might expect class members to file claims. *See* Tiffany Allen, *Anticipating Claims Filing Rates in Class Action Settlements*, 3 CLASS ACTION PERSPECTIVES 1, 1–4 (2008), *available at* http://www.rustconsulting.com/Portals/0/pdf/Monograph_ClaimsFilingRates.pdf (reporting ranges of 2–20% in consumer cases, 20–35% in securities cases, and 20–85% in employment cases); CFPB, ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), §§ 8.3.0–3.1 (2015) [hereinafter CFPB 2015 STUDY], *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (reporting range of 5–50% in consumer cases). These reports are too vague for our purposes here.

35. *See* MAYER BROWN LLP, DO CLASS ACTIONS BENEFIT CLASS MEMBERS? AN EMPIRICAL ANALYSIS OF CLASS ACTIONS (2013), *available at* http://blogs.reuters.com/alison-frankel/files/2013/12/mayerbrownclassactionstudy.pdf.

36. *Id.* An appendix to the Mayer Brown Study listed examples of other consumer settlements with "low participation rates." Because the cases in the appendix do not appear to have been collected pursuant to neutral criteria, we do not discuss them further here.

The Mayer Brown Study collected data on all federal court consumer class actions filed in 2009 and reported in two well-known reporters of class action litigation.[37] The authors identified 148 such putative class actions, forty of which ended in settlement.[38] Of these forty settlements, the authors found data on the claiming rate in six of them: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%, and 98.72%.[39] The authors did not report any information on how many of these class members negotiated any payments they received. Nor did the authors report any information on the average payout of these settlements except for the last one (which was the ERISA litigation resulting from the Madoff Ponzi scheme, with an average payout over $2.5 million[40]) or recovery rates.

The final study was done this year by the Consumer Financial Protection Bureau ("CFPB 2015 Study"), and it is the most comprehensive thus far.[41] The Bureau searched federal court docket sheets to identify all consumer class action settlements involving financial products between 2008 and 2012, and found 419 settlements.[42] The Bureau could find distribution data in only 105 of these settlements, however.[43] Some, but not all, of the settlements we describe later in this Article were included in the Bureau's study,[44] but, like the Mayer Brown Study, the CFPB 2015 Study reported only the rate at which class members filed claims: on average, 21% of the time (and only 8% in the median settlement).[45] Unlike the Mayer Brown Study, the data was reported only in the aggregate, and, although the Bureau reported information on how many of its settlements depended on claim forms and how many were distributed automatically,[46] it did not separate the data by

37. *Id.*

38. *Id.* The number of consumer settlements found by Mayer Brown closely agrees with the numbers I found in my empirical study. *See* Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, *supra* note 5, at 818 tbl. 1 (finding an average of 43.5 consumer settlements per year in federal court).

39. *Id.*

40. *Id.*

41. CFPB 2015 STUDY, *supra* note 34.

42. *Id.* at 8–11, § 8.

43. *Id.* at 5.

44. *Id.* at 39–46.

45. *See id.* at 5.

46. *See id.* at 18–20.

method of distribution. Moreover, the Bureau did not report check negotiation rates, the average payout sizes, or recovery rates.

As best we can tell, then, the literature includes a grand total of 124 data points on compensation in consumer or small-stakes class actions, and most of this data was reported in the aggregate and, therefore, is difficult to combine with other studies and to organize here. Moreover, few of these data points inform the matters that we wish to study in this Article. Nonetheless, we summarize what we know in Table 1, below (leaving cells blank for missing information).

TABLE 1: CONSUMER AND SMALL-STAKES COMPENSATION DATA, ALL PRIOR LITERATURE (1986–2015)

CLAIMING RATE (%)	CHECK NEGOTIATION RATE (%)	COMPENSATION RATE (%)	RECOVERY RATE (%)	AVERAGE PAYOUT	AUTOMATIC OR CLAIM FORMS	STUDY
.000006					Claim forms	MB
.33					Claim forms	MB
1.5					Claim forms	MB
		4		$20 software	Claim forms	PR
9.66					Claim forms	MB
12					Claim forms	MB
	13.1 (n = 10)			Coupons of unknown size		G
21 (n=105)					Both	CFPB
		35		$5.75	Mixed	H
		65		$35	Automatic	PR
		>90		$134	Automatic	H

Note: *"MB" is the Mayer Brown Study. "PR" is the Pace-Rubenstein Study. "G" is the Gramlich Study. "CFPB" is the CFPB 2015 Study. "H" is the Hensler Study.*

Needless to say, this existing data on consumer class actions is far from sufficient to make any conclusions about whether they can serve a compensatory function—the criticism of consumer class actions we cited above notwithstanding. Moreover, we agree with Pace and Rubenstein: given that there are *more than 300* class action settlements *every single year* in federal court *alone*,[47] it is indefensible that commentators have been able to unearth so little data over the last *thirty years*.

47. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, *supra* note 5, at 818 tbl. 1.

On this point, we note that one of us has joined with several scholars to propose an amendment to Rule 23 that would require the parties to report to courts data on the distribution of every class action settlement once it is completed.[48] This proposal is currently before the committee reexamining Rule 23.

II.
Our Data: The Overdraft Fee Class Actions

We wish here to do more than simply call for more data in the future. We wish to try to fill some of the gaps in the existing literature now. To do this, we report original data on fifteen related consumer class action settlements. Thirteen of our settlements come from Rule 23(b)(3) class actions in the In re *Checking Account Overdraft Litigation* multidistrict litigation ("MDL 2036"),[49] which was consolidated in 2009 before the United States District Court for the Southern District of Florida.[50] The other two settlements, also Rule 23(b)(3) classes, come from related federal lawsuits that were not made part of MDL 2036.[51] We chose these settlements because of our ability to gain access to this data. Of course, we can make no claim that these fifteen data points are any more representative of consumer class actions than the data points we identified in the prior literature.

These lawsuits were brought by customers against many of the largest banks in the United States. The plaintiffs alleged that the banks violated various state laws by posting debit card transactions to their accounts in a manner designed to maximize overdraft transactions (from the largest transaction to

48. *See* Letter from Brian Wolfman and Alexandra Lahav to Rule 23 Advisory Committee (Mar. 17, 2015) (on file with author).

49. Tomes et al. v. Bank of Am., N.A., No. 08–cv–23323 (S.D. Fla.); Case v. Bank of Oklahoma, N.A., No. 1:11-cv-20815 (S.D. Fla.); Larsen et al. v. Union Bank, N.A., No. 09-cv-23235 (S.D. Fla.); Dee v. Bank of the West, N.A., No. 10-cv-22985 (S.D. Fla.); Lopez v. JPMorgan Chase Bank, N.A., No. 09-cv-23127 (S.D. Fla.); Duval v. Citizens Fin. Grp., Inc., No. 10-cv-21080 (S.D. Fla.); Mosser v. TD Bank, N.A., No. 10-cv-21386 (S.D. Fla.); Wolfgeher v. Commerce Bank, N.A., No. 10-cv-22017 (S.D. Fla.); Casayuran et al. v. PNC Bank, N.A., No. 10-cv-20496 (S.D. Fla.); Anderson v. Compass Bank, No. 11-cv-20436 (S.D. Fla.); Harris v. Associated Bank, N.A. (S.D. Fla.); Blahut v. Harris Bank, N.A. (S.D. Fla.); Eno v. M&I Marshall & Ilsley Bank (S.D. Fla.).

50. 626 F. Supp. 2d 1333 (J.P.M.L. 2009).

51. Trombley v. Nat'l City Bank, F. Supp. 2d 179 (D.D.C. 2011); Schulte v. Fifth Third Bank, 805 F. Supp. 2d 500 (N.D. Ill. 2011).

the smallest transaction) and, consequently, to maximize overdraft fee revenues for the banks.[52] Class action lawsuits against twenty-eight banks were made part of MDL 2036, and settlements against eighteen of them have now been approved, generating more than $1 billion in settlement proceeds. The distributions for thirteen of the MDL 2036 settlements are now completed, and we report data here for these settlements. We also report data on two federal class action settlements against other banks for the same overdraft practices that were not made part of MDL 2036, but that used the same settlement administrators.

In thirteen of the fifteen settlements, distributions to the vast majority of class members were made automatically, using information the banks possessed and without the need to file claim forms. For current bank customers, the payments were usually distributed via direct account credits. For former bank customers, the payments were mailed via checks. Only when banks no longer possessed complete information did some class members in these settlements have to file claim forms—in which case they were mailed checks. If sufficient money was left over after the first distribution in these settlements—because some of the checks were not negotiated—a second and, in some cases a third, distribution has or will occur. In the other two settlements, no automatic distribution was attempted and class members could participate only if they filed claims forms. All the class members who filed valid claim forms in these two settlements were mailed checks; leftover money was sent to cy pres. In some of the fifteen settlements, the checks were standard-sized and in others the checks were less costly, postcard-sized instruments.[53]

The number of class members in these fifteen cases ranged in size from 28,000 to almost 14 million, with an average size of 2.1 million and a median of over 800,000. The set-

52. *See generally In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1338 (S.D. Fla. 2011).

53. Standard-sized checks were typically printed on three-fold letter-sized bond and enclosed in a standard-sized business envelope. Postcard-sized checks were typically printed on one side of a double postcard; the bond was heavier and enclosed with a perforated edge with the recipient's name and address printed on the exterior. The printing, postage and processing costs associated with standard-sized checks were approximately 30% higher than the costs associated with the postcard-sized checks.

tlement amounts ranged from $2.2 million to $410 million, with an average of $63 million and a median of $19 million. In none of the settlements did any of this money revert to the defendant banks. Rather, the vast majority of settlement proceeds were (or will be if second and third distributions are undertaken) distributed to class members on a pro rata basis in proportion to their losses. In most cases, 70% of the settlement proceeds were or will be distributed to class members; this represents everything other than attorneys' fees and expenses because the defendants usually agreed to pay the cost of notice and settlement administration on top of the settlement fund.[54] Even in the cases where notice and administrative costs came out of the settlement fund, however, a significant majority of the fund still was paid out to class members. We report detailed data about these settlements below.

A. *Compensation Rate*

As we noted at the outset, we are more interested here in whether consumer class actions in fact deliver compensation to class members than whether they do so in theory. As such, we are more interested in whether class members actually realized compensation than we are in whether they filed claim forms or were sent compensation pursuant to claim forms; we want to know whether they actually deposited any money. For this reason, we do not try to report claiming rates here (which are largely irrelevant for many of the automatic settlements in any event).

Instead, we report the following data in Table 2, below: (i) each of the fifteen settlements, (ii) the percentage of class members who actually realized compensation from the settlement in the first (or only) distribution (again, what we call the "compensation rate") either via direct deposit or negotiated check, (iii) the average payout per class member, (iv) whether the settlement was distributed automatically or relied on claim forms, and (v) whether those class members who were sent checks were sent standard-sized or postcard-sized instruments. All of the data in Table 2 comes from information that was publicly filed with the courts in these cases or from the settle-

54. Some of the settlements contained provisions entitling banks to reimbursement from leftover funds for costs they paid for notice and administration before second distributions were attempted.

ment administrators. We do not include here any payouts from any second or third distributions because most of those distributions are still ongoing, but it is important to note that the average payout in Table 2 may grow for the first set of thirteen settlements once those subsequent distributions are completed.

TABLE 2: COMPENSATION RATE, OVERDRAFT FEE CLASS ACTIONS (2011–PRESENT)

BANK (i)	COMPENSATION RATE (ii)	AVERAGE PAYOUT (iii)	AUTOMATIC OR CLAIM FORMS (iv)	STANDARD- OR POST-CARD-SIZED CHECK (v)
1	60.34%	$13.38	Mixed	Postcard
2	60.44%	$21.95	Automatic	Postcard
3	46.97%	$90.92	Automatic	Postcard
4	62.91%	$82.36	Mixed	Standard
5	64.30%	$59.13	Automatic	Standard
6	61.91%	$52.76	Mixed	Standard
7	37.27%	$17.01	Mixed	Postcard
8	64.75%	$66.49	Automatic	Standard
9	69.31%	$17.15	Automatic	Standard
10	70.48%	$40.49	Automatic	Standard
11	64.25%	$57.97	Automatic	Standard
12	42.83%	$49.99	Automatic	Standard
13	64.19%	$70.08	Automatic	Standard
14	1.76%	$68.04	Claim forms	Standard
15	7.39%	$41.83	Claim forms	Standard

Source: *MDL 2036 (S.D. Fla.); Epiq Systems; Rust Consulting.*

Table 2 shows that a significant majority of class members—and, again, these are large classes, often more than 1 million people—actually realized compensation from almost all of these settlements. The most notable exceptions were the two settlements (with Banks 14 and 15) that relied exclusively on claim forms. This is hardly surprising: it is much easier for class members to cash a check (or do nothing at all in the case of the direct deposits) than it is to fill out even the simplest claim form. But even in the automatically distributed settlements, a significant number of class members did not end up realizing compensation, sometimes as many as 60%. How can this be? As we show below, it is because class members do not always or even often negotiate unsolicited checks that are sent to them in the mail.

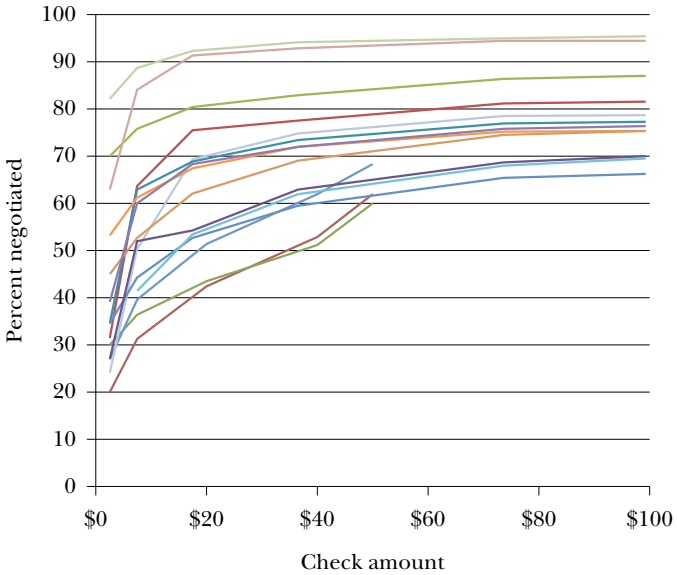
It should be noted that even among the settlements that were distributed (at least in part) automatically, the compensation rates are not consistent, ranging from 37% to 70%. What explains the variation? We think it is largely due to the type of unsolicited check that was sent to class members. As Table 2 shows, in settlements with Banks 1–3 and 7, the checks sent to class members were less costly, postcard-sized instruments. In the other settlements, class members received standard-sized checks. With one exception (settlement with Bank 12), the four postcard-sized settlements had the lowest compensation rates of the settlements distributed (at least in part) automatically. We believe postcard-sized checks may have suppressed compensation rates because class members may have been more likely to discard them as "junk mail," may have been skeptical that unsolicited postcard-sized checks were real, or because they may have been more likely to misplace postcard-sized checks following receipt.

B. *Check Negotiation Rate*

As we noted above, Table 2 shows that, although automatic distribution is more effective at delivering compensation than is requiring class members to file claim forms, it is far from perfect. The reason for this is because, as we alluded above, class members in large numbers do not negotiate unsolicited checks that are sent to them in the mail. Indeed, class members are much less likely to negotiate unsolicited checks they receive in the mail than they are to negotiate identical checks they receive in the mail after filling out a claim form. This can be seen from Figure 1, below, which graphs the rate at which class members negotiated checks that were mailed to them in each of the fifteen settlements as a function of the dollar amount of the check. (It should be noted that the settlement administrators reported the negotiation rates over a range of check denominations—such as checks under $5, checks between $5 and $10, etc.—and Figure 1 plots the midpoint of these ranges. It should also be noted that two different firms administered these settlements and they reported data over different ranges, which is why some curves are truncated earlier than others.) The top two curves in Figure 1 were the ones that relied upon claim forms, and, as is apparent, much higher percentages of class members in these settlements negotiated their checks. Why was this the case? We sus-

pect that some class members were skeptical of checks they received in the mail through no effort of their own, and did not negotiate them for fear of becoming part of a scam. Of course, this does not mean we should not use automatic distribution: as Table 2 shows, many more class members end up compensated when checks are sent to them automatically than when they must file claim forms first. Our point is simply that, even so, a significant number will still be missed. This is why in Part III we urge courts and counsel to turn to automatic direct deposits whenever possible.

FIGURE 1: CHECK NEGOTIATION RATE
OVERDRAFT FEE CLASS ACTIONS (2011–PRESENT)



Source: *Epiq Systems*; *Rust Consulting*.

Figure 1 also shows that the size of class members' payouts influenced negotiation rates: class members were more likely to negotiate larger denomination checks than smaller denomination ones. Again, this is hardly surprising.[55] But Figure 1 also allows us to answer whether our hypothesis about the ap-

55. *Cf.* CFPB 2015 STUDY, *supra* note 34, § 8, at 31 ("Most administrators felt that the dollar amount that an individual can receive influenced claim rates.").

pearance of the check—standard-sized or postcard-sized—remains true even after we control for check denomination. It does. The bottom four curves in Figure 1 are the four settlements that used postcard-sized checks, confirming that postcard-sized checks were negotiated less frequently than standard-sized checks.

We find one other facet of Figure 1 worth mentioning: even the smallest denomination checks were negotiated in large numbers in all of these settlements. Both settlement administrators reported negotiation rates for checks of between $0 and $5; this is the starting point of all of the curves in Figure 1. As these curves show, class members negotiated these checks as much as 80% of the time in the claims-made settlements, but even 30–40% or more when automatic distributions and standard-sized checks were used. In no settlement did they negotiate these checks less than 20% of the time. We were surprised how frequently class members negotiated even the smallest denomination checks.

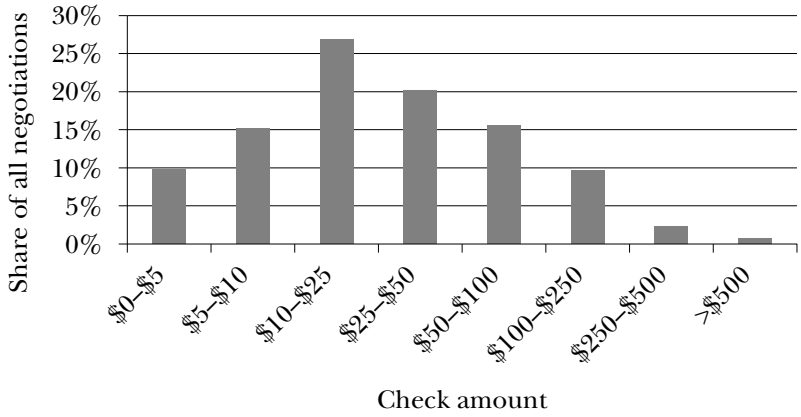
C. *Recovery Rate*

The data on compensation and check negotiation rates paint only one side of the picture of how well the consumer settlements we study here compensated class members. The picture is incomplete without some measure of whether the money delivered to class members was significant in light of how much money they lost to begin with. It is one thing to deliver money; it is another to deliver meaningful compensation for losses. None of the prior studies on compensation in consumer class actions sought to assess this issue—understandably, because it is difficult to gather information about the class's damages—but we have access from publicly filed documents to the class's damages' models for thirteen of our settlements. Thus, not only can we report the average payout for class members who participated in the settlements, but also what the plaintiffs thought these payouts recovered relative to the damage done to class members. This is what we call the "recovery rate." (Of course, the plaintiffs are only one side of the case and their models should not be considered an unimpeachable accounting of the class's damages.)

Before we get there, however, we are often asked what the distribution of payouts looked like in these settlements. We have this data from the settlement administrators for the class

members who were mailed checks (as opposed to directly deposited), and we report in it in Figure 2, below. Because it is difficult to report this data clearly for all fifteen settlements, we instead aggregate this data for the twelve settlements where we have data over the same ranges of check sizes (recall two different settlement administrators were used and they reported slightly different ranges). We report the average percentage of class members in these twelve settlements who negotiated checks within each of the specified ranges. Figure 2 shows that almost half of the payouts in these settlements were for $25 or more, roughly the size of one overdraft fee. A few class members negotiated very sizable checks, in the hundreds of dollars.

FIGURE 2: DISTRIBUTION OF CHECK NEGOTIATIONS, OVERDRAFT FEE CLASS ACTIONS (2011–PRESENT)



Note: *Only twelve of fifteen settlements.* Source: *Epiq Systems*; *Rust Consulting.*

So how do these numbers compare to the number of overdraft fees that class members had been wrongly assessed? To derive the answer to this question, we were able to extract from publicly filed documents in thirteen of these settlements how much in overdraft fees the classes thought they would have been charged had the banks processed transactions chronologically as opposed to the challenged ordering from the largest transaction to the smallest. We found that the settlements recovered between 9% and 65% of damages, with the variation based largely on the strength of the class's claims and the likelihood of winning certification of the class; for exam-

ple, some banks had defenses (most notably arbitration clauses with class action waivers) that other banks did not. In Table 3, we report again the compensation rates and average payouts from Table 2, the average class member damages using the damages' models we found, and the ratio of the two (i.e., the recovery rate).

TABLE 3: RECOVERY RATE,
OVERDRAFT FEE CLASS ACTIONS (2011–PRESENT)

BANK	COMPENSATION RATE	AVERAGE PAYOUT	AVERAGE DAMAGES	RECOVERY RATE
1	60.34%	$13.38	$94.46	14.16%
2	60.44%	$21.95	$332.07	6.61%
3	46.97%	$90.92	$131.77	69.00%
4	62.91%	$82.36	$208.22	39.55%
5	64.30%	$59.13	$146.64	40.32%
6	61.91%	$52.76	$134.64	39.19%
7	37.27%	$17.01	$82.49	20.62%
8	64.75%	$66.49	$116.81	56.92%
9	69.31%	$17.15	$84.38	20.32%
10	70.48%	$40.49	$99.47	40.70%
11	64.25%	$57.97	$142.45	40.70%
12	42.83%	$49.99	$88.70	56.36%
13	64.19%	$70.08	$155.03	45.21%

Source: *MDL 2036 (S.D. Fla.); Epiq Systems; Rust Consulting.*

Table 3 paints the complete picture on how well these settlements compensated class members for their losses, and we think that even the harshest critics of consumer class actions would have to concede that the picture it paints is a fairly successful one. In most of these settlements, from the first column we see the vast majority of class members actually realized compensation and from the last column we see when they did they recovered a significant portion of their damages (even after attorneys' fees were paid). The weakest settlements were three of the four that used postcard-sized checks (Banks 1, 2, 7) and those where the class recovered a smaller share of its damages because the class's claims faced greater prospect for defeat (because, for example, their contracts included arbitration provisions with class action waivers).

III.
Analysis and Recommendations

We believe the findings in the previous part can inform many of the contemporary debates over consumer class actions.

First, to the extent commentators have argued that consumer class actions are not capable of serving a compensatory role,[56] we believe our findings suggest that these criticisms are too broad. To our knowledge, none of these critics sets forth a definition of what compensatory success means in consumer class actions. But we think a fair starting point is a class action that delivers to a significant portion of the class compensation that is commensurate with what those class members could have expected to receive in light of the strength of their claims. We think most of the settlements studied in this Article meet this definition of success. In those settlements that (1) eschewed claim forms in favor of automatic distributions and that relied on (2) direct deposits or (3) standard-sized checks (rather than the less costly, postcard-sized variety), a majority of class members recovered a fair return on even small expected damages. Again, one of us believes consumer class actions are worthwhile even if they cannot serve a meaningful compensatory role.[57] But even for those who think otherwise, our findings suggest that, under these conditions, consumer class actions can succeed.

How often can these conditions be met? We think more often than some might expect. To begin with, it is easy enough for courts and counsel to insist that settlement administrators use standard-sized checks rather than postcard-sized checks. Although the former are more expensive than the latter,[58] the difference in price will usually have only a minor impact on the overall cost of settlement administration.

We also believe that there are realistic opportunities to distribute settlements automatically. Many times defendants will have sufficient information about some or all of their customers to make automatic distributions feasible. These will include defendants who sell directly to customers, especially

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56. For a further discussion, see sources cited *supra* notes 1–2.

57. *See* Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, *supra* note 3, at 2047–69.

58. *See supra* note 53.

those who sell online, where the trail is more often preserved. Courts and counsel interested in the compensatory side should be attentive to these opportunities[59] and insist that defendants preserve such information at the outset of a case. The ALI and other commentators have already encouraged this,[60] but we think the opportunities for automatic distributions go beyond even what these commentators may have envisioned: if the files of defendants are bare, we think courts and counsel should turn to third-parties. For example, when defendants sell their wares through retailers, the retailers that sell online (e.g., Amazon) will have this information; and even those that sell offline keep purchase information on those of their customers who hold so-called "loyalty cards."[61] These third-party retailers can be subpoenaed for information, as they were in a recent class action for which one of us served as an expert.[62] Again, courts and commentators interested in the compensatory side should be attentive to preserving these opportunities

59. For example, in a recent consumer antitrust case over baby products, the settlement initially called on class members to submit claim forms proving they had purchased the products; after the settlement was reversed on appeal, the parties negotiated a new settlement relying on the defendant's files to identify 1.1 million class members and to send them compensation without any effort on their part. *See* McDonough v. Toys R Us, Inc., 2015 WL 263562 (E.D. Pa., Jan. 21, 2015).

60. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.05, cmt. f (2010) ("Courts should approve direct pro rata or per capita distributions of the settlement proceeds to class members when feasible, without requiring class members to submit claims . . . even if the parties have proposed a traditional claims process."); WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 12:18 (5th ed. 2011); BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 30 (3d ed. 2010).

61. *See, e.g.*, Katherine Albrecht, *Supermarket Cards: The Tip of the Retail Surveillance Iceberg*, 79 DENV. U. L. REV. 534, 534 (2002) ("Promoted as savings devices by the grocery industry, cards allow retailers to amass unprecedented amounts of longitudinal information on consumer purchase and eating habits."); Dan Sewell, *Kroger Uses Shopper Data to Target Coupons*, HUFFINGTON POST (Feb. 6, 2009), http://www.huffingtonpost.com/2009/01/06/kroger-uses-shopper-data_n_155667.html; Swinkels et al., *Hepatitis A Outbreak in British Columbia, Canada: The Roles of Established Surveillance, Consumer Loyalty Cards and Collaboration, February to May 2012*, 19 EUROSURVEILLANCE 18 (2014) (detailing the investigation of the source of a hepatitis outbreak using data from grocery store loyalty cards).

62. *See* Chaudhri v. Osram Sylvania, Inc. et al., No. 11-CV-05504 (D. N.J. 2011).

at the outset of a case before the information is lost to data retention policies. Indeed, we suspect these opportunities will only become more common in the future: as the so-called "big data" phenomenon washes over more and more of the economy,[63] we suspect more and more defendants and third-parties (not only retailers, but also social media companies like Facebook) will possess the necessary data for automatic distributions.

But as we noted above, even when class members can be identified, located, and their payouts calculated through no effort of their own, it makes a difference how those payouts are delivered to them. Class members who receive unsolicited checks in the mail do not negotiate them in significant numbers, whereas class members whose payouts are directly deposited into one of their bank accounts are all but guaranteed compensation. For this reason, we think courts and counsel should seek out direct deposits wherever possible. And we think there are plenty of realistic opportunities to do so. Although in many instances class members will not have active accounts with the defendants, they may, again, have them with third-parties, and there is nothing to prevent courts and counsel from crediting third-party accounts. This might be true, again, with regard to loyalty-card customers and online customers, but it might be even more true for customers with PayPal accounts and the like. These accounts are *made* for receiving money and there is nothing to prevent them from receiving money from class action settlements. Again, as these accounts become more and more ubiquitous, we are optimistic that these opportunities will only grow.[64] Indeed, the fact

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63. *See, e.g.,* Joseph Jerome, *Big Data: Catalyst for a Privacy Conversation*, 48 IND. L. REV. 213, 214–224 (2014); Jonas Lerman, *Big Data and Its Exclusions*, 66 STAN. L. REV. ONLINE 55 (2013); Andrew McAfee & Erik Brynjolfsson, *Big Data: The Management Revolution*, HARV. BUS. REV., Oct. 2012, at 4 ("[I]t is estimated that Walmart collects more than 2.5 petabytes of data every hour from its customer transactions."); Steve Lohr, *The Age of Big Data*, N.Y. TIMES (Feb. 11, 2012), http://www.nytimes.com/2012/02/12/sunday-review/big-datas-impact-in-the-world.html.

64. The number of registered PayPal accounts rose from 84.3 million in the first quarter of 2010 to 165.2 million by the end of the first quarter of 2015. *See Number of PayPal's Total Active Registered User Accounts from 1st Quarter 2010 to 1st Quarter 2015 (in millions)*, STATISTA, http://www.statista.com/statistics/218493/paypals-total-active-registered-accounts-from-2010/ (last visited May 20, 2015).

that opportunities for automatic distribution and direct deposit may only grow suggests that compensation in consumer class actions will be even brighter in the future than in the past. This suggests to us that the criticism of consumer class actions may be not only overbroad, but also premature.

Finally, to the extent we will continue to rely on mailing checks to class members, a question often arises: at what point should we cut off the checks—how low, so to speak, should we go?[65] The findings in the previous part suggest we should go as low as we can. To be sure, at some point the cost of sending a check is greater than the face amount of the check itself; in the experience of one of us, that point is hit around $1–$2. But in light of how frequently class members negotiated even the smallest checks in our settlements, we think courts and counsel should not be afraid to send checks at any denomination over the break-even point. If the definition of success in a consumer class action is delivering fair value to as many class members as possible, then there is little reason to exclude even the smallest payees if there is a decent chance they will negotiate their payments.

Conclusion

For as long as scholars have studied consumer class actions, there have been gaps in the empirical literature on how well consumer class actions compensate class members. In this

65. *See* 2 McLaughlin on Class Actions § 6:23 (11th ed. 2014) ("Courts have recognized that minimum payment thresholds for payable claims benefit the class as a whole because they protect the settlement fund from being depleted by the administrative costs associated with claims unlikely to exceed those costs. Courts should approve such thresholds, with $10 being a fair and commonly used figure."); *see also* Hill v. State Street Corp., 2015 WL 127728, at *1, *7 (D. Mass. Jan. 8, 2015) (approving $10 threshold); City of Livonia Employees' Ret. Sys. v. Wyeth, 2013 WL 4399015, at *1, *3 (S.D.N.Y. Aug. 7, 2013) (approving $10 minimum distribution threshold as "entirely reasonable"); *In re* Dell Inc., 2010 WL 2371834, at *1, *8 (W.D. Tex. June 11, 2010) (approving a $10 threshold that was later removed); *In re* Gilat Satellite Networks, Ltd., 2007 WL 1191048, at *1, *9 (E.D.N.Y. Sept. 18, 2007) (approving $5 threshold); *In re* Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 463 (S.D.N.Y. 2004) (approving $10 threshold and noting that "[c]lass counsel are entitled to use their discretion to conclude that, at some point, the need to avoid excessive expense to the class as a whole outweighs the minimal loss to the claimants who are not receiving their de minimis amounts of relief").

Article, we have attempted to fill at least some of the gaps by reporting on the compensation, check negotiation, and recovery rates of fifteen related consumer class actions. Of course, our data will not close the gaps in the literature; we offer only fifteen new data points and we have no way of knowing how representative these points are of other consumer class actions.

Nonetheless, we think our findings should lead to optimism rather than pessimism about the compensatory potential of consumer class actions. Under certain conditions—automatic distributions that rely on standard-sized checks and especially direct deposits—consumer class actions can deliver fair compensation to a significant portion of class members. Although we do not pretend that these conditions can be met in every consumer class action, we are optimistic that, as technology continues to evolve, these conditions will become more and more prevalent in the years to come.

For these reasons, we think much of the criticism of the compensatory potential of consumer class actions has been overstated. But we cannot know for sure until large-scale empirical research is completed. As we noted, in order to facilitate this research, one of us has joined a proposal pending before the committee reexamining Rule 23 to require settlement distribution data to be filed with the court at the conclusion of every class action. If this proposal is adopted, scholars should have complete answers to many of the questions raised in this Article in only a few short years.