

## HIGH COST, LITTLE COMPENSATION, NO HARM TO DETER: NEW EVIDENCE ON CLASS ACTIONS UNDER FEDERAL CONSUMER PROTECTION STATUTES

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*Working from a sample of all consumer class actions filed in the Northern District of Illinois during 2010–2012 (totaling 510), this Article reports and analyzes data on class actions under four federal consumer protection statutes, the Electronic Funds Transfer Act (“EFTA”), the Fair Credit Reporting Act (“FCRA”), the Fair Debt Collection Practices Act (“FDCPA”), and the Telephone Consumer Protection Act (“TCPA”). Even assuming that the TCPA cases alleged actual harm to the named plaintiff, over half the cases in the sample sought statutory damages without an allegation of harm to the plaintiff. Especially in large class actions, only 10% to 15% of the class received compensation, and the aggregate compensation paid to the class is far less than the stated or nominal class settlement fund amount. Because courts award attorneys’ fees based on the nominal settlement amount, attorneys’ fees are a very large fraction of the amount paid to the class, and for some case types attorneys’ fees average 300% to 400% of the amount paid to the class. With low class*

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*compensation rates and attorneys' fees to class counsel that often dwarf total class compensation, such class actions are highly inefficient means of awarding compensation to consumers. As the actual harm in such cases is, at best, small, consumers would likely have little ex-ante demand for insurance against such harm. Because statutory damages are far greater than the actual harm and relatively uniform and independent of actual harm, the system likely leads to a misallocation of efforts of class counsel toward such high statutory damage cases and away from cases with bigger harm but smaller statutory damages. In Spokeo, Inc. v. Robins, 578 U.S. \_\_ (2016), the Supreme Court recently articulated a test for standing in actions brought under precisely the sort of no-harm, statutory damage provisions studied here. This Article concludes by evaluating possible solutions to socially wasteful no-harm causes of action under federal consumer protection statutes. One possibility is that under Spokeo, courts could screen true no-harm cases from the costly class-action process. Another is that through better monitoring of class settlement terms, district courts could lower the costs of class actions and restore balance between costs and benefits. The final reform possibility analyzed in this Article is Congressional amendment of no-harm statutory damage provisions.*

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## I. INTRODUCTION

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

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

This sample of consumer class actions is the largest yet studied whose results can be subject to replication.<sup>1</sup> In brief summary, this Article’s empirical findings show that in at least half of the class actions in our sample, the plaintiffs

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<sup>1</sup> Our data on case filings, coding, and class settlements for the statutes studied here can be accessed at <http://dx.doi.org/10.18130/V3/WR4RF9>. The Consumer Financial Protection Bureau’s dataset on class actions, discussed *infra*, is not and likely will not be publicly available.

rely on statutory provisions that award statutory damages with no need for the plaintiffs to even allege that they were harmed. With or without harm allegations, over 80% of filings end in settlement. Individual settlement—where the named plaintiff settles and dismisses the individual action with prejudice—occurs in over 50% of cases. By comparison, class settlement rates range from 20% to almost 40% and generally compensate only a small fraction of the class. Compensation rates—the fraction of class members who actually receive compensation—vary tremendously across case types even for cases brought under the same statute. However, the biggest class actions seeking statutory damages with no allegation of injury to the plaintiff have compensation rates of 10% to 15%. Only in a very small number of class-action settlements do a majority of class members receive compensation.

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

Thus, the 2010–2012 Illinois Data depicts class-action settlements under federal consumer protection statutes as a mechanism of compensation whose cost far exceeds actual class recovery and which awards recovery only to a small

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

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

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

<sup>3</sup> Adam J. Levitin, *Mandatory Arbitration Offers Bargain-Basement Justice*, AMERICAN BANKER (May 13, 2014), <http://www.americanbanker.com/bankthink/mandatory-arbitration-offers-bargain-basement-justice-1067419-1.html> [https://perma.cc/8CXR-47DG].

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

The findings here confirm the view that class-action settlements are more effective in transferring money from the defendant to class counsel than in compensating class members. They show that the cost of awarding compensation via the class-action mechanism often dwarfs the amount actually paid in aggregate to class members and that a small fraction of class members receives any compensation at all. Judged solely as an instrument for compensating widespread but small harms, the consumer class actions reported on below are ineffective and exceedingly costly.

In response to these findings, it may be argued that even if they do not award compensation to very many class members, class-action settlements nonetheless may effectively deter legal wrongdoing by defendants. The findings here suggest that for the statutes studied, class-action settlements may be at best problematic on deterrence grounds. Perhaps our most striking finding is the sheer number of consumer class-action filings and settlements

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<sup>4</sup> George L. Priest, *What We Know and What We Don’t Know About Modern Class Actions: A Review of the Eisenberg-Miller Study*, 9 CIV. JUST. REP. 1, 4 (2005).

<sup>5</sup> See Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. L.F. 71, 81 (2003). For a further elaboration of the view that contemporary class actions lack both democratic and constitutional legitimacy, see Martin H. Redish, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009).

under statutes awarding statutory damages (up to \$1000) for easy-to-prove violations of statutory disclosure and notice formalities. Class-action settlements are much more likely in cases where the harm to consumers seems unclear or non-existent—as where an expiration date is printed on a credit card receipt—than in cases where the harm seems greater—as where debt collectors harass a debtor. It might well be a surprise to many members of Congress that when they voted for a statute giving consumers a right to statutory damages with no need to even allege harm, they created an enormously powerful incentive for class counsel to bring class actions where statutory damages may greatly exceed actual harm and where the defendant is typically a small firm that may have been unaware of the formalities required by statute.

Over the past several years, class-action settlements under no-harm consumer-protection statutory provisions have been the focus of actions by both Congress and the courts. Both houses of Congress have recently passed legislation requiring class members to have sustained an actual injury of the same sort alleged by the named plaintiff.<sup>6</sup> During its 2015–2016 term, the United States Supreme Court heard two cases—*Campbell-Ewald Co. v. Gomez*<sup>7</sup> and *Spokeo, Inc. v. Robins*<sup>8</sup>—arising under two of the federal consumer protection statutes discussed below.<sup>9</sup> *Campbell-Ewald* involved the procedural question of whether a class defendant can effectively moot a class action by offering to pay full judgment to the named plaintiff before that plaintiff moves to certify the class.<sup>10</sup> As discussed below, defendants have used this tactic in one type of case included

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<sup>6</sup> Fairness in Class Litigation and Furthering Asbestos Claim Transparency Act of 2016, H.R. 1927, 114th Cong. (2016).

<sup>7</sup> 136 S. Ct. 663 (2016).

<sup>8</sup> 136 S. Ct. 1540 (2016).

<sup>9</sup> *Campbell-Ewald* was a case under the TCPA, discussed *infra* at notes 140–50, while *Spokeo* was a case under the FCRA, discussed *infra* at notes 104–28.

<sup>10</sup> 136 S. Ct. at 666.



in the Illinois Data, one where the plaintiff alleges that an ATM provider violated the EFTA by failing to have a notice of fees “on or at” the ATM machine.<sup>11</sup> But this tactic disappeared from use once class counsel began avoiding the problem by moving quickly to certify the class or simply telling the court that they would soon do so.<sup>12</sup>

If the Illinois Data reveals that the *Campbell-Ewald* offer of judgment/mootness issue<sup>13</sup> may be of little practical significance, the same is not true of the issue in *Spokeo*. Plaintiffs in *Spokeo* sought statutory damages of \$100 to \$1000 under the FCRA against a “people search engine” website that allegedly misstated information about the plaintiffs’ age, marital status, education, and professional experience.<sup>14</sup> The FCRA permits statutory damages without requiring proof of harm for the publication of a false report.<sup>15</sup> The defendant in *Spokeo* argued that such no-harm class actions cannot be brought unless the plaintiff establishes Constitutional Article III standing by alleging that she suffered an actual injury.<sup>16</sup> The Court held that the alleged injury must be both “particularized” and “concrete” to satisfy Article III standing requirements but that such a concrete injury could include “intangible” harm.<sup>17</sup> Our empirical findings show that class actions under no-harm provisions—such as that in *Spokeo*—make up about half of all filings under federal consumer protection statutes and thus show the significance of the standing decision in *Spokeo*. After presenting the evidence, this Article evaluates the possibility

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<sup>11</sup> See *infra* notes 73–100 and accompanying text.

<sup>12</sup> For an example of this tactic, see Memorandum in Support of Plaintiff’s Motion for Class Certification, *Core v. Bradley Wings*, No. 10-cv-05900 (N.D. Ill. Sept. 16, 2010), ECF No. 8, where the plaintiff filed a motion to certify the class, with accompanying supporting memorandum, four days after filing the complaint.

<sup>13</sup> See *Campbell-Ewald*, 136 S. Ct. at 670–72.

<sup>14</sup> *Spokeo*, 136 S.Ct. at 1545.

<sup>15</sup> See *id.*

<sup>16</sup> Reply Brief for Petitioner at 15–16, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339), 2015 WL 5731782.

<sup>17</sup> See *Spokeo*, 136 S. Ct. at 1548.

that courts might use *Spokeo*'s standing test to improve the performance of class actions under federal consumer protection statutes such as the FCRA.

The empirical findings in this Article also bear on the major market alternative to class-action litigation: mandatory consumer arbitration. For years, state courts and consumer advocates have decried clauses in consumer contracts requiring consumers to arbitrate disputes and prohibiting consumers from bringing (or joining) class actions. State courts and consumer advocates have argued that arbitration cannot adequately substitute the class action as an instrument of compensation and deterrence. For example, in *Discover Bank v. Superior Court*, the California Supreme Court reasoned that because “damages in consumer cases are often small,” “the class action is often the only effective way” to deter companies from wrongfully extracting small amounts from consumers.<sup>18</sup>

In recent years, the Supreme Court has repeatedly ruled that federal law preempts state court holdings that class-action waivers in consumer contracts are against public policy. In *AT&T Mobility v. Concepcion*, the Court held that by forbidding arbitration clauses that preclude class-wide civil and arbitral relief, California's *Discover Bank* approach runs afoul of and is preempted by the Federal Arbitration Act.<sup>19</sup> Two years after *Concepcion*, the Court enforced a clause mandating arbitration and waiving class-wide relief for claims alleging violations of federal antitrust law in *American Express v. Italian Colors Restaurant* (“*Amex II*”).<sup>20</sup>

However, in its March 2015 Arbitration Study (“2015 Arbitration Study”), the Consumer Financial Protection Bureau (“CFPB”) presented data that some interpreted as showing that class actions are much more effective than arbitration at compensating injured consumers and deterring misconduct by consumer financial products and

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<sup>18</sup> *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108–09 (Cal. 2005).

<sup>19</sup> 563 U.S. 333, 346–52 (2011).

<sup>20</sup> 133 S. Ct. 2304 (2013).

services providers.<sup>21</sup> With the 2015 Arbitration Study as its primary supporting evidence, in May 2016, the CFPB issued a proposed rule banning arbitration clauses in consumer financial contracts if they prohibit the consumer from filing or participating in a class action.<sup>22</sup> This Article’s findings on the performance of one type of consumer class action are thus relevant to the fate of this proposed rule and to the continuing debate over mandatory arbitration in consumer contracts.

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

## II. THE NORTHERN DISTRICT, ILLINOIS EVIDENCE

### A. Federal Statutory Consumer Class-Action Case Types and Outcomes

This section clarifies how our sample of consumer class actions was constructed and shows the overall distribution of case types—those brought under both federal and state law—within the sample. This section then shows the

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<sup>21</sup> See CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [<https://perma.cc/VX3F-58YX>] [hereinafter 2015 ARBITRATION STUDY].

<sup>22</sup> Arbitration Agreements, 81 Fed. Reg. 32,830 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040).

distribution of outcomes for the federal statutory case types discussed in more detail later in the Article.

## 1. The Data Underlying This Study

Our class-action sample studied was drawn from cases filed in the Northern District of Illinois between January 1, 2010 and December 31, 2012. The Northern District was chosen because in prior work, Fitzpatrick observed that the Northern District had a large number of class action settlements relative to the size of its civil docket.<sup>23</sup> All data come from the federal court PACER electronic database of docket sheets. Appendix 2 describes the search terms used in identifying consumer class actions in the Illinois Data. The search criteria defined “consumer class actions” to exclude securities class actions and antitrust class actions. On the other hand, the data includes any other type of class action brought on behalf of consumers under both federal and state law, including the common law. The federal consumer protection laws define “consumer” more broadly than does the dictionary. Under the FCRA, an employment background check is a “consumer report.”<sup>24</sup> For this reason, the data includes FCRA cases involving employment background checks in the sample. Similarly, doctors and dentists with small offices often receive unauthorized telemarketing faxes, and such doctors and dentists are “consumers” protected under the Telephone Consumer Protection Act’s (“TCPA”)

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<sup>23</sup> Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL L. STUD. 811, 823 (2010).

<sup>24</sup> See 15 USC § 1681a(d)(1) (defining a “consumer report” as “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living”). Section 1681a(d)(1) explicitly states that if “used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for . . . employment purposes” then the report is a statutory consumer report. *Id.*

prohibition on sending such unauthorized communications.<sup>25</sup> Thus, the data set includes cases where defendants allegedly sent unauthorized faxes to doctors and dentists.

Information regarding the type and resolution of consumer class actions is derived from docket sheets and the documents to which such sheets provide links. The type of class action—both legally and factually—as well as amount claimed were identified by review of each complaint. Identification of the resolution of each case was then conducted by examination of the relevant docket entries.<sup>26</sup> Much of this process was straightforward. If, for example, a case ended when the court granted the defendant’s summary judgment motion, that would be evident from the docket sheet entry and there would typically be an opinion written to justify the summary judgment order.

Class-action settlements must be approved by the court as fair, and class counsel must submit memoranda in support of both preliminary and final approval of the class-action settlement. Class counsel also must submit memoranda in support of attorneys’ fees awards. The exhibits attached to these memoranda virtually always include affidavits from the settlement administration company reporting the number of class members that it notified, the number of valid claims, and similar information. If the exhibits do not contain such information, the next step is to examine the memoranda written to justify an award of attorneys’ fees. These memoranda typically include the number of hours spent on the case, the proportional relationship between attorneys’ fees and the nominal

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<sup>25</sup> In the sample studied here, there were many such doctor’s and dentist office junk fax TCPA cases. For some examples, see *Dr. G. Neil Garrett, DDS v. Sharps Compliance*, No. 10-cv-04030 (N.D. Ill. 2010); *Chicago Chiropractic & Sports Injury Center, LTD v. Great Plains Laboratory, Inc., et al.*, No. 10-cv-06151 (N.D. Ill. 2010); *Florence Mussat MD SC v. Global Healthcare Resource, Inc. dba Physician Billing Services, Inc.*, No. 11-cv-07035 (N.D. Ill. 2011).

<sup>26</sup> In some filings under multiple statutes, the entire history of the case, as drawn from docket sheets, was considered when categorizing the case under the statute under which the action actually proceeded.

settlement amount typical of similar cases in the Northern District of Illinois and elsewhere around the country, and other information detailing how the settlement funds will be distributed. These memoranda and their supporting exhibits are the primary source of information about class-action settlements.

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

Individual settlements are more difficult to identify. In some dockets, entries indicate that the parties had discussed settlement and/or reached an individual settlement. In such instances, the case was resolved with the entry of an order dismissing the individual claim with prejudice and the class claims without prejudice. In a minority of cases, a final order was stipulated to and entered dismissing the individual claim with prejudice and the class claim without prejudice, but no prior entries state that the case had settled individually. We coded such outcomes as an "individual settlement."

## 2. Relationship to Prior Empirical Studies of Consumer Class Actions

Few other studies have considered the performance of consumer class actions as an instrument of compensation or deterrence. Indeed, the only other systematic study of class actions drawn from a search of case filings (as opposed to reported opinions and other selective reports) appeared in the 2015 Arbitration Study.<sup>27</sup> There, the CFPB attempted to

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<sup>27</sup> See 2015 ARBITRATION STUDY, *supra* note 21.

identify all consumer class actions filed in federal court (and for selected state courts) during 2010–2012 that involved one of six product categories that the CFPB categorized as a “financial product.” The CFPB looked at all federal courts, whereas this study is based on a sample from only the Northern District of Illinois. The CFPB looked at the same time period examined here, and its methodology was similar to that employed here, in that the CFPB searched complaints and other docket items that are available electronically.<sup>28</sup> However, the CFPB sought to find all federal filings involving one of its six consumer financial product categories, whether brought as an individual action or a class action.<sup>29</sup> Here, the objective is to identify all consumer class actions. As the CFPB’s study is very large and employs a similar search methodology to that used here, this Article often compares the CFPB’s findings to the findings reported below.<sup>30</sup>

The only other study of consumer class actions that gathered data directly from docket sheets is by Fitzpatrick and Gilbert.<sup>31</sup> That study looked at only fifteen class-action settlements in class actions challenging bank overdraft on a variety of state law theories.<sup>32</sup> One of the authors was coordinating lead class counsel in the consolidated litigation discussed by the study.<sup>33</sup> Most importantly for present purposes, the overdraft fee class actions studied by Fitzpatrick and Gilbert were not brought under the federal consumer protection statutes studied here.

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<sup>28</sup> In the LexisNexis Courtlink electronic database, which includes the docket entries found in PACER that were used in this paper.

<sup>29</sup> *Section 6, in 2015 ARBITRATION STUDY, supra* note 21, at 11–15; *Appendix L: Section 6, in 2015 ARBITRATION STUDY, supra* note 21.

<sup>30</sup> Appendix 2 includes other differences in search methodology between this study and the CFPB’s.

<sup>31</sup> Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, N.Y.U. J.L. & BUS. 767, 779 (2015).

<sup>32</sup> *Id.* at 779–80.

<sup>33</sup> *Id.* at 767.

A recent 2016 study by Joanna Shepherd closely relates to the present Article.<sup>34</sup> Shepherd's team used a variety of search criteria to identify 2,158 class-action settlements over the period 2005–2015 in cases involving no-injury allegations, where statutory damages provided the sole ground for relief.<sup>35</sup> By looking at all consumer class actions,<sup>36</sup> the present study shows that such no-injury class-action settlements make up a very large fraction of all consumer class-action settlements under the federal statutes. This study includes the same types of settlements as Shepherd discussed, in addition to others.

Moreover, this Article discusses how class-action outcomes and settlements vary across statutes and across case types under the same statute. The following analysis focuses on three aspects of such settlements: (1) the actual aggregate payout to the class; (2) how it compares to the nominal settlement amount and to attorneys' fees; and (3) the actual fraction of the class that receives compensation (the compensation rate). Shepherd does not break out these variables by case type but reports only "percentage to class members" and other payouts across the four, primary no-

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<sup>34</sup> Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions* (Emory University Legal Studies Research Paper No. 16-402, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2726905](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905) [<https://perma.cc/7H9E-E3JF>].

<sup>35</sup> *Id.* at 9.

<sup>36</sup> There seem to be differences in how Shepherd's team identified and gathered information on class settlements. She reports that the team got data on class settlements from "final orders, settlement agreements, and various other court documents such as those approving settlements and attorneys' fee awards." *Id.* at 1. When reviewing PACER docket sheets during data collection for this Article, the research team discovered that information on key features of class settlements, such as attorneys' fees and the actual compensation rate for the class, is generally not included in final orders or opinions (indeed there are few opinions approving class settlements, just uninformative orders). Such information is available in the memoranda and supporting exhibits that class counsel submit when they move to have the class settlement and attorney fee request approved. It is not clear whether Shepherd's team accessed such memoranda and exhibits.



injury federal statutes (FDCPA, TCPA, FCRA, and EFTA).<sup>37</sup> For this reason, one cannot compare outcomes discussed in this Article with those that Shepherd reports.

Authors of earlier empirical work on consumer class-action settlements focused on much smaller and more selective samples than those discussed here. Fitzpatrick included consumer class-action settlements in a more general study of federal class-action settlements over the years 2006–2007.<sup>38</sup> However, he identified cases with class-action settlements from highly selective lists, such as published class-action reporters and district court opinions, only turning to electronic docket sheet data for class settlement details afterwards.<sup>39</sup> Fitzpatrick focused on the determinants of attorneys' fees in class-action settlements and the size of such fees relative to the class settlement.<sup>40</sup> Because Fitzpatrick found little variation in fees relative to settlements—with a ratio clustering around 25% to 30%—he did not obtain and analyze data on the aggregate payout to the class.<sup>41</sup> That is, his work focused only on the nominal settlement amount, which is the amount stated in the settlement agreement and court order and which is almost always much greater than the actual payout to the class.

The law firm of Mayer Brown LLP published a more thorough attempt to identify the actual aggregate payout to the class.<sup>42</sup> However, that study looked at a very selective sample based on reports of class-action settlements and therefore is not comparable to the Illinois Data. As with the CFPB and Shepherd studies, this Article discusses the

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<sup>37</sup> *Id.* at 16.

<sup>38</sup> *See* Fitzpatrick, *supra* note 23, at 816.

<sup>39</sup> *Id.* at 9–13.

<sup>40</sup> *Id.* at 14–22.

<sup>41</sup> *Id.* at 20–22.

<sup>42</sup> MAYER BROWN LLP, DO CLASS ACTIONS BENEFIT CLASS MEMBERS? (2013), <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf> [<https://perma.cc/JW6J-KNKR>].

differences between the findings in this earlier work and this Article's findings.

Before the electronic availability of full federal court docket sheets, as a practical matter empirical studies of class-action outcomes were impossible. For example, in a 2008 study, Pace and Rubenstein attempted to determine the value class-action settlements actually have for the plaintiffs.<sup>43</sup> Pace and Rubenstein reviewed the official case files in thirty-one federal class-action settlements and interviewed judges, lawyers, and settlement administrators involved with fifty-seven class-action resolutions.<sup>44</sup> The authors found their task difficult, as just six of the thirty-one cases files contained information on either the number of claims paid or the total amount of compensation.<sup>45</sup> Further, only fourteen out of 222 (6%) of the lawyers, judges, and claims administrators whom the authors contacted provided relevant information, covering only eleven out of fifty-seven cases.<sup>46</sup>

Pace and Rubenstein say they learned “very little” from the six case files, concluding that only a small fraction of class members received compensation when not automatic.<sup>47</sup> The authors discovered that in the four cases with automatic distribution (mailing a check to a known class member), a high percentage of victims received compensation (ranging from 76% to 99% of the class).<sup>48</sup> However, where plaintiffs had to complete a form to receive compensation, only 4% of the class in one case received a small recovery (of \$30 per victim), and in another case only 20% received a much more

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<sup>43</sup> Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* 1–4 (RAND Institute for Civil Justice, Working Paper No. 599, 2008).

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.* at 23.

<sup>46</sup> *Id.* at 31.

<sup>47</sup> *Id.* at 23.

<sup>48</sup> *Id.*

significant amount (\$1000).<sup>49</sup> Pace and Rubenstein noted that as they required class members to fill out a form to be eligible for compensation, the majority (13 out of 25) of the cases without meaningful information as to settlement distribution were similar to the settlement with a 4% compensation rate.<sup>50</sup>

As for the nine class actions about which Pace and Rubenstein received claims distribution information from attorneys, judges, and claims administrators, three cases had distribution rates below 5%, four between 20%–40%, and two with rates above 50% (with a maximum of 82%).<sup>51</sup> Distribution rates were the lowest in the largest class actions, with hundreds of thousands or millions of class members, even when recovery amounts were as high as \$1,500.<sup>52</sup>

While not based on a large, representative sample of class actions, Pace and Rubenstein's conclusion is consistent with other findings on class-action compensation rates. For example, in a study of insurance class actions, Pace et al. received survey responses from fifty-seven large insurance companies, who reported data on 748 distinct class actions, 89% of which were filed in state court.<sup>53</sup> In seven of twenty-three cases with complete payout and attorney fee information, the median distribution rate to actual plaintiffs was 79%.<sup>54</sup> However, in another quarter of cases, the distribution rate was 13%.<sup>55</sup> In 3% of cases, the plaintiffs received only 4% of the net compensation fund.<sup>56</sup> In ten cases where sources reported potential class size and the number of claims paid, 100% of the class members received some

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<sup>49</sup> *Id.* at 24.

<sup>50</sup> *Id.* at 25.

<sup>51</sup> *Id.* at 32.

<sup>52</sup> *See id.*

<sup>53</sup> NICHOLAS M. PACE ET AL., INSURANCE CLASS ACTIONS IN THE UNITED STATES, xvii–xviii (2007).

<sup>54</sup> *Id.* at xxiii.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

compensation; however, in the worst case, only an estimated 1% of class members received compensation.<sup>57</sup> In the median case, just 15% of the potential class received any compensation.<sup>58</sup> In another study, Hensler et al. reviewed ten class-action settlements in detail and found that compensation rates varied from 100% to less than 5%.<sup>59</sup> As did Pace and Rubenstein, Hensler et al. concluded that plaintiffs tended to receive higher distribution rates in cases with automatic payout, while plaintiffs tended to receive lower distribution rates when class members actually had to fill out a form.<sup>60</sup> Hensler et al.'s conclusion comports with Pace and Rubenstein's findings.

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

This Article analyzes case types comprising an important fraction of all consumer class-action filings in the Illinois Data. Figure 1 below shows the frequency distribution for the 506 class-action filings in the Illinois Data. As shown, plaintiffs made 131 filings under the FDCPA, 127 filings under the TCPA, fifty-three filings under the FCRA, and forty-three under the EFTA. Of the twenty cases brought under privacy protection statutes other than FCRA, twelve were brought under federal privacy protection statutes such as the Video Privacy Protection Act.<sup>61</sup>

The 366 filings under federal consumer protection statutes comprise 72% of all filings in the sample. Filings under such federal consumer protection statutes made up

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> DEBORAH HENSLER, ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS 549 tbl. E.1 (Rand Inst. for Civil Justice) (2000) (compensation rates reported in the text here have been calculated from the data presented in Table E.1 in Hensler et al.).

<sup>60</sup> *Id.* at 459.

<sup>61</sup> *See infra* Figure 1.

71.7% of all filings in the CFPB’s much larger 2010–2012 dataset discussed in its 2015 Arbitration Study.<sup>62</sup> This indicates that in terms of the frequency of federal statutory causes of action, the case types found in the Illinois Data are likely typical of consumer filings in other federal courts.

One difference between the case types indicated in Figure 1 and the case types found in the 2015 Arbitration Study is the absence from Figure 1 of cases brought under the federal Truth in Lending Act (“TILA”). The Illinois Data contained eleven cases in which the complaint included an alleged TILA violation. In three of those cases,<sup>63</sup> the TILA allegation was secondary to an alleged violation of a different federal consumer protection statute, such as the FDCPA. In such instances, the case is coded as arising under the different statute. In another seven cases, the plaintiffs did not pursue the TILA allegation, as the case involved alleged wrongdoing in mortgage origination or servicing. These cases were resolved on state law grounds, and thus are coded under the mortgage-related categories.<sup>64</sup> The plaintiffs actively pursued a TILA allegation in only one case.<sup>65</sup>

Complaints also alleged violations of state consumer protection laws or wrongful behavior triggering common law

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<sup>62</sup> See 2015 ARBITRATION STUDY, *supra* note 21, at 21 fig.2.

<sup>63</sup> *Greene v. Direct TV*, No. 10-cv-00117 (N.D. Ill. 2010) (coded as TCPA); *Wysocki v. City Nat’l Bank*, No. 10-cv-03850 (N.D. Ill. 2010) (coded as FDCPA); and *Velasquez v. THD At-Home Servs.*, No. 12-cv-03125 (N.D. Ill. 2012) (coded as FDCPA).

<sup>64</sup> Such cases are either in the “HAMP Mortgage Failure” or “Other Mortgage” categories and include *Smith v. Residential Servs.*, No. 10-cv-05440 (N.D. Ill. 2010); *Boyden v. BMO Harris Bank*, No. 11-cv-00061 (N.D. Ill. 2011); *Kesten v. Ocwen Loan Servicing*, No. 11-cv-06981 (N.D. Ill. 2011); *Sindler v. Saxon Mortgage*, No. 12-cv-07224 (N.D. Ill. 2012); and *Walton v. Diamond, Urban Fin. Servs.*, No. 12-cv-044493 (N.D. Ill. 2012). Two such cases, *Benn v. Surgery Grp.*, No. 10-cv-05922 (N.D. Ill. 2010) and *Battle v. Chi. Cycle*, No. 10-cv-06983 (N.D. Ill. 2010), are in the “fees and charges” category.

<sup>65</sup> *Swanson v. Argent*, No. 10-cv-01039 (N.D. Ill. 2010) (alleging that defendant failed to notify plaintiffs of their right to rescind, as required by TILA).

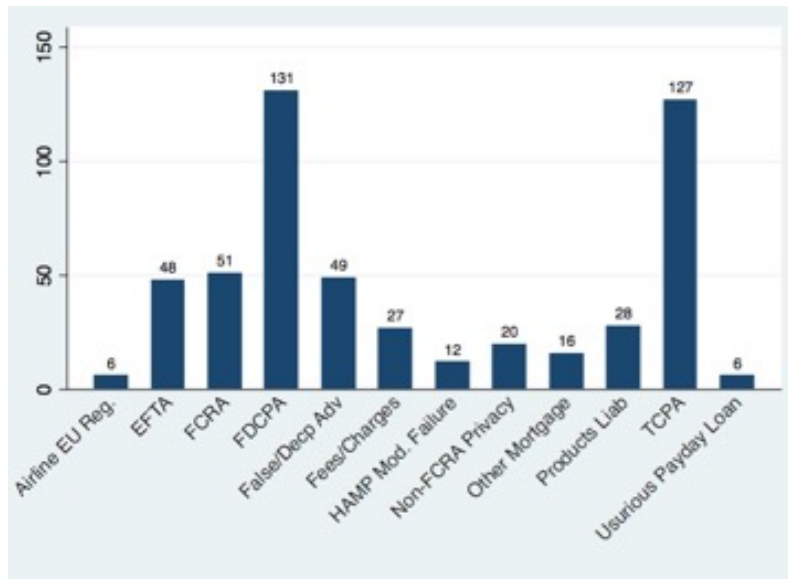
liability.<sup>66</sup> Figure 1 describes some state law case types, such as those involving products liability (defective products) claims and those alleging false and deceptive advertising. Other types require quick clarification. Those categorized as involving “fees and charges” challenge the imposition of such fees and charges in various consumer contracts on a variety of state common law and statutory theories. Home Affordable Mortgage Program (“HAMP”) mortgage modification failure cases arose from the federal HAMP and alleged that financial defendants were liable for failing to modify mortgages as promised pursuant to that program. “Other mortgage” claims include a congeries of alleged violations arising from mortgage origination and servicing. Usurious payday loan claims alleged precisely that. The final category of claims arose under European Union Regulation 261.<sup>67</sup> In that category of cases, plaintiffs alleged that various airline defendants failed to compensate passengers for international flight delay or cancellation.

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<sup>66</sup> These state law consumer class actions will be discussed and analyzed in detail in a subsequent article.

<sup>67</sup> Commission Regulation 261/04, 2004 O.J. (L 46) 1, [http://eur-lex.europa.eu/resource.html?uri=cellar:439cd3a7-fd3c-4da7-8bf4-b0f60600c1d6.0004.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:439cd3a7-fd3c-4da7-8bf4-b0f60600c1d6.0004.02/DOC_1&format=PDF).

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



#### 4. Outcomes in Class Actions Under Federal Consumer Protection Statutes

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

The most frequently occurring federal consumer protection class actions are brought under the FDCPA. That statute<sup>68</sup> imposes various formal requirements on debt collectors, such as registration and disclosure of identity as a debt collector. The FDCPA also contains substantive protections for consumer debtors. It bars a variety of abusive debt collector practices, such as dunning consumers on time-

<sup>68</sup> See *infra* text accompanying notes 128–39.

barred debts without disclosure of that fact, making harassing phone calls (sometimes using auto-dial and pre-recorded messages) attempting to collect debts, using false and misleading information about the balance of the debt, and attempting to embarrass debtors by calling third parties.

Second, cases brought under the TCPA<sup>69</sup> allege that the defendant sent unauthorized and unsolicited automated text messages, phone calls, or emails to the plaintiffs' cell phones or sent one or more unauthorized faxes. Plaintiffs allege that defendants initiated contact with plaintiffs either as part of a debt collection process or as part of a telemarketing program.

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

Finally, cases brought under the FCRA<sup>70</sup> most commonly allege that the defendant printed out the expiration date of a credit card on a retail receipt, a violation of FCRA's privacy protection provisions. FCRA cases also involve alleged violations in the use of an employment background check report (a consumer report under FCRA) and, less often, an allegation that information was disclosed in violation of the FCRA's statutory privacy protections.

Putting aside the category of "non-FCRA privacy,"<sup>71</sup> by February 2016, most cases—338 out of 365 or 93%—filed under the four main federal consumer protection statutes (FDCPA, TCPA, FCRA, and EFTA) had terminated. The distribution of outcomes under these four, primary federal consumer protection statutes is depicted in Table 1 and graphically in Figure 2 below.

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<sup>69</sup> See *infra* text accompanying notes 140–42.

<sup>70</sup> See *infra* text accompanying notes 104–27.

<sup>71</sup> As there were only 12 privacy violation cases arising under various federal privacy protection statutes, those cases will be discussed in a separate paper on consumer privacy class actions under both state and federal law.



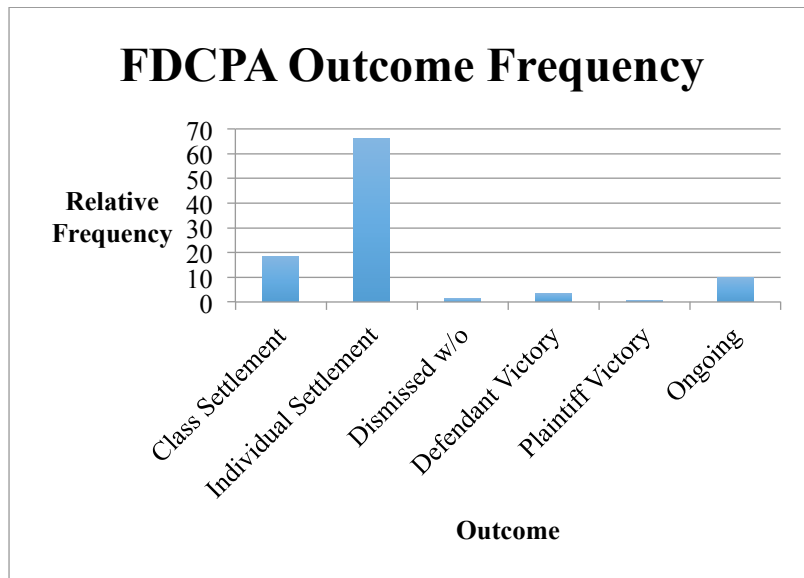
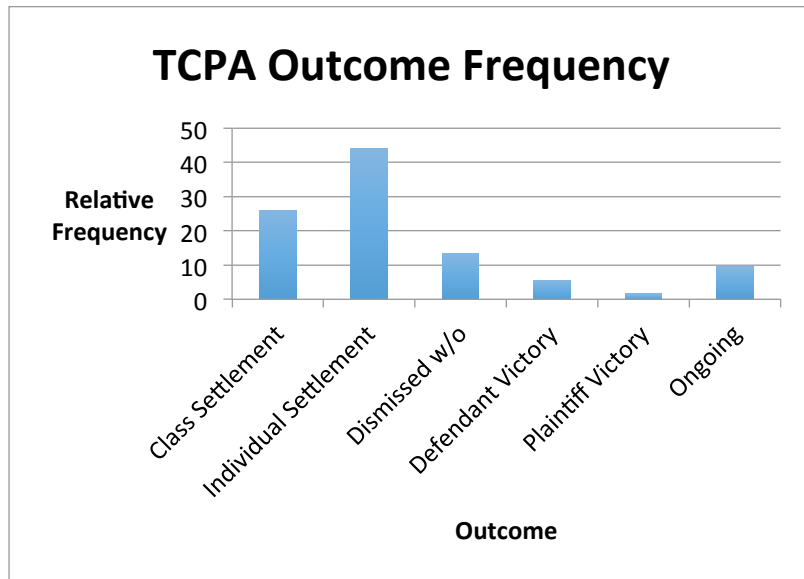
TABLE 1. OUTCOME PROBABILITIES BY STATUTORY CASE TYPE

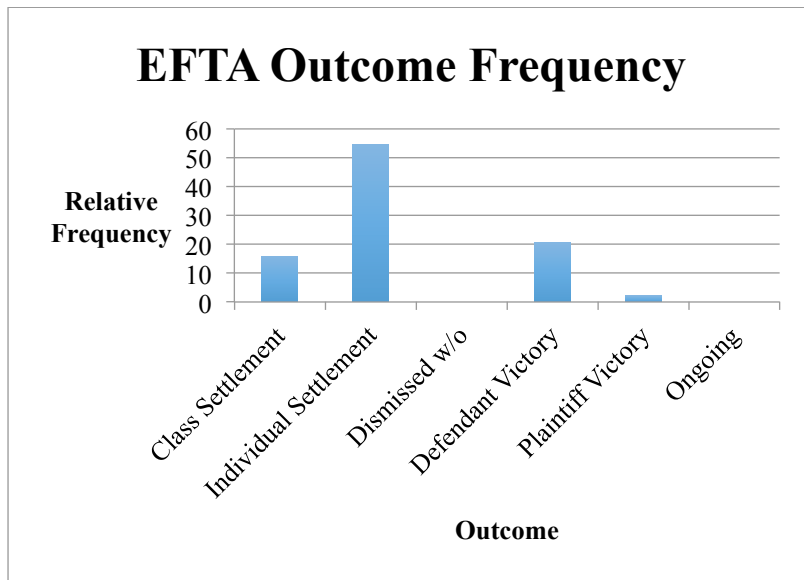
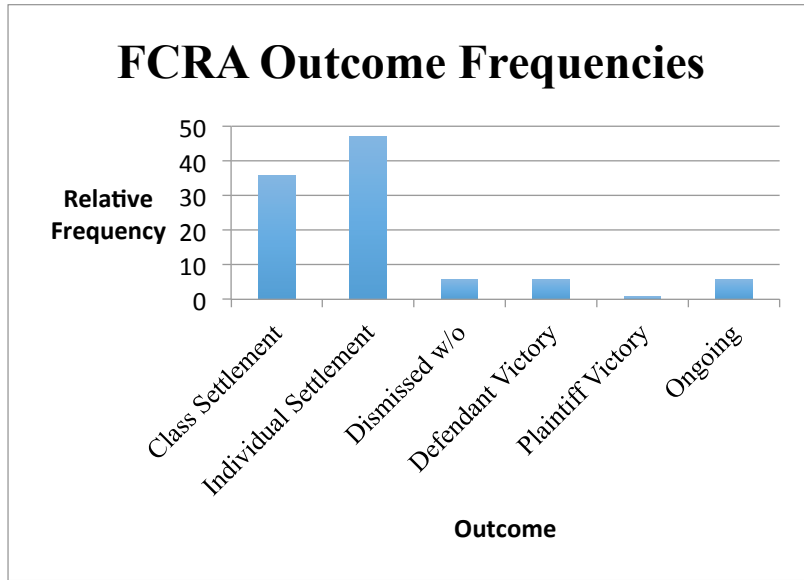
Case Type	Total Resolved Cases	Class Settlement	Individual Settlement	Dismissed Without Prejudice	Defendant Victory	Plaintiff Victory
TCPA	113	.28	.51	.15	.06	.00
FCRA	51	.37	.50	.06	.06	.00
FDCPA	122	.21	.70	.06	.02	.01
EFTA	43	.19	.59	.00	.20	.02

Table 1 shows substantial variation across case types in the relative frequency of each outcome. As explored in the substantive discussion below, this variation is largely due to differences in statutory causes of action. However, for the only three statutory claim types that still exist today,<sup>72</sup> between 87% and 93% of all claims are resolved in either an individual or class settlement. Such high settlement rates are indicative of civil litigation generally. However, in another respect, they seem very different. In only four cases did the plaintiff achieve a judgment in its favor (two TCPA cases, one FDCPA case, and one EFTA case). All of these cases were default judgments. In this sample, plaintiffs *never* actually had their substantive claim adjudicated on the merits by a judge or jury. Finally, defendant victories were judgments on Federal Rule of Civil Procedure (“FRCP”) 12(b)(6) motions to dismiss or on motions for summary judgment. In roughly 370 resolved cases discussed in this paper, no case ever went to trial before a judge or jury.

<sup>72</sup> See *infra*, Section II.B. for a discussion of Congress’ elimination of the ATM notice failures as a cause of action under the EFTA.

FIGURE 2. OUTCOME FREQUENCY ACROSS DIFFERENT STATUTORY CASE TYPES





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

In an ATM notice failure case, the plaintiff alleges that an ATM provider failed to post a notice of the fees charged “on or at” an ATM as was then required by EFTA. As the CFPB explained in a 2013 rulemaking,<sup>73</sup> Congress amended section 904(d)(3) of the EFTA in 1999 to require notices of the fee charged to the consumer digitally on the ATM screen and “on or at” the machine. The “on or at” notice “usually involved a sticker placed on the machine by the ATM operator.”<sup>74</sup> Under EFTA section 916, failure to provide the required notice could trigger liability in an individual or class action for actual damages; costs and attorneys’ fees; and statutory damages between \$100 and \$1,000 per plaintiff without proof of harm.<sup>75</sup> Under section 910(d), ATM operators could escape such liability only if they could show that the “on or at” ATM notice had been damaged or removed by a third party.<sup>76</sup>

In December 2012, Congress voted to eliminate the ATM “on or at” notice requirement from the EFTA.<sup>77</sup> As a result, cases alleging that the failure of an ATM to comply with this notice requirement violates the EFTA are now extinct. However, in several respects, these extinct ATM cases perfectly illustrate a class-action case type that still survives under many federal consumer protection statutes: a case where no class member has actually suffered any injury but which is nonetheless settled, where the nominal settlement is far less than the actual amount paid to class members,

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<sup>73</sup> See Disclosures at Automated Teller Machines (Regulation E), 78 Fed. Reg. 18,221 (Mar. 26, 2013) (to be codified at 12 C.F.R. pt. 1005).

<sup>74</sup> *Id.* at 18,221.

<sup>75</sup> However, class damages are capped at the lesser of 1% of the defendant’s net worth or \$500,000. 15 U.S.C. § 1693m(a)(B) (2012).

<sup>76</sup> 15 U.S.C. § 1693m(a-h) (2012).

<sup>77</sup> In Public Law 112–216, deleting the “on or at” requirement plus some other obsolete language from section 904(d)(3) of the EFTA. Act of Dec. 20, 2012, Pub. L. No. 112-216, 126 Stat. 1590.

and where that amount—the actual compensation received by the class—is dwarfed by the attorneys’ fees received by class counsel. For this reason, ATM notice failure class-action settlements are an interesting and important case study.

Between 2010 and 2012, plaintiffs filed forty-three ATM notice failure class actions in the Northern District of Illinois. In each case, the complaint alleged that an ATM machine in metropolitan Chicago failed to have the required “on or at” notice on a date when the named plaintiff used the machine. Such complaints were supported by photos allegedly showing the state of the machine on the date it was used by the plaintiff. Each case invariably sought statutory damages of up to \$1000 per class member, plus attorneys’ fees and costs. As shown in Table 2 below, the outcomes of such litigation quite clearly evolved over the sample period. However, 74% of the ATM notice failure cases ended in either a class or individual settlement. In this sense, the cases were very successful.

TABLE 2. ATM NOTICE CLASS-ACTION RESOLUTION

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

Given that no court scrutiny is required for individual plaintiff settlements, the dockets generally do not contain details about their terms. The single exception is the docket entry for *Stilz v. ATM National Solutions, LLC*’s attorneys’

fees.<sup>78</sup> In that case, the court entered a default judgment order awarding the plaintiff statutory damages of \$1000 and \$10,905.50 in attorneys' fees and costs to class counsel.<sup>79</sup> This ratio of attorneys' fees and costs to plaintiff recovery of 10:1 means that the attorneys' fees are equal to 1000% of the relief obtained.

As noted above, the requirement that judges approve class-action settlements as fair does generate information about class-action settlements. Appendix 1 details the class-action settlements in ATM notice failure cases. To understand Appendix 1 and the subsequent analysis of class-action settlements under the other federal consumer protection statutes found in the sample, one must understand a few basic features of class-action settlements. Class-action settlements generally have a stated or nominal settlement amount. In virtually all cases, that nominal amount caps the amount that the defendant pays out pursuant to the settlement. Such payouts go first as attorneys' fees to class counsel and then as incentive awards to named plaintiffs and as fees to the settlement administrator (the company that sends out notices to the class of their rights under the settlement). Next, actual class members who qualify (typically by filling out a valid claim form) receive compensation. In some cases, a provision in the settlement is made for some portion of the remaining funds to be paid out as a cy pres award. In the Illinois Data, such cy pres awards always went to legal aid organizations of one sort or another. With rare exceptions (in so-called non-reversionary settlement funds), after all these payouts are made, the defendant keeps whatever funds remain from the nominal settlement. Thus, for example, if the nominal settlement amount was \$100,000 but only \$50,000 was paid out to class counsel, named plaintiffs, the class, the settlement administrator, and the cy pres recipient, then the

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<sup>78</sup> *Stilz v. ATM Nat. Sols.*, No. 1:11-cv-05519 (N.D. Ill. 2012).

<sup>79</sup> *See* Order of May 14, 2012, *Stilz v. ATM Nat'l Sols.*, No. 11-5519 (N.D. Ill. 2012), ECF No. 22.

defendant would only pay out a total of \$50,000, not the \$100,000 nominal settlement amount.

The existing empirical literature on class-action settlements does not share a common investigative goal; therefore, different studies report different class-action settlement measures. The most recent study, by Shepherd,<sup>80</sup> reports on how class settlement payouts are divided among the class, attorneys, settlement administrators, and cy pres awards to charities. Fitzpatrick's 2010 paper is concerned primarily with discussing how attorneys' fees as a fraction of the nominal payout vary across case types.<sup>81</sup> The 2015 Arbitration Study reports on aggregate attorneys' fees, payouts to the class, and compensation rate by product-category type.<sup>82</sup>

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

As Appendix 1 shows, even the nominal class settlements in ATM notice failure class settlements were not large, ranging between \$40,000 and \$150,000. The actual aggregate payout to the class was even smaller, ranging

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<sup>80</sup> See Shepherd, *supra* note 34.

<sup>81</sup> See Fitzpatrick, *supra* note 23.

<sup>82</sup> See 2015 ARBITRATION STUDY, *supra* note 22.

between \$8000 and \$79,000. On average,<sup>83</sup> the actual aggregate class recovery—the total amount received by class members—in the ATM notice failures was only 46% of the nominal settlement amount. On average, although individual class members who were paid each received \$880, only 8.5% of the class received any compensation. By contrast, attorneys’ fees averaged 55% of the nominal settlement amount but 200% of the actual aggregate payout. In aggregate, rather than in average numbers, across all ATM notice failure settlements, the class compensation rate was a slightly higher 10%. However, the total payout to all class members was \$169,500, with total attorneys’ fees of \$198,000. Thus, even in aggregate, attorneys’ fees were larger than the amount paid to class members.

Despite their relatively small payouts, the ATM notice failure cases demonstrate the behavior that Congress incentivized through statutory causes of action combining statutory damages without proof of harm with the class-action procedural device. In general, the incentives cause a feeding frenzy of class-action filings even though the allegedly illegal behavior caused no actual harm. Congress recognized that the ATM notice failure cases involved no consumer harm when, in December 2012, Congress voted to eliminate the “on or at” ATM notice requirement.<sup>84</sup> As the CFPB noted in its 2013 rulemaking, consumer groups had argued against this elimination on the ground that the “on or at” notice might have been a consumer’s only indication that the ATM would charge a fee-for-use.<sup>85</sup> In the end, it seems that Congress agreed with the ATM providers’ commonsensical argument that since every ATM had an on-

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<sup>83</sup> Unless otherwise noted, only unweighted, numerical averages are reported.

<sup>84</sup> Act of Dec. 20, 2012, Pub. L. No. 112-216, 126 Stat. 1590.

<sup>85</sup> Disclosures at Automated Teller Machines (Regulation E), 78 Fed. Reg. 18,221, 18,222 (Mar. 26, 2013) (to be codified at 12 C.F.R. pt. 1005).



screen fee notice, the “on or at” notice provided no social utility.<sup>86</sup>

Second, the now-extinct ATM notice failure class actions demonstrate that class compensation rates in class settlements—the fraction of a class that actually gets any money from the settlement—are sometimes low simply because the class actions involve small stakes. For small-stakes class actions to be economically attractive to class attorneys, courts must ensure a sufficiently low cost of notifying class members of settlements. But low-cost notice is more often than not ineffective notice. In the case of ATM notice failure settlements, the average reported compensation rate was only 8.5%.<sup>87</sup> This low compensation

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<sup>86</sup> Zero social utility had to be balanced against the facts that, not only was it costly for ATM owners to maintain such notices, but the tidal wave of ATM notice litigation was adding to financial institution costs with some of the litigation (at least according to the banking industry) manufactured by plaintiffs whom banks believed (but had difficulties proving) had deliberately removed ATM notices just to generate a cause of action. See *Disclosures at Automated Teller Machines (Regulation E)*, 78 Fed. Reg. at 18,222.

<sup>87</sup> As Appendix 1 reports, in *Barreto v. Center Bank*, the compensation rate was 5%, and in *Loewy v. RBS Citizens Bank*, the class compensation rate was 12%. The average compensation rate for these two ATM “on or at” notice cases is 8.5%, and that is the number reported above in the text. This rate is consistent with what one would infer from the information reported about other ATM “on or at” notice cases. As can be seen from Appendix 1, in several ATM “on or at” notice cases (*Goldshteyn*, *Nguyen*, and *Louisma*), class counsel did provide an estimate of the number of allegedly un-noticed ATM transactions. Over the three cases, this number was large, averaging 19,400 for the three cases. To convert the number of ATM transactions into a rough estimate of the number of actual class members, one can divide the total number of transactions challenged by the number of months during which the ATM was allegedly un-noticed and then divide that by an estimate of the number of ATM uses per month per user. Assuming that each person using an ATM used that machine on average five times per month (a seemingly large number), then a fair estimate of the number of class members would be 772 for *Goldshteyn*, 171 for *Nguyen*, and 400 in *Louisma*. As 42 class members were compensated in *Goldshteyn*, 75 in *Nguyen*, and 44 in *Louisma*, the rough estimate of compensation rates in these three class settlements would be (respectively) 5%, 44%, and 11%. Two of these estimates are

rate did not result from the technical impossibility of determining who used a particular ATM machine on a particular date. In each of the settlements in Appendix 1, class counsel submitted an affidavit from the same Senior Vice President at First American Bank explaining the following procedure to identify who used a particular ATM on a given day.<sup>88</sup> First, one can obtain the bank routing number associated with each ATM transaction. Using those routing numbers, one can cross-reference and identify which financial institution issued each ATM card. Finally, one can contact each financial institution to identify the ATM cardholder.<sup>89</sup> No court disputed that the Senior Vice President's affidavit showed that, with enough effort, the precise identity of each ATM user could be learned. But in every such case, notice to the class was given via a general public newspaper notice and a website.

As indicated by the low compensation rate, such public notice was glaringly ineffective. District courts approved such a notice method because, given the small stakes in these cases, actual individualized notice would have been cost prohibitive. In other words, actual individualized notice

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almost identical to the actual class compensation rates of 5% and 12% in *Barreto* and *Loewy*, respectively. The estimated 44% compensation rate in *Nguyen* is so much higher than in any other ATM “on or at” notice case that one suspects that the assumption that users of an ATM use the machine on average 5 times per month must be incorrect for the ATM machines at issue in that case. Further evidence that the 8.5% class compensation rate in Table 2 may be generally valid for ATM “on or at” notice cases is provided by a report from class counsel in *Barreto* that, as “the claim form return rate in consumer class action settlements is between 2 and 20%,” the 5% rate in *Barreto* (a total of 18 claimants) was “well within the average return rate in the consumer class action context.” Plaintiff's Supplemental Memorandum in Support of Final Approval of the Parties' Class Action Settlement Agreement at 1–2, *Barreto v. Ctr. Bank*, No. 10-cv-06544 (N.D. Ill. Aug. 8, 2011).

<sup>88</sup> See the Affidavit of Eduardo Monteagudo, Exhibit D to Class Counsel's Memorandum in Support of Final Approval of the Class Action Settlement para. 3; *Goldshteyn v. Argonne Credit Union*, No. 10-cv-05402 (N.D. Ill. April 20, 2012), ECF No. 55-4.

<sup>89</sup> *Id.*

would have cost far more than the maximum expected recovery. As a result, such cases would never have been brought because they would be economically unattractive to plaintiffs' attorneys.

While, as cautioned at the outset, this Article does not confirm the representativeness of the Illinois Data, compensation rates in the Illinois Data seem likely to be typical of rates in ATM “on or at” notice failure cases more generally. In certain cases, class counsel filed memoranda in support of their motions for class settlement approval showing typical nationwide payout rates for ATM notice failure cases. For example, in *Barreto v. Center Bank*, counsel reported that 5% of the settlement class received compensation.<sup>90</sup> Class counsel also reported that because the claim form return rate in consumer class-action settlements is typically between 2% and 20%, the 5% rate in *Barreto* (a total of 18 claimants) was “well within the average return rate in the consumer class-action context.”<sup>91</sup> In addition, class counsel in *Barreto* reported that “the typical range of claimants in EFTA class settlements involving one ATM (like this one) is between 20 and 40.”<sup>92</sup> The claim filing rate of 2–20% in consumer class actions comes from an article written by a claims administrator with Rust Consulting.<sup>93</sup> That settlement administrator reports that: “[w]ith their broad range of subject matter, benefit types and amounts, and class member demographics, as well as the ‘hit-or-miss’ availability of mailing lists, consumer settlements can draw a filing rate between 2 and 20 percent.”<sup>94</sup>

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<sup>90</sup> Plaintiff's Supplemental Memorandum in Support of Final Approval of the Parties' Class Action Settlement Agreement at 1, *Barreto v. Ctr. Bank*, No. 10-cv-06544 (N.D. Ill. Aug. 8, 2011).

<sup>91</sup> *Id.* at 1–2.

<sup>92</sup> *Id.* at 2.

<sup>93</sup> See Tiffany Janowicz, *Class Action Perspectives: Anticipating Claims Filing Rates in Class Action Settlements* (Mar. 6, 2013) (unpublished paper) (on file with the Federation of Defense & Corporate Counsel), <http://www.thefederation.org/documents/16.Class%20Action%20Perceptives.html> [<https://perma.cc/7FV3-KJKY>].

<sup>94</sup> *Id.*

Finally, ATM notice failure cases demonstrate that even in seemingly simple cases, defendants will not settle until they exhaust every legally plausible defense making economic sense. Indeed, evolution of the potential legal defenses to ATM notice failure cases explains the evolution in outcomes in such cases over the 2010–2012 period. During 2010, defendants won fully a third of the ATM notice cases by making an offer of judgment to the named plaintiff and then moving to dismiss the case as moot.<sup>95</sup> This tactic—buying out the named plaintiff and therefore mooting the class action—was possible under the Seventh Circuit precedent *Damasco v. Clearwire Corp.*<sup>96</sup> Once the defendant “offers to satisfy the plaintiff’s entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under [FRCP] 12(b)(1), because he has no remaining stake.”<sup>97</sup> As the plaintiff in *Clearwire* pointed out, other circuits had created a rule that allows named class plaintiffs to avoid mootness by expeditiously moving to certify the class even after being offered complete relief.<sup>98</sup> The Seventh Circuit held that such an exception to mootness in class actions was unnecessary because class counsel could move to certify the class at the same time they file the complaint.<sup>99</sup> Class counsel could also request that the court delay ruling on the motion to certify the class to allow time for substantial discovery on the class certification issue.<sup>100</sup>

In 2010, plaintiffs lost many of the ATM notice class actions. In some instances, defendant established the affirmative defense that it had posted the required notice but

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<sup>95</sup> See *Stiltz v. Blackstone ATM LLC*, No. 10-cv-01997 (N.D. Ill. 2010); *Stiltz v. Standard Bank & Trust Co.*, No. 10-cv-01996 (N.D. Ill. 2010); *Stiltz v. Global Cash Network, Inc.*, No. 10-cv-01998 (N.D. Ill. 2010).

<sup>96</sup> *Damasco v. Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011) (quoting *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991)).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 895–96.

<sup>99</sup> *Id.* at 896.

<sup>100</sup> *Id.*

the notice was removed through no fault of the defendant.<sup>101</sup> Most, however, were lost because defendants made offers of full judgment before plaintiffs had requested class certification, thus mooting these cases under the Seventh Circuit's *Clearwire* decision. However, as one can discern from the pleadings, by 2011, class counsel had learned how to deal with the mootness problem by filing motions for class certification early on, or telling the court that they were going to do so. And class counsel had learned how to better prove notice violations: they took photos of ATMs over the course of several days before the named plaintiffs tried to use an ATM without the "on or at" notice. As a result, ATM notice class actions in 2011 and 2012 almost always succeeded in generating some kind of settlement for the individual plaintiff and/or the class: 92% of the cases filed in 2011 and 83% of the cases filed in 2012 resulted in a settlement.

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

### C. Class Actions Under the Other Major Federal Consumer Protection Statutes

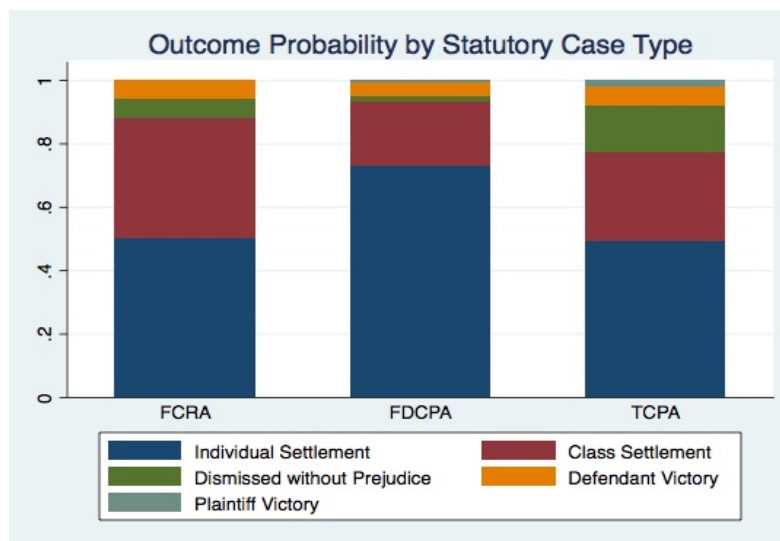
ATM notice failure class actions under the EFTA are now extinct, but consumer class actions survive across the

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<sup>101</sup> See, e.g., *Reyes v. Cole Taylor Bank*, No. 10-cv-02181 (N.D. Ill. 2010), ECF No. 55 (opinion granting summary judgment to defendant).

country under the FCRA, FDCPA, and TCPA. As illustrated by Figure 3 (reproducing graphically the data from Table 1 above), the frequency of various outcomes differs across case types. In particular, the distribution of outcomes under the FDCPA involves a much higher probability of an individual settlement (and hence overall settlement rate) than occurs under both the TCPA and FCRA. As a statistical matter, the outcome distribution under the FDCPA is significantly different than the outcome distribution under both the FCRA<sup>102</sup> and the TCPA.<sup>103</sup> The qualitative discussion of outcomes under the various statutes that follows below sets out some potential explanations for the distinctiveness of FDCPA outcomes.

FIGURE 3. OUTCOME PROBABILITY, BY STATUTORY CASE TYPE



<sup>102</sup> With the FDCPA distribution taken as the null,  $F(4,n) = 15$ , allowing one to reject the hypothesis of identical distributions with  $p < .01$ .

<sup>103</sup> Again with the FDCPA distribution taken as the null,  $F(4,n) = 121$ , which allows one to reject the hypothesis of identical distributions with  $p < .001$ .

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

### 1. The Fair Credit Reporting Act

Passed in 1970, in the heyday of federal consumer protection legislation, Congress enacted the FCRA<sup>104</sup> to ensure that the information held by consumer reporting agencies was accurate, kept private, and to be used only for certain authorized purposes. The FCRA imposes potential liability on both users and providers of consumer credit reports. Under the FCRA, employment background checks are included within the regulated category of “consumer reports.” An employer who uses such a report in its hiring decisions is thus regulated under the FCRA as a user of a consumer report. The FCRA requires that an employer comply with several procedural steps in using an employment background check.<sup>105</sup> First, the employer must tell the prospective employee that it might use the information in the report in an employment decision, and it must ask the employee for written permission before getting the report. Once the employer gets the report, if the employer believes the report might influence its decision, then it must give the prospective employee a copy of a standard “Summary of Rights” produced by the Federal Trade Commission. If the employer bases a decision on data contained in the report, such as criminal or credit history, then it must give the prospective employee contact information for the report provider and an explanation that the report provider did not make the actual employment decision. The explanation must also state that the report provider will not be able to explain the decision and that the

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<sup>104</sup> 15 U.S.C. § 1681 (2012).

<sup>105</sup> See *Consumer Information: Background Checks*, FTC (Nov. 2016), <https://www.consumer.ftc.gov/articles/0157-background-checks> [<https://perma.cc/VW9H-3A76>].

prospective employee has an opportunity to dispute the information in the report before the employer takes action based on it.<sup>106</sup> If the employer takes an adverse action based on the background report, then it must notify the applicant within a reasonable time.<sup>107</sup>

In 2003, FACRA was amended by the passage of the Fair and Accurate Credit Transactions Act (“FACTA”).<sup>108</sup> Intended to better ensure consumer privacy and standardized reporting, FACTA did two things of relevance to the class-action filings in the Illinois Data. First, it added a liability provision. If a consumer can establish a “willful” FCRA violation, he or she may recover attorneys’ fees, costs, punitive damages, and statutory damages between \$100 and \$1000 without the need to prove actual injury. A consumer may also recover damages and attorneys’ fees and costs for bad faith conduct.<sup>109</sup> Second, FACTA regulated credit card receipts issued by retail merchants, providing that “no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.”<sup>110</sup>

Much early litigation under FACTA involved the question of whether defendants who claimed to be unaware of the statutory requirement to remove expiration dates from receipts could nonetheless be held liable for a “willful” FACTA violation. Federal courts established various standards for FACTA willfulness. Amid inconsistency among circuits, in the 2007 *Safeco* decision, the Supreme Court partially clarified the issue when it stated that under the FCRA (and therefore FACTA), willfulness meant an objective

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1955.

<sup>109</sup> 15 U.S.C. §§ 1681n, o (2012).

<sup>110</sup> 15 U.S.C. § 1681c(g) (2012).



“reckless disregard” standard.<sup>111</sup> The Court also held that “there is no need to pinpoint the negligence/recklessness line.”<sup>112</sup>

Hundreds of FACTA class actions were filed after *Safeco*. Class counsels argued that the discovery cost of determining what a business knew or did not know about its receipts would only be economically feasible if plaintiffs could recover for the entire class. Businesses rebutted, opposing class certification on the ground that it risked imposing crushing billion-dollar liability for harmless technical FACTA violations.<sup>113</sup>

In 2008, Congress amended FACTA by passing the Credit and Debit Card Receipt Clarification Act.<sup>114</sup> According to Congress, this law was prompted by the “hundreds of lawsuits” filed against merchants who had mistakenly believed that FACTA compliance required them only to truncate credit card numbers and not the expiration date.<sup>115</sup> Congress found specifically that “[e]xperts in the field agree that proper truncation of the card number . . . regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identify theft or credit card fraud.”<sup>116</sup> Congress retroactively shielded merchants from statutory liability damages even though they had violated FACTA by printing an expiration date on a receipt (between December 4, 2004 and June 3, 2008) because it “deemed these lawsuits to be a significant burden on businesses, without any corresponding consumer benefit.”<sup>117</sup> Despite its

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<sup>111</sup> *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007).

<sup>112</sup> *Id.* at 69.

<sup>113</sup> See Bruce L. McDonald, Wiley Rein LLP, *Congress Restricts FACTA Statutory Damages Class Actions*, LEXOLOGY (July 7, 2008), <http://www.lexology.com/library/detail.aspx?g=464e8ebe-7ca0-4fa5-a3c7-677143dfdce4> [<https://perma.cc/V8NN-CCVC>].

<sup>114</sup> Act of June 3, 2008, Pub. L. No. 110–241, 122 Stat. 1565.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 374 (3d Cir. 2012) (citing Act of June 3, 2008, Pub. L. No. 110–241, § 2(a)(7), 122 Stat.

finding that printing an expiration date alone did not increase the risk of credit card fraud, Congress retained potential FACTA willful violation liability for statutory damages for such an error on any receipt printed after June 3, 2008.<sup>118</sup>

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

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

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1565, 1565–66; Act of June 3, 2008, Pub. L. No. 110–241, § 3(a), 122 Stat. 1565, 1566 (codified at 15 U.S.C. § 1681n(d)).

<sup>118</sup> See *id.*

the case filing date for such settlements to receive final judicial approval.

The high frequency of all types of FCRA class actions and the rapid finalization of class settlements in FCRA expiration date and employment background check litigation is indicative of the fact that such violations are easy to prove.<sup>119</sup> Plaintiffs could easily prove the FCRA violation by producing their credit card receipt (in expiration date cases) or by the failure of the employer to provide the required notices and reports to the prospective employee (in the employment report cases).

In both case types, the “willfulness” standard for the award of the statutory, non-injury damages of \$1000 was easily met by class counsel. Through countless websites and blogs, attorneys and regulators have created sufficient general awareness of the FCRA’s requirements to establish statutory willfulness. For example, by 2010, plaintiffs in FACTA expiration date class actions routinely alleged that the willfulness requirement was met because credit card companies advised and contractually required merchants to truncate expiration dates. International consumer protection conventions also required such truncation.<sup>120</sup> Defendants argued that such allegations were mere boilerplate, contained in every FACTA expiration date complaint, and that they did not establish recklessness as required by Supreme Court interpretations of FACTA.<sup>121</sup> Courts rarely

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<sup>119</sup> Indeed, only seven such cases ended in dismissal and only two of these dismissals were with prejudice; at least one of these two may have been an individual settlement.

<sup>120</sup> *See, e.g.*, Defendants’ Memorandum in Support of Their Motion to Dismiss the Class Action Complaint at 11–12, *Redman v. Take Care Health Sys., LLC*, No. 11-cv-09044 (N.D. Ill. March 19, 2012), ECF No. 22.

<sup>121</sup> In *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 57, 68–71 (2007), the Supreme Court held that “willfulness” under the FCRA means that the defendant’s conduct was reckless. Since that decision, lower courts have routinely understood this as a standard that asks whether a defendant’s interpretation of the FCRA’s requirements was “objectively reasonable.” These requirements very often involve technical questions of what information may and may not be contained in employment background

ruled on such arguments, usually made on FRCP 12(b)(6) motions to dismiss. Instead, at an identical mean time to settlement of thirteen months, parties reached both FCRA expiration date and background report class settlements. This suggests that the FACTA willfulness requirement has in practice provided very little protection for businesses under FACTA. Like the ATM “on or at” notice cases, FACTA expiration date cases are relatively easy for class counsels.

Perhaps the most important respect in which the FCRA expiration date and employment background report cases resemble the ATM “on or at” notice cases is that neither type of violation involves any actual injury to a plaintiff. As for the expiration date cases, Congress found in 2008 that experts did not believe that the risk of credit card fraud decreases when a merchant prints out the expiration date but truncates the actual credit card number, as FACTA requires.<sup>122</sup> Plaintiffs in FACTA expiration date cases do not allege that they have suffered harm, but seek statutory damages for willful violations. Federal courts that have found standing for plaintiffs alleging such FACTA violations have reasoned that the mere statutory violation itself can establish “injury” sufficient to meet constitutional standing requirements.<sup>123</sup> And the injury in employment background reports—a failure to follow process—is precisely the type of injury for which plaintiffs have faced the most difficulty in establishing standing under the Supreme Court’s constitutional standing jurisprudence.<sup>124</sup>

Figure 4 depicts class-action settlements in all types of FCRA cases. As shown, the (smoothed)<sup>125</sup> compensation rate

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check disclosures. *See, e.g., Jones v. Halstead Mgmt. Co.*, 81 F. Supp. 3d 324, 333, 337 (S.D.N.Y. 2015); *Miller v. Quest Diagnostics*, 85 F. Supp. 3d 1058, 1061–62 (W.D. Mo. 2015).

<sup>122</sup> *See supra*, note 114 and accompanying text.

<sup>123</sup> *See, e.g., Hammer v. Sam’s E., Inc.*, 754 F.3d 492 (8th Cir. 2014).

<sup>124</sup> *See Evan Tsen Lee & Josephine Mason Ellis, The Standing Doctrine’s Dirty Little Secret*, 107 NW. U.L. REV. 169 (2012).

<sup>125</sup> It is the smoothing that creates the appearance of a potentially negative value of the compensation rate.

distribution has a double-peaked shape, with compensation rates around 10% being most frequent, but very high compensation also being relatively frequent.

FIGURE 4. DISTRIBUTION OF COMPENSATION RATE IN FCRA CLASS SETTLEMENTS

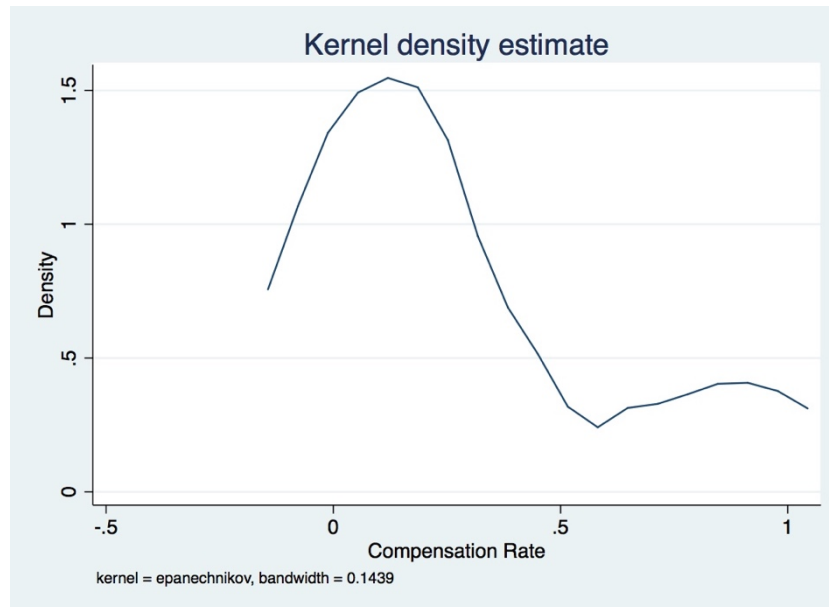
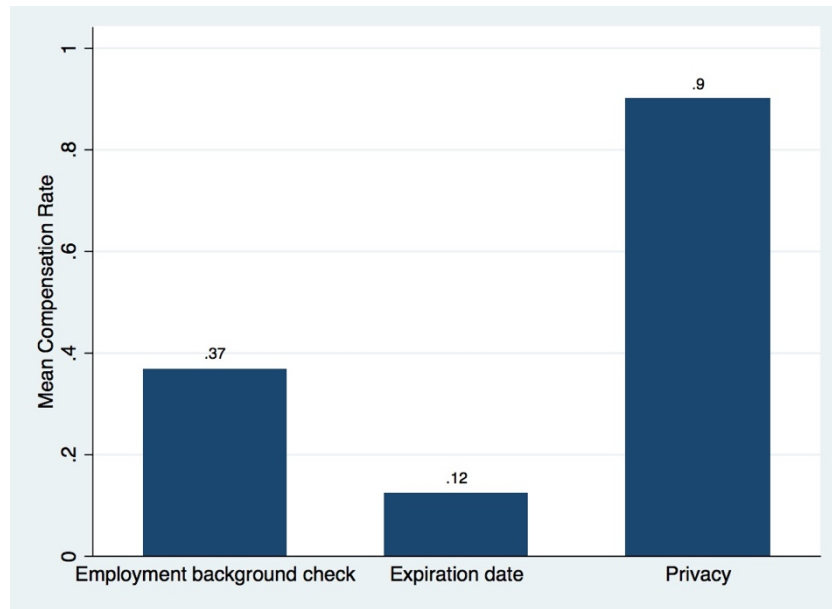


Figure 5 below helps to explain the double-peaked distribution of FCRA class compensation rates. The 37% class compensation rate in employment report class-action settlements is over three times the 12% compensation rate in expiration date cases.<sup>126</sup>

<sup>126</sup> Note that there is a single FCRA privacy settlement in the Illinois Data, and the reason that the compensation rate is so high in that case is because the relief there was free credit monitoring made available to the entire class.

FIGURE 5. FCRA MEAN COMPENSATION RATE, BY CASE TYPE



In a (transformed)<sup>127</sup> linear regression of compensation rate on case type (expiration date) and class size, reported in Table 3 below, expiration date cases have a lower compensation rate, a result that is significant at the 5% level. Increasing class size also lowers the compensation rate, but this result is not significant.

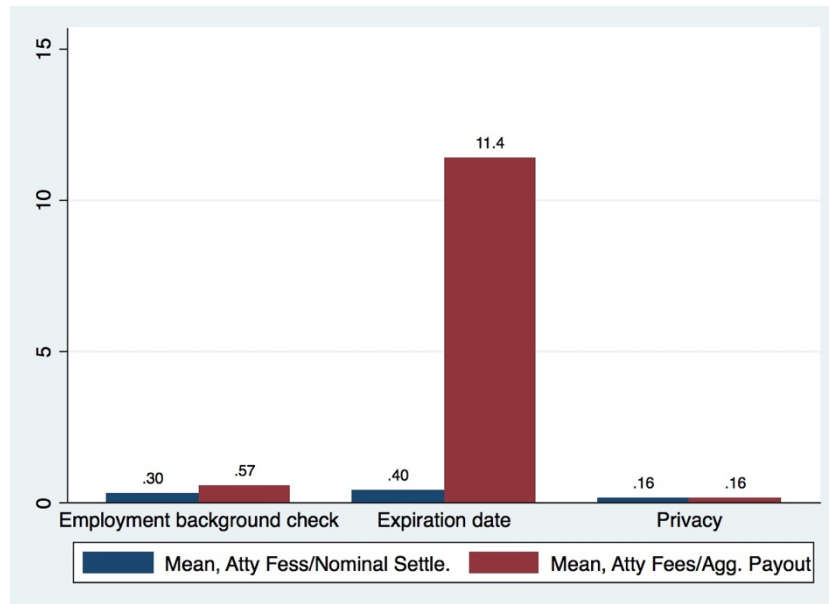
<sup>127</sup> As the compensation rate is a variable confined to the (0,1) range, it is transformed using the LOGIT transformation in STATA before running the linear regression.

TABLE 3. FCRA COMPENSATION RATE REGRESSION RESULTS

Logit Compensation Rate	Coef.	Std. Err.	T	P>t	[95% Conf. Interval]
Class Size	-6.27e-06	8.72e-06	-0.72	0.486	-.0000253 .0000127
Expiration Date Dummy	-2.221758	.9972362	-2.23	0.046	-4.394549 -.048967
Constant	-.0611625	.6825851	-0.09	0.930	-1.548388 1.426063

Perhaps most noteworthy about the FCRA class settlements is the enormous discrepancy between attorneys' fees and the aggregate class recovery for expiration date cases. As Figure 6 depicts, if one considered attorneys' fees in such cases only relative to the nominal settlement, they would appear to be quite reasonable. But at an average of 1100% of the amount that the class actually recovers, attorneys' fees dwarf the class' recovery. Attorneys' fees are actually likely to be even more disproportionate relative to class recovery in expiration date cases than Figure 6 depicts, for several expiration date class settlements involved in-kind relief to the class—things like coupons or sale days—that may well have generated zero compensation.

FIGURE 6. FCRA ATTORNEYS' FEES AS FRACTION OF NOMINAL AND AGGREGATE SETTLEMENT AMOUNTS BY CASE TYPE



## 2. The Fair Debt Collection Practices Act

The most common class-action filing in the Illinois Data was under the Fair Debt Collection Practices Act (“FDCPA”). Enacted as one of the core vintage 1970 federal consumer protection statutes, Congress intended the FDCPA to stop various abusive debt collection practices.<sup>128</sup> Successful FDCPA plaintiffs are entitled to a broad range of compensatory damages, including damages for lost wages, physical and mental distress, and statutory damages up to \$1000 without proof of harm.<sup>129</sup> In a class action, the FDCPA limits statutory damages recovered on behalf of absent class members to the lesser of \$500,000 or 1% of the debt

<sup>128</sup> See 15 U.S.C. § 1692(e) (“It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors . . .”).

<sup>129</sup> 15 U.S.C. § 1692k(a) (2012).



collector's net worth.<sup>130</sup> The FDCPA, as amended, includes six main sections that prohibit a variety of actions by debt collectors. The FDCPA filings analyzed in this Article can be organized into several functional categories that cut across these statutory provisions.

#### a. Formality Failure

The FDCPA imposes a number of formal disclosure requirements on debt collectors. The most numerically important cases in the Illinois Data include those that allege a failure to follow one or more of these formalities, which make up 50% of all FDCPA filings (71 out of 141).<sup>131</sup>

Formality failures fall into three distinct sub-categories. The first type, phone identification, describes cases where a debt collector did not properly identify himself or herself when contacting the debtor.<sup>132</sup> These cases often involve debt collectors leaving phone messages asking the consumer to call back without giving the necessary warning.

The second type of FDCPA formality failure, a letter notice, describes cases where a debt collector sends a letter notice to the consumer that violates the requirements in 15 U.S.C. § 1692g. Examples of this subcategory include letter notices that (1) did not provide effective notice of the 30-day verification period, (2) failed to effectively identify the name of the creditor, (3) failed to include that any dispute or request for name of the original creditor must be in writing, and (4) failed to include the principal and interest amounts, stating only the total amount due.<sup>133</sup>

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<sup>130</sup> § 1692k(a)(2)(B).

<sup>131</sup> The denominator is larger than the number of actual FDCPA filings because ten FDCPA cases included alleged violations in several categories.

<sup>132</sup> The failure by a debt collector to disclose in the initial communication with the consumer that he or she is a debt collector, that the debt collector is attempting to collect a debt, and that any information gathered in the communication will be used for that purpose, is in violation of 15 U.S.C. § 1692e (2012).

<sup>133</sup> See 15 U.S.C. § 1692g(a) (2012).

The third subcategory of FDCPA formality violations describes cases in which a debt collector violated a state law requirement (“State Law Violations”). Most commonly, these violations occur when a party attempts to collect debt without being properly licensed as a collection agency under state law.<sup>134</sup>

### b. Bad Debt

Bad debt cases comprise the second-highest number of FDCPA filings in the Illinois Data (39 of 141, or 28%). These cases can be broken down into three sub-categories. The first, bad debt interest, describes cases in which a party impermissibly adds interest to the debt principal. In the typical case, a debt purchaser retroactively adds interest that should have accrued before the purchase, despite the original creditor’s refusal to do so.<sup>135</sup> The second subcategory of bad debt filing, time-barred, refers to cases in which a debt collector attempts to collect a debt after the date that it is no longer collectable.<sup>136</sup>

The last bad debt subcategory, bad affidavit, describes cases in which a debt purchaser provides a fraudulent affidavit to consumers in violation of 15 U.S.C. § 1692e. In the typical case, the purchaser falsely represents to

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<sup>134</sup> These cases alleged that engaging in this action constituted a false, deceptive, or misleading representation or means in connection with the collection of any debt under 15 U.S.C. § 1692e (2012).

<sup>135</sup> The FDCPA prohibits the use of “unfair or unconscionable means to collect or attempt to collect any debt,” including “[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.” 15 U.S.C. § 1692f (2012). As such, any addition of interest to the debt outside of the original agreement creating the debt is a possible violation.

<sup>136</sup> The FDCPA prohibits a debt collector from using any unfair or unconscionable means to collect or attempt to collect a debt. Attempting to collect a debt that is time-barred, or, in the alternative, wrongly indicating that a debt is time-barred, is an unfair or unconscionable means to collect a debt. *Id.*

consumers that it could prove the debt. Oftentimes, the purchaser conceals documents containing express disclaimers about the enforceability and validity of the debt (“as is” clauses). Other cases involving fraudulent affidavits include the impermissible modification of an affidavit after the affiant signed it.

### c. Litigation Threat

A relatively small fraction (7 out of 141, or 5%) were based on an alleged threat by the debt collector that it would take legal action against the consumer if the debt was not paid off, despite the fact that legal action would not be taken. Often, these cases involved debt collectors who routinely do not file suit to collect on small debts yet represented to the consumer that they would do so. Under 15 U.S.C. § 1692e, a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. This includes the threat to take any action that the debt collector cannot legally take or does not intend to take.<sup>137</sup>

### d. Harassment

The final FDCPA category, called harassment, includes cases alleging egregious behavior by the party attempting to collect the debt. For example, a debt collector might repeatedly and continuously call a consumer without prior authorization to do so and with intent to annoy, abuse, or harass. The debt collector might also attempt to embarrass the consumer by calling third parties related to the consumer, often using inappropriate methods such as auto-dial and pre-recorded messages. Some of these cases involved debts the consumer did not owe.<sup>138</sup> There were sixteen cases in the harassment category (11% of all FDCPA filings).

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<sup>137</sup> 15 U.S.C. § 1692e (2012).

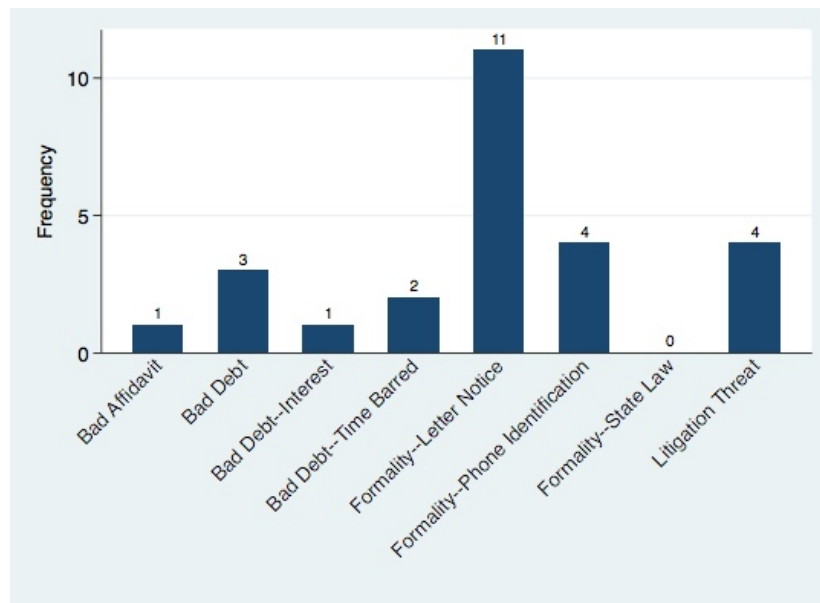
<sup>138</sup> These attempts may be in violation of 15 U.S.C. §§ 1692b, 1692c, 1692d, 1692e.

e. Other

Two cases that did not appear to fall under any of the previous four categories were placed in the “other” category. These included a case in which a debt collector reported false information about the debt to consumer reporting agencies, and a case in which a debt collector purchased healthcare debts and then purported that payments on those debts constituted acceptance of a revolving credit line from the debtor.

As can be seen from Figure 7 below, class-action settlements by FDCPA case type closely track the filings sample proportions for the two main case types, formalities and bad debt, with filings/class settlement proportions being 51/54% for formalities and 23/28% for bad debt. At 15% versus 5%, only for litigation threat type cases was the class settlement proportion far above the proportion of filings.

FIGURE 7. FDCPA CLASS SETTLEMENTS, BY CASE TYPE



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

FIGURE 8. FDCPA COMPENSATION RATE DISTRIBUTION

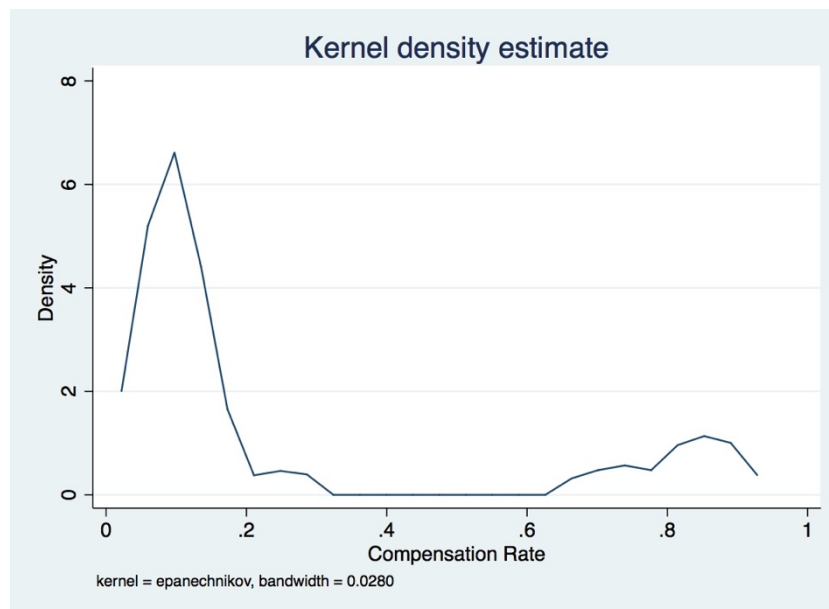
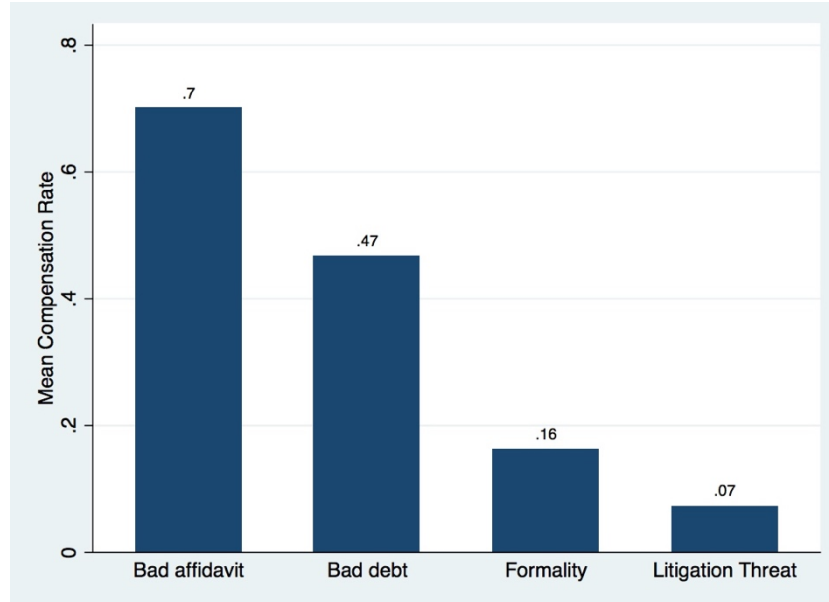


Figure 8 shows the (smoothed) distribution of the compensation rate across all FDCPA case types. Figure 9 breaks out the compensation rate by FDCPA case type. As Figure 8 shows, the majority of FDCPA settlements involve a class compensation rate of less than 20%. The compensation rates across types of FDCPA cases in Figure 9 shows that the mean compensation rate in FDCPA cases varies by an order of magnitude across case types, from 7% for the three cases alleging unlawful litigation threats to 70% for the one settlement in a case alleging a bad affidavit. Restricting attention to the two most frequent FDCPA settlement types, those alleging a failure of the debt collector to follow a required formality and those alleging attempts to collect on a bad debt, shows that the mean compensation rate varies from 47% for the bad debt settlements to 16% for the formality settlements. The difference in the compensation rate across case types is statistically significant (with  $F(3,21) = 9.8$ ,  $p < .007$ ).

FIGURE 9. FDCPA COMPENSATION RATES, BY CASE TYPE

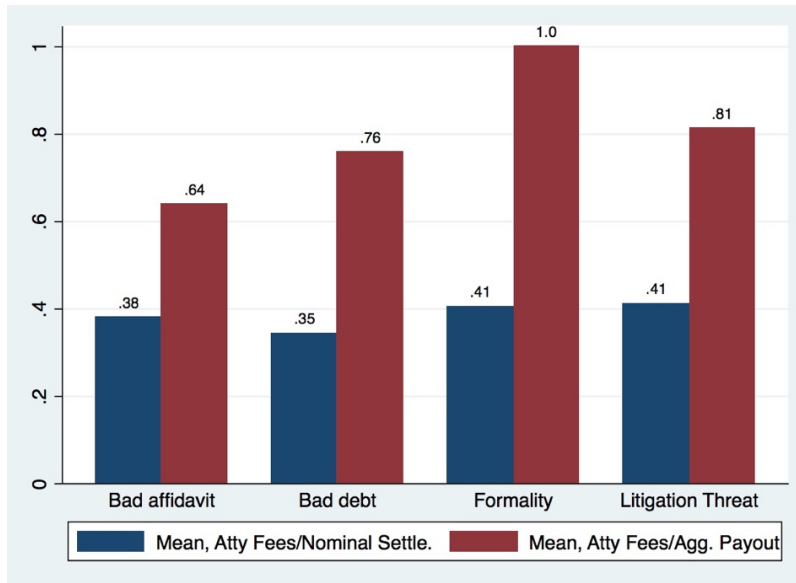


Unlike compensation rates, as Figure 10 shows, attorneys' fees relative to the nominal class settlement amounts and aggregate payouts do not vary as much across FDCPA case types, ranging only from .35 to .42. Aside from formality FDCPA cases, the ratio of attorneys' fees to the aggregate payout to the class varies less. But fees are high, averaging at least 64% of the class payout for all case types. These high fees reflect the fact that courts award attorneys' fees based on the reasonable value of class counsel's time spent on the case. Courts do not base attorneys' fees by comparing attorneys' fees to the recovery (on a common fund theory of fee recovery) because the FDCPA limits actual recovery to the lower of \$500,000 or 1% of the defendant's net worth. This net worth consideration likely explains why attorneys' fees in formality FDCPA cases are higher than other FDCPA case types. On average, attorneys' fees in formality FDCPA cases equal the actual aggregate amount paid to the class.<sup>139</sup>

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<sup>139</sup> The net worth limitation was mentioned in memoranda arguing for judicial approval of the class settlement in 87% of FDCPA formality violation class settlements, versus in only 33% of bad debt FDCPA class settlements (the only other FDCPA case with more than one class settlement). With  $z = 2.06$ , this difference is significant at the .02 level. The formality class settlements with approval memoranda justifying the settlement by reference to the net worth limitation are *Tuntevich v. Levenfeld Pearlstein, LLC*, No. 10-cv-02093 (N.D. Ill. 2010), *Pawelczak v. Bureau of Collection Recovery, LLC*, No. 11-cv-01415 (N.D. Ill. 2011), *Pawelczak v. Financial Recovery Services, Inc.* No. 11-cv-02214 (N.D. Ill. 2011), *Braatz v. Leading Edge Recovery Solutions, Inc.*, No. 11-cv-03835 (N.D. Ill. 2011), *Walls v. United Collection Bureau, Inc.*, No. 11-cv-06026 (N.D. Ill. 2011), *Rice v. Praxis Financial Solutions, Inc.*, No. 11-cv-08488 (N.D. Ill. 2011), *Wilfong v. National Capital Management, LLC*, No. 12-cv-02979 (N.D. Ill. 2012), *Repika v. Accelerated Financial Solutions, LLC*, No. 12-cv-04290 (N.D. Ill. 2012), *Glover v. Alpha Recovery Corp.*, No. 12-cv-04355 (N.D. Ill. 2012), *Kallenhorn v. J.C. Christensen Associates, Inc.*, No. 12-cv-06056 (N.D. Ill. 2012), *Halliday v. Law Offices of David A. Kolb, P.C.*, No. 12-cv-06705 (N.D. Ill. 2012), *Smith v. J.C. Christensen & Associates, Inc.*, No. 12-cv-07023 (N.D. Ill. 2012), and *Kalish v. Transworld Systems*, No. 12-cv-08614 (N.D. Ill. 2012), while the formality settlements whose approval memoranda do not mention the net worth limitation are *Donahue v. Weltman, Weinberg & Reis Co.*, No. 10-cv-04619 (N.D. Ill.

FIGURE 10. FD CPA ATTORNEYS' FEES AS FRACTION OF NOMINAL SETTLEMENT AMOUNT AND ACTUAL AGGREGATE COMPENSATION PAID TO CLASS MEMBERS



### 3. Telephone Consumer Protection Act

The TCPA prohibits autodialed telephone calls, faxes, and emails if the recipient has not given prior consent.<sup>140</sup> The

2010) and *Krenzelak v. The Brachfield Law Group*, No. 12-cv-03325 (N.D. Ill. 2012). For the most common non-formality class settlement, bad debt settlements that do mention that net worth limitation in the memoranda justifying approval are *Wysocki v. City National Bank*, No. 10-cv-03850 (N.D. Ill. 2010) and *Jones v. National Credit Adjusters, LLC*, No. 10-cv-0802 (N.D. Ill. 2010), while bad debt settlements that do not mention the net worth limit are *Skusenenas v. Lindebarger et al.*, No. 10-cv-08119 (N.D. Ill. 2010), *Schallhammer v. Gateway Recovery Assoc., Inc.*, No. 11-cv-00621 (N.D. Ill. 2011), *Stumpf v. PYOD, LLC*, No. 12-cv-04688 (N.D. Ill. 2012), and *Grandalski v. Encore Receivable Management Inc.*, No. 12-cv-05423 (N.D. Ill. 2012). Further details on these settlements can be found in the filing details descriptions available at <http://dx.doi.org/10.18130/V3/WR4RF9>.

<sup>140</sup> With exceptions discussed below, the TCPA makes it unlawful:



TCPA permits such communications in two discrete circumstances: (1) if the recipient voluntarily gave the sender his or her phone number within the context of an already-established business relationship; or (2) if the recipient published its fax number on an Internet site.<sup>141</sup> Importantly, like the other federal consumer protection statutes discussed in this article, the TCPA allows class-action plaintiffs to claim either actual damages or statutory damages of \$500 without proof of injury. The TCPA gives the trial court the discretion to award treble damages, up to \$1500 per violation, if the plaintiff can prove that the defendant “willfully or knowingly” violated the statute. Importantly, under the TCPA, statutory damages accrue per violation.<sup>142</sup>

Unlike the other statutory causes of action discussed here, because TCPA damages aggregate across thousands and in some cases millions of unconsented autodialed communications, TCPA class actions are often huge. On average, each TCPA class-action settlement in the Illinois Data contained 1,901,402 class members. TCPA settlements on average produce a nominal settlement of \$7,377,495 and an aggregate payout of \$6,293,547 (or 85% of the average nominal settlement). Attorneys’ fees average \$2,225,213; however, the time between case filing and judicial approval

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to make any [unauthorized] call . . . using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, . . . [and] to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.

47 U.S.C. § 227(b)(1) (2012).

<sup>141</sup> *Id.*

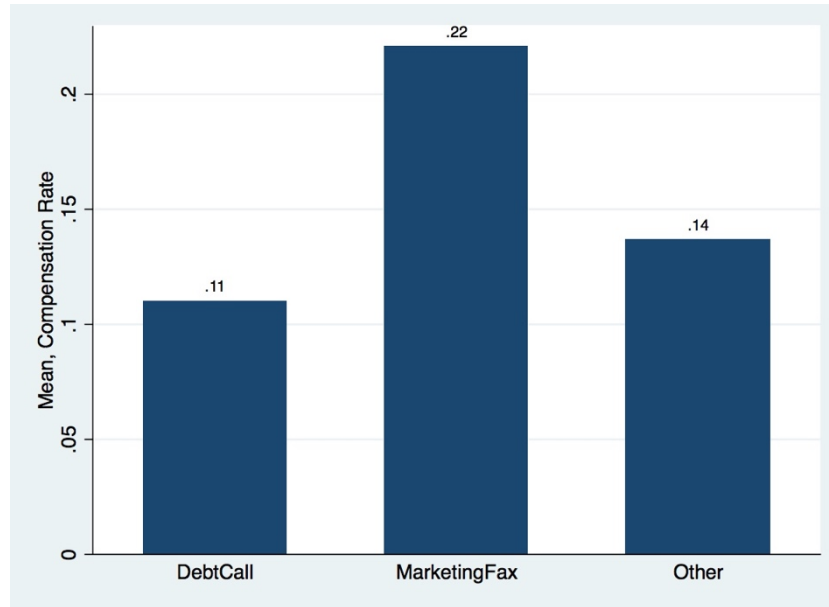
<sup>142</sup> 47 U.S.C. § 227(b)(3) (2012).

of a final settlement is on average twenty-six months. Moreover, the unweighted average compensation rate in TCPA settlements is only 19%. As far as the aggregate performance goes, in TCPA class-action settlements, attorneys' fees of \$76,945,118.49 were incurred to generate nominal settlements totaling \$223,032,294. As actual aggregate payouts total \$188,964,180, attorneys' fees in TCPA class settlements were 41% of the aggregate class payout.

The TCPA cases fall into three broad case types: (1) those involving autodialed phone calls (or, less often, a text message) made as part of the debt collection process (42% of all TCPA filings); (2) those involving an unauthorized marketing fax (31% of all filings); and (3) those involving a marketing text, call, or email (27% of all filings). However, at 44% each, debt call and marketing fax case types account for the vast majority of TCPA class settlements (with marketing call, text, or email cases making up the remainder of class settlements).

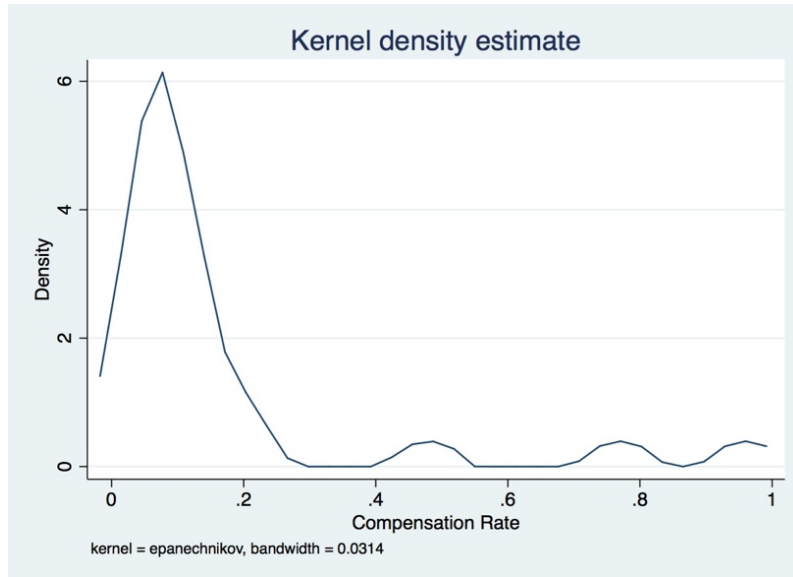
Debt call and marketing fax class settlements are at opposite ends of the TCPA spectrum. Of the marketing fax class settlements, 87% involved doctors' and dentists' offices or other businesses that received unsolicited telemarketing faxes. Class-action settlements in marketing fax cases involved moderately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

FIGURE 11. TCPA CLASS COMPENSATION RATES, BY CASE TYPE



Looking at the (smoothed) distribution of the claims rate across all TCPA case subtypes, and then as depicted in Figure 12 below, we see that, as with all other case types, the distribution is highly skewed, with most settlements involving a claims rate of less than 20%. If we compute the compensation rate weighted by the relative class size compensated, we find that the weighted compensation rate in TCPA debt call class settlements is only 4%. The weighted compensation rate in TCPA marketing fax settlements is 21%.

FIGURE 12. TCPA COMPENSATION RATE DISTRIBUTION



Debt call and marketing fax cases differ in a number of ways. Debt call settlements had an average class size of 5,905,313, while marketing fax classes were much smaller, averaging 22,090 members.<sup>143</sup> In debt call class settlements, the mean aggregate payout to the class was \$12,156,263, almost six times larger than the mean aggregate payout of \$2,255,563 in all other TCPA class settlements.<sup>144</sup> Moreover, the average individual payout to class members actually receiving compensation in TCPA debt call settlements of

<sup>143</sup> There were 53,341,705 class members in debt call settlements and 309,260 class members in marketing fax settlements (counting *Martin* and *Patterson* as a single settlement).

<sup>144</sup> A difference that with  $F(1,26) = 3.26$  has  $p < .08$ .

around<sup>145</sup> \$289 was much smaller than the average payout of \$453 in marketing fax settlements.

Importantly, the \$289 payout in debt call settlements is an unweighted average. Two of the class settlements in the Illinois Data, *Patterson v. Capital Management* and *Martin v. Leading Edge Recovery Solutions, Inc.*, were part of the settlement of three class actions consolidated under the caption *In Re Capital One*.<sup>146</sup> That litigation included almost half of all class members in the Illinois Data (17,522,049). Further, the individual payout to members in *Capital One* who actually received compensation was only \$34.60.<sup>147</sup> Moreover, in the largest TCPA class settlement, *Gehrich v. J.P. Morgan Chase Bank*, with over 19,000,000 class members (over half of the class members in the sample if one counts *In re Capital One* as a single settlement), the class settlement was approved without *any* information given regarding the individual payout that class members could expect.

In terms of how the cost of achieving a class settlement compares with the actual results for class members, TCPA class settlements seem to be almost as bad as FCRA and the old ATM EFTA notice failure class settlements.<sup>148</sup> As Figure 13 shows below, other than for debt call settlements, attorneys' fees as a fraction of the nominal class settlement are right around the contingency fee standard of 33%. However, for every type of TCPA class settlement, attorneys' fees are greater than or (roughly) equal to the actual aggregate class recovery. For marketing fax settlements,

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<sup>145</sup> This is the minimum because in some settlements, only the amount paid per fax was reported in the settlement, making it possible that some class members may have received compensation for multiple unsolicited faxes.

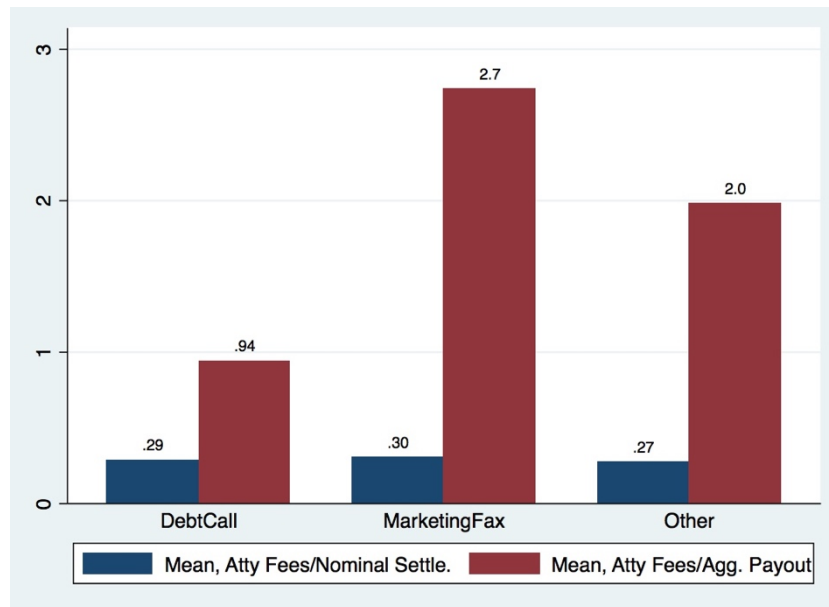
<sup>146</sup> *In re Capital One Telephone Consumer Protection Act Litigation*, No. 12-cv-10064, MDL No. 2416 (N.D. Ill. 2012)

<sup>147</sup> This is the amount reported by the court in approving the class settlement with a reduction in attorneys' fees to a little over \$15 million. See *In re Capital One Telephone Consumer Protection Act Litigation*, 80 F. Supp. 3d 781, 783 (N.D. Ill. 2015).

<sup>148</sup> For details on the ATM notice failure settlements, see Appendix 1.

which, as noted above, make up almost half of all TCPA class settlements, class counsel is awarded fees that are on average equal to 260% of what the class members actually receive in compensation.

FIGURE 13. TCPA ATTORNEYS' FEES AS FRACTION OF NOMINAL SETTLEMENT AND AGGREGATE PAYOUT



It is true that attorneys' fees in some of the largest TCPA class settlements are a much lower fraction of the aggregate class recovery. For example, in the *In re Capital One* litigation, which included two class settlements in the Illinois Data, attorneys' fees comprise only 28% of the amount actually paid to the class.<sup>149</sup> However, while one can

<sup>149</sup> From *In re Capital One Telephone Consumer Protection Act Litigation*, 80 F. Supp. 3d at 787, one learns that if the initially requested attorneys' fee of over \$22 million had been approved, then class members would have received in aggregate \$47,700,569. However, as the court approved only \$15,668,265 in attorneys' fees, 80 F. Supp. 3d at 809, the actual amount paid to class members was about \$53,650,569, so that

identify statistically the factors that influence judges to give big attorneys' fees, no statistically significant relationship is apparent between attorneys' fees as a fraction of class recovery and any other descriptive or outcome variables.

This is shown by Tables 4 and 5 below, which present the results of ordinary least squares regression runs. Table 4 shows that, as one would expect, attorneys' fees increase with both the size of the nominal settlement and the size of the class (with the effect statistically significant at the 7% and 5% levels, respectively). It is noteworthy that the variables describing how the class fared under the settlement—the compensation rate and the aggregate compensation—do not approach statistical significance.

TABLE 4. ATTORNEYS' FEES REGRESSION RESULTS

Attys' Fees	Coef.	Std. Err.	T	P>t	[95% Conf.	Interval]
Duration	-38,138.71	24,466.9	-1.56	0.135	-89,175.77	12,898.34
Comp. Rate	101,043.4	613,931.5	0.16	0.871	-1,179,595	1,381,682
Market Fax	-519589.5	289,635.8	-1.79	0.088	-1,123,759	84,580.26
Class Size	.1233503	.0601498	2.05	0.054	-.0021199	.2488206
Nominal Settle	.2436162	.1269004	1.92	0.069	-.0210934	.5083257
Agg Payout	-.0933392	.1831329	-0.51	0.616	-.4753478	.2886694
Constant	1,264,462	575,598.1	2.20	0.040	63,785.26	2,465,139

In a regression on the same explanatory variables, where the variable to be explained is not the absolute magnitude of attorneys' fees but the ratio of such fees to the actual aggregate payout to the class, there are no relationships that even approach statistical significance. This is shown by Table 5, which also confirms that the court does not consider

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finally approved attorney fees were about 28% of the amount received by the class. Note that the court, like all District Courts, reported, attorneys' fees relative to the nominal settlement of over \$75 million, not relative to the actual aggregate payment to the class. 80 F. Supp. 3d at 787.

the actual amount paid to the class when determining whether to approve a fee award.

TABLE 5. RATIO OF ATTORNEYS' FEES TO AGGREGATE PAYOUT REGRESSION

Attys' Fees to Agg. Payout Ratio	Coef.	Std. Err.	t	P>t	[95% Conf.	Interval]
Duration	.0880711	.1335203	0.66	0.517	-.1904474	.3665896
Com. Rate	-3.924143	3.350336	-1.17	0.255	-10.91282	3.064536
Market Fax	2.379641	1.580595	1.51	0.148	-.9174233	5.676705
Class Size	-1.97e-07	3.28e-07	-0.60	0.556	-8.81e-07	4.88e-07
Nominal Settle	4.91e-07	6.93e-07	0.71	0.486	-9.53e-07	1.94e-06
Agg Payout	-7.52e-07	9.99e-07	-0.75	0.460	-2.84e-06	1.33e-06
Constant	-.7224982	3.141144	-0.23	0.820	-7.274809	5.829813

### III. IMPLICATIONS OF THE NORTHERN DISTRICT OF ILLINOIS EVIDENCE FOR THE SOCIAL UTILITY OF CLASS ACTIONS UNDER FEDERAL CONSUMER PROTECTION STATUTES

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



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

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

To measure the significance of no-allegation-of-injury (or “no-injury”) class actions in the Illinois Data, the research team identified the relevant cases, for example, by examining whether the plaintiff alleged and/or attempted to prove that he or she suffered injury. Under this criterion, three types of cases qualify: (1) EFTA ATM “on or at” notice failures; (2) FCRA expiration date and employment background check formalities cases; and (3) FDCPA cases alleging a failure to follow formalities. This leaves TCPA cases.

In passing the TCPA, Congress found that unconsented autodialed communications cause at least some annoyance to the recipient and that lack of consent was crucial to consumer harm. All TCPA filings in the Illinois Data allege that autodialed calls were made to the plaintiff without consent. For this reason, TCPA cases are not categorized as no-injury cases. As discussed in more detail below, however, courts have shifted to TCPA defendants the burden of proving that the plaintiff did consent. Thus, TCPA plaintiffs merely must allege that they did not consent to the autodialed communication. Many TCPA cases may involve consent and no harm as Congress understood it. For this reason, this Article also considers the proportion of no-injury

filings and class settlements with TCPA filings removed from the sample.

Consider first the numbers on no-injury filings, including TCPA cases. Of 327 total filings, a total of 148, or 45%, contain no allegation of plaintiff injury.<sup>150</sup> Thus, even including all TCPA cases, no-injury cases comprise almost half of the cases in the Illinois Data. As for the class settlement outcome, the question is whether no-injury cases occur with a statistically significant higher probability among filings ending in class settlement than filings ending in other ways. No-injury cases make up 47% of the cases ending in class settlement (40 out of 85), and 49% of cases that do not end in a class settlement (118 out of 242). This difference is not statistically significant, and in any event, no-injury cases are more likely in the set of filings that do not end in class settlement than in those that do.<sup>151</sup>

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

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<sup>150</sup> There are 43 ATM no-harm filings, 44 FCRA expiration date or background check filings, and 71 FDCPA formality filings, for a total of 148 no-harm filings;  $148/327 = 45\%$  no allegation of harm filings.

<sup>151</sup> In the full sample, with TCPA cases included as cases alleging harm, there are 327 total cases, with 158 (or 48%) involving no harm. Of the 242 cases not ending in class settlement, 118 (or 49% of the total) were cases were no-injury cases as categorized in the text. Of the 85 cases ending in class settlement, 40 (or 47% of this sample) involved no harm. With a z statistic of only .33, the difference between the .49 rate at which no-injury cases appear in the sample that does not end in a class settlement and the .47 rate at which they appear in the sample ending in class settlement is not statistically significant (we cannot reject the null of equal proportions).

significantly more likely to end in class settlement than other types of filings.<sup>152</sup>

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

On the other hand, it may be argued that even if the FCRA expiration cases are conceded to involve no harm to consumers, failure to follow disclosure requirements under FRCA and the FDCPA may sometimes lead to harm. A consumer properly informed of a background report could discover and report errors and persuade a prospective employer to look past the report in making its hiring decision. If a consumer knows that a debt collector is attempting to communicate, he or she might be able to inform the debt collector quickly that the debt has actually been paid.

While these are possibilities, the existing literature on disclosure indicates that they are very unlikely. There is little evidence that mandatory consumer disclosures are

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<sup>152</sup> With the overall probability of a no-injury case in the non-TCPA sample at .72, and such cases occurring in the class-action settlement subsample of size 52 with probability .8 and in the no class settlement subsample of size 164 with probability .74, the z statistic equals 16, which is significant at the .0001 level.

effective in actually informing consumers.<sup>153</sup> In light of this evidence, the expected harm to consumers from violation of disclosure and other formalities is likely low. On the basic economic model of optimal compensation, one is led to ask whether the harm being compensated is one that the consumer would insure against if offered such insurance at a price equal to the insurer's expected payout plus a competitive profit (an actuarially fair rate).<sup>154</sup> Because the cost of delivering compensation through class-action settlements is so high, a consumer would pay a relatively high price for such compensation. With such high costs, relative to very small coverage amounts, even a very risk averse consumer would turn down such insurance.

Given the questionable utility of compensating consumers for such harms, the private enforcement incentives created by no-harm class actions become especially troublesome. Simply by allowing the consolidation and joint pursuit of thousands or millions of small claims, class actions incentivize private enforcement of violations generating such claims. The data show that statutes with statutory damages up to (in the case of the TCPA) \$1500 per violation without even an allegation of harm to class members creates an extraordinarily powerful incentive for class counsel to pursue such cases. Moreover, as the data confirms, the extra incentive generated by statutory damages likely has its biggest marginal impact in cases where the class of consumers is relatively small.

To see this, consider first a TCPA class action with one million class members, each of whom suffers on average \$10 of annoyance when bothered by an autodialed call to her cellphone. If recovery is limited to actual damages suffered, such a suit offers \$10,000,000 of actual damage recovery. A

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<sup>153</sup> See OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 33–118 (2014) (giving a survey of the empirical literature indicating the ineffectiveness of consumer disclosure).

<sup>154</sup> See Steven Shavell, *Economic Analysis of Accident Law* ch. 5, at 4 (Nat'l Bureau of Econ. Research, Working Paper No. 9694, 2003).

class action with such an easy-to-prove violation of the law would likely be attractive to plaintiffs' attorneys even without statutory damages that boost the potential recovery to \$1.5 billion.

By contrast, consider next an FDCPA case with only 1000 class members suing for violation of statutory formalities that harmed each in the amount of \$10. If recovery is limited to actual damages, such a class action would hold out the prospect of only \$10,000 in aggregate damages. Such a case might interest relatively few plaintiffs' attorneys. However, the same suit offering statutory damages of \$1000 per class member would have a potential aggregate recovery of \$1,000,000. With such potential liability, the class action would seemingly be much more attractive to class counsel.

It may well be that Congress fully intended to use statutory damages with no allegation of harm to work such a massive boost of the private enforcement incentives of class counsel. However, a necessary consequence of such no-harm statutory damage claims is to divert the efforts of class counsel away from other case types where the harm to consumers may be larger but statutory damages smaller. Statutory damages are relatively uniform across all case types used this in Article; class members virtually always ask for roughly \$1000 per class member. When statutory damages do not vary with the harm suffered by consumers, class counsel have no incentive to choose to pursue cases where the harm to deter is the greatest. Instead, their incentive is to pursue the cases that are easiest to establish, such as those where a credit card receipt contains the expiration date. One must wonder whether Congress intended this result.

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

In class settlements under the TCPA and FCRA expiration date cases—the largest class settlements—attorneys' fees equal or exceed, often by a multiple, the

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

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

The only exception to the pattern of attorneys' fees that may be several times as high as the class recovery is for settlements under the FDCPA. However, as Figure 10 shows, attorneys' fees in FDCPA class settlements are always at least two-thirds of the class recovery. For the most commonly occurring such settlement—involving a failure of FDCPA formalities—attorneys' fees are on average equal to the class recovery. Even in FDCPA cases, viewed purely as an instrument for mass compensation, class-action settlements are enormously inefficient.

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

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

D. As There Are No “Small Dollar” Consumer Class Actions Under Federal Consumer Protection Statutes with Statutory Damages, the Basic Economic Justification for Claims Aggregation in the Class Action May Fail to Hold

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

The federal consumer protection statutes discussed here award statutory damages of at least \$500, and more often

\$1000 or \$1500, without proof of harm. In each of the 327 cases in the Illinois Data, the plaintiff asked for at least statutory damages. Thus, there are no truly small dollar claims under the federal consumer protection statutes studied here. The Illinois Data is insufficient to demonstrate whether or not \$1000 in statutory damages incentivizes an individual lawsuit. However, the Illinois Data does provide evidence that federal consumer protection statutes have eliminated the very small \$20 or \$30 claim that is often taken to epitomize and justify consumer class actions.

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

The data also shows that the value of consumer class actions in setting binding legal precedent that may guide future behavior may be more limited than some commentators assume. Some published opinions do emerge from the kind of class-action litigations studied here. Courts have, for example, clarified in published opinions that the defendant in a TCPA case has the burden of showing that the consumer consented to be called.<sup>155</sup> But while courts do issue opinions when they rule on motions to dismiss and summary judgment motions, very few such opinions are published. Nonetheless, precisely zero cases in the sample of 327 consumer class actions ever went to trial. The rare plaintiff judgments were all default judgments. The data suggest that consumer class actions under federal consumer protection statutes rarely involve a formal vindication of consumer rights.

Most of the time, consumer class actions generate an individual settlement. About half of the TCPA, FCRA, and EFTA cases in the Illinois Data settled individually. A full 70% of all FDCPA cases ended in an individual settlement.

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<sup>155</sup> See cases cited *infra* note 163.



Somewhat ironically, consumer class actions under these statutes seem to do quite well at compensating the individual named plaintiff. The terms of the individual settlements are opaque. However, in the three default judgments in our sample, the plaintiffs were awarded maximum statutory damages of \$1000, with attorneys' fees of roughly \$10,000 also awarded. If the terms of these default judgments were similar to the terms of individual settlements, then at the very least, class counsel are being fully compensated for their efforts in obtaining such individual settlements. It may well be that without the threat of proceeding to discovery in an attempt to certify the class, such individual settlements would not occur. However, the ubiquity of such settlements strongly suggests that the fees awarded for obtaining individual settlements are sufficient to incentivize class counsel in these types of federal consumer protection cases. This suggests that consumer class actions under these statutes may not be vital to either compensation or deterrence.

#### F. Even Cases With Allegations of Harm May Actually Involve No Harm to Anybody

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

Observe, however, that the harm from such practices depends upon individually specific circumstances. Debt collectors are not prohibited from attempting to collect valid debts that are not time barred, and debt owners and collectors are legally permitted to and do bring lawsuits to collect on such debts. Consumers do consent to some autodialed calls, as when an insured gives her phone number

to her insurance company so as to be alerted to changes in her health insurance plan, or a patient gives her phone number to her dentist so as to be alerted that it is time for her teeth to be cleaned by a hygienist. Thus, the question for class-action settlements is whether settlements occur when they should—when the individual circumstances are such that the harm Congress cared about actually occurred, so that settlements may serve a valuable deterrent function—or instead are random, meaning that they are as likely to occur when there is no harm as when there is harm.

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

The non-trivial payouts in TCPA cases may well be justified on deterrence grounds because, unlike the FCRA expiration date cases and FDCPA and FCRA cases alleging a failure to comply with formalities, a typical TCPA class-action filing alleges the defendant engaged in conduct that Congress specifically found to be harmful to consumers. As the Ninth Circuit explained in *Satterfield v. Simon & Schuster*, Congress passed the TCPA “in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls.”<sup>156</sup> Consumers “complained that such calls are a ‘nuisance and an invasion of privacy.’”<sup>157</sup> The TCPA’s goal was to “protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate inter-state commerce by restricting

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<sup>156</sup> *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009).

<sup>157</sup> *Id.*

certain uses of facsimile machines and automatic dialers.”<sup>158</sup> With the obvious difficulty of precisely valuing the cost of such privacy invasions, the TCPA’s \$500 statutory damage provision—rising to \$1500 for willful violations—can be justified as a way to deter privacy invasions without getting bogged down in a likely fruitless attempt to precisely value the harm they cause.

As the harm caused by an autodialed cellphone call or text—namely, an invasion of privacy and annoyance—itself depends on the communication being unwanted by the consumer, the TCPA allows autodialed calls that are made with the “express consent” of the “called party” and also allows fax advertisements from senders with an “established business relationship” to recipients who have “voluntarily” communicated or made available to the sender their fax number.<sup>159</sup> Thus, the TCPA explicitly recognizes that sometimes consumers may actually want to receive certain autodialed calls or fax advertisements. In these cases, there is, almost tautologically, no harm to the consumer in receiving something that she has explicitly authorized (in the case of calls) or might well expect (in the case of faxes).

Inasmuch as the harm from a TCPA violation depends upon whether a particular consumer consented to the communication or had an ongoing business relationship with the defendant, one might argue that a class action is not an appropriate way to adjudicate alleged TCPA violations.

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<sup>158</sup> *Id.* (citing S. REP. NO. 102-178, at 1 (1991), as reprinted in 1991 U.S.C.C.A.N. 1968, 1968.).

<sup>159</sup> More specifically, §§ 227(b)(1)(A) and (B) allow autodialed phone calls made with “express consent” from the recipient, and § 227(b)(1)(C) permits unsolicited fax advertisements from:

a sender with an established business relationship with the recipient” where “(ii) the sender obtained the number of the telephone facsimile machine through—(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or (II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution.

47 U.S.C. § 227(b) (2012).

Under FRCP 23(b), a court is to certify a class action seeking individual damages only if it finds that “questions of law or fact common to class members predominate over any questions affecting only individual members.”<sup>160</sup> However, whether the plaintiff in a TCPA action expressly consented to be called involves an individualized, fact-specific inquiry, making class certification for such actions inappropriate under FRCP 23. Three cases in the Illinois Data contain evidence that the defendant made this argument.<sup>161</sup> In one case, class counsel overcame this argument simply by defining the class to be all those consumers who received the allegedly unlawful communication without consent. However, in a thoughtful opinion, Judge Kendall found that decisions from around the country on this issue had generated a rule that “when a defendant sets forth specific evidence showing that a significant percentage of the putative class consented to receiving calls on their cellphone,” the issues of individualized consent predominated, making class certification inappropriate.<sup>162</sup> The Illinois Data shows that the vast majority of TCPA class actions may survive without serious inquiry into the predominance of class issues.

Defendants also once made the argument that a plaintiff alleging a violation of the TCPA must also prove that he or she did not consent to receiving the cellphone call or fax (the

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<sup>160</sup> FED. R. CIV. P. 23(b)

<sup>161</sup> Plaintiff's Amended Motion for Class Certification of Count VIII of the Consolidated Complaint, *Balbarin v. N. Star Capital Acquisition LLC*, No. 10-cv-1846 (N.D. Ill. 2012), ECF No. 144; Response by First Credit Services, Inc. in Opposition to Motion by Plaintiff Kofi Jamison to Certify Class, *Jamison v. First Credit Servs.*, No. 12-cv-4415 (N.D. Ill. 2012), ECF No. 79; Defendant's Answer and Affirmative Defenses to Plaintiff's Counterclaim, *Hanley v. Fifth Third Bank*, No. 12-cv-1612 (N.D. Ill. 2012), ECF No. 18.

<sup>162</sup> *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 107 (N.D. Ill. 2013) (finding class certification inappropriate where Honda showed that 1200 out of 2887 class members had provided their phone numbers and where individualized inquiry into Honda's records would be required to determine whether the remaining class members had consented).

latter by having an existing business relationship). Judicial interpretations of the TCPA have said to the contrary that “prior express consent” under the TCPA is an affirmative defense on which the defendant bears the burden of proof; it is not a required element of the plaintiff’s claim.<sup>163</sup> The Federal Communications Commission (“FCC”), which administers the implementation of the TCPA, has agreed that the defendant has the burden of establishing that the plaintiff “expressly consented” to the communication.<sup>164</sup> Filings in the Illinois Data show that defendants do sometimes succeed in carrying this burden. Indeed, of the six TCPA cases that defendants won, only two were won on substantive grounds. However, in both of these cases, the defendant established the affirmative defense of prior express consent by showing that the plaintiff had provided her phone number as part of an ongoing business relationship, knowing that it would be used by defendant or others to contact him or her.<sup>165</sup>

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<sup>163</sup> See *Thrasher-Lyon v. Ill. Farmers Ins. Co.*, 861 F. Supp. 2d 898, 905 (N.D. Ill. 2012); *D.G. v. Diversified Adjustment Serv., Inc.*, No. 11-cv-2062, 2011 WL 5506078, at \*3 (N.D. Ill. Oct. 18, 2011); *Martin v. Bureau of Collection Recovery*, No. 10-cv-7725, 2011 WL 2311869 at \*1 (N.D. Ill. June 13, 2011); see also *Grant v. Capital Mgmt. Servs., L.P.*, 449 F. App’x 598, 600 n.1 (9th Cir. 2011); *Pinkard v. Wal-Mart Stores, Inc.*, No. 3:12-cv-2902, 2012 WL 5511039, at \*2 (N.D. Ala. Nov. 9, 2012).

<sup>164</sup> Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. 559, 565 (2008) (“Should a question arise as to whether express consent was provided, the burden will be on the creditor to show it obtained the necessary prior express consent.”).

<sup>165</sup> In *Elkins v. Medco Health Solutions, Inc.*, the court found that the plaintiff expressly consented to receive telephone calls from her health plan’s pharmacy benefits manager advising her of cheaper prescription renewal options when she provided her phone number while enrolling in a health plan agreement that stated that the plan provider may use or share the information provided by the subscriber for “other businesses who work for the Plan . . . [t]o tell You about treatment options or health related services.” No. 12-cv-5617 (N.D. Ill. 2012), *transferred & decided on summary judgment* No. 4:12-cv-2141, 2014 WL 1663406, at \*3 (E.D. Mo. Apr. 25, 2014). In *Greene v. Direct TV*, the court found that when she provided her cellphone number to Equifax knowing that potential creditors would use it as a contact number for potential fraud alert

These decisions were consistent with most earlier judicial decisions and FCC regulations as they existed at the time.<sup>166</sup> Both had said that by proving that a consumer gave his or her number to a business with whom he or she had an existing business relationship, a TCPA defendant established express consent. The burden then shifts to the consumer to show that she had revoked that consent by requesting no further calls.<sup>167</sup>

Following some district courts (including one decision in the Illinois Data),<sup>168</sup> the FCC has recently promulgated a rule under which TCPA defendants may no longer establish express consent to an autodialed call or fax by showing that the plaintiff provided her cellphone number under an established business relationship. Under a rule that took

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notifications, the plaintiff provided express consent for the defendant to use that number to contact her to verify her identity. No. 10-cv-117 (N.D. Ill. Nov. 8, 2010).

<sup>166</sup> See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 F.C.C.R. 559, 564 (2008) (concluding that giving a “cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt”).

<sup>167</sup> According to a decades-old FCC rule, “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached.” In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. at 8769; see also *id.* at 8779 n.47 (“[S]ubscribers may sever any business relationship, i.e., revoke consent to any future solicitations, by requesting that they not receive further calls from a telemarketer, . . .”); *Elkins v. Medco Health Solutions, Inc.*, No. 12-cv-5617 (N.D. Ill. 2012), *transferred & decided on summary judgment* No. 4:12-cv-2141, 2014 WL 1663406, at \*3 (E.D. Mo. Apr. 25, 2014).

<sup>168</sup> *Edeh v. Midland Credit Mgmt. Inc.*, 748 F. Supp. 2d 1030, 1038 (D. Minn. 2010); *Thrasher-Lyon v. Illinois Farmers Commercial Ins. Co.*, 861 F. Supp. 2d 898, 907 (N.D. Ill. 2012) (holding that while providing a phone number to a creditor may establish consent for auto-dialed calls from the creditor, this does not establish express consent to receive such calls from a debt collection company acting as an agent of the creditor).

effect on October 16, 2013, TCPA defendants in telemarketing cases must produce a “prior written consent,” where:

[t]he term *prior express written consent* means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.<sup>169</sup> Such written agreement must include a “clear and conspicuous disclosure” that informs consumers that they are not required to sign the agreement as a condition to receiving any good or service but that by signing they consent to receiving telemarketing calls.<sup>170</sup>

A final commonly occurring problem with the consent defense to a TCPA robocall violation arises when the defendant was provided the cellphone number by a customer but that customer no longer owns the number. Cellphone number reassignments occur with perhaps surprising frequency, totaling (according to one journalistic account) about thirty-seven million in 2011.<sup>171</sup> Several plaintiffs in the TCPA cases in the Illinois Data were called on cellphone numbers that had been given to defendants not by the plaintiffs but by previous holders of that number.<sup>172</sup> In such cases, defendants argued that they had “consent” under the TCPA to make such calls. Plaintiffs argued that when Congress allowed robocalls made with the prior express

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<sup>169</sup> 47 C.F.R. § 64.1200(f)(8) (2012).

<sup>170</sup> §§ 64.1200(f)(8)(i)(A), (B).

<sup>171</sup> Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling*, WALL ST. J. (Dec. 1, 2011), <http://www.wsj.com/articles/SB10001424052970204012004577070122687462582>.

<sup>172</sup> See, e.g., *Soppet v. Enhanced Recovery Co.*, No. 10-cv-5469, 2011 WL 3704681, at \*2 (N.D. Ill. Aug. 21, 2011).

consent of the “called party” in the TCPA,<sup>173</sup> it meant the party actually called. Plaintiffs also argued that Congress did not create an implicit exception for calls inadvertently made to people who had never actually consented. Thus far, the federal courts of appeals have sided with the plaintiffs, uniformly holding that when Congress said that the “called party” needs to have consented, it meant the current phone subscriber.<sup>174</sup>

Such decisions may seem relatively straightforward as a matter of statutory interpretation, but they raise deeper issues regarding the normative desirability of TCPA liability. Prominent commentators<sup>175</sup> have argued that by threatening companies with the kind of multi-million-dollar class-action settlements found in the Illinois Data, TCPA liability for robocalls inadvertently made to the wrong person will chill valuable communications, such as calls sending fraud and identify theft alerts and reminders of appointment and due dates. Other commentators have found it “amazing” that TCPA liability in this situation is even a “topic of debate,” reflecting the current “zeitgeist” in which the potential for liability to increase firm costs and prices itself counts as an argument against liability.<sup>176</sup> Still, the inadvertent wrong number TCPA debt collection calls are yet another indication of the questionable utility on deterrence grounds of many TCPA class settlements.

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<sup>173</sup> 47 U.S.C. § 227(b)(1)(A)(iii) (2012).

<sup>174</sup> See *Osorio v. State Farm Bank*, 746 F.3d 1242, 1251 (11th Cir. 2014); *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012).

<sup>175</sup> See Adonis Hoffman, *Sorry, Wrong Number, Now Pay Up*, WALL ST. J., (June 15, 2015), <http://www.wsj.com/articles/sorry-wrong-number-now-pay-up-1434409610?KEYWORDS=sorry+wrong+number>.

<sup>176</sup> Lincoln Caplan, *Paying for Robo-Calls*, N.Y. TIMES (May 18, 2012), <http://takingnote.blogs.nytimes.com/2012/05/18/paying-for-robo-calls> [<https://perma.cc/CCD7-9NEP>].



#### IV. IMPROVING CONSUMER CLASS ACTIONS UNDER FEDERAL CONSUMER PROTECTION STATUTES

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

As discussed in the Introduction, *Spokeo v. Robins* was a class action seeking statutory damages of \$100 to \$1000 under the FCRA against a “people search engine” website that allegedly misstated information about the plaintiff’s age, marital status, education, and professional experience.<sup>177</sup> As described earlier, FCRA permits statutory damages without requiring proof of harm for the publication of a false report.<sup>178</sup> The Supreme Court allowed the *Spokeo* case to proceed but held that the Ninth Circuit confused the particularity requirement for standing with the requirement that the plaintiff show that “the particular [FCRA] procedural violations entail a degree of risk sufficient to meet the concreteness requirement.”<sup>179</sup> While providing little guidance as to the sufficient degree of risk, the Court’s decision in *Spokeo* nonetheless provides an avenue for courts to screen out consumer class actions where there truly is no harm or risk of harm.

The most glaring no-harm cases in our sample are those involving the printing of an expiration date on a receipt in violation of FCRA, the violation of various formalities in employment background checks under the FCRA, and various communications by debt collectors for which a violation of the FDCPA is alleged. In the expiration date cases, the existing evidence is that there is neither harm nor risk of harm. Under *Spokeo*, a plaintiff’s inability to produce an affidavit testifying that the printing of an expiration date could cause harm could quickly end such cases at the standing stage. As such cases are not insignificant in the sample studied above, that alone would be a salutary impact

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<sup>177</sup> See *supra* text accompanying note 14.

<sup>178</sup> See the discussion of FCRA *supra* Section II.C.1.

<sup>179</sup> *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1543 (2016).

from *Spokeo*. As for the cases involving violations of various formalities, it would be of great interest to see whether plaintiffs could produce affidavits testifying even to a risk of harm to the consumer. If they could consistently do so, then it would be surprising in light of the mass of empirical evidence showing the general ineffectiveness of disclosure formalities in particular. Still, if plaintiffs could produce such evidence, then these cases would proceed as they do now. If, however, such affidavits could not consistently be produced, then *Spokeo* would have been of social value in screening out true no-harm cases from the expensive class-action process.

## B. Better Judicial Monitoring

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

Judges play a unique role in damage class actions: Without the judge's decision to grant certification, a class action lawsuit does not exist. Without the judge's approval, a lawsuit cannot be settled. Without a judge's decision to award fees, the class action attorneys cannot be paid. . . . Even after a case is resolved, judges may continue to play a role by overseeing the disbursement of settlement funds.<sup>180</sup>

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<sup>180</sup> HENSLER ET AL., *supra* note 59, at 445.

However, a very basic economic model of judicial preferences suggests that judges may have little incentive to conform to this ideal. Judges likely value not only leisure but also prestige—their standing with other judges and the public at large.<sup>181</sup> Assuming that prestige declines both when a trial judge is reversed on appeal and when court queues grow too long (partly because of the direct implication that the judge is lazy in failing to resolve cases, and partly because long queues lead to public pressure to increase the number of judges, which lowers the prestige of being a judge), trial judges will be attracted to case resolution methods that keep queues from getting too long but also minimize the chance of a potentially embarrassing reversal. Approving class-action settlements is an ideal method of case resolution from this judicial point of view: dockets are cleared with a very low probability of reversal.

As part of approving such class-action settlements, judges also approve fees to the plaintiffs' attorneys. While trial judges may be reversed on appeal for failing to certify a class, they are rarely, if ever, reversed for approving a settlement and its attendant attorneys' fees award.<sup>182</sup> Thus what Helland and Klick call "judicial expediency" predicts that judges would routinely approve class-action settlements with relatively large attorneys' fees but little actual compensation to class members.

The rough data is consistent with this judicial expediency story; as Eisenberg and Miller's update to include cases from 2003 to 2008 found, judges granted the requested attorneys' fees in 70% of cases.<sup>183</sup> More careful statistical analysis also has tended to confirm the judicial expediency hypothesis. Working with the Eisenberg and Miller dataset, Helland and Klick added to the list of explanatory variables a measure of

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<sup>181</sup> Eric Helland & Jonathan Klick, *The Effect of Judicial Expedience on Attorney Fees in Class Actions*, 36 J. LEGAL STUD. 171, 172–73 (2007).

<sup>182</sup> *See id.* at 175–76.

<sup>183</sup> Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 250 (2010).

court congestion (annual case terminations by judge) and found a significant relationship between court congestion and attorneys' fees, with the fee increasing by .15% for every 1% increase in terminations.<sup>184</sup>

Whatever may be the explanation, judges are not monitoring class-action settlements in a way that ensures that compensation is actually paid to class members and that attorneys' fees bear a reasonable relationship to the amount actually received by class members. A simple way to improve the performance of consumer class-action settlements would be for federal trial judges to wait to approve attorney fee awards until class counsel submit an accounting showing the actual compensation rate and the aggregate amount paid to the class and then base attorneys' fees on both the aggregate payout and the compensation rate. Rather than basing attorneys' fees on the customary range of attorneys' fees to nominal settlement for a particular case type (i.e. TCPA debt call), district judges would award attorneys' fees that increase with the compensation rate and the aggregate compensation. Attorneys would receive, for example, 33% of the nominal settlement only if aggregate compensation paid equaled the full amount called for under the terms of the nominal settlement. For typical class settlements, attorneys' fees would be lower, representing the aggregate compensation actually paid to the class. The goal would be to ensure not only that the cost of generating the common fund recovery is less than the fund, but also to ensure that the bigger the fraction actually paid to class members, the bigger the class counsel's compensation.

The justification for such a relationship between attorneys' fees and the actual aggregate class recovery lies in the basic economic idea that if a class action were instead an individual suit, then no rational plaintiff would agree to pay fees exceeding his or her own recovery. But such a plaintiff would agree to pay counsel more, the greater his or her own

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<sup>184</sup> Helland & Klick, *supra* note 181, at 181.

recovery is. This arrangement describes how contingency fees work in individual personal injury actions. The class action is essentially a substitute, employed in cases where individual damages are too small for the typical contingency fee to create adequate incentives for lawsuits. But the individual contingency fee would provide the model for class-action fees.

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

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

On grounds of both deterrence and compensation, the least justifiable class actions in the Illinois Data are those where the behavior, while it may violate the statute, causes no harm, such as FCRA expiration date cases. Congress acted in 2012 to repeal one such provision: the EFTA provision requiring a notice of ATM fees “on or at” the machine.<sup>185</sup> Likewise, Congress could repeal similar provisions, such as the FCRA expiration date prohibition.

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<sup>185</sup> See discussion *supra* Section II.B.

Somewhat more broadly, Congress should act to repeal or limit many of the statutory formalities whose violation so often provides the basis for a class-action settlement. The most ubiquitous such formality is a disclosure requirement. Cases alleging violation of a statutory disclosure requirement generate a large number of class-action settlements under both the FCRA and the FDCPA. As there is substantial evidence that such disclosure requirements fail to inform consumers,<sup>186</sup> their violation arguably causes no harm to consumers. Since small and medium sized firms are most likely to be without the continuing legal advice that would allow them to avoid formality violations, they are most likely to violate these statutes. Eliminating the statutes would ease one of the burdens on such businesses, which are a primary source of jobs and job growth in the American economy.

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<sup>186</sup> See BEN-SHAHAR, *supra* note 153, at 4.

APPENDIX 1. CLASS SETTLEMENTS IN EFTA ATM NOTICE  
FAILURE CASES

Case Name (date filed– date settled)	Nominal Class Settlement	Attys' Fees	Claims Submitted, Actual Class Payout & as Fraction of Class Settlement Fund	Payout per Class Member	Attys' Fees as Fraction of Settlem.	Attys' Fees as Fraction of Actual Class Payout
<i>Goldshiteyn v. Argonne Credit Union</i> , 10- cv-05402, 8/10–4/12	\$150,000	\$50,000	Only net of \$100,000 available for class, 42 class members certified receiving payout of \$1,000 each = \$42,000 = 28% Settlement Fund (SF). "Hundreds" of class members, 46,292 ATM transactions during relevant period	\$1,000	33%	119%
<i>Barreto v. Center Bank</i> , 10- cv-06554, 10/10–8/11	\$40,000 (balance cy pres to Chicago Bar Fdn).	\$12,000	18 valid claims = 5% of total class, \$1,000 each, \$18,000 total = 45% of SF	\$1,000 plus \$2,000 to named plaintiff; \$7181 in notice and adm costs	30%	66%
<i>Louisma v. Automated Financial LLC</i> , 11-cv- 02104, 3/11–9/12	\$53,000 (not incl. class counsel attys' fees) so including fees, total of \$110,000	\$57,000	44 claims forms submitted (23 late) @\$900 = \$39,600 = 79% of SF. Balance cy pres to Chicago Bar Fdn. More than 20,000 ATM transactions during period	\$900 plus \$1,500 each to two named plaintiffs; \$2,548 settle. Admn. costs	57%	144%
<i>Nguyen v. South Central Bank</i> , 11- cv-02612, 4/11–9/12	\$150,000	\$50,000	12,000 transactions at un-noticed ATM, but only 75 valid claims submitted aggregated payout of \$75,000 = 50% nominal fund.	\$1,000 plus \$1,500 per x 2 named plaintiffs + \$2,657 notice costs	33%	66%
<i>Cole v. Automated Financial LLC</i> , 11-cv- 03299, 5/11–9/12	Consolidated with <i>Louisma</i> , supra, same settlement	n/a	n/a	n/a	n/a	n/a

Case Name (date filed– date settled)	Nominal Class Settlement	Attys' Fees	Claims Submitted, Actual Class Payout & as Fraction of Class Settlement Fund	Payout per Class Member	Attys' Fees as Fraction of Settlem.	Attys' Fees as Fraction of Actual Class Payout
<i>Jones v. South Central Bank</i> , 11-cv-04389, 6/11–9/12	Consolidated with <i>Nguyen</i> , supra, same settlement	n/a	n/a	n/a	n/a	n/a
<i>Loewy v. RBS Citizens Bank</i> , 11-cv-04872, 7/11–3/12	\$100,000	\$30,000	26 valid claims/210 class members = 12%; @\$150 x 26 = \$3,900 = 4% SF. SF Balance, 27% to Legal Clin. NWU Law Sch. 13% to Chicago Legal Clin.	\$150 + \$1,000 to named plaintiff	30%	770%



## APPENDIX 2. CLASS-ACTION SEARCH METHODOLOGY

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

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

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

This search was too narrow for class actions filed under federal consumer protection statutes, as it failed to pick up actions filed by businesses—such as the TCPA filings brought by doctors’ and dentists’ offices who received junk faxes—and employment background check class actions under the FCRA. Both types are, under the relevant

statutes, consumer class actions. Hence, we ran searches using statutes as the search term, for example, “FCRA” and “Fair Credit Reporting Act.” This method brought up every filing under such statutes, and we manually identified which of these filings were class actions.

Our methodology was similar to that employed by the CFPB in gathering data on class actions for its 2015 Arbitration Study in that we searched electronically available docket sheets. Our methodology differed from the CFPB’s in other respects. The CFPB searched a slightly different source of docket sheet information, LexisNexis’s Courtlink database, and its automated search used as search strings the six product categories it had defined as the subject of its study.<sup>187</sup> For example, the CFPB searched for complaints with terms “credit card’ or ‘credit cards’ or ‘charge card’ or ‘charge cards.’” Thus, the primary difference between this study and the CFPB’s is that this is interested in finding all consumer class actions filed during our study period, regardless of whether they involved a financial product or service, whereas the CFPB’s was interested in finding all filings involving one of the financial product and service categories it was studying. Within its product-centered database, the CFPB then seems to have proceeded, as did we, to manually inspect the docket sheet entries, identifying the dispute type from the complaint, and the outcome and other variables of interest from the docket sheet entries. In identifying the existence and terms of a class settlement,<sup>188</sup> the CFPB looked at some of the same docket-available sources we considered—settlement agreements, final or preliminary approval orders—but apparently did not look carefully at the memoranda in support of preliminary and final approval or class settlements. On the other hand, the CFPB sometimes apparently interviewed settlement

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<sup>187</sup> See *Appendix L: Section 6*, in 2015 ARBITRATION STUDY, *supra* note 21.

<sup>188</sup> See *Appendix S: Section 8*, in 2015 ARBITRATION STUDY, *supra* note 21.

administrators to get further settlement details, something that we did not do.