



## WHITE PAPER

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### An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010–2018)

Class action settlements in consumer fraud cases have generated significant controversy. Critics opine that these settlements primarily benefit lawyers, and that class members have often suffered little or no injury to begin with. These criticisms frequently turn to calls for legal reform. But few empirical studies have been undertaken to confirm whether the settlement data support these arguments.

This Jones Day *White Paper* provides an empirical analysis of consumer fraud class action settlements. The study uses a broad data set of 110 cases in which federal courts approved class settlements from 2010 to 2018. The analysis focuses on class member participation rates and allocation of monetary benefits among class members, class counsel, and other recipients (such as claims administrators and *cy pres* recipients).

The data principally show that: (i) only a small fraction of class members receive any monetary benefit at all from the settlements; (ii) class counsel are often given very large attorneys' fee awards even when class members receive little to no monetary recovery; and (iii) in claims-made settlements, class members as a whole receive on average only 23% of the settlement amount, with the remainder being consumed by attorneys' fees, expenses, or *cy pres* distributions; and even considering all types of settlements, more than 60% on average goes to attorneys or others who are not members of the class.

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## EXECUTIVE SUMMARY

Consumer class action settlements have increasingly come under fire. Courts and commentators have recognized that these settlements often do not benefit class members, but instead mostly enrich the lawyers bringing the suit. Courts have concluded that plaintiffs' lawyers seeking large fee awards routinely "place their own interests above those of the absent class members."<sup>1</sup> Class members in many cases have suffered little or even no injury at all, with "the only concrete interest suggested in [the] litigation [being] an interest in attorneys' fees, which of course accrue solely to class counsel."<sup>2</sup> According to some critics and commentators, while many class actions play an important and legitimate role in our legal system, reform is needed to address abuse of the system by plaintiffs' lawyers who use uninjured or virtually uninjured consumers (many recruited by the lawyers themselves) as a tool to drive class actions, settlements, and large attorneys' fee awards.<sup>3</sup>

Criticism of class action abuses has been particularly pronounced with respect to consumer cases alleging economic loss from false advertising or other claimed consumer fraud. Some federal courts have observed that settlements in such cases disproportionately benefit the plaintiffs' attorneys rather than the class members.<sup>4</sup> These cases often result only in what the courts have viewed as "utterly worthless" injunctive relief that does "not benefit the class in any meaningful way"<sup>5</sup> or perhaps a "very modest monetary award" to each class member. By contrast, the plaintiffs' attorneys can walk away with millions in fees.<sup>6</sup> In rejecting a settlement awarding \$1.93 million to class counsel, one appellate court stated that "realism requires recognition that probably all that class counsel *really* care about *is* their fees—for \$865,284 [the cash amount allocated to the class] spread over 12 million class members is only 7 cents apiece."<sup>7</sup>

Industry analysts and legal scholars have opined that these settlements may harm consumers rather than benefit them,<sup>8</sup> as the litigation expenses "are initially borne by businesses" but "are soon passed on to consumers through increased prices, fewer innovations, and lower product quality."<sup>9</sup> They conclude that, because consumers receive little to no benefit, "forcing compensation or deterrence through litigation" is more likely to hurt consumers than help them.<sup>10</sup>

This study examines these much-maligned false advertising and consumer fraud class action settlements, analyzing a neutrally selected data set of 110 total cases in which federal courts approved class settlements from 2010 to 2018. Prior studies have examined various types of class actions and class settlements, and the extent to which they could be perceived to benefit class counsel as opposed to class members.<sup>11</sup> This study adds to these earlier studies by examining federal court-approved settlements in consumer fraud class actions during a broader range of time (including through 2018), with particular focus on class member participation rates and allocation of monetary benefits among class members, class counsel, and other recipients (such as claims administrators and *cy pres* recipients).

Our study's main findings are:

- **Only a small fraction of class members receive monetary benefits from the settlements.** Across 40 settlements in which class members were required to submit claim forms, the average participation rate was 6.99% and the median participation rate was 3.40%, with only four cases having a rate higher than 15%. This range is consistent with what is generally expected in class settlements, and suggests that the claims of economic harm or loss may be overstated to begin with so that consumers have little interest in participating in the settlements regardless of what benefits they stand to receive.
- **Some settlements did not redress class members' alleged economic harms in a meaningful way at all but awarded class counsel hundreds of thousands or millions of dollars in attorneys' fees.** In eight injunctive relief cases, class counsel received an average amount of \$491,717, while class members received no monetary relief. In eight settlements in which class members received only vouchers, class counsel received an average amount of \$1,028,909.
- **Where courts award cash settlements, class members as a whole receive a relatively small share, with the bulk going to pay attorneys' fees, expenses, or *cy pres* distributions.** Across 10 claims-made settlements in which we compared the amount paid to class members and the amount paid for attorneys' fees, expenses, or other non-class distributions, class members received on average only 23% of the settlement amount.<sup>12</sup> Across 44 settlements of all types, more than 60% of the settlement on average goes to attorneys or others who are not class members.<sup>13</sup>

## INTRODUCTION

According to some commentators, consumer class action litigation needs reform.<sup>14</sup> Critics argue that rather than offering injured consumers a path to compensation, too often plaintiffs' lawyers bring lawsuits for their own personal gain, use (and/or recruit) class members who have suffered little or no injury, and negotiate settlements that benefit the lawyers while giving little or no compensation to the class.<sup>15</sup>

There is evidence that plaintiffs' lawyers view consumer fraud laws and class actions as especially lucrative business opportunities.<sup>16</sup> Lawyers may instigate class actions, not because consumers are legitimately aggrieved, but as part of a strategy for earning big returns through settlement awards.<sup>17</sup> In one recent consumer fraud case involving potato chips, for example, the plaintiff described in her deposition how her lawyer recruited her as a class representative during dinner with a church group at the lawyer's home.<sup>18</sup> She then testified that she had not been harmed "in any way, financial or otherwise," from her purchase.<sup>19</sup> The point of the suit was not to benefit the plaintiff, but to benefit the lawyer.<sup>20</sup>

Even when the plaintiff admits to not having been injured, those admissions often do not come until well into the case, after the defendant has been forced to retain counsel and litigate the case at great expense for many months or years.<sup>21</sup> Many of these cases survive even after it is clear the plaintiff was not injured.<sup>22</sup> And in many others, the absence of injury, although apparent, is more difficult to demonstrate because the plaintiff's lawyer has carefully prepared the plaintiff to give testimony to stave off dismissal. Often, defendants facing these suits choose to settle rather than continue with expensive litigation.

There is also evidence that the lion's share of settlement awards go to plaintiffs' lawyers, not class members.<sup>23</sup> In one recent Supreme Court case involving a *cy pres* award, the court of appeals had approved a settlement giving \$2.1 million to class counsel, \$15,000 to the three named plaintiffs, \$5.3 million to several nonprofit organizations uninvolved in the litigation, and \$0 to the class members.<sup>24</sup> One Justice remarked at oral argument: "How can you say that it makes any sense? . . . The attorneys get money, and a lot of it. The class members get no money whatsoever."<sup>25</sup>

Many class actions involve class members who have suffered little or no injury. There are all too many plaintiffs who have not been harmed "in any way, financial or otherwise."<sup>26</sup> In one case alleging deceptive sales of "No Added Sugar" fruit drinks, the lead plaintiff testified she was never injured by the alleged deception because she always understood the meaning of "No Added Sugar."<sup>27</sup> In another case alleging deceptive sales of "0g Trans Fat" and "All Natural" potato chips, the lead plaintiff likewise testified he was never injured by the alleged deception, as he purchased the chips not for health reasons but because "they taste good."<sup>28</sup> In yet another case alleging deceptive sales of wine, the Department of Justice took the unusual step of entering an appearance just to oppose a proposed settlement.<sup>29</sup> As the government explained, the settlement provided "an unreasonable payout to class counsel for pursuing claims lacking a basis in consumer harm."<sup>30</sup> The case reports are filled with other examples.<sup>31</sup> In many of these no-injury cases, plaintiffs' lawyers "argued that they do not need to show that consumers saw, heard, or relied on the labeling or advertising at issue when deciding to purchase the product, but only that consumers might be misled."<sup>32</sup>

The results of our empirical study reflect how these problems appear to manifest in approved settlement agreements. The report examines settlements approved from 2010 through 2018 in federal court false advertising or consumer fraud class actions. Our data set is limited to cases alleging economic loss only—i.e., cases in which consumers allege that the defendant's false advertising or other acts or omissions caused them to purchase a product or service they would not have purchased at all or to pay a higher price than they would otherwise have paid.<sup>33</sup> We have examined settlements in 110 such cases to determine class member participation rates and settlement award allocations. We explain our methodology for selecting and analyzing the cases in Appendix A.

For analyzing class member participation rates ("claims rates" or "take rates"), we included 40 of the 110 cases in our data set. Of the remaining 70 cases, we excluded 53 because the available data from public case dockets and court filings was insufficient to calculate how many class members participated in the settlements. The dockets and court filings did not disclose the estimated settlement class size and/or the number of claims submitted. We excluded 16 other cases because the class members were not required to submit claim forms to

participate in the settlement, and we excluded one case due to unique circumstances surrounding the settlement.<sup>34</sup>

For analyzing settlement award allocations, we included 44 of the 110 cases in our data set. Of the remaining 66 cases, we excluded 32 cases because the data was insufficient to analyze how the settlement award was allocated between the class members and class counsel. The dockets and court filings did not indicate the monetary amount paid to class members, class counsel, and/or the settlement administrator. We also excluded 33 cases because the settlements provided only injunctive relief or involved voucher-type awards for the class members rather than cash awards, and we excluded one case because class counsel agreed to litigate the case pro bono and thus received no portion of the settlement award.<sup>35</sup>

The settlements analyzed in this report were approved prior to the Federal Rule of Civil Procedure 23 amendments, which were implemented on December 1, 2018. The amendments seek to improve take rates by focusing on effective notice strategies, and they attempt to improve class settlements by adding a list of factors for courts to consider before approval.<sup>36</sup> But these amendments do not address the underlying problem of plaintiffs' lawyers who manufacture class actions using uninjured or uninterested class members in pursuit of hefty settlement payouts.

This report briefly discusses four previous empirical studies related to take rates and settlement award allocations in class action settlements, as well as studies taking the position that these settlements harm the very consumers they are intended to protect. The next section of the report presents our empirical findings regarding take rates and settlement award allocations, as well as the implications of those findings. The last section of the report summarizes our conclusions.

## PREVIOUS EMPIRICAL STUDIES OF CLASS ACTION SETTLEMENTS

In 2013, Mayer Brown LLP published an analysis of 148 consumer and employee class actions that were filed or removed to federal court in 2009.<sup>37</sup> The report found that none of the cases went to trial or ended in a final judgment on the merits for the plaintiffs.<sup>38</sup> In fact, 30% of the cases were dismissed voluntarily, 27% of the cases were dismissed by a court on the

merits, and 14% of the cases remained unresolved by 2013.<sup>39</sup> Further, the cases that settled (28% of the data set) provided little to no monetary benefits for the class, as they either distributed “min[u]scale percentages” of the settlement award to class members or provided only injunctive relief or charitable donations.<sup>40</sup> The report concluded that the class actions did not provide class members with the benefits claimed by their proponents, but only enriched the plaintiffs' attorneys.<sup>41</sup>

In 2015, a Vanderbilt University study analyzed 15 overdraft fee class action settlements and found that the class member participation rate in those settlements ranged from 1% to 70% of the class size.<sup>42</sup> The study found that the highest participation rates were in cases with automatic settlement award distributions, and the lowest participation rates were in cases in which class members had to submit claim forms.<sup>43</sup> The authors concluded that consumer class actions could fairly compensate a significant portion of class members in cases with automatic distributions relying on direct deposits and standard-sized checks, and expressed optimism that these conditions would become increasingly prevalent in the coming years.<sup>44</sup>

In 2016, an Emory University law professor published an empirical survey of 432 “no-injury” class action cases that settled between 2005 and 2015.<sup>45</sup> The study found that, on average, 60% of the total settlement award was nominally allocated to the class members, and 37.9% of the award was paid to class counsel.<sup>46</sup> However, because claims rates regularly were lower than 15% and because many settlements dispersed the unclaimed portion of the settlement award to a *cy pres* fund, the class members typically received less than 9% of the total settlement award.<sup>47</sup> Because class counsel generally received over four times the funds distributed to the class, the author concluded that “no-injury” class actions did not fulfill their compensatory purpose.<sup>48</sup>

The author of the Emory University study also concluded that these cases harmed consumers rather than helped them because the litigation costs were “passed on to consumers in the form of higher prices, lower product quality, and reduced innovation.”<sup>49</sup> She maintained that under economic theory, these “no-injury” class actions “are of dubious social value and end up harming the very consumers they are meant to help.”<sup>50</sup> Further, “the *in terrorem* effect of class action lawsuits triggers defendants' risk-aversion and motivates them to settle claims for more than their expected value, often inducing a quick



but expensive settlement” that further harms consumers when those costs increase product prices and reduce innovation.<sup>51</sup>

In September 2019, the Federal Trade Commission (“FTC”) published a study of 149 class-action settlements from the years 2013–2015 “spanning various consumer industries, including consumer privacy, product malfunctions, debt collection, and checking account overdraft practices.”<sup>52</sup> The study focused on the type and characteristics of direct notice provided to class members and the correlation of those notice characteristics with claims rates.<sup>53</sup> For calculating claims rates, the FTC included 29 consumer-fraud or “misrepresentation” cases, compared to the 40 cases in our sample, and it reported the claims rate only for all industries in the aggregate, without distinguishing by type of legal claim.<sup>54</sup> The study reported that the median overall claims rate (across all industries and direct notice types) was 9%, and that the mean claims rate was 4%.<sup>55</sup> This aligns with our conclusion below that in consumer-fraud cases, typically over 90% of class members do not submit a claim. The FTC study did not address allocation of monetary benefits among class members, counsel, and other recipients.

Other empirical studies have reported that businesses pass on litigation expenses to consumers. For example, an economic analysis of state consumer protection act lawsuits found that “consumers are now worse off because they have to bear part of the price increase due to the increase in seller costs due to [class action lawsuits].”<sup>56</sup>

## FINDINGS AND ANALYSIS

Our study focuses on the settlements that have attracted the most significant criticism: consumer fraud class action settlements in which class members allege only economic loss due to alleged false advertising or other misrepresentations or omissions. We examined our data with two main objectives: (i) to assess the take rates across consumer fraud class action settlements; and (ii) to assess the settlement allocations across consumer fraud class action cases, specifically comparing the cash amounts paid to the class and the amounts awarded to class counsel.

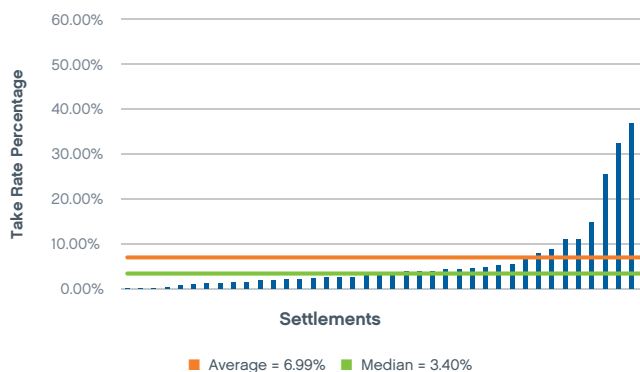
## Take Rate Analysis

Our study of the class member participation rate demonstrates that settlement awards effectively reach only a small subset of class members. Due to low participation rates, typically greater than 90% of class members receive no benefit whatsoever. Defendants, meanwhile, are left with significant litigation bills and settlement costs, which, as some commentators note, can lead to higher prices for their products.<sup>57</sup> Thus, according to these commentators, while plaintiffs’ lawyers are richly rewarded, class members may receive nothing but increased prices.<sup>58</sup> Low participation rates also may be due to the alleged harm or loss of class members being overstated to begin with, such that most class members have little interest in participating in the settlement regardless of what benefits they stand to receive.

To determine the participation rate, we were interested only in take rates where class members actively chose to participate in the settlement award. We therefore limited our analysis to cases in which class members were required to submit claim forms and excluded cases in which class members automatically received a portion of the settlement proceeds unless they affirmatively opted out.<sup>59</sup> Our analysis also did not include cases in which the class size was undisclosed or only vaguely estimated. In many cases, the pleadings, court orders, and Class Action Fairness Act notices either did not give an estimated settlement class size or stated a general ballpark number, such as “millions of consumers.”<sup>60</sup> We excluded such cases.

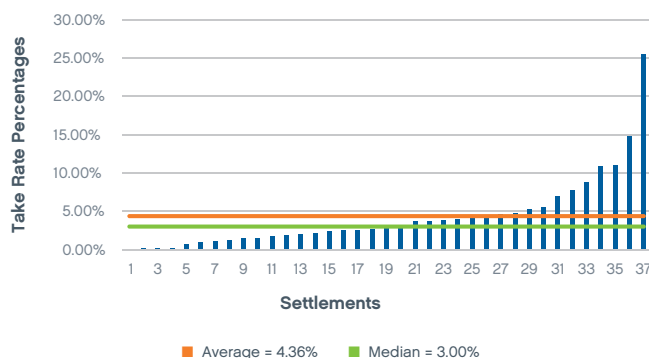
In the 40 cases in our take rates data set, the take rates ranged from 0.01% to 48.99%. **The average take rate was 6.99%, and the median take rate was 3.40%, with only four cases having a rate higher than 15%.** Figure 1 presents this data.

Figure 1: Take Rates Across All 40 Settlements



In the sections below, we address potential reasons for the high take rate in the three outlier cases above 30%. Excluding these three settlements, **the average take rate dropped to 4.36% and the median take rate to 3.00%**. Figure 2 presents this data.

**Figure 2: Take Rates Across All Settlements, Excluding Three Outlier Cases**



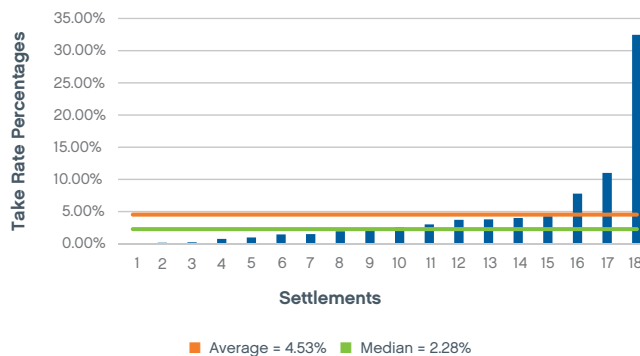
To break these numbers down further, we divided the overall take rate data set into two subcategories: (i) General Public Notice; and (ii) Direct Notice to more than 50% of the estimated settlement class.

### General Public Notice

In 18 of the 40 take rate cases, class members received notice of the settlement by general publication in magazines, newspapers, and internet advertisements rather than by direct mail or email. This General Public Notice subcategory also included cases in which the defendants sent direct notice to some members, so long as the percentage of class members receiving direct notice was less than 50% of the entire estimated class. For example, in one case, the estimated class size was 1.5 million individuals and the settlement administrator was given contact information for approximately 5,000 class members.<sup>61</sup> Because the settlement administrator sent direct notice only to a small percentage of the overall class (0.3%), we treated this case as though the class members received general public notice rather than direct notice of the settlement.

Across the General Public Notice cases, the take rates ranged from 0.01% to 32.45%. **The average take rate was 4.53%, and the median take rate was 2.28%**. These percentages are presented in Figure 3.

**Figure 3: Take Rates Across General Public Notice Settlements**



These relatively lower take rates in General Public Notice settlements likely reflect that (i) public notice is not as effective in getting actual notice to class members as direct notice, and (ii) public notice is more often used in cases with relatively smaller alleged damages, which result in smaller settlement awards per class member and less incentive for class members to claim them.<sup>62</sup>

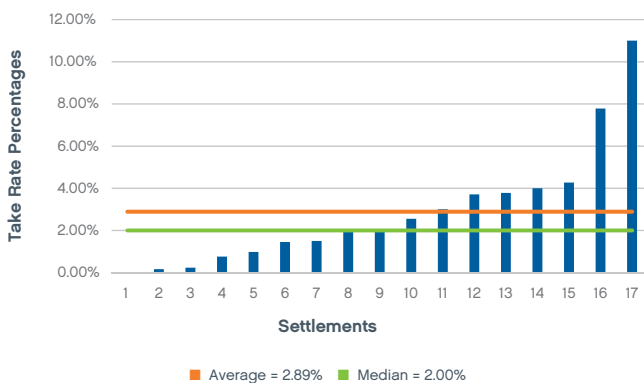
The General Public Notice settlements we reviewed included the following:

- A case in which defendants allegedly falsely advertised the health benefits of dietary supplements, with 79,385 claims submitted out of the 2.1 million estimated class members (a 3.78% take rate). Each class member received \$15 per bottle purchased, up to a maximum of \$105.<sup>63</sup>
- A settlement involving the alleged deceptive marketing of locks, in which the estimated class size was one million and 99 claims were submitted (a 0.01% take rate). Class members were not offered any cash payment. Instead, class members could choose between an identical, upgraded product or a do-it-yourself installation upgrade kit.<sup>64</sup>
- A case in which the defendant allegedly misrepresented its products as “All Natural,” with 661,151 claims submitted out of the estimated 8.5 million class members (a 7.78% take rate). Class members could claim a maximum of \$75 with proof of purchase and a maximum of \$45 without proof of purchase.<sup>65</sup>
- A settlement regarding the alleged misrepresentation of battery life, with 55,346 claims submitted out of the estimated 7.26 million class members (a 0.76% take rate). Each class member received \$3 per pack of batteries purchased, with a limit of \$12 with proof of purchase and \$6 without proof of purchase.<sup>66</sup>

- A settlement involving the alleged false advertising that a dental product was a replacement for floss, with 734 claims submitted out of the estimated 50,000 class members (a 1.45% take rate). Each class member received a voucher of \$7, \$23, or \$33, depending on the product purchased and proof of purchase.<sup>67</sup>
- A case in which the defendant allegedly misrepresented its Nutella spread as “nutritious” and “healthy,” with 55,504 claims submitted out of the estimated 3,705,946 class members (a 1.50% take rate). Class members could claim \$4 per Nutella jar purchased, with a limit of \$20 without proof of purchase.<sup>68</sup>

One settlement in our data set saw a take rate of 32.45%, which was the highest General Public Notice settlement take rate by far (the next-highest take rate was 11%). This case involved alleged false advertising of a walking shoe, with 28,383 out of the estimated 87,452 class members submitting claim forms. The amount allocated to each individual claimant was approximately \$4.17.<sup>69</sup> However, the individual award amount was driven by the number of claims submitted, as there was a net settlement fund of approximately \$118,000 from which the class members received individual awards pro rata. It is possible that such a large percentage of class members submitted claim forms because they believed they would receive greater individual amounts. If this case is removed from the data set, the take rates across the General Public Notice cases ranged from 0.01% to 11.00%. **The average take rate was 2.89%, and the median take rate was 2.00%.** These percentages are presented in Figure 4.

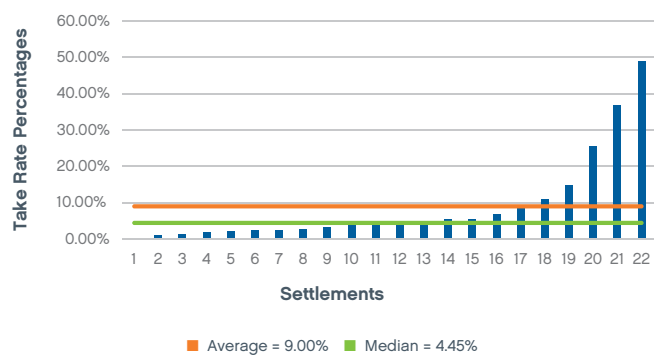
**Figure 4: Take Rates Across General Public Notice Settlements, Excluding One Outlier Case**



**Direct Notice to 50% or More of the Estimated Class Members**

In 22 of our 40 take rate cases, at least 50% of the estimated class members received direct notice of the settlement, by mail or by email. Across these cases, the take rates ranged from 0.17% to 48.99%. **The average take rate was 9.00%, and the median take rate was 4.45%.** These percentages are presented in Figure 5.

**Figure 5: Take Rates Across Direct Notice Settlements**



Although higher than in General Public Notice cases, these take rates still were quite low, as over three-fourths of the settlements saw take rates below 10% (all but five of the settlements). Similar to the General Public Notice cases, the low participation rates in the Direct Notice cases may be due to the low award amount available per claimant. The Direct Notice cases we examined included the following:

- A case in which defendants allegedly falsely advertised the ingredients in dog food products, with 26,419 of the estimated 500,000 class members submitting claims (a 5.28% take rate). Claimants could choose one of the following: (i) a \$2 check; (ii) a \$5 gift certificate to purchase more dog food; or (iii) a \$5 donation to charity.<sup>70</sup>
- A settlement involving the alleged false advertising of merchandise discounts, in which 337,504 of the estimated 8,850,000 class members submitted claims (a 4.27% take rate). Claimants did not receive any cash, but rather received approximately \$10 in gift card credit.<sup>71</sup>



- A case in which defendants allegedly misrepresented the specifications of graphics processing units, with 74,012 of the estimated 500,000 class members participating in the settlement (a 14.8% take rate). Each claimant received \$30 per product purchased.<sup>72</sup>
- A case in which defendants allegedly misrepresented the effectiveness of identity theft protection services, with 164,670 of the estimated 6.8 million class members submitting claims (a 2.42% take rate). Class members who submitted claim forms received \$20 each.<sup>73</sup>
- A settlement involving the alleged false advertising that a pill improved memory, focus, mental clarity, and mood, with 18,564 of the estimated 268,548 class members submitting claims (a 6.91% take rate). Claimants received either \$20 or a savings voucher for 50% off certain products.<sup>74</sup>

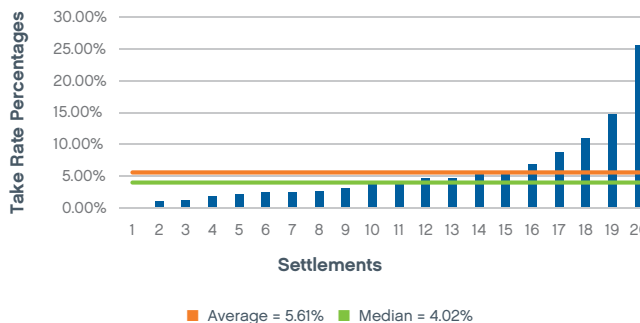
Just as in the General Public Notice data set, the Direct Notice settlements include two significant outliers with take rates of 48.99% and 36.81% (with the next-highest take rates being 25.53% and 14.80%).

The first outlier saw a 48.99% take rate and, similar to the outlier in the General Public Notice data set, involved the alleged false advertising of a “toning shoe.”<sup>75</sup> The settlement administrator emailed notice of the settlement to 53,614 email addresses<sup>76</sup> and received 26,267 valid claim forms.<sup>77</sup> The amount allocated to each individual claimant was approximately \$43.50.<sup>78</sup> The original relief allocated per eligible class member (per pair of shoes) was between \$50 and \$100, and the amount ultimately distributed was reduced pro rata, given the number of claims submitted.<sup>79</sup> One plausible explanation for the relatively high take rate is the potential of receiving \$100 per claim.

In the second outlier case, with a 36.81% take rate, the defendant allegedly misrepresented the total carat weight of rings sold to class members. The entire class consisted of only 182 individuals, and 67 class members submitted claim forms.<sup>80</sup> The relatively high participation rate is likely due to the large cash payments offered by the settlement—\$1,200, \$100, or 60% of their purchase price, depending on the product purchased. The likelihood of reaching the entire class—182 members total—also was much higher than in any of the other cases, with class sizes in the thousands and millions.

Excluding the two outlier cases, **the average take rate in the Direct Notice cases was 5.61%, and the median take rate was 4.02%**. These percentages are presented in Figure 6.

**Figure 6: Take Rates Across Direct Notice Settlements, Excluding Two Outlier Cases**



### Claims Rate Analysis Takeaways

Our data show that the awards allocated to class members in consumer fraud class action settlements reach only a small fraction of the class members. The vast majority—typically over 90% of the class—receive no benefit at all.<sup>81</sup>

This is true even when Direct Notice is given rather than General Public Notice. Although the average and median take rates doubled between our General Public Notice and Direct Notice data sets, the majority of the Direct Notice take rates were still below 10% of the estimated class sizes. Further, while our data set did not include cases in which the estimated class size was undefined or too vague, the take rate likely was similarly low for those cases as well, based on the low take rates for the 40 cases discussed above.

What explains these results? Many class members may consider themselves uninjured by the alleged fraud, just as plaintiffs in some cases have candidly admitted.<sup>82</sup> Or perhaps class members are simply uninterested because the minuscule award is not worth the effort to submit a claim. Another possibility is that class members receive inadequate, nondescript, or confusing notice. As the FTC reported, “[t]here are marked differences in the claims rates across notice methods.”<sup>83</sup> A notice packet sent by regular mail resulted in “a median claims rate of 16%,” while an email notice resulted in a median claims rate of merely 3%.<sup>84</sup> Even in the FTC’s best-case scenario, however, a claims rate of 16% means that 84% of class members never submitted a claim.

Whatever the reason, take rates are low and very few class members receive any compensation from settlement awards. Worse, they potentially may be affirmatively harmed when businesses absorb litigation costs. Given the hours and costs expended by the parties, counsel, and courts, class action litigation would seem to be a highly inefficient method for trying to actually help consumers.

### Settlement Allocation Analysis

Our study of settlement allocation reveals similar results. In the best-case scenario, class members on average receive less than half of a settlement award, and class counsel routinely receive over one-third of an award. And for settlements granting only injunctive relief or voucher-type awards, class members typically receive little or no monetary relief at all, while plaintiffs' lawyers still take their full monetary cut.

To assess settlement allocation, we examined how settlement award amounts were distributed among class members, class counsel, and, where applicable, *cy pres* recipients. We specifically focused on comparing the amounts paid to class members and the amounts paid to class counsel. Our data set contained 44 cases with docket information sufficient to calculate settlement award allocations to class members and class counsel, and 16 cases with docket information sufficient to calculate settlement award allocations to class members, class counsel, and *cy pres* recipients.

We included only cases for which we could determine the amount actually paid to class members, rather than the amount supposedly allocated or made available to the class based on a settlement fund or estimated class size. For example, in non-reversionary settlement fund cases, the cash amount "allocated" to the class (if all of the funds were paid to the class and there was no residual amount going to *cy pres*) differed from the amount actually paid to the class (only the amount received by class members who submitted claim forms, with the remainder going to *cy pres*). Similarly, in Claims Made cases, where the settlement award paid to class members was based on the number of claims submitted rather than a set fund, the cash amount "allocated" or made available to the class differed from the amount actually paid to the class (only the amount received by class members who submitted claim forms).

Because of the difficulty of valuing non-cash awards such as vouchers or warranty extensions (including the extent to which class members actually utilized the voucher-like payments), and because some courts have criticized non-cash awards as less valuable to class members, we limited our data set to settlements that offered cash payments to class members.<sup>85</sup>

The amounts actually paid to the class (i.e., checks received and cashed by class members) likely are lower than the amounts listed in this report, as court dockets typically do not contain updates regarding how many class members actually receive and cash their settlement checks. In fact, only six cases in our data set contained such updates.<sup>86</sup>

### Range of Amounts Paid to the Class Members and Class Counsel

We reviewed 44 cases with sufficient docket information to calculate the amounts paid to the class and the amounts paid to class counsel in attorneys' fees and costs. The calculations are presented in Table 1.

**Table 1: Comparison of Settlement Amounts Paid to Settlement Class and Class Counsel**

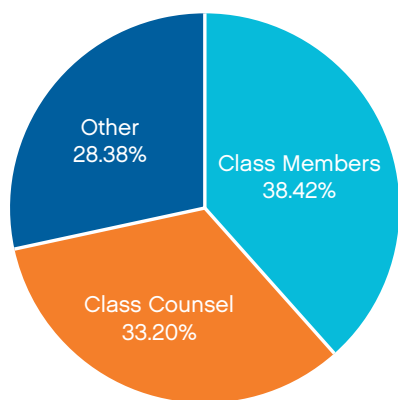
	Cash Paid to Settlement Class	Amount Paid to Class Counsel
Average	\$3,389,438.16	\$1,955,161.90
Median	\$842,483.92	\$966,250.00
Lowest Value	\$11,913.00	\$54,194.00
Highest Value	\$68,000,000.00	\$10,200,000.00

Although the average cash amount paid to the settlement class was approximately 1.7 times the average amount paid to class counsel, the median amount paid to class counsel exceeded the median amount paid to the settlement class. Further, **in 16 cases, the amount paid to class counsel exceeded the cash amount paid to the settlement class.** For example, in one case, class counsel was awarded \$1,295,000.00 in fees and costs (51.80% of the settlement), and the class was paid \$735,856.00 (29.43% of the settlement).<sup>87</sup> In another case, class counsel was awarded \$5,680,000.00 (44.87% of the settlement), and the class was paid \$344,850.00 in cash (2.72% of the settlement).<sup>88</sup> In both settlements, the lower amount paid to the class was due to the low class member take rates (0.23% and 0.76%, respectively).

An average of 38.42% of the settlement award was paid to class members (see Figure 7), and the median amount was 44.70%. An average of 33.20% of the settlement award was paid to class counsel (see Figure 7), and the median amount was 28.11%.

Our data set contained 12 cases in which the amounts awarded to class counsel exceeded 35% of the total settlement award.

**Figure 7: Average Percentages Paid to Class Members and Class Counsel Overall<sup>89</sup>**



Our settlement allocation data set contained one outlier: a case involving the alleged false advertising of identity theft protection services, in which the court awarded the class \$68 million (84.15% of the total settlement award) and awarded class counsel \$10.2 million (12.62% of the total settlement award).<sup>90</sup> The amount paid to the class members was funded by a separate FTC enforcement action against the defendant, in which the district court entered a monetary judgment of \$100 million, \$68 million of which was used to repay class members in the consumer fraud case. The settlement agreement set aside the \$68 million solely for the class, stating that attorneys' fees and administration costs would not come from the fund.

The agreement also established a subclass (class members who purchased the identity theft protection service within a certain time period), in which each member automatically received \$19.48 without having to submit claim forms. Class members outside the subclass were required to submit claim forms to receive \$20, and subclass members who submitted claim forms also could receive \$20 in addition to the automatic \$19.48. According to class counsel, the valid claims submitted amounted to a total of nearly \$68 million, and the parties

planned a second pro rata distribution among class members (consisting of funds remaining from uncashed checks and the residual amount from the initial distribution), "thus ensuring that the full \$68 million is made payable to Class Members."<sup>91</sup>

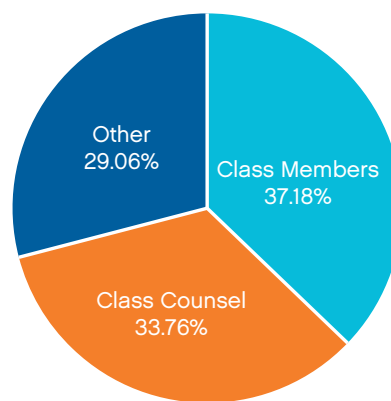
The unique context of this case—the settlement being funded by a separate FTC action, the automatic subclass distribution, and the second pro rata distribution—likely explains why it is an outlier in our data set. Table 2 reflects the comparison between the range of settlement amounts paid to the class and the amounts paid to class counsel across the remaining 43 cases if we exclude the outlier case.

**Table 2: Comparison of Settlement Amounts Paid to Settlement Class and Class Counsel, Excluding One Outlier Case**

	Cash Paid to Settlement Class	Amount Paid to Class Counsel
Average	\$1,886,866.96	\$1,763,421.48
Median	\$840,539.52	\$950,000.00
Lowest Value	\$11,913.00	\$54,194.00
Highest Value	\$16,739,712.00	\$10,000,000.00

Removing the outlier reduces the average amount paid to the class by nearly half. However, when we exclude the outlier case from the percentage calculations, the average percentage of the entire settlement award paid to class members was very similar to the average percentage of the data set with the outlier case. The average amount paid to the class was 37.18% of the total award (see Figure 8), and the median amount was 44.54%. The average amount paid to class counsel was 33.76% (see Figure 8), and the median amount was 28.15%.

**Figure 8: Average Percentages Paid to Class Members and Class Counsel Overall, Excluding One Outlier Case<sup>92</sup>**



Therefore, while the outlier case impacted the total dollar amounts paid to class members and class counsel, it did not significantly impact the overall percentage allocations.

### Range of Amounts Paid to *Cy Pres* Recipients

We also reviewed 15 cases with sufficient docket information to calculate the amounts paid to *cy pres* recipients, compared to the amounts paid to the class and class counsel.<sup>93</sup> These calculations are presented in Table 3.

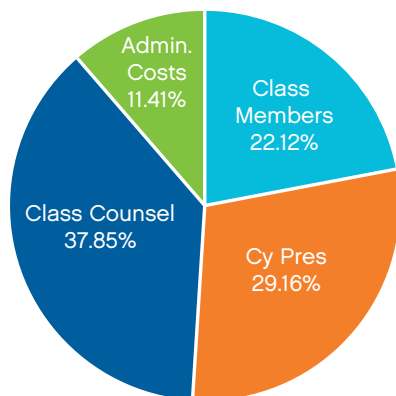
**Table 3: Comparison of Settlement Amounts Paid to Settlement Class, *Cy Pres*, and Class Counsel**

	Cash Paid to Settlement Class	Amount Paid to <i>Cy Pres</i>	Amount Paid to Class Counsel
Average	\$899,282.66	\$1,549,670.78	\$2,198,396.97
Median	\$606,361.34	\$360,904.92	\$1,662,572.15
Lowest Value	\$24,682.00	\$6,000.00	\$359,070.07
Highest Value	\$3,912,811.12	\$8,984,169.26	\$5,690,720.31

Here, the average, median, lowest, and highest values paid to class counsel exceeded those values paid to the class.

Based on our data set of 15 cases, an average of 29.16% of the settlement award was paid to a *cy pres* recipient. This data is reflected in Figure 9. The median *cy pres* percentage was 20.82%.

**Figure 9: Average Percentage Paid to *Cy Pres***



### Settlement Allocations in Claims Made Settlements

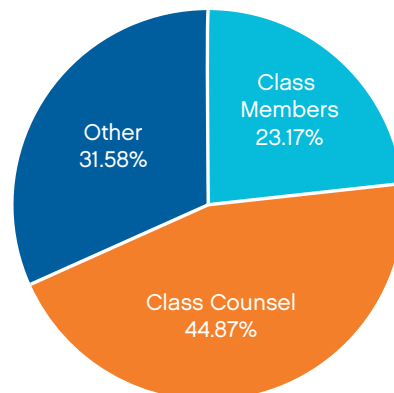
Within the 44 cases in our settlement allocation data set, 10 settlements were “Claims Made” settlements. In these cases, the portion of the settlement award paid to class members did not come from a set fund, but rather was based on the number of claims submitted by class members. As a result, portions of these settlement awards generally did not go to *cy pres* recipients unless a set amount was allocated to charity as part of the settlement agreement. Our calculations for these cases are presented in Table 4.

**Table 4: Comparison of Settlement Amounts Paid to Settlement Class and Class Counsel in Claims Made Settlements**

	Cash Paid to Settlement Class	Amount Paid to Class Counsel
Average	\$1,674,659.58	\$2,244,436.66
Median	\$278,075.00	\$1,141,250.00
Lowest Value	\$11,913.00	\$54,194.00
Highest Value	\$9,202,862.67	\$6,500,000.00

Here, the average, median, and lowest values paid to class counsel exceed the values paid to the class. Further, **the average amount paid to class counsel was 45.25% of the total settlement award (the median was 44.87%), and the average amount paid to class members was 23.17% (the median was 12.82%).** Figure 10 presents this comparison.

**Figure 10: Average Percentage Paid to Class Members and Class Counsel in Claims Made Cases<sup>94</sup>**



**Settlement Allocations in Non-Reversionary Fund Settlements**

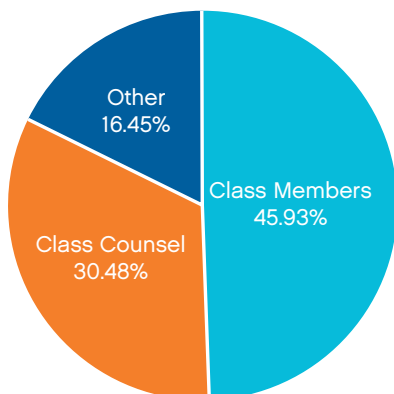
The other 34 cases in our settlement allocation data set contained “Non-Reversionary Fund” settlements. The settlements in these cases established a set fund from which the class members and, at times, attorneys’ fees and settlement administration costs would be paid. Any remaining funds either were paid to *cy pres* recipients or reallocated among the class members who submitted claim forms. Our calculations for the 34 Non-Reversionary Fund cases are presented in Table 5.

**Table 5: Comparison of Settlement Amounts Paid to Settlement Class and Class Counsel in Non-Reversionary Fund Settlements**

	Cash Paid to Settlement Class	Amount Paid to Class Counsel
Average	\$3,893,784.80	\$1,870,081.09
Median	\$891,073.27	\$950,000.00
Lowest Value	\$24,682.00	\$69,563.46
Highest Value	\$68,000,000.00	\$10,200,000.00

Here, unlike the Claims Made analysis, the average amount paid to class members exceeded the average amount paid to class counsel, though the median amount paid to class members remained lower than the median amount paid to class counsel. Additionally, **the average percentage of the total settlement award paid to the settlement class was 45.93% (the median was 49.68%), and the average percentage paid in attorneys’ fees and costs was 30.48% (the median was 27.99%).** Figure 11 presents this comparison.

**Figure 11: Average Percentage Paid to Class Members and Class Counsel in Non-Reversionary Settlement Fund Cases<sup>95</sup>**



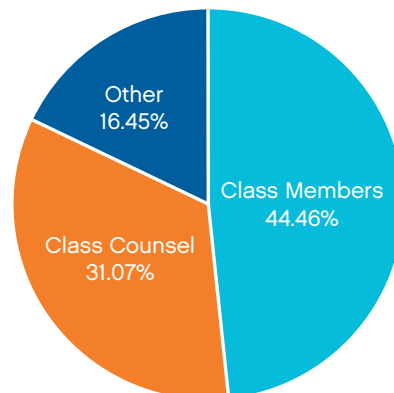
The Non-Reversionary Fund data set contained the identity theft protection service outlier case in which the class was paid \$68 million. Excluding that settlement, the amount paid to the class ranged from \$24,682 to \$16,739,712, with an average of \$1,951,172.22 and a median of \$844,428.32 (see Table 5). The amount paid to class counsel ranged from \$69,563.46 to \$10 million, with an average of \$1,617,659.30 and a median of \$950,000 (see Table 6).

**Table 6: Comparison of Settlement Amounts Paid to Settlement Class and Class Counsel in Non-Reversionary Fund Settlements, Excluding One Outlier Case**

	Cash Paid to Settlement Class	Amount Paid to Class Counsel
Average	\$1,951,172.22	\$1,617,659.30
Median	\$844,428.32	\$950,000.00
Lowest Value	\$24,682.00	\$69,563.46
Highest Value	\$16,739,712.00	\$10,000,000.00

In excluding the outlier settlement from our percentage calculations, we found that the average percentage of the total settlement award paid to the settlement class was 44.46% (the median was 49.04%), and the average percentage paid in attorneys’ fees and costs was 31.07% (the median was 28.03%). Figure 12 presents the average percentages.

**Figure 12: Average Percentage Paid to Class Members and Class Counsel in Non-Reversionary Settlement Fund Cases, Excluding One Outlier Case<sup>96</sup>**





Similar to our overall calculations, the outlier settlement reduced the average amount paid to the class by about half for the Non-Reversionary Fund data set but did not affect the average percentage of the settlement allocated to the class and class counsel.

### **Findings for Injunctive Relief Settlements**

We did not include nine settlements that provided only injunctive relief in our settlement allocation analysis, because class members did not receive any monetary benefit in those cases. However, across eight of the nine injunctive relief cases, class counsel received an average amount of \$491,717.25 in attorneys' fees and costs and a median amount of \$337,500.00 in attorneys' fees and costs.<sup>97</sup>

### **Findings Specifically for Settlements Involving Vouchers**

We also did not include settlements involving vouchers or other non-cash relief in our settlement allocation analysis, as it was too difficult to quantify the actual value of such awards. We excluded a total of 15 cases in which class members could choose between a cash award and a non-cash award, because the calculations in the court documents did not distinguish between the two (though we did include six cases in which the cash and non-cash awards were calculated separately).

Additionally, we excluded eight settlements that provided purely non-cash relief, including warranty extensions, vouchers, and data plans. Across these eight settlements, class counsel received an average amount of \$1,028,909.06 in attorneys' fees and costs and a median amount of \$300,000. Similar to the injunctive relief settlements, the class members in these cases received no actual monetary benefit, while class counsel received an average of approximately \$1 million from the settlements.

### **Settlement Award Allocation Analysis Takeaways**

Our settlement award allocation analysis yields the following observations:

- Across all 44 settlement allocation cases, an average of 38.42% of the settlement award was paid to class members, and an average of 33.20% of the settlement award was paid

to class counsel. These percentages were not significantly impacted by an outlier case in which 84.15% of the settlement award was paid to the class.

- In 16 cases, the actual amount paid to class counsel exceeded the cash amount paid to the settlement class.
- Our data set contained 12 cases in which the amounts awarded to class counsel exceeded 35% of the total settlement award.
- In Claims Made settlements, the average amount paid to class counsel was 45.25% of the total settlement award (the median was 44.87%), and the average amount paid to class members was 23.17% (the median was 12.82%).
- In Non-Reversionary Settlement Fund cases, the average amount paid to class counsel was 30.48% of the total settlement award (the median was 27.99%), and the average amount paid to class members was 45.93% (the median was 49.68%).
- Across eight of the nine injunctive relief-only cases, class counsel received an average amount of \$491,717.25 and a median amount of \$337,500.00 (the attorneys' fees and costs awards ranged from \$35,734 to \$1,813,004), whereas class members did not receive any monetary relief.

Although the overall average settlement award percentage paid to class members exceeded the overall average percentage allocated to class counsel, the average percentage paid to class members was still below 50% of the total settlement award. The average amounts paid to the class in Non-Reversionary Settlement Fund and Claims Made cases were 45.93% and 45.25%, respectively. Therefore, in either type of settlement, class members typically did not receive even half of the settlement awards paid by the defendants to address the class members' alleged economic injuries. Further, in Claims Made settlements, the average amount paid to class counsel exceeded the average amount paid to the class by over 20%.

Our data demonstrates that, despite large settlement awards consisting of hundreds of thousands or millions of dollars, class members on average receive less than half of these awards, and class counsel routinely receive over one-third of these awards. Further, due to low take rates (especially in Claims Made settlements), pure injunctive relief settlements, or settlements involving voucher-type awards, class members commonly receive little to no monetary relief, while class counsel still receives significant monetary compensation.

As studies and industry media have reported, it appears that instead of benefiting from these settlements, class members may be harmed “in the form of higher prices on the goods and services they buy in the future.”<sup>98</sup> According to these studies and reports, defendants who pay litigation fees and settlement funds, as well as comply with costly injunctive relief procedures, end up passing those expenses to the class members who did not benefit from the lawsuit. Thus, taking into account the conclusions in these studies and reports, along with the findings in this study, a conclusion can be made that consumers are not being made whole by class action settlements but rather stand to lose more in the long run.

## CONCLUSION

The findings in this study align with the recent criticism of consumer fraud class action settlements in which class members allege economic loss due to false advertising or other consumer fraud: that they may actually harm consumers and primarily benefit class counsel. While it is true that the average percentage of settlement awards paid to the class exceeds the average percentage paid to class counsel, only a small fraction of class members actually receive monetary relief due to low take rates. Further, in injunctive relief or voucher-type settlements, class members commonly do not receive redress at all for their alleged economic harm, while class counsel receive substantial monetary awards.

It is possible that the 2018 amendments to Federal Rule of Civil Procedure 23 may prove over time to increase transparency in the settlement process and improve take rates. However, low take rates also may reflect that the claims of economic loss or harm were overstated to begin with, such that consumers have little interest in participating in the settlements regardless of the benefits they stand to receive from the settlement. In the end, as some commentators have noted, rather than benefit class members, these consumer class actions may instead achieve the opposite effect, if manufacturers pass down litigation costs to the consumers themselves.

## KEY TAKEAWAYS

The findings of our study suggest the following:

1. Due to low participation rates, only a small fraction of class members receive any monetary benefit from consumer fraud class action settlements awarding monetary relief. This suggests that the claims of economic harm or loss may be overstated to begin with such that consumers have little interest in participating in the settlements regardless of what benefits they stand to receive.
2. Consumer fraud class action settlements often award no monetary relief to class members yet award class counsel significant amounts of attorneys’ fees. In eight injunctive relief cases, class counsel received an average amount of \$491,717, while class members received no monetary relief. In eight settlements in which class members received only vouchers, class counsel received an average amount of \$1,028,909.
3. Even in cases awarding monetary relief to the class, the bulk of the cash recovery does not go to class members. In claims-made cases, class members as a whole receive on average only 23% of the settlement amount, with the remainder being consumed by attorneys’ fees and expenses. The number is only slightly better for all settlement types, with non-class members receiving on average more than 60% of the settlement amount.

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## APPENDIX A: METHODOLOGY

In building our data set, we looked for consumer fraud or false advertising cases in which a class settlement was approved by a federal court from 2010 through 2018. We utilized three strategies to select our pool of settlements:

1. **We examined a list of consumer fraud class action settlements administered by Kurtzman Carson Consultants LLC (“KCC”).** We received a list of 43 cases from KCC and reviewed the final approval orders in those cases to determine whether the settlements fit into our definition of consumer fraud class action settlements. A total of 27 cases fit our data scope.
2. **We reviewed issues of the *BNA Class Action Litigation Reporter*, the *Mealey’s Class Action Litigation Reporter*, and the *Westlaw Journal Class Action Litigation Reporter* from 2010 to the present to identify settlements approved by a federal court during the past eight years.** These reporters allowed us to skim the descriptions of settlements receiving final approval to determine whether we could include them.
3. **We ran term searches on Bloomberg and Westlaw.** Our searches included various combinations of the following terms: false advertising, consumer fraud, settlement, class action, final approval, preliminary approval, deceptive, unfair, and misrepresentation.

To the 27 cases identified from the KCC list, we added 94 cases from our class action reporter research and our case term searches to reach a total of 121 settlements. However, we eventually eliminated 11 settlements either because they involved governmental entities or because they did not fit the definition of cases alleging economic loss only, as some settlement class members experienced physical injury or suffered more than just theoretical economic harm. Our final data set consisted of 110 cases.

In empirically analyzing the 110 cases, we used the case dockets available on Bloomberg and Westlaw to examine case filing and court orders. In particular, we looked to the complaints, the parties’ motions for preliminary and final settlement approval, court orders granting preliminary and final settlement approval, settlement administrator declarations, motions for attorneys’ fees and costs, and orders granting motions for

attorneys’ fees and costs. Often, exhibits to these documents included the settlement agreements themselves, as well as Class Action Fairness Act notices (some of which contained the estimated settlement class size). We collected the following information for each case, to the extent it was available:

- Date filed
- Case number
- Jurisdiction
- Defendant(s)
- Whether the settlement class was a national or state class
- Description of consumer fraud claims
- Products or services involved
- Total monetary relief under settlement
- Non-monetary or injunctive relief under settlement
- Whether there were any coupon payments
- Whether there were any charitable contributions up front (rather than *cy pres*)
- Whether the settlement involved a non-reversionary settlement fund or was based on claims made by class members
- Date of preliminary approval
- Date of final approval
- Estimated settlement class size
- Whether relief was automatic or required claim form submissions
- Number of claims submitted
- Claims rate
- Amount paid or available to each class member
- Total amount allocated to the class
- Total amount and percentage of the settlement actually paid to the class
- Total amount and percentage of the settlement paid to *cy pres*
- Total amount and percentage of the settlement paid to class counsel
- Total amount and percentage of the settlement paid to settlement administration costs
- Where the court records lacked information

Because our data was based on the information available in public court records, it was limited in scope. First, not every case docket contained all the information we sought. As a result, we could not use all 110 cases to analyze both take rates and settlement award allocations. We found that 40 case dockets provided information sufficient to calculate take rates,

and 44 case dockets provided information sufficient to calculate settlement award allocations.

Further, the dockets often did not contain the most updated information. For example, if the most recent claims rate information available was a settlement administrator's declaration accompanying a Motion for Final Settlement Approval, and the settlement administrator had not yet determined which of the claims received were valid and non-duplicative, then the claims rate for that particular case likely was lower than reflected in the declaration and in this report. Additionally, even if court records specified the cash amount to class members, they rarely indicated how many class members actually received and cashed their settlement checks once the checks were distributed. Therefore, the settlement award percentages paid to class members may be lower than reported here.

## APPENDIX B: LIST OF CASES IN DATA SET

### All Cases

	Case Name	Case Number	Jurisdiction	Final Settlement Approval Date	Included in Take Rates Analysis	Included in Settlement Allocation Analysis	Not Included in Either Analysis
1	Yarrington et al v. Solvay Pharmaceuticals, Inc.	0:09-cv-02261	D. Minn.	3/16/2010		X	
2	Simon v. Toshiba America, Inc. et al.	3:07-CV-06202	N.D. Cal.	4/30/2010	X		
3	In re: Tyson Foods, Inc., Chicken Raised Without Antibiotics Consumer Litigation	1:08-md-01982	D. Md.	5/20/2010		X	
4	Radosti v. Envision EMI, LLC, et al.	1:09-CV-00887	D.D.C.	6/8/2010	X		
5	Gemelas v. The Dannon Company Inc.	1:08-cv-00236	N.D. Ohio	6/24/2010			X
6	Geis, et al v. Airborne Health, Inc. et al.	2:07-CV-04238	D.N.J.	9/3/2010			X
7	In Re M3 Power Razor System Marketing and Sales Practices Litigation	1:05-CV-11177	D. Mass.	3/25/2011			X
8	Red et al v. Unilever United States, Inc. et al.	5:10-cv-00387	N.D. Cal.	6/21/2011			X
9	Eisenstat v. Ken's Foods, Inc.	2:10-cv-02510	C.D. Cal.	8/2/2011			X
10	Kelly v. Phiten USA, Inc.	4:11-CV-00067	S.D. Iowa	10/28/2011			X
11	In Re: Enfamil LIPIL Marketing and Sales Practices Litigation	11-MD-02222	S.D. Fla.	11/14/2011			X
12	Weeks v. Kellogg Company	2:09-CV-08102	C.D. Cal.	11/23/2011			X
13	In re Reebok EasyTone Litigation	4:10-cv-11977	D. Mass.	1/19/2012			X
14	Cooperman v. Galeos LLC	8:10-CV-01815	C.D. Cal.	1/23/2012			X
15	Chavez v. Blue Sky Natural Beverage Co., et al.	3:06-cv-06609	N.D. Cal.	6/1/2012			X
16	Rebecca Yumul v. Smart Balance, Inc.	2:10-cv-00927	C.D. Cal.	6/12/2012			X
17	In re Ferrero Litigation	3:11-CV-00205	S.D. Cal.	7/9/2012	X		
18	In Re: Nutella Marketing and Sales Practices Litigation	3:11-CV-01086	D.N.J.	7/31/2012		X	
19	O'Brien v. Brain Research Labs, LLC	2:12-CV-00204	D.N.J.	8/9/2012	X	X	



	Case Name	Case Number	Jurisdiction	Final Settlement Approval Date	Included in Take Rates Analysis	Included in Settlement Allocation Analysis	Not Included in Either Analysis
20	Ko v. Natura Pet Products, Inc.	4:09-cv-02619	N.D. Cal.	9/10/2012	X	X	
21	Zeisel v. Diamond Foods, Inc.	3:10-CV-01192	N.D. Cal.	10/16/2012		X	
22	Gallucci v. Boiron, Inc. et al.	3:11-CV-02039	S.D. Cal.	10/31/2012			X
23	Pashamova v. New Balance Athletic Shoes, Inc.	1:11-cv-10001	D. Mass.	1/28/2013	X	X	
24	Brody et al v. Merck & CO., Inc. et al.	3:12-cv-04774	D.N.J.	3/12/2013		X	
25	Lagarde v. Support.com Inc.	3:12-CV-00609	N.D. Cal.	5/13/2013	X	X	
26	Johnson v. General Mills, Inc.	8:10-cv-00061	C.D. Cal.	6/17/2013			X
27	Rossi v. Procter & Gamble Co.	2:11-CV-07238	D.N.J.	10/3/2013			X
28	Nigh v. Humphreys Pharmacal, Incorporated et al.	3:12-CV-02714	S.D. Cal.	10/23/2013		X	
29	In re Haier Freezer Consumer Litigation	5:11-CV-02911	N.D. Cal.	10/25/2013		X	
30	Perkins v. Philips Oral Health Care, Inc. et al.	3:12-CV-01414	S.D. Cal.	11/6/2013	X		
31	Dennis v. Kellogg Company	3:09-CV-01786	S.D. Cal.	11/14/2013		X	
32	In re: Alexia Foods, Inc. Litig.	4:11-cv-06119	N.D. Cal.	12/12/2013		X	
33	Pappas v. Naked Juice Co. of Glendora Inc.	2:11-cv-08276	C.D. Cal.	1/2/2014	X		
34	In Re Apple and AT&T iPad Unlimited Data Plan Litigation (Apple Settlement)	5:10-cv-02553	N.D. Cal.	3/11/2014	X	X	
35	In Re Apple and AT&T iPad Unlimited Data Plan Litigation (AT&T Settlement)	5:10-cv-02553	N.D. Cal.	3/11/2014	X		
36	Rosales, et al. v. Fitflop USA, LLC	3:11-cv-00973	S.D. Cal.	4/28/2014			X
37	Theis v. AVG Technologies USA, Inc.	1:12-cv-10920	D. Mass.	5/5/2014	X		
38	Tamar Davis Larsen, et al. v. Trader Joe's Company	3:11-cv-05188	N.D. Cal.	7/11/2014		X	
39	In Re Quaker Oats Labeling Litigation	5:10-cv-00502	N.D. Cal.	7/29/2014			X

	Case Name	Case Number	Jurisdiction	Final Settlement Approval Date	Included in Take Rates Analysis	Included in Settlement Allocation Analysis	Not Included in Either Analysis
40	Poertner v. The Gillette Company, et al.	6:12-cv-00803	M.D. Fla.	8/21/2014	X	X	
41	Taromina et al v. Gaspari Nutrition Inc. et al.	2:12-cv-05424	C.D. Cal.	8/25/2014		X	
42	Astiana v. Kashi Company et al.	3:11-cv-01967	S.D. Cal.	9/2/2014		X	
43	Thurston et al. v. Bear Naked, Inc.	3:11-cv-02890	S.D. Cal.	9/2/2014		X	
44	Mirakay v. Dakota Growers Pasta Company, Inc., et al.	3:13-cv-04429	D.N.J.	10/20/2014		X	
45	In Re Sinus Buster Products Consumer Litigation	1:12-cv-02429	E.D.N.Y.	11/10/2014			X
46	Gjolaj v. Global Concepts, Limited, Inc.	1:12-cv-23064	S.D. Fla.	11/19/2014	X	X	
47	Howerton, et al. v. Cargill, Inc.	1:13-cv-00336	D. Haw.	12/8/2014	X		
48	Bezdek v. Vibram USA Inc.	1:12-cv-10513	D. Mass.	1/16/2015		X	
49	Aguiar v. Merisant Company, et al.	2:14-cv-00670	C.D. Cal.	2/2/2015	X	X	
50	Miller v. Ghirardelli Chocolate Company	3:12-cv-04936	N.D. Cal.	2/20/2015		X	
51	Chaudhri v. Osram Sylvania, Inc., et al.	2:11-cv-05504	D.N.J.	3/26/2015	X	X	
52	Ahdoot v. Babolat VS North America Inc., et al.	2:13-cv-02823	C.D. Cal.	4/6/2015			X
53	Gray v. Bayer Corporation, et al.	2:08-cv-04716	D.N.J.	4/27/2015		X	
54	Lilly v. Jamba Juice Company, et al.	3:13-cv-02998	N.D. Cal.	5/4/2015			X
55	Careathers v. Red Bull GmbH, et al.	1:13-cv-00369	S.D.N.Y.	5/12/2015			X
56	Caprarola v. Helzberg's Diamond Shops, Inc.	1:13-cv-06493	N.D. Ill.	5/27/2015	X		
57	Milman v. Thermos L.L.C.	1:13-cv-7750	N.D. Ill.	5/27/2015			X
58	In Re: Kaba Simplex Locks Marketing and Sales Practices Litigation	1:11-md-02220	N.D. Ohio	5/28/2015	X		
59	Trewin v. Church & Dwight, Inc.	3:12-cv-01475	D.N.J.	6/19/2015		X	
60	Klacko v. Diamond Foods, Inc.	9:14-cv-80005	S.D. Fla.	7/20/2015			X

	Case Name	Case Number	Jurisdiction	Final Settlement Approval Date	Included in Take Rates Analysis	Included in Settlement Allocation Analysis	Not Included in Either Analysis
61	Tait v. BSH Home Appliances Corporation	8:10-cv-00711	C.D. Cal.	7/27/2015	X	X	
62	Marty v. Anheuser-Busch Companies, LLC	1:13-cv-23656	S.D. Fla.	10/22/2015	X		
63	In re: Colgate-Palmolive Softsoap Antibacterial Hand Soap Marketing and Sales Practices Litigation	1:12-md-02320	D.N.H.	11/16/2015			X
64	Johnson v. Triple Leaf Tea, Inc.	3:14-cv-01570	N.D. Cal.	11/16/2015			X
65	Monteleone v. The Nutro Company, et al.	2:14-cv-00801	D.N.J.	12/7/2015	X	X	
66	Winans v. Emeritus Corp.	4:13-cv-03962	N.D. Cal.	1/11/2016		X	
67	In Re Horizon Organic Milk Plus DHA Omega-3 Marketing and Sales Practices Litigation	1:12-md-02324	S.D. Fla.	1/29/2016			X
68	Gattinella v. Michael Kors (USA), et al.	1:14-cv-05731	S.D.N.Y.	2/9/2016	X		
69	Brown v. The Hain Celestial Group, Inc.	3:11-cv-03082	N.D. Cal.	2/17/2016		X	
70	Baharestan v. Venus Laboratories, Inc., dba Earth Friendly Products, Inc.	3:15-cv-03578	N.D. Cal.	3/16/2016		X	
71	Eashoo v. Iovate Health Sciences U.S.A., Inc.	2:15-cv-01726	C.D. Cal.	4/5/2016		X	
72	In Re: Blue Buffalo Company, Ltd., Marketing and Sales Practices Litig.	4:14-md-02562	E.D. Mo.	6/16/2016	X		
73	Schwartz v. Avis Rent A Car System, LLC, et al.  & Klein v. Budget Rent A Car System, Inc., et al.  (same settlement)	2:11-cv-04052  2:12-cv-07300	D.N.J. (both)	6/21/2016	X		
74	Hedges v. Earth, Inc.	1:14-cv-09858	N.D. Ill.	6/27/2016	X	X	
75	Carnes v. Atria Senior Living, Inc.	3:14-cv-02727	N.D. Cal.	7/12/2016		X	
76	Mehigan v. Ascena Retail Group, Inc., et al.	2:15-cv-00724	E.D. Pa.	7/29/2016	X	X	

	Case Name	Case Number	Jurisdiction	Final Settlement Approval Date	Included in Take Rates Analysis	Included in Settlement Allocation Analysis	Not Included in Either Analysis
77	Guttman v. Ole Mexican Foods, Inc.	4:14-cv-04845	N.D. Cal.	8/1/2016			X
78	Ebarle v. LifeLock, Inc.	4:15-cv-00258	N.D. Cal.	9/20/2016	X	X	
79	In Re Whirlpool Corp. Front-Loading Washer Products Liability Litigation	1:08-wp-65000	N.D. Ohio	9/23/2016	X		
80	Hendricks v. Starkist Co., et al.	4:13-cv-00729	N.D. Cal.	9/29/2016			X
81	Petersen v. CJ America, Inc.	3:14-cv-02570	S.D. Cal.	9/30/2016		X	
82	Spann v. JCPenney Corp.	8:12-cv-00215	C.D. Cal.	9/30/2016	X		
83	Nicotra v. Babo Botanicals, LLC	2:16-cv-00296	E.D.N.Y.	10/6/2016			X
84	Russell v. Kohl's Department Stores	5:15-cv-01143	C.D. Cal.	10/13/2016	X		
85	Held v. Performance Lacrosse Group, Inc.	3:14-cv-01842	D. Conn.	10/19/2016			X
86	Paz v. AG Adriano Goldschmied, Inc. et al.	3:14-cv-01372	S.D. Cal.	10/28/2016			X
87	Oxina v. Lands' End, Inc.	3:14-cv-02577	S.D. Cal.	12/2/2016			X
88	In Re Nvidia GTX 970 Graphics Chip Litigation	4:15-cv-00760	N.D. Cal.	12/7/2016	X	X	
89	In Re Shop-Vac Marketing and Sales Practices Litigation	4:12-md-02380	M.D. Pa.	12/9/2016			X
90	Smith v. Floor and Décor Outlets of America, Inc.	1:15-cv-04316	N.D. Ga.	1/10/2017	X		
91	Leiner v. Johnson & Johnson Consumer Companies, Inc.	1:15-cv-05876	N.D. Ill.	1/31/2017	X	X	
92	Williamson v. McAfee, Inc. (also Kirby v. McAfee, Inc. – consolidated with Williamson)	5:14-cv-00158	N.D. Cal.	2/3/2017			X
93	Low v. Trump University, LLC	3:10-cv-00940	S.D. Cal.	3/31/2017			X
94	Kline v. Post Holdings, Inc., et al.	3:15-cv-02348	S.D. Cal.	4/6/2017			X
95	Rapoport-Hecht v. Seventh Generation, Inc.	7:14-cv-09087	S.D.N.Y.	4/28/2017			X
96	Vincent v. People Against Dirty, PBC., et al.	7:16-cv-06936	S.D.N.Y.	6/20/2017			X

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97	Horosny v. Burlington Coat Factory of California, LLC	2:15-cv-05005	C.D. Cal.	7/24/2017			X
98	Jovel v. I-Health, Inc.	1:12-cv-05614	E.D.N.Y.	8/3/2017			X
99	Forcellati v. Hylands Inc., et al.	2:12-cv-01983	C.D. Cal.	8/14/2017			X
100	Allen v. Similasan Corp.	3:12-cv-00376	S.D. Cal.	8/17/2017	X	X	
101	Retta v. Millennium Products, Inc. et al.	2:15-cv-01801	C.D. Cal.	8/22/2017			X
102	Elkind v. Revlon Consumer Products Corporation	2:14-cv-02484	E.D.N.Y.	9/5/2017	X	X	
103	Mullins v. Direct Digital LLC	1:13-cv-01829	N.D. Ill.	9/7/2017	X		
104	Birbrower v. Quorn Foods, Inc. et al.	2:16-cv-01346	C.D. Cal.	9/11/2017	X	X	
105	Goldemberg v. Johnson & Johnson Consumer Cos. Inc.	7:13-cv-03073	S.D.N.Y.	11/1/2017			X
106	Soto v. Wild Planet Foods, Inc.	5:15-cv-05082	N.D. Cal.	11/27/2017			X
107	Rodriguez v. Bumble Bee Foods, LLC	3:17-cv-02447	S.D. Cal.	4/24/2018			X
108	Rubenstein v. The Neiman Marcus Group LLC et al.	2:14-cv-07155	C.D. Cal.	10/1/2018	X		
109	Melgar v. Zicam LLC, et al	2:14-CV-00160	E.D. Cal.	11/20/2018			X
110	Kumar v. Salov North America Corp et al.	4:14-cv-02411	N.D. Cal.	7/7/2017 (affirmed by 9th Cir. 9/11/2018)	X	X	



## Cases Included in Take Rates Analysis

	Case Name	Case Number	Jurisdiction	Final Settlement Approval Date
1	Simon v. Toshiba America, Inc. et al.	3:07-CV-06202	N.D. Cal.	4/30/2010
2	Radosti v. Envision EMI, LLC, et al.	1:09-CV-00887	D.D.C.	6/8/2010
3	In re Ferrero Litigation	3:11-CV-00205	S.D. Cal.	7/9/2012
4	O'Brien v. Brain Research Labs, LLC	2:12-CV-00204	D.N.J.	8/9/2012
5	Ko v. Natura Pet Products, Inc.	4:09-cv-02619	N.D. Cal.	9/10/2012
6	Pashamova v. New Balance Athletic Shoes, Inc.	1:11-cv-10001	D. Mass.	1/28/2013
7	Lagarde v. Support.com Inc.	3:12-CV-00609	N.D. Cal.	5/13/2013
8	Perkins v. Philips Oral Health Care, Inc. et al.	3:12-CV-01414	S.D. Cal.	11/6/2013
9	Pappas v. Naked Juice Co. of Glendora Inc.	2:11-cv-08276	C.D. Cal.	1/2/2014
10	In Re Apple and AT&T iPad Unlimited Data Plan Litigation (Apple Settlement)	5:10-cv-02553	N.D. Cal.	3/11/2014
11	In Re Apple and AT&T iPad Unlimited Data Plan Litigation (AT&T Settlement)	5:10-cv-02553	N.D. Cal.	3/11/2014
12	Theis v.AVG	1:12-cv-10920	D. Mass.	5/5/2014
13	Poertner v. The Gillette Company, et al.	6:12-cv-00803	M.D. Fla.	8/21/2014
14	Gjolaj v. Global Concepts, Limited, Inc.	1:12-cv-23064	S.D. Fla.	11/19/2014
15	Howerton, et al. v. Cargill, Inc.	1:13-cv-00336	D. Haw.	12/8/2014
16	Aguar v. Merisant Company, et al.	2:14-cv-00670	C.D. Cal.	2/2/2015
17	Chaudhri v. Osram Sylvania, Inc., et al.	2:11-cv-05504	D.N.J.	3/26/2015
18	Caparola v. Helzberg's Diamond Shops, Inc.	1:13-cv-06493	N.D. Ill.	5/27/2015
19	In Re: Kaba Simplex Locks Marketing and Sales Practices Litigation	1:11-md-02220	N.D. Ohio	5/28/2015
20	Tait v. BSH Home Appliances Corporation	8:10-cv-00711	C.D. Cal.	7/27/2015
21	Marty v. Anheuser-Busch Companies, LLC	1:13-cv-23656	S.D. Fla.	10/22/2015
22	Monteleone v. The Nutro Company, et al.	2:14-cv-00801	D.N.J.	12/7/2015
23	Gattinella v. Michael Kors (USA), et al.	1:14-cv-05731	S.D.N.Y.	2/9/2016
24	In Re: Blue Buffalo Company, Ltd., Marketing and Sales Practices Litig.	4:14-md-02562	E.D. Mo.	6/16/2016
25	Schwartz v. Avis Rent A Car System, LLC, et al.  &  Klein v. Budget Rent A Car System, Inc., et al.  (same settlement)	2:11-cv-04052   2:12-cv-07300	D.N.J. (both)	6/21/2016
26	Hedges v. Earth, Inc.	1:14-cv-09858	N.D. Ill.	6/27/2016

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27	Mehigan v. Ascena Retail Group, Inc., et al.	2:15-cv-00724	E.D. Pa.	7/29/2016
28	Ebarle v. LifeLock, Inc.	4:15-cv-00258	N.D. Cal.	9/20/2016
29	In Re Whirlpool Corp. Front-Loading Washer Products Liability Litigation	1:08-wp-65000	N.D. Ohio	9/23/2016
30	Spann v. JCPenney Corp.	8:12-cv-00215	C.D. Cal.	9/30/2016
31	Russell v. Kohl's Department Stores	5:15-cv-01143	C.D. Cal.	10/13/2016
32	In Re Nvidia GTX 970 Graphics Chip Litigation	4:15-cv-00760	N.D. Cal.	12/7/2016
33	Smith v. Floor and Décor Outlets of America, Inc.	1:15-cv-04316	N.D. Ga.	1/10/2017
34	Leiner v. Johnson & Johnson Consumer Companies, Inc.	1:15-cv-05876	N.D. Ill.	1/31/2017
35	Allen v. Similasan Corp.	3:12-cv-00376	S.D. Cal.	8/17/2017
36	Elkind v. Revlon Consumer Products Corporation	2:14-cv-02484	E.D.N.Y.	9/5/2017
37	Mullins v. Direct Digital LLC	1:13-cv-01829	N.D. Ill.	9/7/2017
38	Birbrower v. Quorn Foods, Inc. et al.	2:16-cv-01346	C.D. Cal.	9/11/2017
39	Rubenstein v. The Neiman Marcus Group LLC et al.	2:14-cv-07155	C.D. Cal.	10/1/2018
40	Kumar v. Salov North America Corp et al.	4:14-cv-02411	N.D. Cal.	7/7/2017 (affirmed by 9th Cir. 9/11/2018)

## Cases Included in Settlement Allocation Analysis

	Case Name	Case Number	Jurisdiction	Final Settlement Approval Date
1	Yarrington et al v. Solvay Pharmaceuticals, Inc.	0:09-cv-02261	D. Minn.	3/16/2010
2	In re: Tyson Foods, Inc., Chicken Raised Without Antibiotics Consumer Litigation	1:08-md-01982	D. Md.	5/20/2010
3	In Re: Nutella Marketing and Sales Practices Litigation	3:11-CV-01086	D.N.J.	7/31/2012
4	O'Brien v. Brain Research Labs, LLC	2:12-CV-00204	D.N.J.	8/9/2012
5	Ko v. Natura Pet Products, Inc.	5:09-cv-02619	N.D. Cal.	9/10/2012
6	Zeisel v. Diamond Foods, Inc.	3:10-CV-01192	N.D. Cal.	10/16/2012
7	Pashmova v. New Balance Athletic Shoes, Inc	1:11-cv-10001	D. Mass.	1/28/2013
8	Brody et al v. Merck & Co., Inc. et al.	3:12-cv-04774	D.N.J.	3/12/2013
9	Lagarde v. Support.com Inc.	3:12-CV-00609	N.D. Cal.	5/13/2013
10	Nigh v. Humphreys Pharmacal, Incorporated et al	3:12-CV-02714	S.D. Cal.	10/23/2013
11	In re Haier Freezer Consumer Litigation	5:11-CV-02911	N.D. Cal.	10/25/2013
12	Dennis v. Kellogg Company	3:09-CV-01786	S.D. Cal.	11/14/2013
13	In re: Alexia Foods, Inc. Litig.	4:11-cv-06119	N.D. Cal.	12/12/2013
14	In Re Apple and AT&T iPad Unlimited Data Plan Litigation (Apple Settlement)	5:10-cv-02553	N.D. Cal.	3/11/2014
15	Tamar Davis Larsen, et al. v. Trader Joe's Company	3:11-cv-05188	N.D. Cal.	7/11/2014
16	Poertner v. The Gillette Company, et al.	6:12-cv-00803	M.D. Fla.	8/21/2014
17	Taromina et al v. Gaspari Nutrition Inc. et al.	2:12-cv-05424	C.D. Cal.	8/25/2014
18	Astiana v. Kashi Company et al.	3:11-cv-01967	S.D. Cal.	9/2/2014
19	Thurston et al. v. Bear Naked, Inc.	3:11-cv-02890	S.D. Cal.	9/2/2014
20	Mirakay v. Dakota Growers Pasta Company, Inc., et al.	3:13-cv-04429	D.N.J.	10/20/2014
21	Gjolaj v. Global Concepts, Limited, Inc.	1:12-cv-23064	S.D. Fla.	11/19/2014
22	Bezdek v. Vibram USA Inc.	1:12-cv-10513	D. Mass.	1/16/2015
23	Aguiar v. Merisant Company, et al.	2:14-cv-00670	C.D. Cal.	2/2/2015
24	Miller v. Ghirardelli Chocolate Company	3:12-cv-04936	N.D. Cal.	2/20/2015
25	Chaudri v. Osram Sylvania, Inc., et al	2:11-cv-05504	D.N.J.	3/26/2015
26	Gray v. Bayer Corporation, et al.	2:08-cv-04716	D.N.J.	4/27/2015
27	Trewin v. Church & Dwight, Inc.	3:12-cv-01475	D.N.J.	6/19/2015
28	Tait v. BSH Home Appliances Corporation	8:10-cv-00711	C.D. Cal.	7/27/2015

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29	Monteleone v. The Nutro Company, et al.	2:14-cv-00801	D.N.J.	12/7/2015
30	Winans v. Emeritus Corp.	4:13-cv-03962	N.D. Cal.	1/11/2016
31	Brown v. The Hain Celestial Group, Inc.	3:11-cv-03082	N.D. Cal.	2/17/2016
32	Baharestan v. Venus Laboratories, Inc., dba Earth Friendly Products, Inc.	3:15-cv-03578	N.D. Cal.	3/16/2016
33	Eashoo v. Iovate Health Sciences U.S.A., Inc.	2:15-cv-01726	C.D. Cal.	4/5/2016
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36	Mehigan v. Ascena Retail Group, Inc., et al.	2:15-cv-00724	E.D. Pa.	7/29/2016
37	Ebarle v. LifeLock, Inc.	4:15-cv-00258	N.D. Cal.	9/20/2016
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39	In Re Nvidia GTX 970 Graphics Chip Litigation	4:15-cv-00760	N.D. Cal.	12/7/2016
40	Leiner v. Johnson & Johnson Consumer Companies, Inc.	1:15-cv-05876	N.D. Ill.	1/31/2017
41	Allen v. Similasan Corp.	3:12-cv-00376	S.D. Cal.	8/17/2017
42	Elkind v. Revlon Consumer Products Corporation	2:14-cv-02484	E.D.N.Y.	9/5/2017
43	Birbrower v. Quorn Foods, Inc. et al.	2:16-cv-01346	C.D. Cal.	9/11/2017
44	Kumar v. Salov North America Corp et al	4:14-cv-02411	N.D. Cal.	7/7/2017 (affirmed by 9th Cir. 9/11/2018)

## ENDNOTES

- 1 *Dennis v. Kellogg Co.*, 697 F.3d 858, 861 (9th Cir. 2012); see also *In re Dry Max Pampers Litigation*, 724 F.3d 713, 718 (6th Cir. 2013) (noting the danger that class counsel “might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees”).
- 2 *In Re Walgreen Co. Stockholder Litigation*, 832 F.3d 718, 726 (7th Cir. 2016) (reversing approval of a class action settlement which awarded \$370,000 in attorneys’ fees but no monetary or valuable injunctive relief to the class).
- 3 See, e.g., Cary Silverman, *In Search of the Reasonable Consumer: When Courts Find Food Class Action Litigation Goes Too Far*, 86 U. Cin. L. Rev. 6-10, 31 (2018) (discussing cases in which plaintiffs have no plausible injury, and “legislative efforts to tighten the requirements for private rights of action under state consumer protection laws”); U.S. Chamber Institute for Legal Reform, [The Food Court: Trends in Food and Beverage Class Action Litigation 46-48 \(Feb. 2017\)](#) (discussing several proposals for reform); Joanna Shepherd, *The Expanding Missouri Merchandizing Practices Act 2* (Am. Tort Reform Found. 2015) (arguing that “[f]ar too much of this litigation is without merit and rewards trial lawyers without contributing in any way to the health, safety, or general welfare of consumers.”); see also *infra* note 9.
- 4 See, e.g., *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (reversing approval of a consumer fraud case settlement because “only one-fourth of one percent of these fraud victims will receive even modest compensation, and for a limited period the labels will be changed, in trivial respects unlikely to influence or inform consumers” while class counsel receives almost \$2 million “for conferring these meager benefits”); *In re Bluetooth Headset Prods. Liability Litigation*, 654 F.3d 935 (9th Cir. 2011) (reversing approval of settlement in part because “the settlement’s provision for attorneys’ fees is apparently disproportionate to the class reward”).
- 5 *In re Subway Footlong Sandwich Marketing and Sales Practices Litigation*, 869 F.3d 551, 557 (7th Cir. 2017) (reversing approval of a settlement over the alleged false advertising of Subway footlong sandwiches that measured 11 inches long, because the settlement resulted in \$525,000 in attorneys’ fees but only injunctive relief that did not actually benefit the class members).
- 6 *Pearson*, 772 F.3d at 783.
- 7 *Id.* at 783–84.
- 8 Our reference to and reliance on these opinions is based solely on reviewing articles and reports written by industry analysts and legal scholars. We have not independently verified the accuracy of their opinions or findings.
- 9 See Joanna Shepherd, [An Empirical Survey of No-Injury Class Actions \(2016\)](#), (including reports and articles cited therein). See also Daniel Fisher, “Study Shows Consumer Class-Action Lawyers Earn Millions, Clients Little,” *Forbes*, Dec. 11, 2013; Harry N. Butler & Jason S. Johnston, “Consumer Harm Acts? An Economic Analysis of Private Actions Under State Consumer Protection Acts,” Northwestern University School of Law Faculty Working Papers, Paper 184 (2009); Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1370 (2003).
- 10 Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions*, *supra* note 9, at 23.
- 11 See discussion in “Previous Empirical Studies of Class Action Settlements” herein.
- 12 The remaining 77% was allocated to attorneys’ fees, settlement administration and notice costs, incentive awards for class representatives, and payments to *cy pres* recipients, if applicable.
- 13 For analyzing settlement award allocations, we included only the 44 cases with sufficient data to analyze how the settlement award was allocated between the class members and class counsel. We excluded settlements that provided only injunctive relief or involved voucher-type awards for the class members rather than cash awards.
- 14 See, e.g., U.S. Chamber Institute for Legal Reform, *supra* note 3, at 46-48 (discussing proposals for reform).
- 15 See Silverman, *supra* note 3, at 6-10 (discussing lawyers’ methods for recruiting class representatives); Daniel Fisher, “Collapse of the 5-Hour Energy Case Reveals the Secrets of Class Action Lawyers,” *Forbes*, Nov. 17, 2015(same); see also *supra* note 9.
- 16 Fisher, *supra* note 15 (reporting on emails from class-action lawyer that revealed “a loose affiliation of lawyers who ran an assembly-line process of identifying companies to sue and then helping each other find plaintiffs”).
- 17 U.S. Chamber Institute for Legal Reform, *supra* note 3, at 1 (“the vast majority of these class actions result from lawyers shopping for cases, not consumer fraud”).
- 18 Deposition of Sarah Samet, at 141–51, *Samet v. Proctor & Gamble Co.*, No. 3:12-cv-01891 (N.D. Cal. filed Sept. 28, 2015) (Doc. 148-1).
- 19 *Id.* at 131.
- 20 For other examples, see Deposition of Manuel Lopez, at 17–22, *Lopez v. H&R Block, Inc.*, No. 1216-cv-12290 (Mo. Cir. Ct.) (deposition taken October 12, 2016; on file with author) (legal assistant at class counsel’s law firm recruited her boyfriend as a plaintiff, and until meeting with lawyers, the plaintiff had no knowledge of the basis for the claim); Deposition of Ronald Perras, at 14–15, *Perras v. H&R Block, Inc.*, No. 4:12-cv-00450 (W.D. Mo. filed Dec. 18, 2015) (Doc. 182-1) (plaintiff “hadn’t thought about filing a lawsuit” until his lawyer recruited him as lead plaintiff).
- 21 See, e.g., *Samet v. Proctor & Gamble Co.*, No. 3:12-cv-01891 (N.D. Cal.) (after complaint was filed in April 2012, defendant litigated the matter for more than three years before the court stayed the case, even though plaintiff admitted in her deposition that she suffered no injury).
- 22 See, e.g., *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Liability Litigation*, 903 F.3d 278, 287–90 (3d Cir. 2018) (district court dismissed for lack injury, but litigation continued because plaintiff appealed, and court of appeals then affirmed that named plaintiff suffered no cognizable injury); *Finkelman v. NFL*, 810 F.3d 187, 195 (3d Cir. 2016) (same).
- 23 *In re Subway Footlong Sandwich*, 869 F.3d at 557 (rejecting settlement that would have awarded \$525,000 in attorneys’ fees while providing only injunctive relief to class members); *Pearson*, 772 F.3d at 783 (rejecting settlement that would have awarded \$2 million to class counsel while compensating only “one-fourth of one percent” of the fraud victims); see also U.S. Chamber Institute for Legal Reform, *supra* note 3, at 38–45 (discussing how “settlements essentially pay the lawyers to go away, providing little or no benefit to consumers”).
- 24 See *In re Google Referrer Header Privacy Litigation*, 869 F.3d 737, 741 (9th Cir. 2017) (while not a consumer-fraud case, this privacy class action ably illustrates the systemic problems with class action settlements).
- 25 Arg. Tr. at 63:2-10, *Frank v. Gaos*, No. 17-961 (Oct. 31, 2018). The Court dismissed the case without reaching the merits and remanded the case for the court of appeals to consider the class members’ standing on March 3, 2019. *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019).
- 26 Deposition of Sarah Samet, at 141–51, *Samet v. Proctor & Gamble Co.*, 3:12-cv-01891 (N.D. Cal. filed Sept. 28, 2015) (Doc. 148-1).
- 27 See Glenn G. Lammi, “Food-Court Follies: Fraud Suits Fall Apart After Plaintiffs’ Candid Admissions During Discovery,” *Forbes*, Aug. 18, 2017.



- 28 *Id.*
- 29 See Statement of Interest of the United States, *Cannon v. Ashburn Corp.*, No. 16-cv-1452 (D.N.J. filed Feb. 16, 2018) (Doc. 765).
- 30 *Id.* at 1, 7 (proposed settlement “provides extremely limited value to consumers and yet seeks to transfer a massive \$1.7 million windfall payment to plaintiffs’ counsel”); see also Statement of Interest of the United States, *Cowen v. Lenny & Larry’s, Inc.*, No. 17-cv-01530 (N.D. Ill. filed Feb. 15, 2019) (Doc. 103) (“proposed settlement provides considerable value to class counsel,” “while providing very little value to the class members whose claims it extinguishes”).
- 31 *E.g.*, *Mulder v. Kohl’s Dept. Stores, Inc.*, 865 F.3d 17, 22 (1st Cir. 2017) (plaintiff in consumer fraud case failed to allege an “identifiable” injury” resulting from alleged deceptive pricing); *Shaulis v. Nordstrom, Inc.*, 865 F.3d 1, 11 (1st Cir. 2017) (plaintiff in consumer fraud case could “identify] no objective injury traceable to the purchased item”).
- 32 U.S. Chamber Institute for Legal Reform, *supra* note 3, at 1.
- 33 Our data set does not include cases involving privacy claims, data breach claims, Telephone Consumer Protection Act claims, or other claims involving technical or statutory violations but otherwise no injury.
- 34 *Low v. Trump University, LLC*, 246 F. Supp. 3d 1295 (S.D. Cal. 2017). We did not include this case in our take rates analysis even though the estimated settlement class size (8,492 class members) and number of claims submitted (4,090 claims) were documented in that case. We believe the high take rate in *Trump University* (48.16%) may be due to the fact that the defendant had accurate contact information for all of the class members, as the lawsuit centered around false advertising of classes for which contact information was needed to register. Further, the case was much more highly publicized and politically charged than the other cases in our analysis. Each class member also stood to recover an average of \$2,500, which likely also contributed to the high interest in this case. Therefore, due to these unique circumstances, we did not include this case in our calculations.
- 35 *Id.*
- 36 Fed. R. Civ. P. 23(c)(2)(B); (e)(2).
- 37 Mayer Brown, LLP, *Do Class Actions Benefit Class Members?* (2013).
- 38 *Id.*
- 39 *Id.* at 3.
- 40 *Id.* at 2.
- 41 *Id.*
- 42 Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions* (2015).
- 43 *Id.* at 3.
- 44 *Id.* at 23–24.
- 45 Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions* (2016). The author classified cases as “no-injury actions” if any of the following conditions were met: (i) plaintiffs suffered no actual or imminent concrete harm giving rise to an injury-in-fact; (ii) the only harm was a technical statutory violation; (iii) any economic loss was negligible or infinitesimal; or (iv) the sought recovery was typically unrelated to compensating plaintiffs for economic or other harm.
- 46 *Id.* at 5.
- 47 *Id.*
- 48 *Id.*
- 49 *Id.*
- 50 *Id.* at 23.
- 51 *Id.*, citing Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1370 (2003).
- 52 FTC Staff Report, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* 10, 12 (Sept. 2019) (“FTC Notice Study”).
- 53 *Id.* at 25–39.
- 54 *Id.* at 19, 27–33.
- 55 *Id.* at 27.
- 56 Harry N. Butler & Jason S. Johnston, “Consumer Harm Acts? An Economic Analysis of Private Actions Under State Consumer Protection Acts,” Northwestern University School of Law Faculty Working Papers, Paper 184 (2009).
- 57 *Id.* at 34–35.
- 58 *Id.*
- 59 Our data set contained four cases in which some members of the settlement class received automatic relief, while other members of the settlement class did not. In these cases, we separated the portion of the class receiving automatic relief from the portion required to submit claim forms, and calculated only the take rate for those in the non-automatic subclass.
- 60 See, e.g., Order Granting Final Approval of Settlement, *Hendricks v. Starkist Co.*, No. 4:13-cv-00729 (N.D. Cal. Sept. 29, 2016).
- 61 Declaration of Christopher Q. Longley, Esq. On Notice Plan and Administration, *Birbrower v. Quorn Foods, Inc.*, No. 2:16-cv-01346 (C.D. Cal. July 21, 2017).
- 62 These low rates are consistent with (albeit some higher than) the take rates found in a 2013 analysis by KCC of all consumer class action settlements it administered “where the notice provided to class members relied entirely on media notice rather than direct mail notice.” See Declaration of Deborah McComb Re: Settlement Claims, *Poertner v. The Gillette Company, et al.*, 6:12-cv-00803 (M.D. Fla. April 22, 2014). The claims rates in that study ranged between .002% and 9.378%, with a median rate of 0.023%. A KCC representative noted that “consumer class action settlements with little or no direct mail notice will almost always have a claims rate of less than one percent.”
- 63 *Mullins v. Direct Digital LLC*, 1:13-cv-01829, (N.D. Ill. 2017).
- 64 *In Re: Kaba Simplex Locks Marketing and Sales Practices Litigation*, 1:11-md-02220 (N.D. Ohio 2015). In this case, the 99 valid claims submitted were “in addition to a total of 17,041 Upgrade Kits which the Defendants shipped to class members as a result of the publicity that the filing of the lawsuit generated” prior to the settlement. Memorandum in Support of Motion for Class Certification and for Final Approval of Class Action Settlement, *In Re: Kaba Simplex Locks Marketing and Sales Practices Litigation*, 1:11-md-02220 (N.D. Ohio May 8, 2015). We do not know whether the pre-settlement upgrade kits were a factor in the low settlement take rate.
- 65 *Pappas v. Naked Juice Co. of Glendora, Inc.*, 2:11-cv-08276 (C.D. Cal. 2014).
- 66 *Poertner v. The Gillette Company, et al.*, 6:12-cv-00803 (M.D. Fla. 2014).
- 67 *Perkins v. Philips Oral Health Care, Inc., et al.*, 3:12-cv-01414 (S.D. Cal. 2013).
- 68 *In re Ferrero Litigation*, 3:11-cv-00205 (S.D. Cal. 2012).
- 69 *Hedges v. Earth*, 1:14-cv-09858 (N.D. Ill. 2016).

- 70 *Monteleone v. The Nutro Company*, 2:14-cv-00801 (D.N.J. 2015).
- 71 *Russell v. Kohl's Department Stores*, 5:15-cv-01143 (C.D. Cal. 2016).
- 72 *In Re: Nvidia GTX 970 Graphics Chip Litigation*, 4:15-cv-00760 (N.D. Cal. 2016).
- 73 *Ebarle v. LifeLock, Inc.*, 4:15-cv-00258 (N.D. Cal. 2016).
- 74 *O'Brien v. Brain Research Labs, LLC*, 2:12-cv-00204 (D.N.J. 2012).
- 75 Settlement Agreement, *Carey, et al. v. New Balance Athletic Shoe, Inc., et al.*, 1:11-cv-10001 (D. Mass. July 12, 2012).
- 76 Declaration of Jennifer M. Keough Regarding Notice and Settlement Administration, *Carey, et al. v. New Balance Athletic Shoe, Inc., et al.*, 1:11-cv-10001 (D. Mass. January 18, 2013).
- 77 Declaration of Lori L. Castaneda In Support of Plaintiffs' Assented-To Motion for Distribution of Class Settlement Funds, *Carey, et al. v. New Balance Athletic Shoe, Inc., et al.*, 1:11-cv-10001 (D. Mass. August 2, 2013).
- 78 *Id.*
- 79 Settlement Agreement, *Carey, et al. v. New Balance Athletic Shoe, Inc., et al.*, 1:11-cv-10001 (D. Mass. July 12, 2012); Declaration of Lori L. Castaneda In Support of Plaintiffs' Assented-To Motion for Distribution of Class Settlement Funds, *Carey, et al. v. New Balance Athletic Shoe, Inc., et al.*, 1:11-cv-10001 (D. Mass. August 2, 2013).
- 80 *Caprarola v. Helzberg's Diamond Shops, Inc.*, 1:13-cv-06493 (N.D. Ill. 2015).
- 81 Two factors discussed in the FTC's study suggest that this rate may be trending *lower* than what our study indicates. *First*, the FTC reported that cases using "email notice have a 7.3 percentage points lower claims rate, in comparison to cases that employ notice packets" sent through regular mail. FTC Notice Study, *supra* note 52, at 40. According to the FTC study, class action administrators have informed the FTC that "they are increasingly using email notifications, especially for large, national classes." *Id.* at 45. As administrators' use of email notices increases, the FTC's study suggests that claims rates may decrease. However, the FTC was careful to acknowledge that their findings do not support a conclusion that the use of notice packets caused the higher claims rate, and that the existence of other factors may explain the difference in claims rates. *Id.* at 16. *Second*, the mean "check-cashing rate" in the FTC's study was only 77% for all cases in which class members were required to submit claims. *Id.* at 32. Thus, the FTC study suggests that the claims rate itself may present an overly rosy picture of class compensation, as nearly one quarter of class members who submit claims may not ultimately receive compensation.
- 82 See Glenn G. Lammi, *supra* note 27; U.S. Chamber Institute for Legal Reform, *supra* note 3, at 40 ("Most consumers" in the *Subway Footlong* class action "had suffered no injury").
- 83 FTC Notice Study, *supra* note 52, at 25.
- 84 *Id.*
- 85 Generally, our data set did not include cases where class members could choose between a cash option and a voucher or other non-cash option, as the court document calculations did not distinguish between the cash and non-cash amounts paid to the class. However, in six cases, the court documents did separate the two categories. In these cases, we included only the cash amounts in our calculations.
- 86 See Memorandum of Law in Support of the Parties' Joint Motion for *Cy Pres* Distribution of Residual Settlement Funds, *Yarrington v. Solvay Pharm., Inc.*, No. 0:09-cv-02261 (D. Minn. Aug. 31, 2011); Stipulation and Order Regarding *Cy Pres* Distribution, *Zeisel v. Diamond Foods, Inc.*, No. 3:10-cv-01192 (N.D. Cal. June 26, 2013); Stipulation and Order Re Change in *Cy Pres* Recipients, *In Re Haier Freezer Consumer Litigation*, No. 5:11-cv-02911, (N.D. Cal. Jan. 28, 2016); Brief in Support of Plaintiffs' Motion Seeking Order Approving (1) Final Accounting of Settlement Proceeds; and (2) Distribution of Residual Funds to *Cy Pres* Beneficiaries, *In Re: Nutella Marketing and Sales Practices Litigation*, No. 3:11-cv-01086 (D.N.J. Feb. 17, 2016); Memorandum of Points and Authorities in Support of Plaintiff's Motion Seeking Order Approving (1) Final Accounting of Settlement Proceeds; and (2) Distribution of Residual Funds to *Cy Pres* Beneficiaries, *Aguiar v. Merisant Company*, No. 2:14-cv-00670 (C.D. Cal. Nov. 22, 2016); Joint Status Report, *Rougvie v. Ascena Retail Group, Inc.*, No. 2:15-cv-00724 (E.D. Pa. Nov. 20, 2017).
- 87 *Birbrower v. Quorn Foods, Inc.*, No. 2:16-cv-01346 (C.D. Cal. 2017).
- 88 *Poertner v. The Gillette Company, et al.*, 6:12-cv-00803 (M.D. Fla. 2014).
- 89 The "Other" section in Figure 7 consists of settlement administration and notice costs, incentive awards for class representatives, and *cy pres* distribution, if applicable.
- 90 *Ebarle v. LifeLock, Inc.*, 4:15-cv-00258 (N.D. Cal. 2016).
- 91 Joint Update Regarding the Status of Settlement Claims in Support of Final Approval of Settlement, *Ebarle v. LifeLock, Inc.*, 4:15-cv-00258 (N.D. Cal. June 23, 2016).
- 92 The "Other" section in Figure 8 consists of settlement administration and notice costs, incentive awards for class representatives, and *cy pres* distribution, if applicable.
- 93 Our data set contained fewer cases with accurate *cy pres* calculations because we were limited to Non-Reversionary Settlement Fund cases where we knew the actual amount paid to the class and all other settlement costs (the remaining amount would be paid to a *cy pres* recipient). Our *cy pres* data set also included two cases where the defendants made charitable contributions from the settlement fund upfront, rather than as *cy pres* at the back end of the settlement.
- 94 The "Other" section in Figure 10 consists of settlement administration and notice costs, incentive awards for class representatives, and *cy pres* distribution, if applicable. For Claims Made cases, the only *cy pres* distributions were certain amounts allocated to charities or other nonprofit organizations in the settlement agreements themselves, prior to settlement distribution.
- 95 The "Other" section in Figure 11 consists of settlement administration and notice costs, incentive awards for class representatives, and *cy pres* distribution, if applicable.
- 96 The "Other" section in Figure 12 consists of settlement administration and notice costs, incentive awards for class representatives, and *cy pres* distribution, if applicable.
- 97 We did not include the ninth case because we could not determine the amount paid to class counsel based on court records.
- 98 See, e.g., Daniel Fisher, "Study Shows Consumer Class-Action Lawyers Earn Millions, Clients Little," *Forbes*, Dec. 11, 2013.

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