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Reforming the Consumer Class Action

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THE FUTURE OF CLASS ACTION LITIGATION:
A VIEW FROM THE CONSUMER CLASS
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MODERATOR: *Troy A. McKenzie*

PANELISTS: *Orran Brown, Elizabeth Chamblee Burch, Elizabeth J.
Cabraser, Brian T. Fitzpatrick, Robert C. Gilbert*

PROFESSOR TROY A. MCKENZIE: Good morning, everyone. I'd like us to reconvene with our second panel. As you can see, we have a full group up here, so I want to jump right in. Before I do that, I want to set the scene a little for what our panel is going to be talking about.

Our panel is following obviously the first panel, which—as Sam and the other participants noted—focused on the current state of the class action with a particular focus on the consumer class action, and many of the doctrinal and practical limitations that have arisen with respect to the use of the class action device.

This panel is going to follow on that theme, but think about some of the potential routes within the class action device itself: of perhaps overcoming some of those limitations, and perhaps improving the use of the consumer class action, and perhaps improving both its ability to be used in the first instance and its legitimacy when used as a procedural device.

In a way our principal commentators are going to start and are going to look at bookends of the process, the front end and the back end. So, our first speaker will be Beth Burch,

who is at the University of Georgia School of Law, and is one of the most promising young scholars in the field of complex litigation. She is going to be discussing issue classes.

Then, we are going to move to Brian Fitzpatrick, who is at Vanderbilt Law School. And I would call Brian a junior scholar, but unfortunately—

PROFESSOR BRIAN T. FITZPATRICK: I just look young.

PROFESSOR MCKENZIE: Yes, well unfortunately we're contemporaries, and so I would love to call him a junior scholar, but knowing myself, I know I'm now old so I can't do that anymore.

And Brian is going to talk about the back end, about various methods to think through the compensatory piece. Do consumer class actions actually get money to claimants? Do they actually seek out money that is provided for them?

And then we are going to have commentary from Elizabeth Cabraser, who really needs no introduction—one of the leading plaintiff-side lawyers—and who is also a member of the Judicial Conference's Advisory Committee on Civil Rules. And also Orran Brown, who is at a law firm, BrownGreer that is a preeminent firm in the field of claims administration.

And so without any further ado, I would like to turn it over to Beth Burch.

PROFESSOR ELIZABETH CHAMBLEE BURCH: Thank you, Troy. I suspect that many of you—who saw that we are going to be talking about issue classes today—would have expected me to talk a little bit about whether they should exist, and then, if they should exist, how it fits within predominance. But I actually want to start at a very different point. I want us to talk a little bit about what I see as the misguided search for class unity.

This class cohesion seems harder and harder to come by the more you have nationwide conduct by a defendant, but you have these sort of traditional jurisdictional boundaries with states, and traditional state laws. I've spent many years now thinking about class cohesion and what really qualifies a group to litigate as a single unit, and I think I've discovered that I may have been on, what we call down South, a "snipe hunt" that has lasted about a decade.

Let me tell you why I think that is, and give you a little bit of history of what class cohesion is about and what it isn't about, and how that in turn relates to issue classes. The term

“class cohesion” actually got thrown around in the 1966 Rules Advisory Committee discussion. Reporter Ben Kaplan suggested that notice and opt-out rights in Rule 23(b)(3) could actually solve for problems of weak intra-class unity.

But you will notice, if you read the Rule, that the term “cohesion” appears nowhere within Rule 23 itself. Nevertheless, the Supreme Court has imported these cohesion concerns in no less than three parts of the Rule. In *Amchem*, the Supreme Court says, well, cohesion is inherently part of the predominance inquiry under Rule 23(b)(3). One year later, they decide *Ortiz*. Then they say, well, actually cohesion is ensconced within Rule 23(b)(1)(B), which of course has no bearing on predominance whatsoever, and doesn’t actually have a predominance requirement because it’s all about limited funds. More recently, we saw in *Wal-Mart v. Dukes* that perhaps cohesion is ensconced within Rule 23(a)’s commonality. We have this commonality component that requires some glue holding employment discrimination decisions together.

Despite having located this cohesion concern, in no less than three parts of Rule 23, the Supreme Court has never once told us what class cohesion means. They have never told us what counts for class unity. And they’ve never once told us how much unity is required.

Now, not surprisingly, lower courts tend to invoke class cohesion kind of haphazardly. They come up with a smattering of metrics to try to measure it. They say, well, it’s really about race and gender. We saw *Myriam*, just in the last panel, talking about these prototypical examples of (b)(2) for civil rights cases.

But if you even look at some of the civil rights cases, like school desegregation and school busing cases, if you look at the members within this presumably cohesive class, you have some folks who really want to improve local black schools instead of integrating. You have others who want to avoid busing their kids to integrated but poor schools. Yet they are presumed to be cohesive. They’re all sort of lumped together in this very “cohesive” group.

Same sort of principles, by the way, hold true for Title IX cases and Title VII cases. You have members who are happy with the status quo. You have employees who really don’t want to litigate, and yet they are lumped together, and they are presumed to be a cohesive group.

I want to suggest something that is both—if it can be—radical and intuitive. I want to suggest that what bonds the plaintiffs together for the purposes of litigation isn't their skin, it's not their gender, it's actually the defendant's conduct towards them. If courts are willing to reorient their traditional thinking about group cohesion along these lines, then it's going to free them to think pragmatically about how to situate, sort, and adjudicate what's actually common.

Let me suggest to you that if you take any claim or any defense, you can sort it into two categories according to the goals that those elements are meant to serve. Some elements are meant to regulate the defendant's conduct. Some elements are meant to determine the plaintiff's eligibility for relief.

So let me tell you a little bit what I mean by that. These defendants' conduct elements, things like—what the defendant knew, when the defendant knew it, whether the defendant used a biased hiring procedure, whether the defendant issued consumer warranties, whether their washing machines are smelly, and whether that's a problem, how companies advertise, how they label their products—these are all conduct elements. When a defendant's actions are uniform and when they're governed by the same or similar laws, the conduct elements are common to all the people who are affected by that conduct.

Now, obviously in private litigation, we have eligibility elements. This is my term, not theirs. But when private plaintiffs sue, they have to show that they're actually entitled to the kind of relief that they're requesting. Now, some of these eligibility elements might actually be part of the plaintiff's case-in-chief. So, specific causation, loss causation, damages, reliance, these are all part of the plaintiff's case-in-chief. Sometimes these specific eligibility elements actually come in as affirmative defenses. Things like contributory negligence, assumption of the risk, or even statutes of limitation are all measuring the plaintiff's eligibility for relief even though the defendant has the burden of proving them.

Historically, it's the eligibility elements that tend to be the most significant barriers to wholesale class certification. But if we're willing to start thinking about issue classes, issue classes can actually allow for partial certification just to the defen-

dant's conduct, and efficiently resolve whether that conduct is wrongful, and thereby avoid inconsistent judgments.

If we are willing to certify these conduct elements, then we can think about how this fits with the ALI's definition for aggregate treatment. I think certifying conduct elements when those elements are uniform would, in the words of the ALI, "materially advance the resolution" of the claims.

Let's look at couple of quick examples. *McReynolds v. Merrill Lynch*, a classic Title VII case. If you're resolving the question of whether allowing these teaming and account distribution policies is going to disparately impact African Americans, then that materially advances the claims of all of the people who are affected by those policies.

But sometimes, and here's the major caveat, sometimes the defendant's conduct is actually decentralized. Sometimes it only comes into focus by looking at a series of individual actions. When I try to explain this to my class, I sort of say what it's like is looking at a pointillism picture. You can't just look at a single individual dot and see what the whole picture looks like. Let me suggest that issue classes on conduct elements don't actually advance the claims resolution when the conduct itself is not uniform—when you have to take a step back and look at the whole picture.

Think about two classic Eleventh Circuit cases, *Rutstein v. Avis Rent-A-Car*, and *Jackson v. Motel 6*. In *Rutstein*, the plaintiffs would have to demonstrate individual circumstances of why they were denied car rentals in order to show any sort of religious animus on Avis's part. Same sort of thing for *Jackson v. Motel 6*, each plaintiff has to prove why they were either denied hotel accommodations or rented dirty rooms in order to show any sort of racial discrimination on Motel 6's part.

Plaintiffs' attorneys have tried to mask this heterogeneity in different ways. One of the ways that they often do this is through statistics and experts. They try to show the judge the whole picture all at once by using statistical evidence. But that doesn't magically transform a series of individual wrongs into one common wrong. The proof is still a series of individual wrongs: dirty room, dirty room, dirty room, didn't get a hotel at all. So issue classes are inappropriate in those sorts of cases.

On the other hand, if we're actually willing to think about these conduct elements, as I call them as what glues the class members together, then we can replicate some of the other

strategies that have worked well for plaintiffs. One strategy is to change the underlying substantive law: suing under RICO or medical monitoring forces the court to really look at the defendant's conduct as a whole. It brings the defendant's conduct into focus as opposed to the series of individual plaintiffs' actions.

Reorienting the elements in any sort of claim or defense along these lines helps us not only with commonality and with predominance, but it can also situate how courts think about Rule 23's other requirements as well, for example, typicality.

Typicality would test whether the defendant's conduct towards the class representative is actually typical of how that conduct affects other class members. In this way, typicality and commonality screen for decentralized conduct.

Adequacy, on the other hand, should actually prove far less disruptive when courts certify conduct elements. If you think about the most disabling conflicts, the most disabling conflicts tend to arise from eligibility elements, things like—reliance or loss causation, or damages, or specific causation—these things that tend to be more individuated to the class members.

I think that if courts are willing to shed conventional thinking about two things, about class cohesion on the one hand, and about the need for either wholesale class certification or nothing on the other, then we can do a couple of things. We can promote consistency among multiple regulators, whether it's a state attorney general through a *parens patriae* case, or through a series of private individual actors. We can promote consistency in the outcome by adjudicating the defendant's conduct once on the merits. This furthers substantive goals. Whether you feel like compensation, or deterrence, or some mix of the two is the right metric, this will help further those substantive goals because we're actually testing cases on the merits for a change.

Finally, it affords some measure of predictability to subsequent preclusion questions. It's true that a court can't ever predetermine the *res judicata* effect of its judgments, but if you have a specific and carefully crafted issue class, it makes those subsequent preclusion questions much more palatable and easier to decide.

I'm obviously leaving out a host of different interrelated doctrinal, practical, logistical, and constitutional concerns. I'm

happy to talk about those a little bit more later, but I wanted to leave plenty of time for the rest of our co-panelists.

PROFESSOR MCKENZIE: Thank you, Beth. I would now like to turn it over to Brian Fitzpatrick and his co-author whom I neglected to introduce earlier, Bobby Gilbert of Grossman Roth. They have a very interesting paper on claiming rates in a class action with actual data.

PROFESSOR FITZPATRICK: Thank you, thank you Troy. I'm here with my co-author Bobby, and this paper was really inspired by the Center's request and wish for some data on what goes on in terms of compensation in consumer class actions.

Bobby was the lead liaison counsel for an MDL in Florida that involved a number of class actions against some of the largest banks in the United States, and I was an expert in some of those cases. So, Bobby has access to a great deal of data about what happened to the settlements in those cases. We decided to try to mine some of that data to be helpful to courts and scholars about what goes on in consumer fraud class action settlements.

Bobby's going to talk later to describe the cases and how we got the data, but one of the things that I want to say at the outset is that we have access to a lot of data from these settlements, and I really would like to ask you for your help in coming up with some ways in which this data can be useful. In the charts and graphs I'll be presenting today, these were the ways in which we thought this data might be helpful to scholars and to practitioners and to judges. But please if you have other ideas of what we can do with this data, or other information we can ask the settlement administrators for about these settlements, please let us know because I'm very curious to try to maximize this opportunity that we have to really learn something about consumer class action settlements. Please, you know, we'd love your help.

One thing I want to stress at the outset, and Bobby's going to cover this in more detail in a few minutes, is that these settlements that we're going to talk about, they were not kind of the ugly poster child consumer fraud settlements—you know, the wanted poster kind of consumer fraud settlements, where you had to file a claim form to get paid. These were settlements, which we refer to as automatic distribution settlements. The defendant had data on the class members that allowed for

the class members to receive payment automatically without having to file a claim form.

At the very outset, I want to make that clear, and Bobby will make it more clear, that this may not be representative of consumer fraud settlements, although with technology improving as it is, the era of big data is upon us. I think companies have more and more data on who their customers are. So, these automatic distributions may become more and more possible than they have been in the past.

I think, if it is okay, Troy, I am going to stand up.

PROFESSOR MCKENZIE: Yes.

PROFESSOR FITZPATRICK: Is that okay? And get in front of this screen here, so that I can actually see the PowerPoint presentation as you do as well.

The data we have is about class participation in these consumer fraud settlements, and as the discussion has talked about earlier today, there's not a lot of data out there on how often class members participate in consumer fraud settlements. So there is a very good study by Professor Eisenberg, and the superb Professor Miller, on opt-out rates in class action cases. They studied thirty-nine consumer fraud class actions. They found a very low opt-out rate, 0.2% in consumer fraud cases.

Claim rates, again we're not going to be able to add to this literature today because our settlement was not a claims-made settlement, but there is very little data out there on how often class members file claims when they have to in a settlement, and the ranges are quite broad. The "Ns" here are the number of settlements examined by these studies, so there's not a lot of data out there.

In the first two studies, Pace-Rubenstein Study, [and] the Hensler Study, most of those cases involved average claims that were actually quite high. They weren't your traditional small-stakes consumer fraud settlements like the case that we're going to be describing today. The Mayer Brown Study or as Myriam referred to it, "the memo"—that we heard about from Andy earlier, they did study mainly consumer fraud cases, and they found some very low claims rates in those cases.

More appropriate for what we're going to present today is the one piece of literature that looked at "negotiation rates," and "automatic settlements." So, Pace-Rubenstein looked at four consumer fraud-type settlements, and they looked at what

rate did the class members negotiate the automatic payment that they received. All but one of these actually involved very high average allotments for the settlement, so they are not again traditional consumer small-stakes, consumer fraud settlements. But the prior literature is fairly small, as you can tell not many studies, none of them really random and very small numbers of settlements examined in the studies themselves.

We didn't do a big randomized study. This is a case study that's based on several consumer fraud settlements. I'm going to turn it over now to Bobby to describe the settlements and a bit about our data.

MR. ROBERT C. GILBERT: Thank you, Brian. First of all, I want to echo what Brian said. It's a pleasure to be here, an honor to be here to participate. Thank you very much for the invitation. We hope this information will add to the scholarship, and to think about what can be done in the future to make the class action device and settlements even more effective as we move ahead.

Our laboratory, if you will, is MDL 2036. It was a case that began in 2009, eventually included contract-based claims brought against thirty of the largest banks in the United States. Of those thirty banks, ten of them effectively invoked their class action arbitration provisions in their account agreements, and successfully extracted themselves from this MDL without any liability whatsoever—approximately ten—leaving approximately twenty banks. Of the remaining twenty banks, all but one of them eventually settled the claims, and as I said, one of them is scheduled to proceed to trial sometime in the next few months or next year.

What Brian and I did is we took seven out of the nineteen settlements. The settlements total over \$1 billion. We took seven of the nineteen settlements that we thought could shed some light, with the data, on information regarding opt-out rates and negotiation rates.

So let me just describe what you see here on Table 1: the seven banks in question with the settlement amounts of those particular cases, what the percentage represents in the second, what is the third column is the range of recovery as to the overall damages. You see quite a variation here where you see, for example, Bank 2 is a settlement that the range of recovery was about 9% in a case where you had a unique situation—a non-arbitration defendant that had a nationwide release already

entered in its favor from a prior class action, and this recovery of \$410 million was in the face of that prior nationwide release as well as the overarching defense that all of these banks asserted under the National Bank Act.

The highest range of recovery is \$35 million representing 63% of the actual damages in a case that was brought against a non-arbitration defendant, where the case proceeded all the way through class action discovery, class certification, a contested class certification, a 23(f) denial, all the way up onto the eve of expert disclosures and summary judgment motions being filed when the case settled at mediation for 63%.

You have the other cases that are listed here. The three settlements—Banks 4, 5, and 6—that are in the mid-forty range. Those are all non-arbitration banks that settled either at or shortly after contested class certification was granted. Bank 7 is an arbitration defendant, and Bank 1 is an arbitration defendant.

The distribution instrument, interesting to what we're looking at, is: has there been a difference in negotiation rates where the instrument that was sent out to these class members was a standard-sized check inside of a standard business envelope versus what's called a double postcard check? Where the banks and securities companies have used them for some number of years to distribute dividends, where it's a double-sided postcard sealed with perforated edges—the name and address of the class member is on the outside—when they tear off the edges and open it up, it's a check. It's smaller in size than the standard-sized check, because it looks like a postcard, hence the name postcard check. It's less expensive to print. It's less expensive to mail. It saves money in that respect when you involve millions of class members.

Also we have the allotment issue before opt-out. In all but one of these cases, as Brian will discuss in just a moment, class members received notice obviously through first-class mail and publication as a supplemental notice. The final approval motions were filed before the opt-out deadline. They included the standard language about what the range of recovery was. But class members did not know on an individual basis what their recovery was going to be; how much was the check going to be that I would eventually receive in the mail if the settlement was approved.

In one case, due to a snafu involving the bank's data that was provided to the administrator, approximately one-third of the class members did not receive initial notification. When this came to the attention of all involved after final approval had initially been granted, we had to go through a new process of sending out first-class—literally on the eve of distribution, we sent out to that one-third of the class—a new notice, which they were receiving for the first time along with their checks.

We said in this notice, enclosed is your check for your allotment under this particular approved settlement. Because of this snafu in notice, you did not receive this notice earlier. If you do wish to exercise your right to opt-out, you may do so by signing this form and returning it together with the enclosed check. And if you return the check, you will obviously be opting-out.

As Brian will report, we saw with this smaller group—this one-third of the class—a much higher rate of opt-outs than we did with the others. I should add one more thing. It's incredible.

PROFESSOR MCKENZIE: Yes, it is incredible.

MR. GILBERT: But the one other thing I should add before I turn it back to Brian is this: These banks, obviously some number of the class members were still customers of the banks, and approximately half to 60% were no longer customers. The data we're reporting on primarily focuses on the former customers.

Why? Because in the case of the current customers, when the settlements were approved and distributions were made, distributions were made automatically by account credits into their accounts. They never had to negotiate a check. It was automatically deposited into their accounts.

For the other half, the former customers, checks had to be printed and mailed to those former customers. That's the negotiation rate data that we're studying now, and we plan to write on.

PROFESSOR FITZPATRICK: Thank you, Bobby. In this Table here, I lay out some of the basic data from the seven settlements we selected, and I want to emphasize one thing. We picked these seven settlements so there would be some variation in the circumstances of the settlements, we could test some hypotheses about the negotiation rates, some postcard checks, some not postcard checks, that kind of thing.

You see the number of class members in these settlements are very high, up to 13 million—from about half a million to 13 million class members. The average payout was quite small ranging from \$11 to \$77. About one-third to one-half of the class members got direct deposits in their accounts because they were current customers. The other class members got the checks automatically sent to them in the mail at their last known address that the bank had.

When you add up the people that automatically got the account credit and the people that cashed their checks that were sent in the mail, you see that a very large percentage of class members received compensation from these settlements. The range is from 58% of all class members up to 84% of all class members. The bottom line is, in these settlements, the vast majority of class members are receiving compensation.

I'll tell you I've long been a skeptic of the compensatory function of consumer class actions. I think I'm with Myriam on this. I'm a deterrence guy. I don't really care if anyone gets compensation. I am all about deterrence. But I will say, I was impressed here by what happened, that we actually got money in the hands of the vast majority of people that were injured by these practices.

This does suggest to me, and I know Bobby certainly agrees with this, that consumer class actions can under certain circumstances really serve a compensatory function to class members.

You see in this column here, the second-to-last column, this is the rate at which the class members that received checks in the mail chose to cash them. You see that the rate varies quite significantly. In one of the settlements the rate was only 37% of all checks cashed, whereas in the highest case it was 70% of checks cashed. So we're going to talk about in a moment about why we think there may have been some difference there.

One thing to note is even among the people that had to cash checks, even when the checks were pretty small on average, still a lot of people chose to cash them. This again suggests to me that maybe I've always been too pessimistic about the compensatory function in the consumer fraud class action.

One thing to point out on this chart is Bank 4. Bobby mentioned this opt-out rate difference, this snafu in the notice. What you see is the opt-out rate on all other settlements is

very small, 0.003% to 0.009%. In the Bank 4 case, the opt-out rate is 100 times as great. We think that very well may be because in that settlement, people, a large chunk of the class knew what their allotment was, and I suspect they probably didn't like it, and so they chose to opt-out.

AUDIENCE MEMBER: Was it small?

PROFESSOR FITZPATRICK: The average allotment was \$75. There are a lot of them that are \$5, a lot of them below \$5. I'll talk about that in a minute. So people may have been upset.

One policy question that comes out of this is should courts strive to tell class members what their allotments are before the opt-out decision? Should they? We talked about it some in the paper we're going to write on this, but since I'm running low on time, I'm just going to flag that question now.

Should we give people a second opt-out chance once the checks have come in the mail, so that they can make a more informed decision about opting-out? What good is it to give them that opportunity? They're not going to file a lawsuit on their own for \$75. What good is it to give that opt-out opportunity? Maybe it serves the purpose of protest that the court can take into consideration when deciding whether it's a good settlement or something of that sort.

This figure here shows what the check-cashing rate was as a function of how big the checks were, or how much money the checks were, the dollar denomination of the check. And what you see obviously that when the checks get bigger, people cash them more frequently. What really surprised me here was even among the smallest checks, checks for under \$5, the rate at which people cashed them was pretty high.

At the lowest, it was 20%, but up to 45% of class members cashed even the lowest denomination checks. This suggested to us that maybe courts should not cut off the point at which they're willing to send a check to a class member unless it's just economically infeasible to send a check—for something like \$0.30 or something like that because even small checks are cashed.

I went into this thinking that we shouldn't worry so much about sending checks out at all, but if we are, we ought to only send out big checks. But even the small checks, people went and cashed them, so that suggests to me that maybe we ought to keep the smallest class members in the distribution.

I've bolded these four banks. These are the lowest negotiation rate banks. All four of those banks were the postcard check banks. This suggested to us that class members are less willing to cash a check that comes in the form of a double postcard than they are traditional checks, we think probably it is because they think maybe it's junk mail. They don't think it's a legitimate check.

Our view, and Bobby correct me if I'm wrong, is courts probably ought to ask for a real check to be sent to class members even if it's more expensive unless the added cost will just dwarf the amount in the settlement fund. If we do care about compensation, that did seem to make a pretty big difference.

I think I'm going to stop there because I've gone over my time. Thank you.

PROFESSOR MCKENZIE: Thank you very much. I was thinking while Brian was speaking, how many checks have I thrown away?

Now we're going to turn to comments, and I'd like to start with Elizabeth Cabraser.

MS. ELIZABETH J. CABRASER: Thank you. I was tasked with commenting primarily on Beth's piece, but I am so excited about the opportunity to contribute data to this debate that I'm going to give you two data points about the litigation that you just learned about because I think they illuminate.

First of all, the ability of class counsel—and full disclosure, I was one of the lawyers involved in the overdraft MDLs—to negotiate a settlement that actually worked to deliver benefits to consumers depended on many factors, most of which you heard about.

But it also depended on the leverage of the attorneys to insist upon those mechanisms. And that leverage doesn't come out of nowhere. It didn't come out of nowhere in the overdraft cases. There was a precursor to those cases.

It was an overdraft case called *Gutierrez v. Wells Fargo* that was tried in the Northern District of California. At the time of this litigation, there was a judgment. It was a bench trial on restitution under California's Unfair Competition Law. Same conduct. It was a \$203 million judgment.

So, the banks knew that they were at risk. Now while this overdraft litigation was going on, *Gutierrez* went up to the Ninth Circuit, was overturned on all but one claim, restitution. The District Court was allowed by the Ninth Circuit to recon-

sider its restitution judgment. After this settlement was negotiated just last month, the Ninth Circuit affirmed the restitution judgment. So there will be a \$203 million judgment that will be distributed to class members using these same mechanisms.

The other thing that matters in terms of enabling distribution is retention of records. Records are more ephemeral now. In *Gutierrez*, that case was tried in 2008. We have the records because we went to trial, but many consumer cases that settle, the records are long gone by the time settlement is reached.

Now I think we will know to ask courts to order those records be preserved at the outset because they matter not only to class certification itself, they're going to matter not only to trial and these cases do go to trial, but they will matter tremendously at the point of settlement when we want to be able to deliver compensation to class members—there have been some recent settlements in consumer cases where unfortunately we just can't. The case is too old. The records were not preserved.

The other thing that I want to mention was another recent case, too recent for this study but a somewhat similar case, the *Chase "Check Loan"* case, also an MDL from the Northern District of California. We just got our distribution report: \$71.9 million was the net settlement amount that was distributed to the class in the form of mailed checks. One million checks went out, 93% of them were cashed. That's a very high rate. I think in part that rate is high because in that case, although many of the checks were small, \$50 or less, the practice at issue was a practice that outraged the consumers, the bank customers. The interest rate was unilaterally raised on their check loans in midstream, and they had two choices: pay off the whole loan, or pay the higher interest rate when the contract was that the interest rate would stay the same for the life of the loan.

I think the claim that is being litigated and settled matters quite apart from the monetary value, and that's hard to capture with data. But I think it matters a lot, which gets me into Beth's thesis that when we're looking at class definitions and cohesion and looking at definable classes, that it is the defendant's conduct that creates and defines the class.

I think that's true. I think it's not only the defendant's conduct that creates ascertainable or definable or categoriz-

able group of people who otherwise are unrelated. It is the conduct that creates and defines how that group reacts to the conduct, and how they react to opt-out opportunities, to checks in the mail, and everything else. So it's a qualitative as well as a quantitative phenomenon.

The issues class, I have to say I am identified as a huge proponent of issues classes, but I also have a fundamental confusion about them because I'm not sure exactly why we need to have a debate about 23(c)(4) in order to recognize what the Supreme Court taught us in *Wal-Mart Stores, Inc. v. Dukes*, which is that when you have a question that does have or should have the same answer no matter how many times you ask it, that is a common question that can and perhaps should be tried once with preclusive effect.

The problem really is that we are very, very afraid of preclusion. That's why, despite *res judicata* and collateral estoppel and class actions, the number of instances of preclusive adjudication of common questions is very low. Litigators would always prefer to mitigate the risks, to have multiple bites at the apple, and many, many, many more people are afraid of the simple operation of preclusion than were ever afraid of Virginia Woolf.

If you ask a regular person, not a lawyer, whether or not a question with one answer should be answered once or a thousand, or a million times, they will tell you, "Once." You answer the question, you live with the outcome, and you move on. That is the power of class actions. You don't make everybody that has the same issue in their case litigate on their own if and when they can because, as commentators have taught us, when one is left alone to assert his rights—if and when he can at best—there will be a random and fragmentary enforcement, if indeed there is any at all.

If we think the best is random and fragmentary enforcement of the law in the face of common conduct, then we wouldn't want preclusion issue classes or class actions of any kind. If we think the best is some sort of coherent predictable enforcement of the law in the face of a violation that impacts many, then I think we'll do the best we can to make the procedures that we have available in Rule 23 work at a functional level. If we need additional procedures or mechanisms, we will work to develop them. And I hope as we do that we will be

guided by the need to get past our biases and prejudices on both sides, and be guided by the data.

PROFESSOR MCKENZIE: Now I turn it over to Orran Brown.

MR. ORRAN BROWN: Thank you, Troy. I'm going to take us on a whirlwind tour of the data. We'll do it very quickly, but I'm also honored to be here, and very grateful for this chance to share some of this with you.

This is a quick run-through of about twenty consumer-type cases that we have administered. We always feel like there's no settlement that just works. There are settlements that are workable. Our job is to make them work on the ground, after the parties have approved and agreed to them, and written them up. We take the eligibility basket of issues that Beth mentioned, that have now been transferred into some settlement program under its own rules, and apply those to the people who come forward.

If we want to look quickly at: are these things working? If they're workable, are they working? This is about twenty cases, different types of consumer cases, so this is not just apples and oranges. This is a basket of fruit. They're all kinds of cases in here: bank fees, credit card, SCRA, TPCA, statutory contractual claims.

If you look at all the money that changes hands in them, everything all in—about 11% of it goes to administrative costs, notice costs, and sending payments to class representatives. About 45% of it's going to the class members and about 44% to the counsel. But that's average. This is kind of an average look. A lot of money is going to claimants; a lot of money is going to lawyers.

This is looking at participation rates that Brian and Bobby have talked about. We're looking for the main driver of what makes people come forward to join in a consumer program, and we've batched them here or bucketed them by how steep the path is to get payment. The ones that Brian mentioned about automatic payment, we refer to it as a burden of proof, where there's none, where there's an automatic payment because you know your customers. The defendant has data.

It's not always good data, some of it's old data, but you can figure out where people are, or at least used to be, do an automatic check to them or a fund deposit if you have their fund information. Obviously, the participation rate is very high, but not perfect—because you can't always find every-

body—where it's an automatic payment. These are structural things about a settlement that affect the participation rates and whether the benefits are delivered to the claimants who are in the class.

The next step is just a signed claim form. A class member has to do some affirmative act, just sign a card and send it back. So they have to take some action. It's not an automatic delivery of the benefits.

There are a lot of ways to enhance participation on how you implement these things to make it easy for people to participate. You send them a postcard that they just sign and send back, with prepaid postage—a lot more will come forward, obviously. That stands to reason. We get about 44–45% of people stepping forward when all they do is send back a claim form.

If they have to send back a claim form and some information: What was your account number? What years did you have this? Then, they have to fill out more information. It's tougher for them, not all of them have it. They come back; some of them are deficient, and you can't pay them anyway. But we get 22%-plus playing in the program when they have to do a little bit more. The more they have to do, the fewer people can do it. A signed claim form and some proof—proof of purchase, some proof of a cost, proof of paying a higher interest—the participation rate's going down to 15%.

Just as a benchmark, look at personal injury programs. We do a lot of personal injury programs of all sizes. All of them have some application process and a claim form, and some proof you have to turn in—proof of use, proof of injury category. We see, on average, about 73% of the known claimants coming forward in those programs because there the money is usually much bigger.

Superimpose on this eligibility rates. These are the same participation rates. Let's see how many people actually get paid. That's what this line is showing us. Most people get issued a check. You'd have to dig deeper, like Brian and Bobby are doing, to see how many actually cash the check. In these consumer cases that we've done, about 80–85% of people cash the check. And sometimes we can't find them and get them the check.

Of the people that are in these groups, what percentage of them turn out to be eligible? It's very high in consumer cases. It's not as high in a lot of the personal injury programs,

because the burden of proof there in our process, in the settlement, is higher.

Look at notice reach. Obviously, participation is a function of: do people know about the program? When you know your customers, where you can send them automatic payments, you get very high notice reach—93%. Here, actually the participation is higher because some of these people got automatic loan forgiveness without us having to find them.

It looks like to us that very high notice reach is not really the driver of participation like this burden of proof is. What this is telling us is that what you require people to do to get the payment is really the driver of how many people participate.

This is looking at average value of the payment—also not a huge driver because consumer cases are all lower value. These are average numbers you get from \$20 to \$1,000; looking into the hundreds is kind of average. In personal injury programs, the number is a lot higher, but again, we think that for personal injury, the value at stake—the amount of money you might get—is a big driver for participation.

In the consumer cases, the dollars don't really drive as much as the structure does. And even if we talk about overall settlement amounts, a lot of times people hear a billion dollar settlement. It creates a lot of news. It creates interest. You hear that more in the personal injury area. Again, this line is showing us that our participation rate is really a function of the structure, what you have to do to participate, and not so much what the total dollar value is.

We found, in our experience, that there are ways to enhance participation: by a claim form online, postcard claim form, good website for information, a lot of claimant support to tell people how to go about doing this, making the envelopes attractive so they realize they're official. They're not scams; they're not some junk mail. You do the best you can to make them more attractive when you send them to them.

We've seen that structurally, the burden of proof issue, and then administratively, how you can grease the skids for people to participate, are what really drive how willing people are to join in these programs.

PROFESSOR MCKENZIE: Thank you, Orran. Very, very informative. I'm going to exercise my moderator's prerogative to ask the pessimistic question because this is extremely interesting. Beth's presentation gives some hope of getting a toehold

on how we can re-conceptualize what we're doing in class actions so that you can look to what you can actually resolve, and actually try to resolve it, and try to get some of the efficiencies that should come with the device.

Brian and Bobby's presentation suggests that we really do have some hope of extracting out of data what makes class members actually want to get compensation. That's all very hopeful, and it's a nice sunny day.

Now I'm going to come with the pessimism. First, to Brian and Bobby, what's the universe of cases that you're really talking about? Isn't it true that most of the class actions out there are going to involve some kind of claim form and then we're going to be down in a much lower rate? And to Beth, if issue classes have this promise, and as you say in your paper, we've dabbled in them before, why hasn't there been a headlong rush towards issue classes earlier?

There must be something that has held back the use of issue classes because it just seems like such a clean and efficient way of resolving the part of the case that really is common to everyone in the class. I put those notes of pessimism out there, and discuss.

MR. GILBERT: Thanks Troy. First, before I answer your question because I'm not as pessimistic as you on that issue, I want to say Elizabeth pointed something out—and in her modesty she neglected to point something out—which is that it was her partners and her firm that secured that trial victory in *Gutierrez*. In fact, they rescued the case on the eleventh hour, and took it to trial.

Without that effort from her firm, double effort in having to go back after the Ninth Circuit reversed it the first time, a lot of this, as she pointed out, probably wouldn't have happened. So it was a great deterrence factor, if you will, that helped all of the banks that we faced in MDL 2036 realize that we were prepared to do what they had done in front of Judge Alsup in trying those cases so that they knew that absent the arbitration provision and absent a post-judgment plenary reversal, they were going to face the music.

In answer to your question, I don't agree. I think that the answer is this: in contract-based cases, claim forms are typically not needed because the data, as we've gotten more sophisticated, exists in the computerized systems of these defendants. But as Myriam pointed out, the problem we have there is that

in almost all of the contract-based cases, which are like these incredibly strong merits-based cases, we now face defendants that have almost uniformly invoked individual arbitration.

In the tort-based cases, the non-contract-based cases, claims are still a significant issue. I don't consider myself an expert who can talk about this from a data standpoint, but logic tells me that where they are personal-injury claims or claims based on some wrong where the amount recoverable is sufficient to incentivize an individual to fill out a simplified claim form, that people will do that. But that defendants and sometimes class counsel make those claim forms too difficult. Not intentionally, but they make them too difficult, and that has a deterrence effect on the claim rate.

My suggestion would be in non-contract-based claims, where we don't have the data available, efforts should be geared at making claim forms as simple, as efficient as possible, subject to the verification processes that people were talking about earlier.

PROFESSOR FITZPATRICK: And on that point Troy, if I could just add something. I find it very ironic that as we try to simplify the process by which people can file claims—by asking them just to sign an oath that they were someone who bought this product or what have you—at the same time, we see people asking to do that, we see a defendant, BP, that is litigating a case at the U.S. Supreme Court now where they're arguing that, because some people might lie on those claim forms and might not actually be injured, that the courts don't have Article III jurisdiction to approve a settlement.

It's almost heads the defendant wins, tails the plaintiffs lose on some of this stuff. If we want people to file a claim form, make it easy, then if someone lies on the claim form, there's no Article III jurisdiction. I'm not sure how we can navigate all of those things, but I just wanted to point out that there's another side of the coin to make it easy for class members to file claims.

PROFESSOR BURCH: I want to address Troy's questions in two respects. One, I think Elizabeth has talked about already and that is, preclusion is scary. Preclusion is scary for the plaintiffs. It's scary for the defendants.

Preclusion can also be a great boon for defendants. If you look at some of the consolidated trials in *Bendectin* for example, trial on general causation in *Bendectin* knocked out 600

plaintiffs—same sort of thing for the smelly washing machine cases in Ohio.

Preclusion can actually be a really great tool for defendants if they feel like they have a strong case on general causation and general liability. On the other hand, there aren't many issue classes that are being brought because plaintiffs' attorneys initiate them, and plaintiffs' attorneys don't know how they're going to get paid. Because we're basing payment to class counsel on a restitutionary theory, generally issue classes, unless they settle right after having been certified, don't produce a common fund.

One of the things that I've tried to do in my paper is tease out how we might get some of the benefit for the plaintiffs' attorneys to start incentivizing issue classes. So there are a couple of analogies that I draw, and I'm happy to send these to people who are interested. They're a little bit nitpicky, but I think you can draw analogies to charging liens, which have typically been used to try to recoup costs from non-compliant clients.

There are also analogies to the common benefit doctrine. Common benefit is something that's used in equitable cases where you don't actually create a fund, but you still confer a benefit on class members. We see the same sort of thing, and there are differences in terms of how you operate this in a multi-district litigation with an issue class where the eligibility elements are then remanded to the transferor courts, heaven forbid, to have individual trials. That makes it a little bit more difficult, but there are ways to deal with it then too. The law of the case doctrine, for example, is a great way to try to get some basic categories of compensation on the books for the plaintiffs. Unless there are changed circumstances then the transferor judges shouldn't meddle with the basic categories of fees.

You can look at how much benefit the issue class attorney generates versus how much benefit the individual attorney generates. Does the individual attorney subsequently have to take all of these eligibility elements to trial on specific causation? If so, then they're going to get more of the fee perhaps than if they settle immediately upon remand, and most of the fee should then go to the issue class counsel.

Those are the two main barriers that I see to issue classes: the fear of preclusion, and how do you incentivize the plain-

tiffs' bar to start bringing them. I don't think that it's impossible to overcome those two.

PROFESSOR MCKENZIE: I'd want to take questions from the floor.

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Editor's Note: The additional Q&A session with the audience members is not reflected in this transcript, and is available on the *NYU Journal of Law & Business* website. This Conference transcript has been edited for clarity.