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INTRODUCTORY NOTE

2014 FALL CONFERENCE:
THE FUTURE OF CLASS ACTION LITIGATION:
A VIEW FROM THE CONSUMER CLASS
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On November 7, 2014, the Center on Civil Justice at NYU School of Law held its first major conference, *The Future of Class Action Litigation: A View from the Consumer Class*. We heard a sterling group of panelists and astute audience participants talk about consumer class actions. The discussion made it apparent that arguments about consumer class actions, though important themselves, are also proxies for debates about class actions in general and about much more in the civil justice system. The four panels debated questions such as: Are consumer class actions an important means of providing access to justice for people who otherwise would not have access? Or, are they a cumbersome, expensive mechanism that benefits only the lawyers? Do they encourage the over-legalization of our society? Or, do they provide necessary deterrence—a way for private citizens to enforce public norms? And, if not class actions, then what? Arbitration? And what problems does this privatization of our justice system bring?

The proceedings and ideas discussed during the 2014 Fall Conference are published in this *NYU Journal of Law & Business* Special Issue 2015. The videos are also available on

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the Center on Civil Justice and the *NYU Journal of Law & Business* websites.

As the Director of the Center on Civil Justice, I wanted to comment on something that particularly struck me—that is, how many times during the panel presentations, and in the more informal discussions at the breaks, these engaged, experienced, experts said in one form or another, "We just do not know." We do not know how these class actions operate in fact. We do not know in any systematic way whether or how much money is distributed to class members. We do not know whether some kinds of cases are more likely than others to produce better distributions. We do not know how best to notify class members that they are entitled to money or what are the best ways to distribute that money. We do not know whether judges are approving fees for lawyers that are too high, too low, or just right. We know very little about the claimed deterrence effect of these class actions, so we do not know how best to calibrate the deterrence to fit the offense. And we do not know how the deterrence function of these class actions fits with the enforcement efforts of public authorities.

The answers to these important questions will help us understand how to make the class action mechanism more effective and fairer. More fundamentally, they will help us understand whether it is "worth the candle" to try to "fix" class actions. Maybe it would be better to scrap them in favor of some other kind of procedure (and if so, what procedure?). Right now, these questions are being debated largely on the basis of anecdote because there is very little solid empirical information. We were fortunate to have panelists who presented some new evidence at our conference.

Panelists Brian T. Fitzpatrick and Robert C. Gilbert responded to the Center's call for papers with empirical research on consumer class actions, and discussed their findings in preparation for the Article featured in this Special Issue 2015. Professor Fitzpatrick was an expert witness in a series of consumer class actions involving contract claims, and Mr. Gilbert was plaintiffs' counsel. Professor Fitzpatrick and Mr. Gilbert aggregated data from seven settlements (without identifying any party) and examined opt-out rates and the rates at which checks were actually cashed. There were some surprising results.

For example, in the past Professor Fitzpatrick had expressed doubts about the compensatory function of class actions when the potential recovery by individual class members is small.[1] Based on the data that he presented at the 2014 Fall Conference, however, he said that he was surprised at how many people cashed even very small checks and that the size of the check did not correspond to cashing rates. In other words, even very small checks—those under $5—got cashed at rates up to 45% in one case. He concluded that he had been overly pessimistic about the compensatory function of consumer class actions. These findings—that payments to consumers do get made and that consumers find them meaningful enough to cash them—are in contrast to the many statements made at the Conference that consumer class actions provide no meaningful compensation to consumers.

In *Panel 2: Reforming the Consumer Class Action*, Orran Brown of BrownGreer, PLC, a law firm specializing in claims administration, presented information on the efforts his firm makes to maximize the rates at which claims to class members get paid. The firm attends to issues as detailed as the design of the envelope that contains notices and payments to maximize the possibility that a potential class member will open it and participate. Again, without identifying any party, Mr. Brown was able to provide average claiming rates across several kinds of class actions. He demonstrated, among other things, that the most important factor in whether or not class members in a consumer case participate is how much the claimant has to do to make a claim. The size of the payment is relatively unimportant. This stands in contrast to, for example, mass tort cases where the size of the potential payout is the primary driver of participation rates. In Mr. Brown's sample, participation rates reached 40% where claimants had only to return a postcard to make a claim while rates were 22% where they had to provide additional documentation to make a claim. Among the claims that were made, he found that about 88% were eligible for compensation.

The presentations by Professor Fitzpatrick, Mr. Gilbert and Mr. Brown also exposed a significant problem. They were able to gather and aggregate data because they are important

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1. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043 (2010).

players in the world of class action litigation. Research like theirs cannot be done except by people with similar access. I think they were willing to share their data with the Center because they understood that the Center is neutral and that it has no agenda except the improvement of the civil justice system in the United States. However, research like this is quite rare primarily because people who are not inside the system find it extraordinarily difficult to obtain the data.

For example, in 2007, Nicholas M. Pace, a Social Scientist at the RAND Corporation, and William B. Rubenstein, a Harvard Law School Professor, set out to perform an empirical study of claiming practices in class actions.[2] They chose a sample of thirty-one cases and went to court dockets assuming they would find the data they needed (e.g., how much money was at stake, how many consumers were in the class, whether or not those consumers received any money). Instead, they found that fewer than 20% of those court dockets contained any information about the aggregate size of the settlement or the number of claims that were paid. With respect to the other 80% (twenty-five cases) there was no meaningful information at all.

What happened next was even more eye opening. They chose another cohort of class actions and sent 222 letters asking for information about the settlements to the participants—plaintiffs' lawyers, defense lawyers, settlement administrators and judges. Of the letters sent, they received only fifty-five responses. Most of those responses gave reasons why data could not be supplied. Only 6% of the participants responded with data. Judges responded to the letter requesting information in the greatest proportion, but were the least likely to have information. Settlement administrators had the most information but were least likely to share it because they claimed it was proprietary to their clients—which they believed to be the lawyers.

Good data is essential for making good policy. Consumer class actions either compensate consumers or they do not. They either deter unwanted business practices or do not. At

2. Nicholas M. Pace & William B. Rubenstein, *Shedding Light on Outcomes in Class Actions*, *in* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20 (Joseph W. Doherty, Robert T. Reville & Laura Zakaras eds., 2012).

the moment, the debate over these questions is being conducted with anecdote and personal experience. This is not helpful because the personal experiences of equally knowledgeable professionals often lead to opposite conclusions. Data exists to answer these questions. It is either in the possession of parties with little or no incentive to share it, or, when information is available in court files for some cases, it is prohibitively expensive to find the court file for those individual cases and then combine whatever information is available.

The Center on Civil Justice is beginning to explore ways that it can serve as a neutral repository for information that certainly exists somewhere. Unless there is some such facility, the important questions mentioned above will continue to be answered on the basis of who has the loudest voice or the best anecdote.