LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Plaintiffs Bar Should Work To Raise Class Action Claims Rates

By **Jay Edelson and Amy Hausmann** (March 7, 2022, 5:25 PM EST)

Jay Edelson

Amy Hausmann

If there's one thing most consumer class action attorneys quietly dread facing at a settlement approval hearing, it's a question about the claims rate of the settlement class.

For years, especially in large consumer class actions, the percentage of class members who submit claims and receive any money has been embarrassingly low — often 1%-2%.

As courts today pay more attention to whether consumer class settlements deliver real money to the class, judges also are starting to focus on claims rates in deciding whether to approve class settlements and how to evaluate fees.

But currently, the problem of low claims rates remains — not as some well-kept secret, but as a widely known problem that too few attorneys seem motivated to talk about, let alone solve.

One obvious example popped up just last month, when the parties in In re: Facebook Internet Tracking Litigation announced a $90 million settlement of class privacy claims on behalf of some 120 million class members.[1]

The plaintiffs' motion for preliminary approval, filed Feb. 14 in the U.S. District Court for the Northern District of California, brags that the settlement would be "one of the ten largest data privacy class action settlements ever," but it estimates that fewer than 5% of class members will submit claims.[2]

Mysteriously absent from the motion is any mention of the 22% claims rate that Facebook — owned by the recently renamed Meta Platforms Inc. — achieved in its $650 million data privacy class action settlement in the very same court in August 2020, on behalf of a class of roughly 7 million.

As U.S. District Judge James Donato said when preliminarily approving that $650 million settlement:

> [T]he ultimate goal is to achieve a high claims rate and payout to class members based on effective notice. ... It is safe to say that if any defendant can provide notice likely to reach online users, it is Facebook.[3]

So why is the projected claims rate in the Facebook internet tracking case still so low?

Lawyers, judges and scholars have tried to explain low claims rates in consumer class actions before.

For example, one law review article by Depaul University professor Max N. Helveston points to

> the difficulty of notifying class members, the overly complex and technical notifications that class members receive, the effort required to pursue a claim, the lack of interest of class members in the types of relief available, and the failure of fund designers to design claim procedures in ways that take into account cognitive biases.[4]

An empirical study of class action settlements conducted by Mayer Brown LLP argued that

> many class members may not believe it is not worth their while to request the (usually very modest) awards to which they might be entitled under a settlement. And the claim-filing process is often burdensome, requiring production of years-old bills or other data to corroborate entitlement to recovery.[5]

These factors are certainly relevant, but they only tell part of the story. It is also important to look at the unfortunate incentives driving too many consumer class action lawyers, both historically and today.

In the 1980s and '90s, many class action settlements created reversionary settlement funds, where any money unclaimed by class members goes back — or reverts — to the defendant.

That meant that parties could announce a $50 million settlement, and the plaintiffs' attorneys would take $17 million in fees. Meanwhile, only 1%-2% of the class would actually submit a claim to recover their damages, such that the $50 million settlement would only return something like $150,000 to consumers, and the rest of the money would go right back to the defendant.

In a reversionary deal, it's easy to see why defendants would favor low claims rates. But clever — and unscrupulous — plaintiffs attorneys would take advantage as well, brokering settlements based on the unspoken understanding that class notice would be ineffective, claims rates would be miniscule, and defendants would only actually pay a small fraction of the announced price, all while the plaintiffs' attorneys took home more than 10 times the money actually delivered to consumers.

Thankfully, courts have seen the problems of reversionary deals, and now rarely, if ever, approve them.

But low claims rates persist. In 2019, the Federal Trade Commission reported that the median claims rate for consumer class action settlements was 9%, and that the weighted mean — weighted by the size of the class — was only 4%.[6]

Harvard Law School professor William B. Rubenstein reports that the average claims rate for settlements with over 2.7 million class members is a mere 1.4%.[7]

Even in nonreversionary settlements, two other attorney incentives help explain why claims rates have not particularly improved in recent years.

First, some lawyers settling class actions want to avoid drawing objections, since the success of a class action settlement is often measured by the number of objections it received.[8] If notice is less

comprehensive, and fewer class members find out about the deal, fewer class members are likely to object to it.

The desire to avoid objections therefore leads some lawyers — on both sides — to provide the bare minimum notice, which in turn causes low claims rates.

Second, courts are beginning to focus on the per-person recoveries of consumer class settlements, rather than only the grand total.[9] And in a nonreversionary settlement where the common fund is distributed pro rata to the number of claimants, as often happens in consumer cases, a higher claims rate means a lower per-person recovery.[10]

In light of all these perverse incentives to keep claims rates low — from reversionary settlements to the more recent focus on per-person recoveries and avoiding objections — it's no wonder that too many lawyers seem content with the status quo.

Current settlements justify paltry claims rates by pointing to the scores of former cases with similarly paltry claims rates.[11]

It's time to stop relying on historical claims rate averages that were the result of more limited technology, less effective notice campaigns, and unfortunate incentives for both plaintiffs and defense lawyers.

Class action lawyers today can do much better than the 4% weighted mean calculated by the FTC, including in the consumer and data privacy spaces.[12]

At present, a claims rate above 10% for a large class settlement "should not be, but is, an unprecedentedly positive reaction by the class," as Judge Donato wrote in In re: Facebook Biometric Information Privacy Litigation.[13]

Going forward, we predict that rates in the 10%-25% range will be considered the new floor for consumer class settlements.

Judges are starting to pay close attention to claims rates in reviewing settlements, since robust claims rates are central to ensuring that deals provide actual, meaningful relief to the class.

Just in the past few weeks, at least two federal judges have withheld final approval based in part on low claims rates — something that used to be practically unheard of.

In February, in the U.S. District Court for the Central District of California, U.S. District Judge Cormac J. Carney denied final approval for the second time in In re: ConAgra Foods Inc. — a decade-old deceptive marketing class action — based on the disproportionate allocation of the $8 million settlement — nearly $7 million to class counsel but less than $1 million to the class.

The court found "excessive self-interest" based on the facts that "the parties ... knew the claims rate would be extremely low, [2%-3%]," and that class counsel even had an "incentive to make sure claims did not get too high."[14]

In addition, in the U.S. District Court for the Western District of Wisconsin, U.S. District Judge James D. Peterson has twice denied final approval in February to a data breach class settlement in Powers v.

Filters Fast LLC, noting specifically that "the total number of claims represents a little more than one percent of the class members," and that the plaintiffs "offer no explanation for what appears to be a low response rate in a context where there was little downside to submitting a claim."[15]

Class counsel in Powers attempted to justify its 1.16% claims rate as "completely consistent with other, recent, comparable settlements,"[16] but Judge Peterson was not convinced by this explanation, nor by counsel's invocation of the old adage, "You can lead a horse to water, but you cannot make him drink."[17]

Instead, Judge Peterson homed in on improving the specifics of the notice process — including details such as email subject lines — since "[a] settlement that is otherwise fair provides little benefit for the class if few of them are aware that they are entitled to participate in the settlement."[18]

The Northern District of California has similarly demonstrated a heightened interest in claims rates, issuing new guidance in 2018 that specifically instructs parties to include information on claims rates in both preliminary and final approval motions.[19]

And in the Facebook biometric information privacy case, Judge Donato made clear from the start of the settlement approval proceedings that he was looking for a "record-breaking claims rate,"[20] and that "[t]his settlement is a golden opportunity to establish best practices for online notice."[21]

He insisted on "robust [notice] measures, and they paid off in spades," generating a 22% claims rate in a class of roughly 7 million consumers.[22]

The consumer class action bar would do well to pay attention to the trends being set by Judges Carney, Peterson and Donato.

The Facebook internet tracking settlement, for example, should look to the Facebook biometric information privacy case as the benchmark for claims rates in a data privacy settlement, rather than looking at historical averages or settlements with 0.5% and 0.03% claims rates.[23]

As Judge Donato insisted, higher claims rates are readily attainable — particularly when settling with tech companies — if the parties use modern methods, such as:

- In-app notification;[24]
- Direct notice through both email and U.S. mail;[25]
- Several reminder notices to class members;[26]
- Using simple language in notice materials and claim forms;[27]
- Consulting behavioral psychology experts to design a claims process that maximizes claims rates;[28]
- Offering a variety of payment options for consumers, e.g., paper check, PayPal, Zelle and direct deposit;[29] and

- Putting together deals that deliver good results to class members — offering real relief, not just coupons or credit monitoring, that will make consumers want to participate in the settlement.

Modern consumer class action settlements are providing us, in the words of Judge Donato, a golden opportunity to break away from the culture of silence about low claims rates, "to establish best practices for online notice," and to "achieve a high claims rate and payout to class members."[30]

And while the law's overreliance on past precedent can sometimes make it slow to embrace change, change is undoubtedly coming.

The plaintiffs' bar, which quite correctly prides itself on overhauling entire industries, should be driving this change. Doing so starts with a willingness to move these private conversations we all have about claims rates fully into the public square.

Jay Edelson is the founder and CEO of Edelson PC.

Amy Hausmann is an associate at the firm.

Disclosure: The authors' firm served as co-lead and lead counsel in In re: Facebook Biometric Information Privacy Litigation and Dickey v. Advanced Micro Devices Inc., respectively, both of which are cited in this piece.

[1] Dkt. 232, In re Facebook Internet Tracking Litig., No. 5:12-md-2314 (N.D. Cal. Feb. 14, 2022).

[2] Id. at 1, 17.

[3] In re Facebook Biometric Info. Priv. Litig., No. 15-CV-03747-JD, 2020 WL 4818608, at *4 (N.D. Cal. Aug. 19, 2020).

[4] Max Helveston, Promoting Justice Through Public Interest Advocacy in Class Actions, 60 Buff. L. Rev. 749, 782–83 (2012); see also Amanda M. Rose, Classaction.gov, 88 U. Chi. L. Rev. 487 (2021).

[5] Mayer Brown LLP, Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions (Dec. 11, 2013), https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

[6] Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns at 11, Fed. Trade Commission (Sep. 2019), https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf ("FTC Study") (study of 149 consumer class action settlements).

[7] Dkt. 517-2, In re Facebook Biometric Info. Priv. Litig., No. 15-cv-3747 (N.D. Cal. Dec. 14, 2020) (expert declaration of Professor Rubenstein in support of final approval).

[8] See, e.g., 4 Newberg on Class Actions § 13:58 (5th ed.) (the "class's reaction to the proposed settlement" is a key factor courts consider in approving class action settlements); Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 577 (9th Cir. 2004) (same).

[9] See, e.g., Ward v. Flagship Credit Acceptance LLC, No. CV 17-2069, 2020 WL 759389, at *19-20 (E.D. Pa. Feb. 13, 2020) (denying final approval to TCPA class settlement because per claimant recovery was "de minimis").

[10] Id. at *20 (acknowledging the tension between claims rates and per claimant recoveries due to "the mathematical reality that a high level of participation will reduce per claimant recoveries").

[11] Dkt. 232 at 17, In re Facebook Internet Tracking Litig. (justifying low claims rate as "within the [4-5%] mean calculated by the FTC"); Schneider v. Chipotle Mexican Grill, Inc., 336 F.R.D. 588, 599 (N.D. Cal. 2020) ("Here, the 0.83% claims rate . . . is on par with other consumer cases, and does not otherwise weigh against approval.").

[12] See, e.g., In re Facebook Biometric Info., 522 F. Supp. 3d 617, 629 (N.D. Cal. 2021) (noting that 22% claims rate reflected an "unprecedentedly positive reaction by the class"); Dickey v. Advanced Micro Devices, Inc., No. 15-CV-04922-HSG, 2020 WL 870928, at *6 (N.D. Cal. Feb. 21, 2020) (granting final approval to consumer class settlement, noting that "[t]he 27.4% claims rate is an excellent result in the Court's experience"); In re Nexus 6P Prod. Liab. Litig., No. 17-CV-02185-BLF, 2019 WL 6622842, at *7 (N.D. Cal. Nov. 12, 2019) (granting final approval to products liability class settlement, noting that claims rate over 18% was "substantial").

[13] In re Facebook Biometric Info., 522 F. Supp. 3d at 629.

[14] Dkt. 779 at 15-16, In re ConAgra Foods, Inc., No. 11-cv-5379, MDL No. 2291 (C.D. Cal. Dec. 22, 2021) (Order Denying Final Approval); Dkt. 795, In re ConAgra Foods (Feb. 22, 2022) (Order Denying Plaintiffs' Mot. for Reconsideration).

[15] Powers v. Filters Fast, LLC, No. 20-CV-982-JDP, 2022 WL 461996, at *1 (W.D. Wis. Feb. 15, 2022).

[16] Dkt. 56 at 18, Powers (Feb. 22, 2022) (Plaintiffs' Renewed Mot. for Final Approval).

[17] Dkt. 65 at 2, Powers (Feb. 24, 2022) (Order Denying Plaintiffs' Renewed Mot. for Final Approval).

[18] Id. at 3.

[19] Procedural Guidance for Class Action Settlements, U.S. Dist. Ct. Northern Dist. of California (Dec. 5, 2018), https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/.

[20] Prelim. Approval Hr'g Tr., In re Facebook Biometric Info. (July 23, 2020).

[21] In re Facebook Biometric Info., 2020 WL 4818608, at *4 (N.D. Cal. Aug. 19, 2020).

[22] In re Facebook Biometric Info., 522 F. Supp. 3d at 624.

[23] Dkt. 232 at 17, 25, Facebook Internet Tracking Litig.

[24] In re Facebook Biometric Info., 522 F. Supp. 3d at 624 (approving of "robust" notice measures that included "Facebook's 'jewel' and newsfeed notifications").

[25] See FTC Study at 11, https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf (notice campaigns that mailed notice packets with claim forms yielded higher claims rates than emails and postcards alone).

[26] See id. at 26 ("[C]ases that send multiple communications to class members have average and median claims rates that are more than twice as high as cases that attempt to reach class members just once.").

[27] See id. at 12 ("[V]isually prominent, plain English language describing payment availability has a significant relationship with the claims rate.").

[28] In re Facebook Biometric Info., 522 F. Supp. 3d at 625 (describing claim form design that incorporated expert advice about the "no-action bias").

[29] Id. at 622.

[30] In re Facebook Biometric Info., 2020 WL 4818608, at *4.