

JIM KOHM: OK. Folks, we're going to try to get started here. So if everybody can take their seats. I think we're still wrangling a few people from the hallway.

We make these lights as difficult as possible for the people up here. This is quite something.

Are you starting or am I?

LAURA KOSS: You are.

JIM KOHM: OK. OK. Great.

Good morning. And welcome to the FTC's Class Action Workshop. My name's Jim Kohm. I'm the associate director of the Enforcement division. We're the folks who run the agency's Class Action Fairness program.

I want to thank everybody who's attending today in the audience and everybody who's listening on the webcast. Welcome. And thanks particularly to our panelists for taking the time to share their thoughts today.

The experts you'll hear this morning have extensive experience in class actions and represent a broad range of perspectives. I know-- I worked with Liz Cabraser on the Volkswagen diesel case. And her reputation is well deserved. And I haven't met the other folks yet. But I'm really looking forward to hearing everybody today. And I would encourage you to disagree.

That-- before I begin, let me, let like any good lawyer, disclaim what I'm about to say-- that my views are only my own, and not those of the commission as a whole, or any particular commissioner, or, for those of you who know me, probably of any of the smart people that I've hired that you'll hear from today as well.

We have a very ambitious agenda today. Although our focus is going to be on class action notices, we'll delve into a few other issues as well. Over the course of the morning, we're going to discuss the strengths and weaknesses of the current class action settlement process, the research conducted by the FTC staff and others, and, finally, ideas about how to improve the process in the future.

Before we get started, I'd like to provide a little background on our Class Action Fairness

Project. And hopefully that will frame some of the issues that we're going to discuss today. For almost two decades, the commission has followed developments in class action cases and consumer protection class action cases through our Class Action Fairness Project.

In that program, we strive to ensure that class action settlements provide appropriate benefits to consumers. As a consumer protection agency, we're concerned about settlements that don't adequately compensate consumers either because the settlement itself has inadequate compensation or because the settlement process creates substantial barriers to consumers participating. And therefore, it drives down participation rates. And consumers as a whole are not adequately compensated.

In addressing these issues, the FTC has taken a multi-pronged approach. We've monitored class action settlements; filed amicus briefs in appropriate cases; issued reports; followed legislation; filed comments, including input into the Judicial Conference's discussions on Rule 23; and coordinated with state, federal, and private groups. All of this has been less successful than we had hoped. And so we're trying something new. And this is the public beginning of that new agenda.

In conducting these activities, we've long recognized that class actions play an extremely important role in compensating consumers and deterring wrongful conduct in the future. Nevertheless, the extent to which consumers benefit from these settlements often turns on the ease with which consumers can participate in the process.

In some cases, participation is extremely straightforward, where the available consumer-- where the consumer's information is readily available. Often, that allows for the defendants to send direct payments to consumers. Those consumers simply get a check, and then the issue is whether they cash the check or not.

Even that in the modern world has become somewhat more complicated, because the FTC has sued a number of different defendants for sending checks, that actually signing the check itself was the scam. So all of this has become more complicated. But that is clearly the best way-- and I'll talk about some statistics in a second-- to get consumers money.

However, more often than not, or at least in a very large number of consumer protection cases, what we see are what we call claims-made processes. These are processes where consumers have to make a claim, usually by sending in the claim-- sometimes that's now online-- but also providing information to prove their claim. And gathering that information and

going through the process can be quite difficult.

In those processes, at a minimum, consumers have to open whatever is sent to them. They have to read it. They have to understand what they've read so that they can move forward. Successfully accomplishing these simple steps is much more difficult than it would seem at first blush.

The commission has significant experience in these issues because a lot of what we do is giving back money to injured consumers. Each year, the FTC directs dozens of mailings that result in millions of dollars in refunds to consumers. In the last few years, that's resulted in billions of dollars to consumers.

As if-- as in class action cases, these efforts are often very difficult. They're challenging. And once the FTC lost, a suit is final, and the defendants have paid the money, the FTC has to develop a plan on how best to return that money to consumers.

As I indicated previously, if we have a reliable list of consumers, along with contact and purchasing information-- and in the modern world, that's a part that's getting easier-- we usually conduct a direct payment campaign and just send the check out to consumers. On average, we have a 67% return rate-- in other words, 67% of those people cash those direct payments, which is pretty good compared to other methods. We'd like to see that get even better.

In other cases, however, direct payment is not possible. And when there is no list of known consumers, and there's insufficient information about losses and purchases, we too have to use a claims-made process. In these cases, we use a variety of methods to try and get the word out, not the least of which is trying to get word out through the media that these letters or emails are coming.

However, no matter what we do in those situations, the claims rate is inevitably dramatically lower than that for sending out checks. In fact, the FTC generally receives claims from only about 5% to 20% of potential claimants in a claims-made process. You could see, compared to sending out checks, that's a very small fraction.

Therefore, not surprisingly, we try to send the checks out immediately, and do so in most cases. However, we've seen many class actions that forego the simple sending-the-check approach in favor of the more cumbersome, less effective claims-made approach, even

sometimes when there is adequate information to send out the checks.

We've often raised these concerns in court through amicus briefs-- for those of you, and that's probably most of you, very familiar with the class action process-- that the government is encouraged to file amicus in these cases. But those filings have been less successful than we had hoped. And one reason for that, we believe, is that by the time we get involved in the process, the defendant's lawyers, the plaintiff's lawyers, and the court all have a vested interest in the settlement.

And settlements-- and this isn't just about collusion. Settlements balance in complicated cases many, many different values on every side, right? And so there is a delicate balance that's been achieved on many issues. And we come in. And it's hard to upset the apple cart at that point.

Therefore, we've decided to take a new approach-- today's approach. Specifically, we've embarked on a number of research projects, followed by today's workshop and public comments. And we'll keep moving forward thereafter. We hope the results of this ambitious agenda will help attorneys improve class action redress plans and courts to adequately monitor those plans from the very beginning of the settlement.

Thus, we're going to talk today about two in-depth studies we've had that we've recently released, and talk about other people's research, and what we can do in the future to improve the process. We'll use these studies as a springboard for what promises to be a robust discussion of how to improve class action settlements.

The FTC has not recommended any particular legal or policy outcome at this time, nor has it identified any specific method as clearly superior to another. Instead, we hope this information will help researchers, policymakers, practitioners all think about the process and help improve it. We hope today's discussion will significantly move the yardsticks toward that goal.

Once again, thank you for being here today. And we look forward to the promise of many lively discussions as the morning progresses. But first, Laura Koss, assistant director in the Enforcement division, has a few incredibly important pieces of information. Thank you.

[APPLAUSE]

LAURA KOSS: Incredibly important pieces of information. Welcome. Thank you, again, for participating today.

My job today is to go over some of the administrative details. So please silence your phones and any electronic devices. If you must use them, please be respectful of the speakers and your fellow audience members.

Please be aware that if you decide to leave the building during the workshop, you'll have to go back to the security screening. So keep that in mind. And plan ahead, especially if you're one of the panelists, because we really want to stay on schedule today.

We're going to have a quick 15-minute break around 10:30. So if you want coffee or a snack, we have a great cafeteria in the building around the corner. So there's no need to leave the building. And the cafeteria will stay open until 2:00, if you're interested in grabbing lunch after the workshop.

So most of you received a lanyard with a plastic FTC event security badge. In the interest of being environmentally friendly and saving some taxpayer money, we'd appreciate it if you could leave-- when you leave for the day, return your badge to security. In the very unlikely event of an emergency, if that emergency requires us to leave the conference center, but remain in the building, please follow the instructions that are provided over the PA system.

If we have to evacuate the building, an alarm will sound. In that case, please leave the building in an orderly manner. We'll all be exiting through the main 7th Street exit, and then walking down the street to the left to the FTC Emergency Assembly Area, which is across-- which is on 7th & E across from the church. So please stay in that area unless we're instructed to return to the building.

If you notice any suspicious activity, please alert building security. And please be aware that this event is being webcasted and recorded. And so by participating, you're agreeing that your image and anything you say or submit may be posted indefinitely on the commission's website or on any of the commission's publicly-available social media sites. And finally, but importantly, the restrooms are located in the hallway just outside the conference room.

So thank you once again for being here today. And without further ado, let's get started. And I'm going to turn the microphone over to FTC economist Shiva Koochi.

[APPLAUSE]

SHIVA KOOCHI: Hi, everybody. My name is Shiva Koochi. I'm an economist here at the FTC. And along with the

wonderful team sitting here in the front row, I've spent a significant portion of the last couple of years working on this class action staff report. And so I'm looking forward to sharing my findings with you today.

So just to give you an overview of the talk today, this is summarizing the staff report that we released last September-- or this past month that I hope many of you had a chance to read. The report was composed of two studies-- the Administrator Study, for which we collected data from settlement administrators and conducted a descriptive analysis of how settlement characteristics relate to consumer outcomes. And the second study is the Notice Study, which was an internet-based consumer perception study. And for each of these, I'll walk you through the data collection, and the study methodology, the results, and the takeaways.

So the Administrator Study-- we collected the data through 6(b) orders sent to eight large class action administrators. And we asked for the largest cases involving consumer issues from 2013 to 2015. We ended up with a sample of 149 cases. We collected data on a number of things, such as number of notice recipients, claims filed, checks cashed, and many other statistics. And you can read more about those in the report.

And we also obtained a copy of the notice in the majority of cases. And this allowed us to follow this very structured coding methodology of coding up the information that was contained in the notice. And I'll talk you through that a little bit more later.

And as many of you, I'm sure, are aware, class actions can take very complex forms sometimes. And this required a case-by-case analysis of the data to make sure that our metrics are meaningful. So for example, if a case had various subclasses, we made sure to only include the recipients that were eligible to file a claim when we calculated the claims filing rate.

And here are just the sort of practice categories of the 149 cases. This table is also in the report. You can see that they span a variety of industries here. Most of the cases were brought in federal court. And most were what we are calling standard claims-made cases. So this meant that every person who received a notice was eligible to file a claim.

We also had several direct payment cases, 21 direct payment cases-- so checks mailed out to consumers or automatic payment credits-- and then also several cases that I had talked about previously. So subclasses-- some were eligible to file claims, some weren't. Some could elect the method of payment. So those were slightly more complex, but we adjusted the metrics to

make them meaningful.

I also wanted to give you an idea of sort of how large these class actions are. So there were only 124 cases that required a claims process. And of those, 66 had fewer than 100,000 notice recipients. So about half the sample had classes that were sort of quite small-- at less than 100,000 people. And then a handful of them-- about five cases-- had very large classes-- 5 million to 20 million. And these are really-- these tell you the numbers of notice recipients, and not exactly the size of the class. And sometimes, that's unknown.

And this next slide, I lay out the mean claims rates by the method of notice. This is a weighted mean, meaning that if a case has five times as many notice recipients, it is weighted five times as much in this calculation.

So you can see that across all cases, it's a 4% mean claims rate. It depends on the method of notice, with notice packets having highest claims rates at 10%, email having 3%, and postcard having 6%. Notably, if a postcard included a detachable claim form-- so that sort of-- yeah, it was kind of either this perforated postcard-- it actually had a much higher claims rate-- 10%, which is right in line with the notice packet claims rate.

We found that publication notice and claims rate were not significantly related, but that reaching recipients multiple times with several mailings or a mailing and an email did impact the-- or did have a significant relationship with the claims rate, at 9% versus 4%.

So this next slide is just meant as a two-minute recap of high school statistics class. So I'm sure we all remember the old adage correlation does not imply causation. So just a really silly hypothetical example-- imagine that parents who own boats have children with higher SAT scores.

So I think most of us would agree that that does not necessarily mean that owning a boat causes your SAT scores to increase. So it would be incorrect to sort of draw this conclusion from that relationship that we see. And that's because there could be various alternative explanations-- the ability to pay for prep classes, access to private schools-- that impact both owning a boat and higher SAT scores. And we call these, in statistics, confounding variables. So that was just kind of a silly example to sort of put our study's findings into context.

And it is true that cases that use email notice do have lower claims rates. But because method of notice isn't randomly assigned across cases, we can't draw any sort of causal conclusions

from this. We just know that cases that use notice by email have lower claims rates.

Just some potential alternative explanations-- I don't work in the industry. So I don't know exactly how method of notice is assigned. But it could be that those companies that have worse contact information, for example-- are using email-- larger cases are using email, there might be less money at stake, and several other explanations could be likely. And without sort of an experimental design or a quasi-experimental design, we really just don't know what the most effective method is.

But I think, nevertheless, the findings that we have in our report really serve as a really important initial benchmark for judges and future researchers on this topic just given sort of how comprehensive the cases were that we studied. So I think, despite this being a descriptive analysis, it could be very valuable for practitioners in the field.

I also wanted to lay out some of the refund statistics. So the first chart displays the mean claims rates by the refund amount. And it's actually-- we found no relationship between the refund amount and the claims rate. And this may not be particularly surprising to those of you who know the industry, because many notices actually don't tell the consumer what they might expect as a refund.

And so when the consumer gets the notice, he or she does not know if they're getting \$5 or \$500. So that might explain that even the \$200 or more category has a quite low claims rate at 7%. I also found it interesting, when you look at the case counts in the parentheses, that more than half of the cases actually provided a significant amount of refund-- about \$50.

I also plot out the mean check-cashing rate separately for direct payment cases and claims-requiring cases. So the text might be quite small, but the green is the direct payment cases. There, the average check-cashing rate is 55%.

And for claims-requiring cases, it is 77%-- and so probably not surprising either, since those consumers in the claims-requiring required cases actually had already gone through the effort to file a claim. And so they were expecting the check in the mail. We did find that check cashing rates do increase as the amount increases.

Next, I'll just walk you through some of the things that we coded up by actually looking at each of the notices. And so we looked at a variety of things. And a lot more detail is in the report. But I'll just kind of walk you through the categories.

So we looked at the top of the notice to see if they had a legal caption or no legal information. We looked to see whether there was a table of options. So this is sort of "file a claim," "attend a hearing," "exclude yourselves--" that table that we've all seen.

This is a category of taking action. So some notices very clearly delineate that, you must file a claim in order to get a payment, or, this is the only way you can get a payment; some do not. And so there is various ways that we coded this in a structured manner that you can read about in the report.

Whether or not the notice is relevant to the consumer-- so some notices might say, our records indicate that you purchased product x in year y, and you might be eligible for a payment. Others say, if you purchase product x, you might be elig-- you could be eligible for payment. So that sort of "if" language got notices lumped into the not-relevant category.

And then we also coded up what kind of phrasing was used to describe the payment to the consumer. I'll give you an example here of the sort of refund or payment availability. So we sort of defined plain English in this context, like I have on the slide. And we defined certainty-- you can see. I won't read through this, because I thought it'd be more helpful to actually give you some examples.

So the first example is "you could be entitled to settlement benefits." So I think many people might not really understand what settlement benefits mean. It could be-- who knows what? I don't really get the sense that that's money for sort of the everyday consumer. This one was coded as neither plain English nor certain.

Some might say, "you could receive \$10." That's pretty clear what that means, but it is not certain. So we said it's plain English only. Another might say, "receive \$10 by filing a claim form." That makes it pretty sort of discrete, that you will receive \$10. Maybe that doesn't use quite as strong of a language, but it does not include the words "could" or "may." So that is plain English and certain. And then, "by filing a claim form, you will receive a share of a settlement fund--" again, not clear that that really involves a payment. And so we coded that as certain only.

And just to clarify, the vast majority of the cases in our-- or I think essentially all of the cases in our sample included some amount of money. And the vast majority of those included a check rather than a coupon. So in looking at these settlement benefits really wasn't necessary to use

if it really involved money, in my opinion at least.

So we found that there was a lot of variation in the way notices provide information. You can see the report for that. And we found that the notices with plain English payment language had a claims rate that was about 10% higher-- 10% points higher. So the other characteristic is we did not find a statistically significant relationship. But I think that merits future research.

So this is maybe hard to see in the back. But these are just the claim form characteristics. Also, to see how much variation there is in the way class actions ask for information from claimants, I think the more interesting findings I'll talk about on the next slide. But this table is also on the report if you want to take a look at those actual numbers.

So the key takeaways here-- the average claims rate was 4%. And higher claims rates were associated with multiple rounds of notice, using plain English to describe the refund, and when using a postcard notice using a detachable claim form.

And I think, from this, my main takeaways were that additional research, such as randomized controlled experiments, like A/B testing, out in the world could shed additional light about the causal impact of various notice methods. And practitioners should also be using cost-benefit analysis to make sure that additional rounds of notice are actually worthwhile in terms of money given back to the consumers.

And I thought sort of one of the more interesting findings here as well was that, anecdotally, when you ask consumers why they don't file for class actions, I think you typically hear something like, oh, I don't want to dig up my receipt from five years ago just to get a \$5 check. I think I've seen that a lot in some of our open-ended questions that we've had in another study. But I thought it was really interesting that sort of our descriptive statistics actually show that that might not be true.

So for example, as we talked about, more than half the cases gave consumers more than \$50 in money back. And this slide before, that I didn't quite go through in detail, showed that more than half the cases ask consumers for only very basic contact information-- name, address, email.

So I think some broad-level approaches might be necessary to convey to consumers that it might actually be worth their time to sort of file out a claim form that might take them a few minutes, but could get them a significant amount of money back.

So moving onto the second study, this was what we called the Notice Study. It was an internet-based randomized design to study consumer perception. And we had various conditions. And I'll walk you through some examples. But here's just some bullet points of sort of the conditions that we tested-- whether or not there was money included in the subject line, whether or not the email included a court seal. And we ended up with 108 total conditions.

And it was a two-part study. So each respondent viewed an inbox and an email. And we randomly assigned them to one of the 108 conditions. And each respondent answered the same questionnaire that gauged the likelihood of opening the email, and the impressions of the claims and refund process.

So here's just one example out of 18 conditions that we had for the inbox part of the study. It's a little bit hard to see. But this is sort of, again, also in the report. But we just kind of made up of a couple-- or a bunch of fictitious companies with promotional email subject lines. And the class action email is on the third line of that inbox.

We had 18 different inboxes so consisting of a sender and a subject line, we had a uscourts.gov sender. We had a fictitious company named Senoro and a fictitious class settlement Senoro jet settlement. We also had subject lines that ranged from more traditional subject lines, such as "Notice of Class Action Settlement," to less traditional subject lines, such as "Notice of Refund."

And then we also had a subject line that was the case name along with "Class Action Settlement." And each of these was displayed with either the "\$100 Refund Available" or without it. And each respondent viewed one inbox, and then answered a series of questions.

So in the first question, we just wanted to gauge the opening rate. So we asked them what emails they would open and calculated a rate based off that. In the second key question, we asked respondents to rate the following true or false statements. And these were randomly rotated across respondents to minimize any sort of order effects.

But we gave them several wrong options, such as "this email is an advertisement," "it provides information about a class action settlement," "it provides the shipping confirmation," or "it provides information on getting a refund." I hope everyone knew which ones were the correct ones-- it's B or D. And we calculated a comprehension rate based off of that.

So we found that the uscourts.gov email address sender performed a little bit better than the

others in terms of the opening and the comprehension rate-- 2% to 6% points. So we actually found that the subject lines that contained the dollar amount performed worse on both dimensions. And I'll tell you why that might be in the next slide.

And we found that the sort of less traditional subject line "Notice of Refund" had the highest stated opening rate, but respondents were less likely to understand that it was related to a class action settlement. And then the longest subject line-- case name "Class Action Settlement--" had the lowest stated opening rate. It was only about half as high as the one for "Notice of Refund."

So I think sort of the main takeaways here-- across all conditions, less than half of the respondents actually understood what the nature of the email was-- that it was a class action settlement or a refund, but was not promotional in any way. And less than half said that they'd open it.

There appears to be a trade off between conveying information through more traditional subject lines and getting recipients to actually open the email. So I think what really speaks to that is that the "Notice of Refund" subject line had the highest stated opening rate-- so no mention of a class action settlement in there.

And when we looked at open-ended responses, those saying "spam," "scam," "junk," et cetera, were really likely to be mentioned. And when the dollar amount was mentioned in the subject line, respondents were more likely to say those kinds of words.

So I think overall, all put together, this suggests that there is a lot of skepticism around class actions. And careful attention needs to be paid when providing additional information just to minimize fears of malicious emails.

So next, we asked respondents to assume that they had opened the class action email. And then-- again, probably really hard to see, but these were some examples of the email. So we had a very long, traditional format. We had a condensed format. And we had an experimental format. Each of these was presented with or without the court seal. The condensed format follows the Rule 23 requirements; the experimental format does not.

And so then we remove the email from view. And then we asked respondents actually the same set of questions that we asked them before. We asked them to rate the following statements on a range of true to false. And same as before-- advertisement, settlement, online

order, getting a refund. And those that got the correct answers-- said true to the correct statements-- were counted as sort of comprehending the nature of the email.

And then we actually told respondents what the email was about-- since many still did not understand, even after opening the email. And so we told them that it contained information about a class action settlement, including information about a refund. And then we showed the email a second time, and then removed it from view, and then, again, asked them to rate the following statements from true to false about the actions they might need to take to get a refund.

So we had several incorrect options, that they should "take no further action," they should "file a customer service complaint," the correct answer-- "fill out a claims form--" "hire a personal attorney to represent them in court." And those that understood this, based on answering true to C, but not the others, were counted as correctly understanding the next steps.

So we finally ended the questionnaire with sort of personal opinion questions about sort of the email that they had seen so that we could also compare across conditions with these responses-- so where we asked them about how likely they would think they would actually receive the refund, how easy it would be to meet the refund requirements, how many people who submit a claim form actually receive a refund, and how long they think that it would take them to apply for the refund.

So just a brief summary of our findings. The court seal email bodies performed better on all the dimensions, but just by a few percentage points-- by 2% to 3% points. The long version outperforms the other formats on some of the dimensions.

So people were most likely to understand that it related to a class action settlement. And people thought they would be more likely to receive the refund. And people were least likely to mention those scam-type words.

The experimental version-- the ones with the bullets-- outperformed the others when conveying information about the next steps, but it was actually the most likely to elicit mistrust. And so respondents were the most likely to mention words such as "spam," "scam," and "phishing."

So looking ahead into the future, I think, sadly, unfortunately, our report seems to indicate there are really no easy solutions to increasing consumer participation in class action

settlements. It's a really hard problem. But I think the first step is to lay out the current state of affairs just to serve as a starting point for future research.

I think real-world practitioners should run randomized controlled trials, or A/B testing, and monitor the claims process in real time. Because the most effective method of notice is probably going to be very case-specific.

Our study seems to indicate that there is pervasive consumer skepticism. And so some broad-level approaches might be necessary. I think what I'm trying to say is that maybe some small changes in the subject line may not really make the impact that we were hoping for them to make. And I think careful attention needs to be paid when restructuring subject lines or bodies of emails just to make sure that these changes don't actually backfire by being misconstrued as spam, scams, or phishing.

So I look forward to hearing feedback about the report during the panel discussions, and also discuss ideas for sort of where we are and how we can improve consumer participation in class action settlements. And so with that, I'd like to invite the first panelists to come up on stage, along with my colleague Robin Moore, who's going to be moderating.

[APPLAUSE]

ROBIN MOORE: All right. I'm Robin Moore. I'm an attorney here in the Bureau of Consumer Protection. And as Jim did at the opening of his remarks, I will also put the disclaimer forward that the views that I express here today are not mi-- are mine--

[LAUGHS]

--not those of the commission or any particular commissioner. And also, before we get started, I wanted to emphasize that this really was a team effort between the Bureau of Consumer Protection, the Bureau of Economics, and also the Office of Policy Planning-- in particular Elizabeth Jacks, who's sitting right there. All of us worked together on the design of the research, on the report, and in putting together this panel. So I just wanted to make sure that Elizabeth gets recognized for her hard work.

As Shiva mentioned, the starting point for trying to solve some of the challenges associated with delivering an effective notice is to examine how the current system is working. And that's

what this first panel is about. So we're going to get into some of those challenges, what folks that practice in this area do to try to overcome some of those challenges, and the impact that emerging technologies have had on the way notice campaigns are delivered.

We've got a fantastic panel here to discuss these issues. And so to start, I'd like to have everybody introduce themselves and also to state their affiliation. I guess I'll start with you, Hampton.

HAMPTON Oh.

NEWSOME:

[LAUGHTER]

Hampton Newsome from the FTC.

CAMERON AZARI: Cameron Azari with Epiq.

ELIZABETH Elizabeth Cabraser with Leiff Cabraser Heimann & Bernstein.

CABRASER:

BETH CHUN: I'm Beth Chen from the Texas Attorney General's Office Consumer Protection Division.

JACQUELINE I'm Jacqueline Corley, a magistrate judge in the Northern District of California, sitting in San
CORLEY: Francisco.

TODD HILSEE: I'm Todd Hilsee, principal of the Hilsee Group.

BRIAN I'm Brian Perryman with Drinker Biddle & Reath.

PERRYMAN:

HASSAN Hassan Zavareei from Tycko & Zavareei in Washington DC.

ZAVAREEI:

ROBIN MOORE: Great. So before we delve into the nuts and bolts of how notice campaigns are working, I wanted to draw back and ask kind of a policy question. And that is, what's the purpose of class actions? Is it-- and it's because there's a little bit of a debate in the literature about this. Is it compensation? Is it deterrence? Is it a little bit of both? And I'm going to throw that question to you, Judge Corley.

JACQUELINE Well, I think for-- and again, I'll give the caveat I'm speaking on behalf of myself obviously,

CORLEY: because I'm not the federal judiciary or even any of my colleagues in the Northern District. But from a judge's point of view, I think the answer is pretty straightforward. Federal Rule of Civil Procedure 23 sets forth the factors that I apply when I'm deciding whether to certify a class. And last I checked, deterrence is not one of them. Right?

We basically have to decide if a class action is the appropriate procedural vehicle, applying a number of factors, including commonality, predominance-- or maybe superiority is the one that's most relevant to the question. Is a class action superior to bringing many individual actions-- at least individual actions by those class members who choose to do so?

So I don't ever think, oh, boy, if I certify this class, it's going to deter certain conduct. As Robin said, that's a policy decision that I don't think is probably appropriate to make. What's interesting is what we've seen recently with the advent of large consumer class actions with statutory damages, is defendants actually making sort of the opposite argument-- if you certify the class, it's going to lead to too big of a potential recovery-- almost an over-deterrence argument-- and so you shouldn't certify it.

And I know at least the Ninth Circuit recently in a Facebook case rejected that argument on those same grounds-- Rule 23 doesn't say anything about that. That's just not a factor to consider. Of course, there might be a due process argument. So I think from the judiciary's point of view, it's simply compensation is a class action an appropriate vehicle given the factors under the rules.

ROBIN MOORE: Does anybody else want to comment on that?

BETH CHEN: Sure. So I'm with the Consumer Protection Division. And one of the roles of state attorneys general is in the CAFA process. And so states actually review class action settlements for fairness and to ensure that consumers are being protected, despite the competing interests that can sometimes exist and can sometimes be generated by these class actions.

And when we are reviewing for fairness, one of the things that we do take into account is what compensation that consumers may receive and whether that compensation is proportional with the compensation that the attorneys are receiving, considering the Rule 23 factors.

And so one of the other things that we consider as states is we also have a role to play in deterrence for-- through the use of our penalties. And we also have a strong role in providing injunctive relief to consumers as well. But class actions can especially help areas where

government regulators may not be able to address, either due to resources or to other reasons.

And sometimes, there are actually occasions where we're able to work together with states and maybe other government regulators, as well as class actions, to work together to obtain both compensation and deterrence that benefits consumers, such as the Volkswagen matter that, recently, a lot of us were a part of.

**BRIAN
PERRYMAN:**

As the defense attorney up here, I'd like to second Judge Corley's point, which is that we shouldn't imbue Rule 23 with any mystical properties. It is a procedural rule. It's a variant on traditional joinder rules. And it's to be interpreted purely as a matter of procedure, not as a matter of a substance.

It's also to be interpreted in accordance with Rule 1, which requires that every case, whether it be a class case, or an individual case, or a different form of representative action, be treated with expedition, inexpensiveness, and justness. But there is no magical properties about the class format that should provide a policy.

**HASSAN
ZAVAREEI:**

As one of the plaintiff's class action lawyers here, I'll take a bit of a different spin on that. On a macro level, when we're looking at our cases, and we're looking at the harms that corporations are doing to consumers, and to individuals, and to employees, we do believe that it's important to look at the policy impacts and to look at the ways in which class actions can change corporate behavior.

So that's on the macro level. And that's something that we do believe is important, at least at our firm. That is one of our core missions, which is to push corporations to be more just and fair to employees and consumers. On the micro level though, once you get into individual class actions, you do have a duty to that class to maximize the return to them. Now, you end up in a situation where sometimes the injuries-- class actions are designed in fact for cases where the injuries are often very, very small.

So in a case where the injury is \$0.50 or \$1, is it really true that the goal in that case is to get compensation? Or is it to obtain a measure of justice and deterrence with respect to that particular defendant? And so I would submit that, even on the individual cases, it does depend. But once you get into those cases, your goal is always to maximize the recovery for your individual class. But I do believe that there is a policy-- and a very important policy role for Rule 23.

ROBIN MOORE: Elizabeth, did you want to add anything? Or we can move on if--

ELIZABETH I think we can move to the next one.

CABRASER:

ROBIN MOORE: OK.

[CHUCKLING]

Anyway. Yeah, same for you.

CAMERON AZARI: I'm good. I think we can move on [INAUDIBLE].

ROBIN MOORE: OK. Great.

CAMERON AZARI: Thank you.

ROBIN MOORE: So obviously, one of the really important components here is the court's ability to determine whether a class action notice campaign is likely to be successful or has been successful. And so Judge Corley, I'm curious about your views on this-- what you would find to be helpful information to have in terms of making that determination?

JACQUELINE Of whether the notice was successful or--

CORLEY:

ROBIN MOORE: Well, on the front end whether it is likely to be, because you have to make that determination first. And--

JACQUELINE I think some of the most important information, which we generally don't have, would be, in
CORLEY: similar class actions, what has been successful in the past. So in some of the study, we said, what type of notice when you have this type of contact information for the class members has been most successful?

I think we'd also want to know-- and in the Northern District, we're starting to try to find out-- about the claims administrator. What is their track record? What kind of cases have they done before? We also want to know in advance, what is a claims administrator going to do to ensure that notice gets to as many people as possible?

When that packet gets returned as undeliverable, what steps do they take? When the email is

unopened, what steps do they take to do that? But sort of historical data is sort of obviously the most important.

ROBIN MOORE: Go ahead, Cam.

CAMERON AZARI: Just chiming in, as an administrator, the guidelines put out by the Northern District, in my opinion, are extremely welcome. We very much appreciate those. Because I think we at least have all-- have tried for a long time to provide that information upfront, because we want to give the courts, the judge specifically, as much objective criteria as we can.

Because you're the one that has to-- you've got to make the decision whether it's a good plan. And then we're coming in at the end at final approval. And we want it to be successful, because you're the one that's got to approve it. So the additional scrutiny that those guidelines-- the structure that allows the judges to be looking at settlements is-- we think it's extremely important. And-- I think I'm speaking for a lot of other administrators-- it's a very welcome change.

JACQUELINE CORLEY: And maybe I should just say what the guidelines that he's referring to is. In the Northern District, we have procedural guidelines-- they're guidelines, not requirements-- in which we ask plaintiff's counsel to tell us about the claims adm-- because we don't pick the claims administrator, right? The plaintiff's counsel proposes a settlement administrator to us.

We want to know, how did you select them? What is the compensation structure? What is your relationship with them? Why did you select them? And then at the end, we've now asked the plaintiff's counsel to tell us, after everything is done, how much did you distribute, what was your claims rate, what was your notice.

You'll now see in orders-- and I went back and checked actually this year. You'll see in final approval orders from our court actually reciting, there were four notices ultimately that were unable to get to claims members. But four is pretty good. That was probably more likely smaller wage and hour class actions as opposed to large consumer class actions. But we're getting that granular until having counsel actually tell us that, and now creating a record and a benchmark in other cases that we can look at.

ROBIN MOORE: That's great. So let's get into the nuts and bolts of how this really works. And for that, Cam, I'm going to turn to you, and ask you, what are the biggest obstacles you face for consumer participation?

CAMERON AZARI: Well, we heard the brilliant presentation about the study that was done. And that recited a lot of the obstacles. It's whether we're doing a good notice, whether there are barriers to people filing a claim, and then dealing with consumer skepticism.

For me, the biggest barrier is when we're putting together a notice program, we have to think. It's not this is always better, email is always better, mail notice is always better. Nothing is always better. We have to look at the situation that we have.

And class counsel, and defense counsel, and the administrator-- if they've hopefully hired somebody with some experience, they can be a real help in that process and really make an evaluation of what is most likely going to get the result that we want, which is a good, adequate response rate and final approval of a settlement. And that doesn't always happen.

Whether it's time, whether it's money coming into play, that doesn't always happen. And for me, that's the most critical factor. We have to be putting our heads together and making an assessment of what is going to accomplish our goal sooner.

ROBIN MOORE: And so when you're trying to make that assessment, what sorts of variables do you consider? If you're designing the campaign or making a pitch for the campaign, do you think about, for example, how the defendant communicated previously-- those sorts of best practices?

CAMERON AZARI: Sure. I don't want to get in too deep here. But it's, what data is available? And what can we do to access that data, and make sure that we clean that data up? And it's-- because whether it's email notice or mail notice, direct notice to the class is-- and the study bears it out-- by far the most effective way to get a response.

And so we start there. And then if we don't have all the data or no data, then we do-- we turn to an advertising agency basically. And we're doing demographic modeling in the class. We're looking at how the defendant communicated-- whether it was through their own advertising if it's a consumer product. And we do the best we can to get the notice in front of a class.

But it's hard to say. I'm not going to sit up here and give specific examples. We just-- we think when we're making assessments of all the things I just said.

ROBIN MOORE: OK.

[CHUCKLING]

CAMERON AZARI: Sorry.

ROBIN MOORE: That's all right. Hassan, what kinds of campaigns have you found in your practice to be the most successful types of campaigns in reaching class members?

HASSAN ZAVAREEI: I think this goes back to what Cam said, which is that it really depends on a lot of different factors in the cases. One of our most successful was an email campaign, where we got a 40% take rate on emails. And that was a relatively large settlement with a group of professionals, PhD's on an issue that they were all very actively engaged in.

It was a professional dispute. And as you can imagine, a bunch of academics were all pretty worked up. And so they were involved from the beginning in the case. And there were thousands of them. And they wanted to be involved.

And we've also found that-- I was also pleased to see that the postcard notice with the tear-off proves to be effective, because that is something that we use quite a bit, and that we have had a good deal of success with. It's less expensive than the big packet. And a lot of times, you are limited in the amount of money that you can spend on notice, depending on the case. But it's gratifying to see that you get a similar return to the full packet.

I've always been skeptical about the big packets, because I think it's a lot for people to absorb. But if you have a postcard that direct you to a website, and a tear-off that you can fill out and send back, we've had really good results with that. And that's consistent with what I saw in the study.

TODD HILSEE: Yeah. Hassan, I would, speaking as a notice expert-- historically, we know that convenience drives claims. Convenience-- it's reach. It's understandability. It's convenience. It's the things that the FTC study has been bringing to light.

And I'll just speak to Cam's point just a little bit and sort of amplify it. Those of us-- and I analyze notifications now after having executed them for many years. We know that when you can send a direct mailing, it will routinely outperform email just on a one-to-one basis. That's what all of the historical studies have shown.

And so it's important I think looking at when you're planning a notification and it's important for courts to inquire at the front end how hard did the parties try to develop the list. Because going back to Mr. Kohm's salient point at the outset when settlements are brought to courts, there is not that much of an adversarial process these days.

The settling parties are in sync. Their administrator is on their side. And the plan that is developed is one that is what the parties want. And I think the court has to be cognizant of testing how much effort did you put into developing truly the best practicable notification.

ROBIN MOORE: Does anyone want to respond to Todd's comments?

CAMERON AZARI: I guess I'd add one more point-- something that doesn't seem to be a part of the study, but I think is becoming more and more important, which is-- we talked about publication notice. There's another piece of that, which is sort of online publication advertising-- targeting Facebook, targeting Instagram.

There are a number of notice providers that are very sophisticated at this and do a very good job. And we've also had some success with that-- not in all cases. But in some product cases where we're trying to target a very specific audience, we've found that that's helpful as well in certain cases.

ROBIN MOORE: Elizabeth, you look like you might have wanted to respond.

ELIZABETH CABRASER: Just to amplify on some of this, I don't think the debate is which medium of notice of communication is the best under all circumstances. No medium is going to win that contest hands down in every case.

It's very important to use a combination of methods whenever possible and practical. Repeat contacts, as we all know, are more effective than a single notice of any kind. And using email, and social media, and even more traditional publication to augment a direct campaign can be very effective.

But above all, it's not medium or the methodology that is going to dictate the success of the program. It's knowing and understanding who the class members are, what they care about, what motivates them-- not just their demographics, but where they're getting their information, how they receive that information.

I have the opportunity to know and understand that, and the duty to know and understand that, because the class members are my clients. The fact that they're in a class action format doesn't change the fact that they're clients. And when you represent a client, whether it's on the defense side or the plaintiff side, you have to know that client.

You have to learn about that client-- who they are, what they care about, what they want out of a case. And that is going to guide us in the content and style of the notice program; what methodology of those available we're going to use most frequently; and how we are going to relate, and make ourselves available and accessible, to class members. Because notice campaign is interactive. It doesn't matter what or how you are telling class members about a case if you're not also giving them an opportunity to communicate back and ask questions in some practical way.

So we try to pay a lot of attention to the iterative aspect of notice campaigns. I prefer to call them communication and motivation campaigns, because what we're now going to do is not just satisfy Rule 23 standards. That's necessary, but it isn't sufficient.

What we're trying to do is reach a class member; inform them about an opportunity for a refund, or compensation, or participation in a program, such as a medical monitoring program-- that's a very important injunctive relief-- and then motivate them by making the steps as easy as we possibly can, but by enabling them to understand how that action will benefit them.

Nobody needs to motivate anyone apparently to spend an hour on Amazon spending money. That job is done. Our job is to motivate people to take as easy an action to compensate themselves and to accomplish justice for themselves in the consumer realm.

ROBIN MOORE: Go ahead, Cam.

CAMERON AZARI: I'll be short. And just going back to email, because a lot of this is about email notice. We have to remember when we're using email notice and evaluating it as an effective tool, email addresses are not all the same.

If I'm dealing with an email address that a person has given their bank as a means of communication, and they've said, bank, communicate with me via email, that's a very good email address. If I got an email address that I gave the clerk at Banana Republic because they said they would give me 10% off if I gave them an email address, that's probably not very good. And so that's what we have to think every time.

Postal address is pretty consistent. We can do a good job of those, finding where people live. But just it's-- we can't just say, email always better, email always not better. Sometimes it may be the very best way to communicate with people directly. You just have to think.

ROBIN MOORE: Did anybody else want to comment before we move on to the next one?

TODD HILSEE: Just a point to that is if an email and a settlement of that bank came from the bank, it would, consistent with the FTC study, certainly would have a greater chance of effectively communicating. What happens-- and we'll probably talk about this some more.

What happens as a routine practice is the administrator hire-- it's not the bank. It's the administrator, who in turn hires a vendor. And so it doesn't look to-- to that bank customer, it doesn't look like a communication from the bank customer. And that's why the opening rates are as low as they are for email notifications. So it's something-- very, very difficult, tricky problem.

ROBIN MOORE: Elizabeth, and Hassan, and Brian, I'm just wondering in your practice if you've had cases where the notification has come from the defendant? Or if there's maybe something posted on the defendant's website? And what impact, if any, you see that as having had in the campaign?

BRIAN PERRYMAN: No. From the defendant's perspective, generally no. We want to keep litigation away from marketing functions. It's just bad optics to have a class action notice mixed in with your website or to have it come to the consumers email that they entrusted that institution to have.

So generally, no, you don't see that. I have never experienced that. And frankly, I haven't seen that-- although speaking from the perspective of a class member, I was recently in the Yahoo data breach.

And so I got an email directly from Yahoo on the class action settlement that was-- that they issued the class action notice I think last month. And so I think that was appropriately formatted because Yahoo provides email. And it was knowing your client, knowing your class member, which was Elizabeth's point.

ELIZABETH CABRASER: Yeah, we do now ask defendants to post at least a link to the official settlement website on their own company website, because people do often go to the company website when they hear generally about a class action settlement. They may see a news article on it. They may hear about it on the television. And one of the places they will go to check into the legitimacy of the settlement, right--

They'll go to two places now. They'll go to the corporate website. So it's important to have the link there and at least the company's own press release about the settlement. And companies

generally will issue a fairly generic press release about it. So we want to make sure that's there for authenticity.

And then the other thing we like-- and courts can't always do this. We love it when a litigation is considered significant enough that the court in which it's pending will include information about the case on the court's website, either by having a website with the important orders and transcripts on the case or at least a link to the class action settlement, if not the class action settlement filings themselves. Because that's legitimacy. The class members can check it out. They're getting the information directly from-- I mean this in the best possible sense-- the horse's mouth.

This is the court speaking. This case is really happening. They are really orders. People really filed briefs. And for those members of the class that really like to have a lot of background information-- the comparison shoppers-- that is reassuring to them. And it empowers them because it informs them. Now they know everything about the case that is a matter of public record.

ROBIN MOORE: Judge Corley, I'm wondering what your thoughts are on having class action information on a court website?

JACQUELINE CORLEY: Well, and if I could just follow up a little bit on what Brian said first. I actually do a lot as the settlement judge. So I help parties reach class action settlements. And one thing I do see is defendants are very resistant to putting anything on their websites at all, because of course the settlement is each side agrees that there's no admission of liability. And they feel like putting it on their website is somehow telling their consumers that, we did something wrong. And it's very important to them that they've preserved that.

So that is, to Todd's point, one of the biggest, I think, sticking points with that. Of course, I've also seen judges though nonetheless order, as Elizabeth said, that there at least be a link to the-- well, it's hard to order a defendant to put a link to the plaintiff's counsel's website. Right? But as Elizabeth said, if the court has something, then at least you could order that be there as well.

And then in terms of what the court can do-- so we do in our district, and with the VW case, and a number of big cases-- we recently seem to have had a few big cases in the Northern District. We do have right on the home page links to all the documents and things for consumer--

The one thing you have to be careful about of course is that the more public information is on the website, the easier it is for fraudsters to copy it. And I can foresee where you have something on the website which is now announcing out there that there are all these official class actions out there. And you're creating an opportunity then for people to send emails, or even to spoof emails, or things like that.

And so it's a delicate balance because-- all the time-- jury summons or things like that. There was a study recently out of UCLA that showed even court orders were being forged and signatures. Judge's signatures were being forged in orders.

So I'll leave it to the experts on how we-- what the court could actually do. But I do think, in terms of what Todd said, judges are now realizing-- or maybe we realize it and are now starting to take a much harder look and recognize that we're the neutral in the situation.

When I started first working for the federal courts almost now 30 years ago as a law clerk, I can tell you-- and I'll just tell you-- we just-- judges just signed those settlements without looking at them at all. And the last 10 to 15 years, we've seen an absolute-- I'm sure that all the lawyers here can tell you-- sea change in terms of how judges are now scrutinizing and looking at things.

In our district, it is rare that I will ever preliminary approve a class action proposal settlement on the first round. It usually takes two or three times for them to get it right. And we're looking at everything in terms of the act-- the wording of the notice word-by-word because it is an official communication from the court. They are speaking for us. So that is our job.

I think the balance or the challenge is, how do we find the time. We can't do that by ourselves. So I think coming up with some resources for judges-- obviously when we have a class action in which Elizabeth or her colleagues are the plaintiff's counsel, we don't have to look so hard. But that's a very small percentage of the class actions that we get. And there are hundreds and hundreds of them. And so how do we find the time to really go, and scrutinize, and ask the right questions?

ROBIN MOORE: OK. Hassan, it looks like you might want to comment as well

HASSAN Yeah, I just wanted to add something to this, which is in the reality of the situation, negotiating
ZAVAREEI: class settlements-- they're all different. And the leverage that you have as a plaintiff's counsel

differs from case to case.

There are cases where you've got them beat. You've got them dead to rights. You can prove your damages. You've gotten class certification. You're on the eve of trial. And you can get pretty-- you can get a lot of concessions from the defendant. And sometimes you can even get a defendant-- we've had a bank include in their monthly statements a class action notice in the monthly statement. OK? That's on the end where you've got a lot of leverage.

There is at the other end where you settle cases where you've got a weak case. Your case isn't as strong as you thought it was when you filed. There are a lot of problems with the case. And you decide to settle in a way that is you think the best that you can get for the class, but it's not necessarily the strongest case in the world. And in situations like that, getting a defendant to put something on their website, getting a defendant to send out an email is practically impossible.

And for those reasons I think it really is important for things to happen like what's happening is in our district of California and some other ideas that people are working on, including Professor Rose, who I was talking to earlier, who's going to be talking in one of the later panels-- for there to be some standards and some requirements. Because it's a lot easier to go to a defendant and say, hey, this isn't me, this is what's required, we're not going to get approval unless we do this.

And so I think that even in situations where you don't have the greatest bargaining leverage, those sorts of things are very, very helpful, and do allow you to get those sorts of concessions that are important to getting notice out.

ROBIN MOORE: Great. Cam, you mentioned a while back data-- getting-- and I'm curious, where more and more companies have data, there are loyalty programs, things like that, what role does consumer data play in today's world when you are devising a notice campaign?

CAMERON AZARI: Well, that's a good question. As an administrator, we're not controlling that data initially. Right? So we're reliant on what is available through the settlement process. We certainly ask what data is available.

And a lot of times, it's obvious. It could be, like Hassan mentioned, his bank case. It's obvious there's going to be data if it's an insurance company case, et cetera. But I think you're talking about a consumer case where somebody has purchased a product maybe over the counter.

ROBIN MOORE: Right.

CAMERON AZARI: There's no question that data is-- more and more data is available. You mentioned the loyalty programs. If it's a Costco, or a Sam's Club, or somebody, they're definitely tracking your purchases. And so I've done settlements where that data has been made available. And we use it for an individual notice. I've certainly done settlements where we didn't use that data for notice. And it wasn't available.

So it's a question I don't think I can answer. I think Hassan mentioned that it's part of the negotiation process in the case. And whether that kind of information comes available, there's no question that, as an administrator, if I'm advising the clients on ways to increase the claims rate, if we can get data, that's certainly going to help.

ROBIN MOORE: Elizabeth, in your practice, how often do you-- are you successful in getting that type of data?

ELIZABETH CABRASER: We're getting more successful in getting the data because we are remembering more often to ask for it when you need to ask for it, which is not when you're negotiating the class action settlement, but at the very beginning of the case. This is relevant to class certification for any purpose, whether it's for trial or settlement. And all defendants that deal with huge amounts of data must have, as a practical matter, a data retention and data destruction policy.

They're not keeping that customer data forever. And they can't be expected to unless they are requested to do so as part of the discovery. So unless there's a preservation order in place as one of the very first things the judge presiding over the case is directing, you might have a lost opportunity by the time settlement comes or by the time class certification for trial purposes comes.

So that is number one on the list of initial orders-- to preserve that data as part of the evidence. That also enables an early discussion with the defendant about the practicalities of that and of course the Rule 1-ness of that. I was so pleased to hear a defense counsel quote Rule 1. It's my very favorite because if you know that rule, you don't have to really remember the rest of them.

[LAUGHTER]

ROBIN MOORE: That's true.

CAMERON AZARI: It's all common sense.

[CHUCKLING]

ELIZABETH CABRASER: And so that's your e-discovery conversation, about what is practical, what makes sense, how to safeguard the integrity of that data. The defendant may not want to hand it over to a bunch of class action lawyers, but it can be given to a neutral.

It can be given to someone who will preserve it and maintain its confidentiality-- because privacy is another big issue where there are legitimate concerns-- so that if and when that is needed to facilitate a notice program of any kind, whether it's for settlement or for trial, it will be available. And, of course, the more recent that information, the better, the more effective it will be in reaching the customers, who are also the class members.

CAMERON AZARI: And also, along those lines, a lot of the data that we're talking about is with third parties. If it's a retailer, that's not the person who was sued. If it's a bank, if it was credit card information. And issuing third-party subpoenas-- we've done cases where that was done-- takes a lot of time.

And so if, like Elizabeth said, you're at the settlement stage-- this is a months and months and months process to do this. And a lot of times, we don't have time. We're just going to go with what we got. So to the extent that that process could be initiated much sooner, it's better. It would be more available for us to use.

TODD HILSEE: It's an interesting point with data and obtaining data on the front end. It's been my experience-- and not with Elizabeth's firm, I will say, ever did I experience this. But the most common complaint that I get from defendants who want to scrutinize plaintiffs and push back against plaintiffs' attempts to get certified is say, hey, hey, plaintiffs, you could get the data, why aren't you trying harder? And it's a puzzler. But very often, plaintiffs get certified the duty and obligation be on them to give notice of a certification.

So I don't find very often plaintiff's counsel pushing that hard on the front end to do things like subpoenaing retailers, even though experts have advised their clients that, you could be very successful issuing subpoenas to retailers to get data to increase the likelihood of and increase the direct notice that's potential.

BRIAN PERRYMAN: Todd, do you see defendants or plaintiffs using third-party data brokers to drive the notice?

TODD HILSEE: It's-- not that often. Not that often. Where's the motivation on either party?

BRIAN To give the more practicable notice if it's out there, right?

PERRYMAN:

TODD HILSEE: Right. It should be. It should be. I agree with you. It should be, but I don't see it.

BRIAN The defendant might have a different perspective on that than the plaintiff. But perhaps you

PERRYMAN: have--

TODD HILSEE: I think on the front end, the plaintiffs would argue it's not reasonable to go to that extent. If it's not reasonable to subpoena a retailer, then to data mine from third parties, they'll argue, is not reasonable. And then a settlement comes along. And if it's a claims-made settlement, the defendants are not pushing to increase the notice.

ROBIN MOORE: Elizabeth, did you want to respond to that?

ELIZABETH Again, it's going to depend on the case. And what you want is not just data, but you want
CABRASER: reliable data. And you want data that can be used to directly reach those who are within the class.

So it's going to depend on what type of business the defendant is in, what the nature of the claim is, whether it's a retail product that until quite recently wasn't tracked by anyone. Now if you buy something from a chain pharmacy or a chain grocery store, they not only know how much they've sold, but to whom they have sold it, at least if you've signed on for that.

So I think this is going to continue to change. But again, this emphasizes that it's very, very important, particularly on the plaintiff side, since you're the initiator of the class certification motion of the settlement negotiation process, to really think about the case at the outset. Where is the information? You do that, or you should do that, as part of your overall discovery plan anyway.

But class action discovery is a very important key there. And who's got the information? What's the most cost-effective and reliable way to get it? How far can you go under the federal discovery rules to do that and make that part of the discovery plan so that you've got the ability to not only custom tailor the content of the notice to the needs and interests of your class, you've got a way to reach them directly if possible?

ROBIN MOORE: Now that we've been talking about some of the obstacles that folks here on the panel face in their practice-- and I'm just curious, from the state's perspective, when you guys are trying to do a redress program, do you encounter these same types of obstacles? How do you deal with them? Do you have additional tools that you can call upon that might not be available outside of the public context?

BETH CHEN: We certainly face a lot of the same obstacles that have been discussed today on deciding what's the best type of notice, what should be included in the notice. And that can vary also depending on the way that we are handling our redress program. So occasionally, we may send out redress notices ourselves. We may use an administrator. We may ask the defendant to do that depending on the case. And so that may also affect what we-- how we craft the notice itself.

I do think that we've strived to use plain language. And we also do take into consideration what is normally the content of class action notices when designing our notices as well. But I think, like Judge Corley said, one of the biggest obstacles that I think we may encounter in the future especially is the problem of government impostor scams becoming more and more prevalent. And then the consumer education of knowing that-- while we're trying to publicize the fact that these scams exist, that also in turn will lead them to be skeptical of receiving notices from government actors.

And so I think that that's something that we're going to tackle more and more as these scams continue to be prevalent. So people are becoming-- we're having more consumer skepticism of getting calls from our office, for example.

And I think that one of the interesting aspects of the study that may point to a shift in this direction of consumer skepticism of government notices is that the use of the court seal and the use of the court email address only improved consumer understanding and consumer opening rates by 2% to 3%, where you would maybe expect that to have been higher. And I think that that could in fact shift in another direction, even so that it may negatively impact in the future, if we continue to have such a prevalence of government impostor scams in the future.

So one way that we have tried to tackle that problem in our notices is to include a contact number to one of our legitimate government phone numbers. So that way, consumers can try to cross reference in the notice. They can Google online and see if that's one of our phone

numbers. And then if they do take that extra step to call that phone number, we have our call center people prepared to be able to answer questions about our settlements.

ROBIN MOORE: Great. Cam, a little while ago, you mentioned money. And that makes me think about the role of price in all of this.

[LAUGHS]

So I'm curious what your experience has been-- you're up against, I imagine, in any large class action in particular a number of administrators, all of whom are making proposals. So I'm curious what role that plays?

CAMERON AZARI: Sure. This is kind of a touchy subject, right? Of course it's--

ROBIN MOORE: I thought it probably would be.

[LAUGHS]

CAMERON AZARI: Yeah. So I'm going to be really generic. No, it's-- of course it's an issue, right? Because it's-- we're a business ultimately, right? And we're trying to-- for me, I've always tried to have the prices do not change what I'm recommending to the client. I'm telling the client what, and I think a lot of my colleagues are telling their clients, what we think is the right thing to do. And we want the client to make a decision based off as much information that we can give them.

There are certainly situations where we maybe would have liked to do a little bit more, but we did a little bit less to a point, and still got to work and went for-- but there are definitely other situations where cost became a problem for us, for sure. And there are, in all honesty, certain types of cases that I don't typically do because I just know I'm not going to win. Because the recommendation I'm going to make is going to be too expensive for what the parties want to pay.

And so that's kind of all I'm going to say about it. So cost definitely does come into play. It's a balancing act every single time-- almost every single time.

ROBIN MOORE: And Elizabeth, you're partly on the other side of that transaction.

ELIZABETH Yes.

CABRASER:

ROBIN MOORE: I'm curious about your views?

ELIZABETH CABRASER: Well, I think we just saw demonstrated in action the Cyndi Lauper doctrine, which is that "Money Changes Everything." If you don't know that song by heart, you should.

[CHUCKLING]

We try to avoid a situation where the notice budget dictates the notice. We try to work the other way around when we can. We also try, when we can, to make sure that the defendant is paying the costs of notice and administration in addition to the class benefit, which is great. But then that puts a finer point on making sure that we're getting the most and best notice for the money.

And there's a speech that I always give to defense counsel when they push back at paying for it, and then say, well, if we're going to pay for it, we're going to pick the vendor-- they tend to call notice experts and providers "vendors--" and we're going to provide a budget. And I say, no, we're going to do the right notice and the best notice that we can for this class.

And believe me, these providers are competitive. So once we decide what we need, and what the court is going to require, and the best notice, then we're going to get bids. And then we're going to select on quality, on experience, on reliability, and on price, because I hate to waste anybody's-- I hate to waste my money on administration that doesn't do what it's supposed to do or notice that doesn't work.

And I also hate to waste the defendants money also. That's money that could be used for other purposes, including compensating the class members, for example, when the notice costs have to come out of the class fund or things that the defendant could be doing.

And I know that-- and Cam and Todd know this. I nitpick proposals. I negotiate proposals. We are as ruthless as we can possibly be on price. And we know that courts are concerned about waste and cost as well. So the money that's being spent has to matter. It has to produce a good notice. And it hasn't caused notice providers and experts, for the most part, to retreat from the field. I believe it's caused notice programs to improve, and be more creative and innovative.

TODD HILSEE: I would have to say that-- I'd have to agree and disagree to some of that. Unfortunately, what's happened is, in my experience, there are some vendors in this field that are not participating in

this conference that have given false promises to both the plaintiff's bar and the defense bar in terms of what it would cost to achieve an effective notification campaign. And they're using erroneous methods. And that has baked in this sort of spiral-down in terms of effectiveness. And that is why, in turn, response rates are lower than they have been and were in the past.

Price is a very, very interesting dynamic because if you think of-- the purpose of the notice-- dial back to the beginning-- isn't the purpose of the notice in the law and due process, is notify this consumer, is this a good settlement. Not just, hey, come get your money, but is this a good settlement? You're allowed to weigh in and decide.

So if-- I often see this argument, where it's like, we have a \$10 million settlement, so we can't afford to-- or \$5 million, or \$2 million, or not even-- we can't afford what it costs to give notice. And it's sort of circular logic to say, because this is the settlement we've come up with before the class even knows about it, we therefore can't justify notifying the class about it. It's tricky. It's difficult.

CAMERON AZARI: Yeah. And real quick, I think I agree with everything that Elizabeth said. But there are definitely, echoing what Todd said, tiers. When Elizabeth and Hassan-- I'm just talking about class council right now-- come to us, we know that they're going to be aggressive in wanting us to give a good price for a good notice program. That's one model.

But there are definitely, like Todd's alluding to, other cases where we're looking for the cheapest amount-- the party is looking for the cheapest no matter what. And that's not very common. That's not most people, but that's some. And that's a different situation. And that's where it becomes a challenge for a lot of providers like me to even participate in that process.

ROBIN MOORE: Hassan, did you have anything that you wanted to add?

HASSAN
ZAVAREEI: Well, one thing that's occurred to me is that we've talked a lot about notice. And we're almost sort of equating that with take rate and claims rates. And I think that there might be a mistake there. There are a lot of people who get the notice, understand the notice, read the notice, and don't really care; or think, OK, I'm opposed to class actions; or this isn't something that I felt I was wronged by, so I'm not going to make a claim.

I think, even in a case where you achieve perfect notice and reach 100% of the class members, you're probably n-- I mentioned the 40%. I think there's some where it's gotten much higher-- into the 80s or something. But that's usually where it's a much smaller class,

and you're talking about massive amounts of money. But I do think that it's important to take a look at this second step, which is notice is effective, people understand it, but just choose not to make a claim for whatever reason. And that does not necessarily mean that notice was ineffective or that there was something wrong with notice.

I don't have any empirical evidence on that. But anecdotally, that certainly seems true to me, where I've had better notice, or what felt like better notice, and a lower claims rate, and not as good notice and a higher claims rate. So I don't think those things are necessarily equated to one another.

BRIAN PERRYMAN: And that's precisely why proving to the court that you reached the class and gave them that opportunity, whether or not they chose to come forward, is what's critical.

ROBIN MOORE: All right. So we are almost out of time. I have one final question, but everyone will have to be quick.

[LAUGHS]

And that is if you could change one-- and maybe this is an unfair question to ask for a quick response. But if you could identify one thing in the current system that you would change, what is that? Cam, I'll start with you.

CAMERON AZARI: Oh, my god. You're starting with me.

[LAUGHTER]

I was thinking about it. Oh, boy. One thing in the current system that I would change? I can probably think of something better as soon as I sit down.

Time pressure is a big problem for us. And a lot-- Elizabeth mentioned this earlier, that it's a communication problem-- that it's going to be better if there's back and forth. And a lot of times, we don't have a lot of time. We are jammed. We got to get that approved. You got to get that notice out. You've got the tightest possible window before the opt-out deadline.

And it doesn't allow us to be very creative. And if it was up to me-- and I know there's lots of reasons to do things quickly-- having more time would make things a lot better, in my opinion.

ROBIN MOORE: OK. Elizabeth?

ELIZABETH CABRASER: I'm going to agree with that. It's not the way the current system works. But it would be better, at least in some cases, to be able to engage a notice provider, a claims administrator earlier on. It's difficult to do right now. And there are good reasons why it isn't done. Competition is one of those things.

But there are cases where it's going to be very important to have engagement by the class members earlier rather than later-- not every case. So maybe some more flexibility in that area, at least in terms of coming into court and explaining to the judge as part of the discovery or class certification plan what-- why it would be useful to do that.

ROBIN MOORE: Beth, did you--

BETH CHEN: I don't know that I have any specific comments on this.

ROBIN MOORE: OK.

[CHUCKLING]

I'm just going down the line. So.

ELIZABETH CABRASER: Don't mess with Texas.

[LAUGHTER]

BETH CHEN: Yeah, always.

JACQUELINE CORLEY: I'm actually going to say something that's more at the very front end, which is just the cost of class action litigation. And the reason I say it is because I think what we see happening is we have these settlements come because of the potential high cost to the defendants, but also to plaintiff's counsel, right? They have to invest so much capital to take it all the way through.

So you have a settlement that's just a compromise based on the cost of litigation on both sides as opposed to the merits. And maybe if we were able to do something about that and actually get the class action settlements that were based more on the merits, then we'd have a higher claims rate because we'd be getting settlements in cases that people really cared about. So I'm going to say cost.

TODD HILSEE: [INAUDIBLE]

ROBIN MOORE: OK.

TODD HILSEE: I'm going to make two short points. One, can courts test whether, to go back to Mr. Kohm's first point, a settlement can simply give the consumers the money? Number one. And number two, would it help notice and solve a lot of problems if plaintiff's counsel were paid based on the actual money that was received and into the banks of the class members?

**BRIAN
PERRYMAN:** So Hassan stole my point, which is that the claims rate does not-- the mentality that the claims rate is the end all and be all of the fairness or the reasonableness of the class action is not an appropriate mentality. You can have low claims rates and still have a wonderful class action.

We-- I've had experiences where we provided 100% approximating the relief that would be won at judgment made available through the claims process. And that was doable because of the claims process itself. We couldn't have paid 100% relief to 100% of the class members. And so it's like a balloon. You're squeezing at one end. Something's got to give at the other end.

**HASSAN
ZAVAREEI:** I would say if I could have-- if I could rub the lantern and have a genie give me one wish, I would look for some sort of uniform standards similar to what we've now got in the Northern District-- something that gives me more negotiating leverage when I'm in the room with the defendant, and trying to get better notice, and trying to make sure that everything that we need to get the word out to the class members is included as part of the settlement. Because in other aspects of settlements, there are certain guidelines. And when those are there and when they're present, they are always helpful in negotiations.

ROBIN MOORE: OK. I think that's a great note to end on. So I want to thank our panelists. We're going to take a short break now it is 40 after. So let's come back at 10:55.

[APPLAUSE]

HAMPTON NEWSOME: Well, we'll go ahead and start with panel two. I am Hampton Newsome with the FTC. And this panel is going to be about research. We're going to talk about the FTC research study, get into some detail with that, talk about other research that's been done out there, and also ideas or plans for research in the future.

And before we get going, why don't we just go down the line. And if everybody could just introduce themselves and give their affiliation. Robin, we know who you are.

ROBIN MOORE: [LAUGHS]

HAMPTON NEWSOME: And Shiva, we know who you are. So Nicole.

NICOLE CHRIST: Hi. I'm Nicole Christ. I've been managing the redress program here at the FTC for about three and a half years.

BRIAN FITZPATRICK: I'm Brian Fitzpatrick. I'm a professor of law at Vanderbilt Law School in Nashville.

ALISON FRANKEL: I'm Alison Frankel. I'm a writer for *Reuters*. I've been writing about class actions for many, many years.

DAVID SIFFERT: I'm David Siffert. I'm the director of research and projects at the Center on Civil Justice at NYU Law School.

RICHARD SIMMONS: And I'm Richard Simmons. I'm the president of analytics consulting.

SHANNON WHEATMAN: Hi. Shannon Wheatman, president of Kinsella Media.

HAMPTON NEWSOME: OK. All right. So what I'd like to do at the beginning is-- we can get into the weeds about specific issues in the report. And I can ask questions about that. But I think what would be most useful for us at the FTC is to get an idea from people about what they felt was the most important takeaway from the report, what really jumped out to them, and also kind of the-- if there was a surprise there.

Before we get into that, I wanted to circle back to Shiva. She talked a little about the causation-correlation issue. In some of the articles-- you have a few articles, a few blog post about the

report. In some cases, there was kind of a takeaway from the report that email-- the report shows that email is bad, or the kind of sweeping conclusions from it.

And I wanted to give Shiva a chance just to revisit that a little bit to talk about your impressions of the results, and also if you have any recommendations about how practitioners, administrators-- when they're approaching this report, what they should be looking for from those issues.

SHIVA KOOHI: Sure. Yeah, I think I just wanted to reiterate here that we really want to be comparing apples to apples, right? And so when you start looking across all the different notice methods, that you're not really doing that.

So for example, email notices tend to be set when the class is really large-- five million people, for example. It would be really cost-ineffective to probably send notice packets to all of those five million people. Versus em-- notice packets might be sent of a class of 500 people. And so when you start getting into these various-- the fact that characteristics differ across all these various notice methods, you really can't compare the claims rates and make any sort of causal inference based off of that.

And I think the really the best way to try and gauge this-- and, of course, I understand that there might be limitations based on the plaintiff side and also the defendant's side based on sort of what they think is best for the class.

But I think the best way to really-- from a statistical perspective is to take a real-world case, and randomly assign method of notice across each of the class members, and then just compare. Like, did this person who received an email-- did the people who received emails file claims at higher rates or lower rates than those that received mail notice? And obviously, that could be an iterative process, where sort of you kind of see how things work initially, and then you realize, OK, postcard seems to work best, let's send postcards to the rest of the class.

And I really look forward to hearing from the real-world practitioners or administrators here on this panel and in other panels to see if that's something they have done, and if not, sort of why they think there's been push back to doing that sort of randomized controlled design.

HAMPTON NEWSOME: OK. Thanks. So let's start-- let's talk about, when you saw the report, what was important to you. And I'm going to start with you, Alison. You talk to people in your work about class actions all the time. And I know that you talk to people about the report. And just interested in your

impressions, and what you heard, and how you think-- what's important, what will be most useful to people working in this area?

**ALISON
FRANKEL:**

Thank you. I think the most important aspect of this study was that it exists. We've had, for years, a paucity of information about claims rates. As the study discussed, there have been a few previous studies, including one by Brian-- none was comprehensive. Previous studies have kind of come at this question of claims rates with a bit of an agenda.

And here, we had information from the horses' mouths-- from claims administrators-- that was carefully analyzed and carefully-- and statistically analyzed. And we came out with some hard data on who's actually taking advantage of class actions-- whether class members are in fact receiving compensation through class actions.

What was interesting to me in reporting on the outcomes was that those same old advocacy positions kind of kicked in, where people who favor class actions were like, 9%, that's a pretty good median rate. And people who are skeptical of class actions were like, well, you've got a 4% mean, and that's only in class actions where there's a component of direct notice. So what does that really tell us about your small-dollar class actions? Not much.

I do think what the study is most encouraging about is that we've learned a lot about what works, what doesn't work, what we can build upon. And if you believe in class actions, I think there's a lot of room from this study for ways that plaintiff's lawyers and claims administrators can be more effective about reaching class members and encouraging response. So I think the study was-- is a great first step. I'm very excited about it.

**HAMPTON
NEWSOME:**

OK. Well, let's see if the whole panel could weigh in on this. It would be great. Brian, do you have any thoughts about the report?

**BRIAN
FITZPATRICK:**

I do. And I completely agree with Alison, I should say. I think the study was excellent. And I commend you in devoting the resources you did to it and to taking this so seriously. As I've told many people, it is the best study of claims rates by far that has ever been done. And I really commend you for it. I--

[APPLAUSE]

[LAUGHTER]

I was most surprised by two things-- one was the email claims rate. And I do have a question for you, Shiva, about that. And one explanation for why the claims rate was lower in the email notice case, as you said, was maybe those classes were much bigger. Do you have enough data where you can control for the class size and then test that hypothesis?

SHIVA KOOHI: Yes, we actually conducted some regression analysis that does exactly that-- that controlled for any sort of observable that we had, including the size of the class. And actually even then, even with that control, we found that email notices were significantly lower even in that regression framework.

So yeah. So that was just-- that actually really depicts this really well, so that if you just look at the sort of raw mean claims rates, once you control, I think the percentages change a little bit. But they're still lower. But I think that just shows you that there's so many other things we don't know.

We don't know the level of information in the company records. I didn't know that as the economist working on this. And so if we were to control for that and control for the type of practice-- just kind of go down the list-- things could look very different. And the really true way, as I said before, is kind of to take one case or multiple cases and sort of randomize people on how they got notice.

BRIAN Yeah. Or we could do all those things, and things could not look any different.

FITZPATRICK:

SHIVA KOOHI: Right. No one knows.

BRIAN That's-- I'm worried that maybe email has become so spam-ated that now direct mail is thought of as less of a junk mail alternative to email. To the extent that we might be able to do a randomized study to get at this a little bit better, I think the audience for that kind of comment should be the judges.

The people that could actually insist upon some kind of randomized study would be that federal district court judges that are overseeing these cases. They could say to the parties, I'm not going to approve your settlement unless we do notice this way.

The Northern District could take it on as a project-- we're going to randomize how we do notice in the settlements that come before us. We could pick one settlement and do email, one settlement do direct mail at random. We select which ones. Or in a given settlement, we could

say, we're going to do half the class mail, half the class email. The judges really have a lot of power over this.

Now, there could be objections. You could see a class member saying, well, what if email is not the best form of notice. And now you're randomly assigning people to the email side. Does that violate due process? You could see some objections to it. But I really think to get a randomized study, the judges are the ones that are going to have to insist upon it.

The other finding from the report that I found interesting-- and again, I was sad to see this-- was it didn't seem to make much of a difference-- a little bit of a difference, but not as much as I'd hoped-- when there was a government sender of the email or even the government seal that you placed on the notice. I was hoping that having what would seem to be a credible source would make people much more inclined to file a claim, or open the email, or just read what was going on. And I was sorry the rates didn't seem to change that much.

But I think that more study is needed about how can we find credible ways to communicate to class members. I thought having the government stand behind it would be a credible way. And maybe we need to find different ways to communicate, this is the government, so that people are more willing to accept it as real as opposed to potential spam.

HAMPTON

OK. Thank you. And I promise I wasn't fishing for compliments.

NEWSOME:

[CHUCKLING]

But we appreciate your words. Thank you. Thank you. David, do you have anything to add in terms of the importance?

DAVID SIFFERT: Yeah.

I'll let you catch one more compliment here along the lines of what Brian and Alison said. The fact that this happened is enormously significant-- and not just that it happened. That if you actually read the study, it's readable. And it's serious in a statistically literate way in a way that very little legal academic work is, and especially very little in the complex litigation arena.

So I think that's a real testament to the work that the FTC did and especially that Shiva has done. So I'm very grateful to all of you for putting in that work to make a study that's both readable and serious.

In terms of getting into the substance of it-- this is hitting a little bit on something that Brian mentioned, but the gap between the weighted mean and the median in terms of the effectiveness was larger than I expected. I'm not surprised that the claims rate is higher at the median level than the weighted mean, because the bigger cases are more challenging. But the fact that the gap would be 4% versus 9% was surprising to me.

In terms of notice, there were a couple of things. One is that in terms of the Administrator Study, the irrelevance of most of the substance of the notice and claim forms was surprising to me. The fact that plain English was relevant was not. But the fact that all the other things that were looked at basically were statistically insignificant was surprising, especially when looked at next to the Notice Study, which showed all sorts of things being statistically relevant in often surprising ways-- for example, that the shorter version of the email was actually worse for comprehension. That surprised me.

And then when you look between the long-form versus the experimental, that there wasn't one that was the clear winner-- that experimental was actually better for what were the next steps, but the long-form was better for comprehension and trust-- that surprised me. But it also gave me hope that perhaps we could combine some elements in both to create a perfect notice substance or something like that.

HAMPTON

OK. Thank you. Richard?

NEWSOME:

RICHARD

I think that the most important thing that came out of this is the discussion that's going on now in terms of how it can be improved, how notice can be analyzed, what the next steps are in terms of improving class notice and improving consumer participation.

SIMMONS:

In terms of the most important results, I think-- and that I was surprised by as well-- was the lack of a statistical impact of request for documentation that had on the claims rates. And then the positive impact, or the markedly positive impact, of repeated contacts-- so layering notice, be it email and mail. Multiple contacts driving up claims rates and driving up participation.

But then building on something earlier about randomizing samples, I think it would be easier to look at natural experiments that arise out of settlements, where you have a portion of the class that has email addresses and a portion of that don't, and that in some settlements-- not all, but in some settlements, these cells exist where you can look at and report on what claims rates

look like.

HAMPTON OK. Great. Shannon?

NEWSOME:

SHANNON Yeah. A lot of what other people said. I think it's just-- to me, I love data. . And the fact that you
WHEATMAN: could do a regression analysis-- it was very exciting to me to really see what might be impacting these claims rates.

I think some of the things that you found will help us practitioners convince attorneys to do things more effectively. Maybe if we say, hey, the FTC study found this really does impact claims-- I think that's going to be really helpful to us.

I was excited that plain language-- you found a significant difference for that, because that's where I started my career, with the Federal Judicial Center drafting those plain-language model notices. So that's always exciting. And that'll help me convince people to try and keep the notices as simple as possible.

HAMPTON Great. Now, several of you mentioned kind of surprises. And I'm curious if anyone else saw
NEWSOME: results that were surprising or seem counter-intuitive that you didn't expect? Is there anyone else who would like to weight in on that-- things that just seemed weird or head-scratching?

SHANNON Yeah. One of the things-- and I think it's the nature of how the email study-- how you had to do
WHEATMAN: it. We look at a lot of best practices with email notice, and how is the best way to design notices. We do know that over 50% of the population is going to look at their email notice on mobile devices. So the rule of thumb is that you want that subject line to be short-- 35 characters or less.

So I think an interesting maybe future study would be to look at something on mobile devices. And maybe there's some way to do it where it's maybe a more real-world setting, because I think that the shorter email notice, at least the one that still effectively satisfies Rule 23, likely would have higher comprehension rates if it was delivered in the environment of people in their busy day to day.

And they are just opening it up and not having a lot of time to read it. I think it's different when you're doing an internet study-- which I've done as well in other situations-- where people know that, I really have to read through this whole thing. So I think that might be a different finding for you.

HAMPTON Mm-hmm.

NEWSOME:

NICOLE CHRIST: Yeah

HAMPTON Go ahead.

NEWSOME:

NICOLE CHRIST: I just wanted to weigh in with the FTC's experience on this, because we have experienced some slightly different results from our email notices. The lowest response rate we've had in any email campaign was 7.5%. So I think we've worked really closely with our Division of Consumer Business Education to do plain language.

And it isn't just about making the email shorter. That's actually a different mark. Plain language is not being short. It is getting rid of unnecessary words, but plain language is an emphasis on making sure that someone that doesn't have a legal background, obviously, is going to recognize and understand the instructions in the email.

And to that point, I thought it was interesting, for example, "Notice of Refund" had a higher open rate, but that we were concerned because it didn't have the same comprehension. But the purpose of the subject line is actually to get people to open the email. It doesn't need to do all the work of the email. The email can do some of that work too.

So I think when we're looking at certain things, we just-- I wouldn't want to muddle the data too much, and say that, oh, the short version didn't have the results we expected. I think some A/B testing here is actually really, really called for in terms of being really careful about what we call plain language. And I think we saw the plain language results in the broader study.

HAMPTON Mm-hmm.

NEWSOME:

ALISON FRANKEL: There's one factoid that-- I don't know that "surprise" is the right word, but it was heartening when you guys talked about the response rates that the FTC gets when the FTC is doing reimbursement programs, and that the median claims rate in class actions actually sort of falls right in the middle of the claims rates that you experience. Out there in the world of class action reporting, you hear a lot of skepticism about plaintiffs and defense lawyers colluding to dampen response rates.

And so it was kind of an indication that there's not really much to that when it turns out that class action claims rates are analogous to government claims rates, because I'm assuming that you all are not colluding to dampen--

[LAUGHTER]

--consumer claims rates when you have reimbursement programs.

BRIAN FITZPATRICK: And can I ask a question about that? When you guys do your campaigns, do you do it entirely in-house? Or do you hire these same settlement administration companies to help you do your distributions?

HAMPTON NEWSOME: And I think that this would be a good opportunity, Nicole-- she runs our redress program. And she's on this panel in part to give some background about what we do. And I don't know whether Robin's earlier statement inoculated all the FTC people up here. But anything the FTC staff is saying, they are our own views, and don't necessarily represent those of the commission.

So Nicole, if you could give everyone kind of background on what we do? We do this all the time. We're not involved in class action cases per se. But we're, in our redress program, dealing with many of these issues all the time. You could just give a short overview of what we do and the kinds of issues we face.

NICOLE CHRIST: Sure. Thanks. So we do-- to answer the specific question, we do use settlement administrators to help us get these distributions out. I think that we though have a really active role, especially in drafting notices, in drafting any communications that go to consumers, and also in designing the program-- how it's going to work.

As Jim said at the beginning, the FTC primarily does direct payments, right? We think that we reach a much larger portion of the population-- and, of course, it's been borne out in stats that we reach a much larger portion of the population by doing direct payments. We do claims processes when we have to, when we don't have all of the necessary information.

And so yes, we use the same settlement administrators. I'm familiar with most of the folks that have been on the panels. And we do dozens-- we did last year-- the last annual report we did showed 38 different distributions within one year. So over the last four years, we've-- the FTC

specifically has sent out over \$1 billion in refunds to people. So yeah, we're in this space. We're doing this work all the time.

Generally, the way it works is that we-- a case is completed. And we-- the redress team get the data for that case. We know how much money we have. We select a settlement administrator for that particular case. And we figure out the best way-- we generally do provide a distribution so people get a percentage of what they paid if we have that information.

And our cases, like the ones that were analyzed in the study, are of a variety of cases, from a person bought a very specific product, and we sued because maybe the advertising for that product wasn't as clear as we thought it should be versus cases that are basically just fraud-- just somebody never even ordered a product. They were just charged for something.

And those cases are really difficult because the defendants aren't even known to the consumers. They don't have any memory at of having an interaction with the defendant. And so they get a check. And they think, well, is this a scam, because I don't know who these people are?

So anyway, that's the work of the FTC. We actually have been putting out annual reports for a couple of years that show all of the distributions we've done for the year, and the money, and the percentage of the money that actually got returned to consumers. So those are all on the website. And we're looking at even more interactive, transparent, and maybe even geographic ways of presenting that data in the future. So.

HAMPTON Great.

NEWSOME:

BRIAN Can I ask you a little follow-up question about that? And that is, do you-- I assume you do
FITZPATRICK: confront situations where you have leftover money because people didn't cash their checks?

NICOLE CHRIST: Mm-hmm. Of course.

BRIAN And what do you do in those situations?

FITZPATRICK:

NICOLE CHRIST: So in the vast majority of those situations, we-- so one thing I should say is we take additional steps that maybe not everybody would take. If we have leftover money, we may do address traces just to try to find consumers who didn't cash their check.

And it's pretty standard to do address traces on checks that are actually returned as undeliverable. But we've been doing it on all of the un-cashed checks at the end. Because what we found is a lot of times, even if they're not returned as undeliverable, they didn't get delivered because that person has moved.

And so we will do that. And we will re-mail checks. And we sometimes will re-mail checks even to the same address if we have reason to believe that person is really still at that same address. And we've found success with that as well. We've seen increases of 10% to 12% in a case from-- as the study indicated, that second is a similar sort of thing-- the second chance to cash that check, right?

But once we've taken what we think are all of the appropriate steps to reach the group of people that we know about, we would then take the leftover money and redistribute it to the people who cashed the first check.

BRIAN Oh, OK. Very interesting. And do you ever confront a situation where a victim might then get
FITZPATRICK: more money than they were actually injured?

NICOLE CHRIST: No, no. When I say that we do a second distribution, we would never-- we would always cap anyone's--

BRIAN At 100%?

FITZPATRICK:

NICOLE CHRIST: At 100%. Once everybody has been redressed 100%-- which happens very occasionally in our cases-- the rest of the money we have to send to the US Treasury. That's our--

HAMPTON OK. Great. All right. Well, thanks, Nicole.

NEWSOME:

[CHUCKLING]

BRIAN I'm sorry.

FITZPATRICK:

HAMPTON Good questions.

NEWSOME:

NICOLE CHRIST: I'm sorry.

HAMPTON
NEWSOME: No, good questions. So now I'd like to talk about limitations of study-- any sad stories that we see in there. But before we do, I'm not sure if everyone-- did everyone weigh in on their surprises and anything that was kind of counter-intuitive? Anybody else want to add anything on that? We're all good? OK.

So I was-- Richard, if you could-- I'll pick on you. If you could just let us-- did you see any limitations in the study? And not so much things that need to be studied in the future, because we'll talk about that later on in the panel, but things in this study that, within the focus, within the scope, you thought, well, this could have been done differently or there just wasn't-- the data was limiting?

RICHARD
SIMMONS: I think there were three things. And some of them have been mentioned. The first is the study only explains maybe 40% of the variability in claims rates-- that there's a lot that we don't know. And there are a lot of factors outside of the number of-- the type of notice, the type of documentation that determines claims rates since every class actions are complex and every settlement ends up being different.

The issue of causation versus correlation that was mentioned earlier. And we can talk about that later. The third one is with the Notice Study, is that I understand the testing that was done in terms of opening and comprehension. But I think the test is being done against the wrong thing.

The question is, as the email is being sent, what percentage actually participate? And does the structure of the email, the communications dictate the consumer participation rate in the settlement? And so they may understand it, but do they actually take any action after that?

HAMPTON
NEWSOME: OK. And any response from-- OK. Anybody else in terms limitations? Yeah, David?

DAVID SIFFERT: Yeah. So first of all, I want to put this in context of, again, that this got done, which is very impressive. But the fact that it got done means that some things are going to be left on the table. And those things are important to remember. Some of them maybe could be considered areas for future study, like going beyond consumer class actions to other kind of class actions. I think Hassan mentioned in the previous panel studying media programs in more depth-- Facebook ads, magazine, TV ads. That wasn't really covered so much.

But even in terms of what it did, the sample size was 149 cases, which is pretty good. But they all came from seven claims administrators and specifically their 10 biggest cases, which really biases the sample a lot because this is not representative of what class actions look like in general.

So we have to remember, for example, if we're looking at a new class action and we want to see how the notice program looks-- if it looks reasonable, if it looks likely to succeed-- how the settlement broke down-- whether the people got compensated in the expected amounts-- we have to remember that comparing it to the sample, it might not be representative of what we were looking at before. And there are a lot of things that we have to remember to control for. And it's not just the fact that this sample isn't necessarily representative.

Another example is there's a lot of individual-level information-- and I know that you collected information on the individuals. But there's a lot of information on the individuals that I think may not have been controlled for here that might have to be controlled for in thinking about how to, for example, design a notice program.

There's a famous set of two cases. I don't know if, Shannon, we've talked about this before. But there were two cases that were both class actions. And they were both product liability cases about olive oil. But one olive oil was sort of a high-end, luxury olive oil. And the other olive oil was sort of a consumer-grade olive oil.

And in fact, they tried using the same notice program. And it worked much better for one than for the other because the type of people that had bought the product were completely different, even though on paper the cases looked very similar.

And there are ways to deal with that. For example, if you collect the zip code of all the claimants, and you say, OK, what's the average income of this zip code, you collect maybe the gender of the claimants, and the age range of the claimants-- this still won't necessarily be personally identifying, but it's still enough that you might be able to figure out, OK, well, it looks like these are two very similar cases, but in fact this one olive oil case will require a very different notice program.

And Liz mentioned this in the previous panel-- that you're not going to find a perfect notice program for all cases. You need to figure out what your case looks like in designing it. And I think that because this had to get done, it's not-- there there isn't that much grappling in the

study over breaking it down into subsets of cases and subsets of what did the classes look like.

And you may see, for example, in the email example we've talked about a lot that using some of these controls in your regression analysis may help in figuring out when email is and isn't effective. Age range may be a particularly significant factor.

And the number one limitation here way beyond anything else, I think, is that the underlying data is not public. And I understand why the underlying data isn't public and why it can't be public here. But I can't stress enough the importance of having public, open access to data. Because, for one, academics can't replicate the work done here. So we can't test to see that all the data analysis was done properly. And we can't try different methods on the data. But we also can't explore new ideas with the data.

For example, addresses were collected. We could use the zip code controls that I talked about if this data were open to academics. But because I can't get access to it-- which I understand why. I understand why it's impossible. And this project never would have happened if this had to be an open-data project. But these are inherent limitations in the study.

I'll talk a little bit later about something that we're working on that we'll hope to overcome it. Unsurprisingly, we've been working on this for a long time, and we still don't have results, because it's a lot harder. And the FTC does have results. So there are different strategies. But this strategy does have its limitations.

HAMPTON

Great. Thank you. Very helpful. Anybody else want to weigh in on limitations?

NEWSOME:

BRIAN

The major criticism that I've heard of this study is that it excludes cases where it was

FITZPATRICK:

publication-only notice, that it only looks at cases where at least there was some direct notice attempted. And I don't know how common the publication-only cases are.

But this is the one criticism that I've heard some people level, is that you're kind of-- the criticism I've heard is that you're kind of cherry-picking the best cases, if you will, to get that 9% rate-- that if you looked at cases where it was publication-only, the claims rates would be much lower. I don't know if there was a particular reason why you selected the ones that only attempted direct notice. I'm sure you can tell me. But that's the criticism that I've heard most often.

The other limitation of the study, to my mind, is that no one has ever studied what happens to claims rates when the unpaid media pick up a class action and start reporting on it in the news. My--

SHANNON Ala, Equifax.

WHEATMAN:

[CHUCKLING]

BRIAN My suspicion is that that is the most effective notice of all-- that when the *New York Times* or
FITZPATRICK: *Reuters* is running an article on a case, and it has a link to the settlements at the bottom of the article, that that drives claims better than anything else. I would love to try to find a way to quantify that, and then think of maybe ways to push cases out to people like Alison and another unpaid media.

HAMPTON I'd like Alison to comment on that. But before, I'd like to give Shiva a chance to talk about the
NEWSOME: publication notice.

SHIVA KOOHI: Sure. Yes. I think that's a really good point and I think definitely worthy of future research. I think in the context of this study, as many of you have mentioned, there was a lot of data limitations.

So just several examples of why we didn't delve further into the publication notice is, one, publication can take various forms. So it could be some print ad in *USA Today*, or it could be a very highly targeted social media notice. That's sort of targeting millennial women who are interested in beauty products or something like that. And so because there's so much variation, there just that didn't seem to be too much of a point in really trying to nitpick it.

And another limitation that I talk about a lot in the report is that for these publication-only notice campaigns, a lot of times you just don't know the size of the class at all. You have no even realm of how big the class is. And it just-- how do you calculate a claims rate based off of that? Right? So I think-- but I agree that this is definitely worthy of future research. And I hope someone sort of more deep into the industry can shed more light into it.

But I think one other thing I wanted to address-- and I'm glad, I think, David mentioned this both in just your response now and previously-- is the sample size. So 149 cases-- probably bigger than I think-- maybe with the exception of the CFPB study, but other than that, sort of

the biggest sample of cases that have been analyzed. But that is still not a lot in the realm of statistics.

And so I think when you're looking at the regressions, I think it's also important to keep in mind that our sample isn't as large as the Notice Study. So for the Administrator Study, we had 149. I think once you get into the cases that provided data, it gets down to about 100. For the Notice Study, we had 8,000 respondents.

So I think care should be taken in comparing across the statistical significance, comparing that across those two studies. Because really, all we're showing with the regression analysis in the Administrator Study is that multiple rounds of notice, plain English payment language-- those really, really matter. Because even with 100 cases, we found really significant impacts there.

Everything else, I think, is worthy of future research. I think the reason we just didn't find statistical significance might be because our sample was pretty small.

HAMPTON

OK. Great. Thanks. So Alison, is the media important?

NEWSOME:

ALISON

Before Equifax, I would have said not at all.

FRANKEL:

[LAUGHTER]

We-- I think there's regular coverage of class action settlements being announced.

Anecdotally, in terms of what my friends and my non-legal-reporter colleagues talk about, I never hear anyone say, wow, did you hear about that Facebook privacy settlement, and, yeah, I'm going to make a claim for my \$0.04 cents. No, I don't.

Equifax, which had the FTC actively promoting it, shocked me really. Because friends I would run to run into in the grocery store would say to me, hey, I put in for that \$125 cash settlement in Equifax.

I'm really honestly not sure what the difference was there. Maybe it was a material amount of money. I would say, in general, media attention does not make a whole lot of difference. But for some reason, there, it did.

HAMPTON OK. Thanks. OK. Before we move on, anyone else on-- yes, Shannon?

NEWSOME:

SHANNON Yeah. So in a number of our cases, we offer media pitching that we pitch to journalists. And for

WHEATMAN: one example, in an electronics case-- and it wasn't a sexy or exciting electronics case. The minimum payment was \$10. We got two stories picked up. And we track all the analytics online. We can track who's coming into that story, who's filing a claim. In those stories alone, we got 68,000 claims.

NICOLE CHRIST: Really?

SHANNON Yeah.

WHEATMAN:

NICOLE CHRIST: Wow.

SHANNON So I'm not saying it's typical. But there are ways to generate more excitement in pitching the

WHEATMAN: story. And in four cases this year, we've actually taken class counsel into a studio. And we've pre-pitched the story to news outlets. And they are getting interviewed live online or being taped for news segments. And it's also on radio.

And we're getting-- even, again, in cases that are not that exciting, for something that doesn't really cost a lot of money, we're seeing a much bigger bang for the buck than we would be if somebody is seeing an ad in a publication or a banner out online. Because people are more trusting of their journalists or of their news outlets. They're going to see that as legitimate. So I think you can harness it. And it can be helpful.

NICOLE CHRIST: How do you persuade journalists to care about your class action settlements?

SHANNON Well, I think you just have to pitch the story to them, and let them know that, hey, you have

WHEATMAN: readers who are going to be really interested in this. Sometimes you can just get lucky. We had lifehacker.com want to do a story. And so a lot of people follow them. And that generated a lot of people accessing the website.

So it's hit or miss. But when you make an effort to do it, you're getting a bigger return for the dollars that you're spending than you are on paid media, in my opinion.

NICOLE CHRIST: Yeah.

HAMPTON
NEWSOME:

OK. Well, let's-- I want to move on and talk about other research that's being done or the work that administrators do in terms of getting feedback and tracking. But I'd like to really briefly talk about the issue of trust. One of the interest things to me in the study was the result that when we put a specific dollar figure in the email, people were much more wary of that.

One of the things we do are we do energy labels and things like that have specific dollar figures on there. And I just thought, uh-oh.

[CHUCKLING]

And so there's this tension here, where we want consumers to be wary of emails that are going to cause problems. And at the same time, we want them to know about these settlements. And Brian, I was wondering if you could just weigh in on that.

BRIAN
FITZPATRICK:

Yeah, no. I think you've hit on the central challenge with driving claims rates up is the credibility of the communicator. And if people are skeptical, they're not going to even cash a check. That's been your experience.

It was my finding when I did my empirical studies. When you sent people checks without any claim form, they cashed the checks at a much lower rate than if they'd filed a claim form first. Because they weren't expecting the check. And they think they might get ensnared in some kind of scam.

And so finding the most credible way to communicate is really the central difficulty and challenge, I think, of this entire process. And I do agree with what Shannon had to say-- that when the news media communicates to people, I think it does look more credible than getting an email. Because you trust the *New York Times*. You trust *Reuters*. And so you don't think they're trying to scam you when they tell you something.

And so I agree with you that the finding of putting the dollar amount in the email subject line turning people off-- that was initially surprising. But if you think about it, the way in which we're inundated with spam every day with all kinds of fantastic claims made in the email subject line, it does kind of make sense that people are going to say, oh, that's too easy. If you're telling me up front that I'm going to get \$100, it looks like it's too good to be true.

And so it's a very interesting study of consumer behavior to try to find a balance between interesting people in something, but not making it look like it's too good to be true. And so striking the balance between having it look credible, but also look interesting, is really going to

be difficult, and require a lot of expert thought and attention, and, as we've said, future study.

But I think you guys have really hit very beautifully in the report on the trade-off. What gets people to open the email is often not the same thing that gets people to comprehend what they're reading. It's that same trade-off between too good to be true and interesting enough to do something about it.

HAMPTON
NEWSOME: Thanks. Anyone have any quick thoughts on that issue? Yeah, Shannon?

SHANNON
WHEATMAN: Yeah, we definitely come across this. In the last year, I think we actually did a program that I think was the largest email program. We sent out over 180 million emails. And just because of the quantity of people who were being contacted, there started this conversation online that they didn't think it was legitimate.

And so there was a lot of effort made to try and put information out there to respond to those social conversations to let people know it was legitimate and where could we send them. As Elizabeth said, can we send them to a court website? Can we send them to an AG website? Can we send them somewhere where they're going to be more trusting that something out there is legitimate?

And in another case, we actually had a similar problem. And we did some advertising where we actually advertised those trusted news sources who wrote stories, because we found that those trusted sources sent a lot of people to the website. And so you may not get them directly to your website. But you'll get them to read a story, start trusting the messenger, and get over to the website, and hopefully file a claim.

HAMPTON
NEWSOME: Great. Thanks. So I was hoping that Richard, and Nicole, and Shannon maybe could talk a little bit about what they do to get feedback-- kind of doing I guess in-house research based on the day-to-day work that you do in order to not only improve things for future cases, but within cases, within campaigns, and any other research that you might do if you're doing formal research kind of outside of that. And I'll start with you, Richard.

RICHARD
SIMMONS: I think there are two threads of research that we do, or experiments that we do. The first is A/B testing, similar to the Notice Study, of the form and content of banner advertisements and emails, and the structure of them to see what the response rates are.

So we'll break off a small segment of the class, send 20,000 emails to one group. And they get one format. 20,000 to another. And you can see material changes in open rates and claims rates coming from the two different samples.

So that's what we started doing, is taking something that looks like the long-form notice that was in the FTC study, and then putting a button in the middle of it near the top, where it's visible on a mobile phone, that says, file your claim, here's the information, so consumers know immediately where to go and immediately what to do. And they have some cues instead of reading the entire notice.

And we've seen that that materially drives up claims rates-- increases them by-- doubles them compared to the response without it. The same thing is true of banner advertisements in terms of what information is included-- whether or not the court logo in the advertising makes it look like spam? Or is it something else? Does it lend legitimacy? And those, again, can materially impact the way that the class members go through the whole process and whether or not they file claims.

The second strained threat are more the intellectual curiosity research that we do in terms of the natural experiments that exist within any case. And so we have a case where, for example, we-- you know, it involves several million consumers. We had text messages going to as many as we could, but not all. We had emails going to as many as we could, but not all, mailed notice, and then a published notice campaign.

So you have cells where class members received multiple communications. Some received an email and a text. Some received mail and a text, just different combinations. And you could see the different response rates. This controls for the type of case. It controls for everything across the way. And you can see how the impact of the type of notice that they received and the multiple waves of notice drove up claims rates.

And then the final example is in ERISA litigation has been largely immune from email notice. And ERISA litigation or 401(k) fee litigation is really interesting, because it's something a lot of people care about. It's your retirement fund, and claims rates in those settlements drive north of 40%. And you can see-- but not everyone provided their email address to their 401(k) plan administrator, and instead get mail.

So you've got segments that can receive email and segments that receive mail, a mail notice. And you can see the difference in their response rates. And the differences are along the lines

of what you see in the study. And it's been repeatable every time.

HAMPTON
NEWSOME: OK, great. And so we have a couple minutes. I'd like Shannon and Nicole, if you wanted to, weigh in on this. And then I'd like David, you've got some research that you're working on, so I'd like to help you-- give you a chance to talk about that. Shannon, briefly, do you have anything you--

SHANNON
WHEATMAN: Yeah, I mean what Richard said. I mean it's really the natural experimentation that we can do within our cases that we are able to do with the resources that we all have. And the other thing that we've started to do, which has been invaluable, is to do surveys. So after someone files a claim, they'll get a survey that pops up. So this is only online at this point.

And we ask them how they heard about the settlement. So it's easy enough, if you're doing an online campaign, it's all digital. You have website analytics and data that you're getting from your vendors that you know how that's working. But the other components, we just never know.

And a lot of people who come to your website, they come in directly. That means they're typing in that website address. Now they might have seen an email and not trusted the link, and that's why they did it or saw a banner ad and remembered it later. But ultimately, to have a fair understanding of what drove in those claims, you need to have the survey data.

And so the survey data helps us within a case to fine tune our media programs so that we are using the most effective media. This is-- if we've gone through due process, and we're at the stage where we're stimulating claims, where we have greater flexibility in the media that we're using, so that allows us to be more effective with any budget that we have to spend on claims stimulation.

HAMPTON
NEWSOME: Right. Nicole, you're nodding your head like you know something about this.

NICOLE CHRIST: Well, yeah. I was nodding a little bit about everything in terms of the sort of organic testing that happens, because you have data limitations. So we had a case, where-- so in the past, when we've only had email addresses, we've emailed folks, asked them to provide their mailing address so that we can send them a check, so it's essentially filing a claim.

This year, we had a case where we had some mailing addresses, but about half, we only had

email address. And we did a PayPal payment. So we wanted to find a way to do a direct payment and avoid the claims process. And you know, the PayPal results were significantly better than any email claims process we've done. So--

ALISON That's fantastic.

FRANKEL:

NICOLE CHRIST: It continues to show the direct payment and, for us, has been successful. And there are other-- so we also did a very close look at over five years of cases that were FTC-specific cases. We just did this with our own data to sort of try to identify variables that affect check cashing rates. And we found very similar things to the study-- most importantly, that the most important variable in terms of predicting whether or not someone is going to cash a check is the check amount.

And we saw pretty specific points that drove up check cashing rates. The other thing that no one I think has mentioned that wasn't in this study was timing. So the longer away from the purchase of a product we got, we see less check cashing. And I think people forget that they bought the product.

And then it starts to look more like a scam. If they can't make the direct connection themselves, that yes, I bought this product-- that's why I'm getting a check-- then you have to overcome that extra level of skepticism. And so those are some of the things that we've been finding.

HAMPTON [INAUDIBLE]. OK, well, in the last few minutes, let's talk about the future, future of research.

NEWSOME: And David, you're working on a project. And if you could briefly describe it, and if other people have any thoughts about things that are going on or should be going on in terms of research, we'd love to hear it. Thanks. Go ahead, Davide.

DAVID SIFFERT: So the Center on Civil Justice, several years ago, hosted a conference on consumer class actions. And the conclusion, I think, was basically the conclusion that the FTC drew, which is that we don't really know what's going on in these cases. We don't have the data behind it. And if we want to figure out how they should run as well as possible, we need that data.

So we first did what the FTC did and went to the claims administrators. But not being the FTC, we couldn't get the claims administrators to give us the data. So the next thing we did is actually what Brian just suggested is go to the judges, because the judges can order the

claims administrators to turn over data. The first thing they ask is, why should we do this?

We get claims administrator reports on our dockets already, and we explain to them, if we get this data, we can, for example, build you a piece of software that says, you've got this proposed settlement in front of you. Here's how it stacks up to cases that look similar, not just all cases that have ever happened, which in all fairness, even that they didn't have access to.

But we can even have algorithms determine which cases are likely to look similar to each other and give the judge a relevant sample to compare it to. And so the judges get excited, and they say, OK, so what do we need to do? And we say, well, you need to order them to turn over the data. And they say, what data?

And here's where it gets tricky, which is the judges aren't going to ask claims administrators to do something that's incredibly burdensome for the purpose of research, because that's not their job. Their job is to resolve the case in front of them. So we have now been working with claims administrators to try to figure out what the right template is for data to be turned over in such a way that it can resolve some of the limitations I mentioned earlier and get real substantive information that can help look at a specific case and say, how is this case working and how should this case be working, but at the same time, not overburden claims administrators.

So that was an ongoing process. Ed [INAUDIBLE] has been extremely helpful in it, along with Warren Brown, BrownGreer, a number of others. But the current state of it is that we need help from claims administrators to figure out the best way to sort of put together a template, much like the one the FTC did, under the limitation that, unlike the FTC, who can just say you have to turn this over, the judges have to keep the research interests weighed against the expediency of the case.

HAMPTON Right.

NEWSOME:

ALISON FRANKEL: David, can I ask you a question about this? I'm noticing when I read motions for preliminary approval that-- and this is purely anecdotal-- I feel like I'm seeing more disclosure of claims rates. And is that useful to you? I mean, for me, it's sort of hit and miss, but--

DAVID SIFFERT: The problem is--

HAMPTON David, there's your hook on the floor.

NEWSOME:

DAVID SIFFERT: The problem is that the ad hoc disclosure in a PDF is very hard to put together into a data set. We want to make a big data set that we can make public. We would love to put together our analytical tools that judges can use, that anyone can use. But we want this data to be available to all researchers-- claims administrators to help them make their jobs better, people like Brian, who love to get their hands dirty with this data, to figure out whatever they can figure out.

And ad hoc disclosures like that are quite difficult to put together into a data set. So it's not that it's not useful. It's just that if we want to take it seriously, we need something different.

HAMPTON NEWSOME: David, have you have you looked at the data that's coming into the Northern District of California in their new guidelines?

DAVID SIFFERT: Yes, I'm very glad you raised that, because we actually worked with the Northern District when they put that together. Though, what they're asking for is excellent, we have reached out to them to try to get that data reported in a very specific format to help with data analysis. We're not there yet, but hopefully will be.

The main-- it's a huge step forward. And it's an amazing thing that the Northern District did. It's still not as rich as what we are hoping for. Mainly, the individual level data that we're hoping for isn't in there. It's mostly just case level data, and the individual level data can be very important.

HAMPTON NEWSOME: OK, great. Well, this has been a great discussion. Maybe we should have made this panel four hours long. But really appreciate it. And we will move now to the Panel 3, right? OK, thank you.

[MUSIC PLAYING]

ROBIN MOORE: So this morning, we've been talking about sort of how the system is working currently and some of the research and issues that are being looked at. And this panel is actually going to focus on the future, what kinds of things we can do to improve the class action notice system. So I'm going to-- most of these folks here have been on previous panels, but not everybody. So as we've done before, I'd like everyone to just introduce themselves quickly, and then we'll jump right into it.

ELIZABETH Hi, Elizabeth Cabraser, Lieff Cabraser lawyer.

CABRASER:

BETH CHUN: Hi, I'm Beth Chun. I'm an assistant attorney general with the Office of the Attorney General at Texas Consumer Protection Division.

BRIAN Ryan Fitzpatrick, professor at Vanderbilt Law School in Nashville.

FITZPATRICK:

HON. Jacqueline Corley, magistrate judge, Northern District of California in San Francisco.

JACQUELINE

CORLEY:

MATT Hello, Matt Garretson. I'm a principal in Signal Interactive Media.

GARRETSON:

AMANDA ROSE: I'm Amanda Rose. I'm a professor at Vanderbilt Law School as well.

SHANNON Shannon Wheatman. I work at Kinsella Media.

WHEATMAN:

ROBIN MOORE: Great. So Matt, I'm going to direct the first question to you, and that's, what tools do we have right now that we are maybe not using as effectively as we could, or maybe that we're not using at all to get effective notice campaigns delivered?

MATT Sure. There's three things that come immediately to mind, and the first being the use of large
GARRETSON: consumer modeling or consumer data files. Our organization works with a lot of political campaigns, and that's the history of where we get our data and approach.

But there's 250 million Americans in these consumer data files that you can model to see which-- if it's a consumer case, what type of consumers take their news where, what products have they bought in the past, what their interests are, so you can link Google Ads to those type of inquiries and the like. So consumer data files-- and there's many out there-- but they're pretty robust, and they're very informative.

The second is others have talked about that the A/B testing. We refer to it as pre-programmed research and testing. The Equifax case-- I know we got a lot of press, but we also did some different approaches there that I think were very impactful, such as doing surveys and focus

groups.

And so we were able to test where people get their news, what messages we think people are going to react to, and then slicing millions and millions of people into different little cohorts and serving up that message in that media to that cohort versus thinking of a class as just one big whole. Various messages and various, obviously, media approaches are going to work for different slivers of the whole.

And the third, which is obviously common in political campaigns but rarely done in class actions, is this kind of this notion of exit polling. It's obviously easy with Equifax since there's-- we could go around the room here and poll a statistically relevant survey-- or I'm sorry, sample.

But exit polling to figure out how people-- if we went in with a strategy on the front to do pre-programmed testing and the test messages, then we can follow up after the fact and actually see if we were right. And that informs the way we read surveys and data moving forward. So those are the top three that come to mind.

ROBIN MOORE: Are you employing these in sort of a direct notice campaign and publication notices, or how do you use those in your practice?

MATT GARRETSON: Yeah, definitely in direct and publication. So in direct notice, while others have talked about it, obviously, at length, and your study demonstrates it, is looking at various subject lines and wording choices and email campaigns for direct notice is obviously quite practical. We actually haven't been involved in many campaigns that send paper notice.

I think it's not very effective, and it's certainly in our sweet spot. But with respect to email notice, we-- same thing-- take them through surveys, take them through focus groups, use the approaches you use of showing sample inboxes and see what people are going to click on. Those are very effective for targeting direct notice.

ROBIN MOORE: All right, so I'll throw this up to the rest of the panel just to get reactions to that approach. Is that something that you've seen in your practice? Is it something that you think would be useful? Anybody? Or we can move to the next question.

SHANNON WHEATMAN: Can I add-- can I add, Robin, that one of the things I think that would be very helpful-- and this was hit upon in the first panel as far as when you're in discovery, things that you might request-- you know, as a media provider, we are very limited. We have a very limited amount

of time to both educate, engage, and try to persuade someone to take an action.

If we're dealing with a big brand, such as Volkswagen, which we did have this data in Volkswagen, but if we can get information from the defendant as far as what marketing they've done, what surveys they have done, because sometimes we don't have great data on people who've bought a certain product, but that defendant has done surveys.

So that could give us information that would help our media program. What different things have they done online? What has worked? Can we get their media plans they've done in past cases? Those are things that we don't usually get, but it would be very, very helpful if it was requested during discovery so that you could provide it to your notice provider. It's going to make our programs more effective if we have that information.

ROBIN MOORE: Elizabeth, you're nodding.

ELIZABETH CABRASER: No, that is really the gold standard. And if there is a case in which the defendant does not want to share that information, and often they don't, you can do it yourself. You just-- you go and watch and look and see where the defendant is advertising its products or services. That's-- it knows its market, and so that's where your notice goes. And that goes for all sorts of notice, whether it's publication, traditional publication notice in print media or television or radio spots.

You know, I cringe when I see a notice provider give me a publication format that includes the *New York Times* and the *Wall Street Journal*, and I know that my class members are reading *Road and Track* and *Truck Trend*. And that's narrow casting publication notice, but it's very, very effective.

The messenger is trusted. We know that people are reading and engaging in those publications or watching those TV shows or radio stations. And so that's where we want to be, because automatically, our message is going to be more trusted, more interesting, and more effective.

ROBIN MOORE: That's great. And this brings up sort of a corollary point, the kind of general media-- and this is focused on a publication notice, obviously-- a general media campaign versus something that's more targeted, like what you just described, or possibly targeted through social media or other avenues like that. Just curious if you've had experience with that, what you think about that in terms of what the future holds.

ELIZABETH CABRASER: Well, it's every state of the art class action notice campaign or claims stimulation campaign is going to be multimedia from now on. It's not an either/or situation, because the media are synergistic. And the key is picking the appropriate mix of media for the class and for the settlement. Social media is very inexpensive. Email is inexpensive.

Print publication is traditionally more expensive, so you want to use it wisely and well. And by the way, having your case publicized on the web's home website of the court that you're in is totally free and totally trusted and is a way for the other-- the messages going through other media to become trusted. That is the gold standard.

So if you want to overcome the distrust, if nobody wants to open the email, it might be spam. If they see through a press release, through something the general media is picking up, that this is a real court case, it's really happening in a real court, and they can go to that real court and check up on it, then you've automatically gotten through that barrier. But all these components of a notice campaign, the whole is going to be greater if it's designed properly than the sum of its parts.

And so you have to design the different aspects of this to work together. And when you're doing the repeat contacts and repeat messages, which are important, you sometimes want to vary the media. So you want to have a different schedule for social media as opposed to the email. In long term claim programs, we always have reminder notices, so 30 days, 60 days before that claims period is over, we always get a notice out there to remind people. And that stimulates the claims.

HON. JACQUELINE CORLEY: So Elizabeth, are you saying that you think it would be helpful if the court, say, had on its home page a little tab, and you could go to it, and the court would list all certified class actions just listed there or something and maybe the names of attorneys or something so that someone could verify that that is a class action?

ELIZABETH CABRASER: You know, that would be extremely useful. It's also a lot of work for courts. And some courts have greater capacity than others and are more interested than others. You know, no two district court's websites look exactly the same.

I think at least the cases that have either already attracted a lot of media notice or are larger cases could be featured. The more dense the content gets on the front page of any website, the less navigable or user-friendly it becomes, so there's a balance to be struck.

But I think-- and there may be discussion of this-- I think that the more we go to trusted official or academic repositories of class action data and information that are not commercial or not case-specific, and people get-- class members get used to, oh, there's a class action site. I can go and check and see how my class actioner is doing or whether there's a class action about this product or the service, because I'm concerned about it or worried about it.

That's going to increase front end consumer awareness of class actions, both their own case and class actions in general. And I apologize for waxing on about this, but I am all about ending the concept of class actions as involving a bunch of passive beneficiaries, who are contacted for the first time at the end of the case.

A class action should be participatory. People should care about them. This is something that consumers can do, and while courts can't embed social policy in the procedural rule of Rule 23, consumers sure can utilize class actions more actively to promote deterrence and better practices. And it's my job as a class action lawyer to encourage people to do it and make it easier for them to do that if they want.

ROBIN MOORE: Great.

BRIAN FITZPATRICK: And I think Elizabeth is really right that the central repository is-- I know that's one topic that you want to talk about, Robin, on this panel-- but the central repository, where you can go to find all the class action settlements or class action cases, that this is a very cheap and easy way, I think, to dramatically increase not only people's participation on the front end of a case, but claims rates at the end, because if there's one place you have to go, and it's known to be credible, then people can sign up on the email list. I do this on a website, topclassactions.com. I get an email every day.

[CHEERING]

And it's a nice source. And we could do things like that. I know my colleague, Amanda, is working on a central repository idea that's run by the government. I'm sure she'll tell us a little bit about that, but I think central repository that has a credible operator, I think this is an easy, easy, easy way to dramatically improve our claims rates.

ROBIN MOORE: Yeah, we're going to get into the trust issues in just a minute. But I just want to close out the discussion we're having about methods of reaching people and ask Shannon, what other-- are there nontraditional methods that were-- we're not really using yet or using very much yet?

And I'm thinking about, for example, an in-app notification or other things like that that you see as being something that will be more prominent in the future.

SHANNON

WHEATMAN:

You know, we end up going to-- I go to at least two conferences a year, digital conferences, media conferences, just to hear what people outside of our industry are talking about. One of the things that they're talking about for the future is that personalization is just going to continue to grow. I mean right now, we are able to take a video. Maybe we use it for a TV spot, and we're able to personalize that and send it to people through email.

So they are talking about there's a possibility down the road that you can be delivered that while you're watching TV, because Xfinity and DirecTV are collecting so much information on their customers, not only information that you've provided them, but they go out to third parties, and they get additional information on you.

So right now, the ads that you're seeing on TV, it's likely your neighbor seeing different ads, because they have different data, and that person might be more likely to be buying a toy for their child. And you have a couple dogs, so you might get more commercials that are pointed towards pet owners.

So I think in the future, that's the possibility that there's just going to be more personalization. Even banner ads, as they're being delivered, can be more personalized. They're even talking about the fact that these things might say somebody's name on them, which could be problematic, because, obviously, multiple people use a computer, and there's multiple people in the household.

But you know, I think it's the personalization. Studies have found that 71% people are more likely to engage with media if it's personalized. So I think that's going to be in the future. It might be five years away, but I think that's what's going to be.

ROBIN MOORE:

Does anybody-- Judge Corley? I thought you might have something to say.

HON.

JACQUELINE

CORLEY:

I guess I hear that, and I get concerned. I mean it's sort of like you have a TCPA case, and the best way probably to give notice would be a text. You can't send unconsented to texts, so I want to get notice. And so I don't know that notice is always the end all be all, that there's a balance.

And we see all these privacies. And I don't-- you know, people actually get uncomfortable sometimes when you look up something on the internet, and next, all the ads show up on your

computer. And I think I would be freaked out if my name was there. I might be upset.

And so I do think courts and lawyers and everything are going to have to weigh that at some point, there's a balance. Like some people may not get notice, but maybe they don't want it. In other words, I think the researchers should also find out, well, how much effort do I want them to make to give me notice? And maybe I'd rather just be left in the dark than having you data mining or sharing all this information or [INAUDIBLE].

SHANNON

WHEATMAN:

Well, and privacy is so huge. You know, when we go to these conferences, especially with the Cambridge Analytica scandal, so there are things that we used to be able to target better on Facebook that you can't target directly on Facebook. You might be able to use third party data to do it.

But even Safari and Firefox now are blocking cookies, and that's the way that these third party data providers are getting information and our networks are getting information on people. So if you're coming in through those browsers, we're losing information. And it's going to make it-- and they're going to be able to respond to it probably pretty quickly. But at this point in time, it looks like some of the targeting capabilities that have been great for us are going to go away. And obviously, there are these privacy concerns. People don't like it.

ROBIN MOORE:

All right, great. So Judge Corley, you've now had a year with the guidelines out in the Northern District of California. I'm wondering if you have any observations on additional pieces of information that, you know, aren't in the guidelines now or anything else that you think would be useful for courts to have in evaluating these settlements.

HON.

JACQUELINE

CORLEY:

I guess first, I think it'd be useful to have the information that we asked for in the guidelines, because we're not-- I mean the number of settlements that get proposed that the lawyers haven't even read the guidelines might or might not surprise you, particularly the smaller cases.

And so actually, I think what we need to do first is make sure we're actually getting all that information-- in particular, the post-approval information it asks for. As one of my colleagues, Judge Chhabria, said, what always bothered him was we'd sign off on it, and then we'd just hope that what we said would be done is done. But we actually don't really know.

And so that's what that post-distribution requirement is. But I'm not sure, actually, how much that's actually being enforced or required. And so the first thing I think we need to do is, as a

court, is make sure that we're actually getting that data.

BRIAN Give back the attorneys fees until you get it.

FITZPATRICK:

HON. Now he's trying to pick a fight.

JACQUELINE

CORLEY:

ROBIN MOORE: One of the things that Brian mentioned in the last panel is this-- you know, the possibility of courts to order A/B testing. So I'm just curious about your reaction for that.

HON. No.

JACQUELINE

CORLEY:

BRIAN I don't think you can say you're not going to approve your settlement unless you do notice this

FITZPATRICK: way.

HON. Oh, no, no, no. I thought more it was--

JACQUELINE

CORLEY:

ROBIN MOORE: Not for research, but--

HON. No, not for research. Oh, no, of course. We can dictate-- and we do all the time.

JACQUELINE

CORLEY:

BRIAN So you could say, I want you to do notice where half the class randomly gets a letter and a half

FITZPATRICK: gets an email.

HON. No. No, you can't do that, because you're doing that for research purposes. And I think that's

JACQUELINE inconsistent with Rule 23.

CORLEY:

BRIAN Well, you're learning about what's best to give notice to class members.

FITZPATRICK:

HON. JACQUELINE CORLEY: For the future case, for the future case, not this case. But when I approve a settlement and notice in this case, my duty as the judge is to ensure that those class members-- I agree with you on a going forward basis. That might be the best way of doing it, but I don't think I can do it.

As the panelist said in the previous panel that we do have settlements, where there are-- we have some emails, and we just have some things. And you can go back and compare that data to do it. But I actually think I would get reversed in a nanosecond when I do what you suggested.

BRIAN FITZPATRICK: OK, what if you did this, Judge? What if you said, everyone gets both. Everyone gets both, but we're going to order it differently. The first half of the class gets an email first, and then later, they get a letter. The second half of the class gets a letter first, and then later an email. And we'll see what the claims rates are from the first round versus what happens after they get the second notice.

HON. JACQUELINE CORLEY: I have to say, Brian, I just think that judges in deciding cases cannot be in the business of doing things for the primary purpose of facilitating research. I just don't think that's the oath or my obligation or responsibility, which I know, because I get these letters all the time. Somebody's asking you to do things, and I know it's frustrating, and more data would be better. But I think our oath and our responsibility is different.

ROBIN MOORE: Yeah, and I think Elizabeth wants to chime in, and then we're going to tackle the next issue.

ELIZABETH CABRASER: Yeah, I mean the lawyers can be made the Guinea pigs in these experiments. The class members can't, because they've only got one shot at being able to participate in a particular class action. But I think what the guidelines do is just that. I mean the lawyers are the Guinea pigs in the experiment, and they also are required to read the directions for the experiment.

And I have-- I got two reactions on the same day shortly after the guidelines came out from two colleagues, who do class actions. And the first one said, this is fabulous. I'm printing this out, and I'm going to take it into every settlement negotiation I have, because now I have-- now it's true what I've been saying. This is what we have to do. This is what is needed. This is what is best, and this is what's going to get a settlement that can be approved.

And the other one said, why do the judges hate us so much? So that seems to be at the extremes. And you know, the answer to the second question is, well, because so often,

settlements come in that can't be approved or that call on the judge to do too much course correcting. It's one thing to have a court make additional suggestions to either the content of a class notice-- and I always hope that judges do that, because they are reading it as generalists.

It's another experience to have a court tear up your entire notice program and hand it back to you in pieces, because it just doesn't work. You know, it's a cookie cutter notice, and I think the one thing that so many people have said this morning is that there are some things that can be studied about class actions, and the FTC has done a remarkable job given the complexity and the limitations. But there aren't any two class actions, and there aren't any two classes alike.

And I think that that is one of the points that the guidelines are making by requiring the lawyers involved to really, really think about what is best and practicable in a particular case for a particular class, and then to document it. So at least the data will-- the data will accumulate going forward. It is a research project. It's just a research project that is running in the background of some very real cases on behalf of very real people.

ROBIN MOORE: All right, so let's pivot now to the really, really difficult issue that has run through this entire morning, which is what we can do to improve consumer trust in these notices. You know, there's been a little bit of talk about standardization. And Brian, you started to touch on this a little bit with the central place, but standardization, just in terms of the notice itself, you know, is another potential way of getting consumers used to or class members used to what a notice looks like. So I'm just curious about your views on that. Yeah, go ahead.

BRIAN FITZPATRICK: So I think when we're talking about standardization in the form of direct mail, I think there might be some benefit to having a notice look the same. I worry a little bit if we standardize the email notice that then the spam people just know what to make their spam look like. So it's kind of a whack-a-mole problem with the spam people.

And so I'm not-- I'm not sure if standardization is a panacea for the emails, although I see little downside to it for direct notice. That way, people will recognize it for what it is. I guess you could say the junk mail people will try to copy it. But I think the junk mail people have all moved to the internet.

BETH CHUN: Well, I actually would disagree that the junk mail people have all moved to the internet. I mean they're still everywhere, so we see them still continuing to use direct mail to people. We see a

lot of it coming through phones, either through text messages and through phone calls.

And so I agree that there is that risk of, with standardization, it does allow these scammers to take advantage. I can't really think of any specific instances of that occurring here, but I just anecdotally in experience as a government regulator and seeing all the scams that come into our office, I think that there is always a risk of that.

But I will say, on the other hand, from wearing the hat of trying to evaluate fairness, if there is a standard to evaluate from, I mean that can help us from that perspective as well and also help us and our consumer redress that we do for ourselves, if there is eventually enough data to come up with a standard that is most beneficial to people.

ROBIN MOORE: Does anybody else have any views on the standardization?

AMANDA ROSE: I think that you need standardization, that you need it coupled with centralization. And you need it coupled with the trust that government provides. And so I think the idea that's been discussed a bit about a central repository could do much more than simply be a site where court documents are housed that someone, if they had the initiative and wanted to check the veracity of a case, could go and look. It could itself be the source of notices.

And so I'm working on a paper called ClassAction.gov, where we would have a government agency that ran this website, but also was the source of all email notices, was the source of all direct physical notices so that there was, in combination with consumer education and publicity, everyone would understand exactly what they were getting when they were getting a class action notice and would be directed to an official trusted case website housed on a government server, where the settlement website and case information prior to settlement would be available.

Not only would this solve all the sort of data limitation-- well, let me say as well, the claims processing could be done through this interface as well. If the federal government served as sort of the escrow agent for the distributions of funds, and claims were submitted through this website, we would have clear tracking of all distribution data in all cases.

So I think that we need to be thinking bigger than we're thinking. And I think that the report suggests that the trust barrier is significant, and technology alone, without addressing it, isn't going to get participation rates up to any acceptable level.

ROBIN MOORE: Elizabeth, you look like you have a reaction to that.

ELIZABETH
CABRASER: So I had several reactions. I don't have a good poker face, so yes, centralization and I think developing official class action notices as a recognizable brand, much as trusted products have done, makes a lot of sense. You know, the utilization of the court seal I think is a step in that direction.

But I think there could be a lot done at very low cost to create a brand for the courts. I mean the courts-- I get an email from the courts that have profiles of judges and such. It's very official-looking, but it's very friendly. It's very nice. I'm pretty sure it's not fake. I think it's really the US courts. And so I think the courts have taken a step in that direction. It could go further.

The thing that I worry about in terms of centralizing the actual process of giving notice and administering claims is that a state of the art program in a class action can cost from \$3 to \$5 to \$10 million. And there is a dependable source of funding for that right now, and it's the parties, either the defendant or the class action fund.

And the court is there to make sure that that money is all spent and well spent and produces a product I worry about surrendering that process to central planning, perhaps an unfunded mandate, where the program doesn't actually happen, because there's not the budget for it, where it takes so long to set up the program that the settlement is a year or two old.

And we know that time is money. Literally, time is money in class action settlements in terms of getting the claim program out or the money out there ASAP, because the longer it takes between the initial purchase or the initial fraud or whatever it is and the ultimate claims process, the lower the claims rate. So we know time matters. Immediacy matters.

It also matters being able to get the claims process going or the monetary distribution going as soon as possible, after final approval by the court. That's one of the biggest things that class members say they are surprised and satisfied about in class action cases, which is that the money actually gets to them, and it gets to them relatively quickly. So those are the challenges that I think would need to be addressed by having an official body of any sort take on all these tasks.

Right now, for all the complaining we have about various notice administrators and claims administrators, at least it's a competitive industry. And the industry is-- the competitors are always striving to top each other and be more innovative. And that's where a lot of these

innovations have come from is, you know, Shannon versus Todd-- you know, who can come up with a better program for the same dollars, and who can reach more people and motivate more people for the same dollars? And so I'd want to preserve that.

ROBIN MOORE: Amanda, did you want to respond, and then we'll move forward?

AMANDA ROSE: Sure I think that funding is always an issue, and it needs to be clear that it would be secured. You know, there are places where competition is warranted, and there are places where centralization and government provision makes more sense. I think that because of the trust barrier, I mean the claims rates are over 90%. These are the best cases, as David was emphasizing on the last panel, the very best cases, the biggest cases by the best claims administrators filed in federal court.

The numbers would be even more depressing if we looked at the whole universe of class actions that are out there. So the results of the present system seem to be really deserving of change, one, in terms of timing and efficiency, obviously. I think that government can do well, but I think you're right to be suspicious.

One other thing to mention is if there was trust in this system, if you were making claims via this portal, and you were more willing to give account information or PayPal information, you could turn into electronic distribution what today is much more lengthy paper check sending. And you have the FTC study. You're dropping off a lot of people who are cashing checks.

So there could be aspects of it that would lead to quicker distribution and higher check cashing rates. But you know, obviously, it's a big idea and a big change, and there's concerns when we interpose government. But I think the system now is clearly, clearly broken, particularly if we look at the broader range of cases.

ELIZABETH CABRASER: What if it were a combined program, where that, what you just described, were a portal for claims, but not the sole portal for claims? That would enable you to get to do the research and to get data. It doesn't interfere with the familiar functioning of a class action notice program. But it would-- it's just, you know, an additional trust builder for people that would otherwise be concerned.

How do I know this is a real class action settlement? Well, you know it's a real class action settlement, because one of the ways that you can provide information or make your claim is to go to this government site and do it there, if you want.

AMANDA ROSE: There are lots of different permutations one could imagine. I mean I don't know how bogged down we would get if-- I mean you would still have notice administrators designing notice plans. It's just that the email notice itself would come from this particular address and that the physical notices that the parties would still have a role in crafting would go through the government center.

I don't know that that's going to be as much of a clog point as we might anticipate. And it would allow for some screening, centralized screening of best practices and allow for standardization. But I think those are all really important points that we need to be thought through.

ROBIN MOORE: Yeah. And go ahead, Brian.

BRIAN FITZPATRICK: I just had one quick comment about the repository, and that is even if you don't want it to do everything, like Amanda proposes, it still would be very easy for the government to just set up a website that lists each class action settlement as the settlement comes in with a short description about what the case is about and maybe what the deadline is, because the Attorney General of the United States under CAFA gets a notice in every single proposed class action settlement in federal court. The attorney general could literally just give those notices to you, and you could put them on a website with just some basic information. And voila, we have a central repository.

ROBIN MOORE: Or an agency that's not us, perhaps.

BRIAN Yeah

FITZPATRICK:

ELIZABETH CABRASER: The attorney generals of all the states get them, too. They have to under CAFA. And so you wouldn't want to impose an obligation on all of the attorneys general to do that. But there are some states where the consumer departments are very active, and that may be something that they want to do.

ROBIN MOORE: Beth, did you want to weigh in?

BETH CHUN: Well, I'm not sure if I want to weigh in on the issue of whether we want to add these to our website or not. But I will weigh in on our role in class actions and CAFA. As mentioned, we do receive notice of class actions, where our states have class members in them. And states

regularly discuss and review these notices that we receive pursuant to CAFA. And we, in Texas, really appreciate the opportunity to be able to review these notices for fairness.

We-- after we have these discussions with other states, often, we will hold calls with class and defense counsel to discuss any questions or issues that we may have seen from settlements and mainly just to learn more. And as a ballpark amount, we probably have about three to four of these calls per month among different states who are interested.

We frequently do raise concerns regarding class action notices as well, and to the extent possible, a lot of times, we have seen that the bar is willing to clarify any potential issues or errors that we may have identified in notices, of course assuming that notice hasn't gone out yet. And then if notice has gone out, we've seen some willingness to update the settlement websites to then reflect those changes that we may have noticed that might need to be made.

I think that it's really useful for us to be able to have this role. I think it benefits both sides or all three sides in a way for us to have this opportunity to discuss informally about the notices that we receive, because that may head off us needing to raise those concerns publicly. And I think that the earlier we can receive notices pursuant to the statutory requirements, the better, because then we can have those more informal discussions.

And there are occasions where states will file amicus briefs if we still have concerns. But that is not as frequent. Lately, we've filed amicus briefs that concern coupon settlements, distribution of attorneys' fees, and cy pres awards, and I'm using sort of the royal we. I'm not representing all states here today. But I'm just explaining my experiences as part of this group of states.

ROBIN MOORE: OK, great. So you know, while we're talking about registration and centralization, one of the things that-- one of the important pieces here is how good the administrator is. And I'm just-- I'm curious, Judge Corley, if you feel like you have enough information when you're looking at a settlement to kind of make that determination.

Is this someone who's really kind of at the top of the game? Am I looking at kind of a mid-tier? Am I looking to-- looking at someone who's a little bit more like what Cam described earlier today, who just wants the cheapest notice possible? Do you have a sense for that? Is that information that would be helpful for you?

HON. JACQUELINE No, I don't have a sense for that. I mean, to be honest, we're relying on plaintiff's counsel that they've selected. I mean our guidelines try to get at that a little bit more. But we don't even

CORLEY: know very much about the industry or how it works.

And it really, whether we're going to-- I mean if you think about it, there's so much, as today's discussion has shown, there's so much for judges to just really go deep on. And you sort of have to pick and choose what you're going to-- what you're going to do that with.

Certainly, in a case, a larger case with more money in which notice is going to be more complex, you'd want to know more about that. And good lawyers will give you, when they're moving for preliminary approval, they'll give you all that information-- the background, the resumes, the other cases that they've done. But that's the exception, not the rule at all.

And hopefully, with our guidelines, counsel will do that, tell us more often how they even came to select this particular administrator. But for the most part, we're relying pretty much on class counsel.

ROBIN MOORE: So if there were some sort of a repository-- and it could be just like this is Administrator A had the following-- I don't know-- 50 cases last year, and these were-- you know, this is how it turned out.

HON. Yeah, I don't know if there's some way of rating--

JACQUELINE

CORLEY:

ROBIN MOORE: Or rating or something like that.

HON. --them somehow, or they are certified by, engage in these best practices, or something. That might be helpful. I personally-- I don't know enough to know if this is a big issue or not in terms

JACQUELINE
CORLEY: of the industry out there.

ROBIN MOORE: Elizabeth, do you have a view on this?

ELIZABETH
CABRASER: You know, as class action attorneys get to know the notice providers and experts and claims administrators very well over time, and some are better at certain types of class actions and proceedings. You know, there are certain administrators that you would want to use in a personal injury class action settlement arising out of a mass disaster, where there has to be a lot of personal interaction and personalized private claims portals, a lot of individual attorneys representing class members within the class. And then you have the non-registered retail product consumer class action that requires a different skill set and orientation and

communication skills.

So we are looking at providers that way. If it's a big enough case-- and, of course, the guidelines encourage this-- we will do competitive bidding based on the quality and the fit of the notice program as well as price, and, of course, we'll disclose that to the court. All of these folks have CVs. Many of them have passed muster under Daubert, because they testify on due process and notice in a number of situations. They all have very informative websites. That's a lot of material for courts to digest.

We are charged, the lawyers for the parties are charged with doing all that homework first, and then reporting in, and making recommendations. And we have to live by them, because if we have a failed notice program-- and again, you can't correlate directly to a claims rate. But there have been failed notice programs, where somebody forgot to send mail to everybody in California-- a notice provider, not in this room who will go unnamed.

Of course, we wondered why we weren't getting any opt-outs or objections from California. So we had to redo the notice. So you know, we-- there is quality control there. We are accountable. The notice providers do file declarations and reports at the close of the notice program. So those are on file. Now they're all on file in separate cases.

Anybody under 25 could probably figure out how to do some data scraping and collect all of those declarations in the class action cases. It's laborious, but it could be done. Or the Federal Judicial Center or some law school could request that those providers simply send in a copy of their declaration, which has all the statistics on what the notice program was and how it worked, and they can do the same with their claims reports, which, by rule now in California and by best practice elsewhere, they have to file with the court at the end of the claims process.

So that data, it's out there. It's hiding in plain sight. It hasn't been correlated. There are important functions for centralization of data to fulfill to make the notice program better and to give courts an easier way of checking up on a notice provider.

BRIAN

Elizabeth, I think it is not the case that people are filing reports at the end about claims rates routinely. When I've had to look for my empirical studies for those reports, I find them in a small minority of cases.

ELIZABETH

Certainly, in the biggest cases, but certainly under the guidelines, you'll begin to see that

CABRASER: more. It wasn't required in every case, and there's nothing in Rule 23 that requires it. But it's been a best practice. It's been slow to gain steam, but if you want to see claims sliced and diced every way from here to eternity, if you go on the DeepwaterHorizonSettlement.com economic settlement page, there are monthly reports that run to 60 pages and more from the claims administrator that have an amazing array of charts and graphs. And that was a very large class action and had a lot of public scrutiny and interest.

That can't be replicated in every case. But slowly and surely, I think through the guidelines, you'll see more standardized reporting. In more of these cases, it'll become routinized, and it'll become cost effective to do in the smaller class actions. At least that's the hope.

ROBIN MOORE: Great. That's very useful. So I want to talk now about direct payment and new methods that we might use to get money to consumers or to class members outside of just sending a check. You heard Nicole mention on the last panel that we used PayPal in one instance. And I'm just curious about the thoughts that you guys have on these alternative payment systems.

And I'm going to pick on you, Matt, first because you haven't spoken very much in the last couple of minutes. So I'll start with you, and then we can open it up to the whole panel.

MATT GARRETSON: Well, certainly. I think they're highly effective. I mean if we polled everybody in here, what are the statistics, that 90% of Americans now or people worldwide-- I shouldn't say worldwide-- but Americans are trending towards smartphones. So it's almost as high as email usage.

If we were to poll those same people and ask what percentage of them had some kind of payment application on their phone-- Venmo or PayPal or Amazon or, you know, Google Pay, a Starbucks card-- they're going to have it on there. And so it's pretty clear that that instantaneous and secure payment route exists, and it's very prevalent, especially for consumers.

And then you can-- we've had experiments, where people have wanted to use payment cards, actually with the physical cards and found that the claimants have asked if that's what they'd like to do or class members ask if that's what they'd like, would universally say, no, I prefer to have an electronic payment.

So without getting into any more detail, I would just say there's a common sense application to it. There's a safety anti-fraud aspect to it. Might as well rely on proven technology that's spends their day in and day out preventing fraud, like a PayPal. And I haven't carried a

checkbook or cashed a check in probably five years, So I think that's where people are going.

ROBIN MOORE: Brian, do you have any thoughts on this?

BRIAN FITZPATRICK: Yeah. I think this is very exciting, and I think it's the future, because when I did my study, when you send people checks directly without any claim form, they don't cash them in the rates you'd expect them to. And so just putting the money directly in their account is virtually foolproof. And so I think this is very exciting. To the extent that more and more people have PayPal and Venmo and all these things, we ought-- and we have their email address, which a lot of times we do. That's why we're studying email notice.

If we have their email address, we ought to just be able to put the payment directly in their account and do away with the claims process altogether. So I've thought this for a number of years since I did my study on this, and I was very excited to hear Nicole say that you have tried it. And it appeared from her comments to be very successful. And so I think this is a wonderful direction to start thinking about.

Now sometimes when I've talked about it in the past, people have raised the objection of privacy. We don't want our email address to be given to someone else so that we can receive these payments. But it sounds like the email address is going to be given to someone else regardless. It's going to be given to the notice administrator to send the email notice. Someone is going to get your email address, whether you like it or not.

And so I don't see going the further step of putting the money in the account to be that much more threatening to privacy than giving the email to someone for the email notice would be. And so I think this is a huge opportunity we have to really get claims rates way up.

Nicole told me that when you send money to someone on PayPal using their email address, if they don't have an account on PayPal already, the email will say, the money is waiting for you. If you open an account, you can get it.

And Nicole also told me that the FTC had personalized that email to say, if you don't want to open up a PayPal account, that's OK. Give us a call, and we'll send you a check. I think that is an incredible way to do things. And I commend, again, the FTC for bringing on the forefront of the future by trying this out. And I hope it's something we try in other cases.

ROBIN MOORE: Elizabeth, did you have any views on this?

**ELIZABETH
CABRASER:**

I-- any way that we can, within the law, get money directly into people's accounts is going to be the gold standard. It isn't always possible, but for years, we were able to do it in cases involving banks and credit cards, because you can credit people's accounts. Or people on installment payment plans-- their payment can be made for them. Their payments can be reduced.

Those were always very difficult terms to get defendants to agree to. So this is another synergistic effect. The more often through innovation we can figure out how to get refunds, payments, compensation directly into the accounts of class members, the less an excuse there will be that, oh, we can't do that in this case, because it's too inconvenient, because there are workarounds. There are ways around it.

And yes, there will be cases in which, for security reasons, proof of having a particular property, you'll need to make claims. I'm hoping that those processes get simpler, and there's less and less for the consumers to have to do to fill out. We can pre-populate claim forms. That's another thing. If it has to be a claim form, a lot of that information can be pre-populated, and the class member can check it to make sure it's correct.

And that one more-- reduces one more barrier to getting claims made when they have to be paid. But if direct notice in whatever form is the gold standard of notice, direct payment is the gold standard compensation.

And by the way, sometimes old school methods work best. I'm working on a case right now, not a class action, but a case in which we are going to have to give notice person to person, because that's the only way that the victims-- this is the Northern California fires cases-- that's the only way many of the victims will trust the process, if someone actually authorized by the court comes to their encampment, comes where they're stuck, and talks to them about the process and gains the trust so that they will make that claim.

So again, it's always a mix of whatever is going to work in a particular case. And that barrier is always the trust barrier, and then the convenience factor.

ROBIN MOORE:

Right. Does anybody else have anything on this issue? Are we good? Then I think that is actually a perfect note to end today's workshop on. I want to thank again-- we're out of time. So I want to thank again everybody. Oh, actually, that's right. We have closing remarks.

ELIZABETH

Even better.

CABRASER:

ROBIN MOORE: Even better.

SPEAKER: Thank you very much. I'm acutely aware, personally, that we're past the lunch hour. So I'll be very brief that I-- like, Robin, I'd like to thank the panelists, as it was a terrific morning, that I'm particularly impressed that there were both big and small ideas. If you never play small ball, you often don't move forward at all. And if you never swing for the fences, then you're stuck in the same paradigm forever.

I've mixed a lot of metaphors there. But you're-- but I thought it was incredibly useful. And I want to remind everybody that we're open for comment on the workshop and on our research until the 22nd of November. So please comment. We're very interested in hearing your big, small ideas, and particularly critiques of what went on today and where we are and ideas for moving forward.

This is an iterative process, and we very much need your help. Thank you all. And thanks for coming.

[APPLAUSE]

[MUSIC PLAYING]