

Assessing 'The Value Of Class Actions'

By **Andrew Pincus**

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Gary Mason claims (in his recent Law360 opinion piece[1]) that class actions provide “significant benefits” to class members. But the study, conducted by Mason, who is a member of the American Association for Justice (the trade association for the plaintiffs bar), shows just the opposite

Mason says his study rebuts the findings of an earlier class action study conducted by my law firm for the U.S. Chamber of Commerce Institute for Legal Reform.[2] But Mason appears to have used the same methodology, and reached virtually identical empirical conclusions.[3]

The critical question is whether class actions generally deliver relief to class members. The answer: They don't.

Most Class Actions Deliver No Benefits to Class Members

The class action debate has typically been a battle of anecdotes: Class action proponents cite examples of cases in which class members benefited and class action skeptics respond with cases in which class members received little if anything.

Mason uses that tactic in the first paragraph of his article — but there are plenty of contrary examples. For example, a recent report discussed a class action settlement — upheld by a federal court in June 2016 — in which a settlement fund of \$800,000 was made available to class members in the form of gift cards. Only seven class members filed claims; the leftover gift cards were passed along to one nonprofit organization, which was unable to use them. In the meantime, the plaintiffs' lawyers pocketed a \$200,000 fee.[4] This example is not at all unique.[5]

That is why it is necessary to gather data on a group of class actions — something that is difficult to do, because the federal courts do not publish data on class action filings, let alone class action outcomes.

But every study that has tried to gather that information — Mason's, Mayer Brown's and one conducted by the Consumer Financial Protection Bureau[6] — reached the same conclusion: The overwhelming majority of class actions deliver nothing to class members.



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Mason found that 80 percent of resolved cases provided no benefit at all to class members — presumably because the cases were dismissed, the class was not certified, or the named plaintiff dismissed the action in return for an individual settlement.[7] The CFPB study put that number at 87 percent;[8] and the Mayer Brown study, 67 percent.[9] (Ironically, the Mayer Brown study criticized by Mason thus had the largest number of cases settled on behalf of a class.)

Mason says that these cases “are no different than individual cases that similarly fail to resolve in favor of the plaintiffs.” But there is a very significant difference: individual civil cases settle much more frequently than class actions — an average of 67 percent settle according to one study,[10] or three times as frequently as class actions, based on Mason’s data. That dramatic disparity by itself indicates that there is something seriously amiss in the class action system, because so many more cases are being filed that yield no benefit for class members. The fact that these cases consume judicial resources and still cost a substantial amount to litigate, yet yield nothing for class members, is highly relevant to any cost/benefit analysis of class actions.

Even Settled Class Actions Typically Provide Nothing to Class Members

Most of the settled cases in Mason’s sample involved “claims made” settlements, in which class members must file a claim to receive a benefit.

Tellingly, Mason does not disclose the claims rate for nearly any of these settlements. He argues that irrespective of the claims rates, these settlements produced benefits for consumers because they “made more than \$40 million in cash available to class members.” In short, Mason’s view is that the value of a class action should be measured by its potential benefits rather than the real-world benefits that class members actually receive.

That dodge is not surprising, because claims rates — to the extent they can be ascertained — are extremely low. (Not surprisingly, claims rates are rarely disclosed.) The typical claims rate in the Mayer Brown study was less than 10 percent.[11] The CFPB study claims rate averaged 4 percent, meaning that 96 percent of the class did not file a claim and therefore received no compensation.[12] Mason himself acknowledged earlier this year in a prior Law360 op-ed that “consumer class actions will at best draw claims of about 10 percent.”[13]

Mason says claims rates are irrelevant because who benefits from class actions is “often quite personal.” But perhaps the real reason for low claims rates is that class actions are for the most part designed by plaintiffs lawyers looking for suits with the best chance to survive a motion to dismiss and class certification rather than claims that actually matter to class members.

As common sense would suggest, what actually matters to consumers is whether a class action actually puts money in their pocket. Thus, as Judge Richard Posner of the Seventh Circuit has observed, the better way to calculate the value of a class action settlement is to determine its “ultimate value” for consumers, rather than looking at relief on paper.[14]

Mason also refers vaguely to “nonmonetary benefits” of settlements. But lawyers who litigate class actions recognize that these “benefits” are added to make a settlement look more substantial to a reviewing court, and often have minimal real-world value.

Mason identifies another group of settled class actions that “provided either a fund that did not revert to the defendant or an automatic payment to class members.” But he carefully avoids revealing where

that money went — and such settlements often involve “cy pres” payments to nonprofit organizations rather than payments to class members.[15]

Finally, Mason studiously avoids comparing the benefit to class members with the benefit obtained by plaintiffs lawyers — another critical element of the cost-benefit analysis. Again, that is not surprising, because it would be an admission against interest. One academic study concluded that for the cases studied, “although 60 percent of the total award may be available to class members, in reality, they typically receive less than 9 percent of the total” — making “the true beneficiaries” of the cases “the lawyers.”[16]

Mason ends with the bald assertion that “class actions send a message to corporations and deter them from engaging in unfair and deceptive business practices.” But that unsupported claim makes no sense: because cases that survive dismissal and class certification virtually always settle, the class action system doesn’t punish wrongdoing and exonerate the innocent. It imposes burdens on both — and therefore deters both lawful and unlawful conduct or, probably, is just chalked up as a cost of doing business unrelated to the merits of a business decision.

Empirical data about class actions is important. Logical analysis of that data is just as essential. Mason’s approach unfortunately flunks that test.

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[1] Gary Mason, The Proper Measure of the Value of Class Actions, Law360, Aug. 16, 2017, <https://www.law360.com/articles/954049/the-proper-measure-of-the-value-of-class-actions>.

[2] Mayer Brown LLP, Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions 7 (Dec. 11, 2013), <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf> (“Mayer Brown Study”).

[3] Mason’s criticisms of the Mayer Brown study’s methodology are bizarre, given his claim that he used a similar approach — although Mason does not provide any information about how he obtained his sample of 118 cases — in contrast to the detailed information provided in the Mayer Brown study. See Mayer Brown Study at 17-19. Mason faults our study for now being “dated,” but the study was published in December 2013 and examined cases filed four years earlier, in 2009. Mason’s study published in 2017 studies cases filed five years earlier, in 2012. Certainly Mason offers no support for his speculation that class actions have “evolved” since 2009 to be more beneficial for consumers.

[4] Perry Cooper, Charity Loses \$700K Award After Complaining About Gift Cards, (Corrected), Class Action Litigation Report (Aug. 16, 2017), <https://www.bna.com/charity-loses-700k-n73014463293/>.

[5] See Mayer Brown Study at 8-10 and 13-16.

[6] CFPB, Arbitration Study, at sections 6 and 8 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (CFPB study).

[7] Mason reports that approximately 20 percent of the resolved cases ended with a settlement, which indicates that the remaining 80 percent ended with no benefit to the class — Mason does not report that a single case produced a judgment on the merits in favor of the class.

[8] CFPB Study at section 6, page 37.

[9] Mayer Brown Study, at 7.

[10] Theodore Eisenberg and Charlotte Lanvers, What is the Settlement Rate and Why Should We Care?, 6 J. Empirical Legal Studies 111 (2009).

[11] Mayer Brown Study. at 7 & n.20.

[12] CFPB Study, at section 8, page 30.

[13] Gary Mason, What's Wrong With Consumer Class Action Settlements, Law360, April 14, 2017, <https://www.law360.com/articles/913600>

[14] Redman v. RadioShack Corp., 768 F.3d 622, 634 (7th Cir. 2014).

[15] E.g., Mayer Brown Study at 9-10.

[16] Joanna Shepherd, An Empirical Study of No-Injury Class Actions 5, 24 (Emory Univ. Sch. of L. Legal Studies Research Paper Series No. 16-402, Feb. 1, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905.