

FEDERAL TRADE COMMISSION WORKSHOP: "PROTECTING CONSUMER INTERESTS IN
CLASS ACTIONS"

PANEL SIX: EMPIRICAL ANALYSIS OF CLASS ACTION TRENDS: CURRENT KNOWLEDGE AND
FUTURE RESEARCH AGENDAS
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Earlier this summer, media reports related the tale of the continuing controversy between eminent astrophysicist Stephen Hawking and his colleagues over the nature of "black holes", those mind-boggling, hyper-dense regions of the universe where the normal laws of physics simply do not apply. The question debated by these folks concerned the traditional theory that because of the crushing force of gravity in these collapsed stars, no light or other radiation can escape from its surface and nothing inside the hole can be glimpsed by outsiders. As Hawking has asserted over the past three decades, all "information" of any type about the black hole is therefore swallowed up, forever hidden, and can never be revealed.

Unfortunately, we have a very similar situation right here on this planet. Class actions may very well be the "black holes" of the American civil justice system. Like those celestial bodies, class actions have enormous influence on everything around them and swallow up unbelievable amounts of energy. Class actions and black holes also attract considerable attention from all sorts of researchers who spend a lot of time and effort speculating about their features, their origins, their effects on other aspects of their respective universes, and ultimately what happens to them in the end. But like black holes, class actions also have the frustrating characteristic of revealing very little about themselves to outside observers. One would think that events that sometimes touch on the lives of millions of our citizens, that sometimes send blue chip companies into bankruptcy, that strike fear and loathing into the hearts of CEOs everywhere, and that are sometimes hailed as the only way to protect consumers and achieve real justice in this country would have been sliced, diced, and dissected ad nauseum like some poor withered frog passed around a high school biology class semester after semester. The

sad truth of the matter is that one does not have to travel across the cosmos at Warp Ten to witness a seemingly illogical paradox where humankind can know almost nothing about an important phenomena that regularly shakes our very universe to its core.

Back here on Earth, we run into two major problems in regards to understanding what is going on with class actions. First, there is a lack of *public* data for these cases despite the fact that they can consume enormous amounts of judicial attention and court resources. We get repeatedly calls at the Institute for Civil Justice from media folks and legislative staff posing the same set of questions: *How many class actions are there? Have those numbers been growing and if so, how fast? Where are they being filed? Who is bringing them? And what are they about?* All reasonable questions and we'd certainly be happy to give out the numbers if we had them but because there is no single point source for tallying these cases up, nobody really knows for sure. You simply can't go to the vast majority of court systems in this country and ask the clerk across the counter for a laundry list of all the certified class actions they've had to deal with in recent years. It just isn't possible.

The federal courts do perhaps the best job of tracking these cases within their jurisdiction but there have been questions about the accuracy of their transactional database in this regard and even if it was dead-on perfect, it would only reflect the experiences of a specialized, albeit extremely important, segment of our civil justice system. For a variety of reasons, the federal courts are probably not the filing forum of choice for attorneys bringing most money damage class actions involving consumer issues or personal injuries. One thing is for sure: studies that use federal court data exclusively have a real problem if they make a claim that what they see accurately reflects what is happening out there at the state court level as well.

Alas, the state courts are far, far worse when it comes to keeping tabs on putative and certified class actions. While individual local courts could probably tell you about recent cases in the class action pipeline, getting state-wide counts is almost impossible. California, where RAND is headquartered, traditionally had 58 separate courts of general jurisdiction because each county had their own judicial administration, with different record-keeping procedures, different case management systems, and different levels of priority given to tracking when a motion for certification is filed and how the judge eventually ruled on the question. I should note that California is actually moving quite rapidly towards

centralized state administration of its Superior Courts but our historic system of Balkanized courts may still be the common model for other states. Moreover, court administrators first have to make a difficult decision whether to allocate the considerable resources needed to review each case on their docket and to flag it when this particular pre-trial event takes place. If that isn't done, the information never goes public. With the tight budgets and staff shortages that are common in our nation's civil courts of law, it's a lot easier and a lot more justifiable to the bean counters for the clerks to be solely concerned with recording the facts of filing and termination and to ignore the messy stuff in between.

I should also note here that I am primarily talking about money damage cases in general because certain particular types of mass litigation, such as securities class actions and perhaps large scale civil rights matters, are sometimes tracked very closely by courts, by regulatory agencies, and by other entities. But when it comes to more routine or mundane cases involving, for example, overcharges by cell phone companies or insurers, court systems seem to lump such litigation indiscriminately with the fender-benders, the slip-and-falls, and the student loan debt collections. In terms of recordkeeping, a million member class action is just another docket number.

The second major problem that prevents "information" from escaping from the surface of these class actions is the lack of *private* data. Despite the fact that judges must review proposed settlements in open court, what happens after the order of approval is signed sometimes falls into its own black hole. Unless the judge requires ongoing disclosure, defendants and class counsel are under no continuing obligation at all to publicly report how a settlement fund (one that might have been touted by both sides during the approval process as the shining apex of one thousand years of Anglo-American jurisprudence) is actually being distributed. Even if only one class member out of a thousand or even a million is able to successfully complete the claiming process, the judge, and the public at large, will never know how poorly this particular resolution is serving the class in particular and our society as a whole.

It gets worse. One would hope that interested parties such as public interest groups, government agencies, and even private research organizations such as RAND would still be able to simply pick up a phone and call the principals in these cases of national import for a quick and accurate accounting of what actually took place. Even if the judge failed to require periodic or final reports,

surely the public-spirited defendant and the crusading class counsel would gladly fill in any gaps in the hopes of avoiding even the appearance of impropriety. But during our past research into class action outcomes, we repeatedly ran into attorneys for both sides apologizing--one assumes with great sincerity--that they could not possibly discuss any aspect of the case, including the distribution, because as part of the settlement process, they executed a non-disclosure or confidentiality agreement with opposing counsel. In other words, don't ask, don't tell.

And the lack of public and private data is most acute for putative class actions, those elusive matters where class treatment is actually or is likely to be sought but in fact are dismissed or resolved on a non-class basis prior to certification. Putative cases don't get a lot of attention in the overall debate because they don't have headline-making types of company-busting resolutions or the outcomes that affect millions of consumers. Nevertheless, they sometimes have enormous impact on similar litigation that does get certified in other courts, can result in inflated settlements on an individualized bases, and they often consume significant levels of defense costs. Unfortunately, nobody tracks them and nobody talks about them.

All of this leaves civil justice researchers with a number of options, each of which have serious drawbacks. One method to wade into the class action morass might be to do a case-by-case review of actual court files in the hopes of finding those rare beasts where class treatment is mentioned in complaints or motions for certification. Unfortunately, this is a hideously expensive approach. Another would be to obtain a list of class actions from a small number of courts that do track that sort of information and dig deep into their case files. Less expensive but generalizing what is found in those particular courts or geographical locations to the justice system at large is problematic. Another is something we at the RAND Institute for Civil Justice are trying now, where we identify a particular industry, contact a sample of companies within that industry, and then survey them on their class action experiences on a case-by-case basis, even regarding putative matters that are never certified. Not cheap either, there are real problem with this sort of voluntary cold-call survey, and what we see in one industry is not likely to reflect what is happening out there in others. Another method would be to comb through litigation reporters and electronic mass media sources for reports of class action filings and other case events. Here the issue is one of shortfall and one can never be quite sure that you aren't just picking up the most notorious cases while ignoring the run-of-the-mill, low dollar

settlements that exist below the radar screen. The bottom line is that there just isn't any single way to do this that is cheap, fast, scalable, and reliable.

So what's the answer? In a perfect world, every court system in the country would be required to immediately report to some central authority each and every time a motion for certification is filed, what the result of that motion might be, what were the details of any settlement agreement or other case outcome, and a complete description of the process for notification and claiming. In a perfect world, every judge in the country would, without fail, require regular reports of how any fund is being distributed and administered (including information about denied claims) and make those reports available to the public so outsiders could monitor the progress as well. In a perfect world, that same judge would always require, as part of the approval of any settlement, that class counsel and the defendants publicly disclose any and all payments made to attorneys in competing cases, to intervenors, and to objectors. And in a perfect world, all of this information would be easily available to everyone, so judges could use prior cases for benchmarks for judging the proposed settlement agreements before them, so researchers could do their job with hard numbers instead of conjecture and anecdote, and so policymakers could make quality decisions for ways to improve the outcomes of class action litigation.

Maybe that sort of rosy future is in fact possible. After thirty years of steadfastly declaring that the escape of any information at all from black holes was an absolute impossibility, Dr. Hawking announced to a shocked conference of his peers in Oslo this July that in fact there indeed was a very, very faint glimmer of light being emitted from these cosmic sinkholes if you looked very closely and waited patiently for a very, very long time. If the greatest mind of our generation can now see the light at the end of the galactic tunnel after decades of frustration, then perhaps there is hope for understanding a similarly thorny problem here on Earth that has brought us together for this important and much needed conference.