

**PRIVACY CLASS ACTION SETTLEMENT TRENDS: INDUSTRY  
PRACTICE OR IMPROPER INCENTIVES?**

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**ABSTRACT**

*Data breaches are an increasingly common and harmful occurrence for businesses and consumers alike. Courts struggle to evaluate the harm associated with such breaches of personal consumer information, especially in the context of large private class action settlements. This article gathered data from 80 data privacy class action settlements from 2010 to 2020. It examines and notes trends in the settlements over the last decade, including evaluating the practice of granting incentive awards to class representatives. Through the analysis of these representative settlements, the article found that the median incentive award given to class representatives was \$5,000, with that amount, on average, constituting almost one percent (0.7%) of the total settlement fund. In contrast, the median attorney's fees were \$1.3 million, constituting 35.06% of the total settlement fund. Part I examines the data set, the different types of settlements, the various avenues of relief, and the methodology. Part II looks exclusively at incentive awards, finding that though the median award of \$5,000 is in line with the Rule 23 reasonableness standard, courts lack a comprehensive framework upon which to determine and to base their incentive awards. Part III analyzes attorney's fees, which were not found to track onto the incentive awards. Finally, Part IV examines some relevant data privacy settlements that were not included in the data set, but that provide insight into trends that foreshadow courts' attitudes of data privacy settlements in the 2020s.*

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## INTRODUCTION

Data breaches affect individuals all over the world, with businesses, healthcare providers, federal agencies, and local entities proving to be vulnerable to cyber-attacks. It takes years to determine the full scope of compromised information,<sup>1</sup> and we are only recently able to determine the effect of the decade's prominent data breaches. In the private sector, practitioners increasingly focus their counseling on proactive incident response planning to data breaches, as mismanagement and lack of disclosure can result in hefty liability for their clients. Further, following large privacy breaches, the plaintiffs' attorneys typically rush to find a class representative to jumpstart a litigation effort. Therefore, private rights of action and consumer class actions are considered "anathema" even to privacy-friendly companies, while being the "foundational goal" for advocates.<sup>2</sup> But who are the real winners and losers of privacy class actions? Are there really so many consumer class actions that companies are just forced to settle for exorbitant amounts, with class representatives reaping rewards that are not offered to the entire class? This paper looks at 80 privacy class actions settlements from 2010 to 2020. Specifically, it focuses on incentive awards, finding that the median award aligns with the

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1. See, e.g., Sue Halpern, *After the SolarWinds Hack, We Have No Idea What Cyber Dangers We Face*, THE NEW YORKER (Jan. 25, 2021), <https://www.newyorker.com/news/daily-comment/after-the-solarwinds-hack-we-have-no-idea-what-cyber-dangers-we-face> (quoting the Trump administration's assessment of the lengthy process in determining the full scope of the hack on the federal government).
  2. Cameron F. Kerry & John B. Morris, Jr., *In Privacy Legislation, A Private Right of Action Is Not an All-or-Nothing Proposition*, BROOKINGS (July 7, 2020), <https://www.brookings.edu/blog/techtank/2020/07/07/in-privacy-legislation-a-private-right-of-action-is-not-an-all-or-nothing-proposition/>.

Rule 23 reasonableness standard with “coherence and modesty.”<sup>3</sup> This paper aims to be a helpful resource for practitioners, courts, and consumers as we move into the next decade of data privacy enforcement.

Currently, there is no comprehensive federal information privacy statute.<sup>4</sup> Instead, there are a number of state and federal consumer protection statutes that authorize a private right of action. As “consumer protection” is moving rapidly into the sphere of misuse and collection of personal data, businesses face potentially high liability for novel privacy violations under these traditional statutes. Due to the impact that privacy breaches have upon large numbers of individuals, suits brought as class actions are a common avenue for relief, especially for entrepreneurial attorneys.<sup>5</sup>

For example, a common action in the 80 settlements analyzed surrounds improper data use by third-party data traffickers or brokers.

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3. Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1347 (2006).
  4. *Compare* Consumer Online Privacy Rights Act, S. 2968, 116th Cong. (2019) (intending “[t]o provide consumers with foundational data privacy rights”), *with* Online Privacy Act of 2019, H.R. 4978, 116th Cong. (2019) (intending “[t]o provide individual rights relating to privacy of personal information”). *See generally* CAMERON F. KERRY ET AL., BRIDGING THE GAPS: A PATH FORWARD TO FEDERAL PRIVACY LEGISLATION (2020) (“[T]his report presents a comprehensive review of key legislative proposals and offers detailed policy recommendations with the ultimate goal of filling in gaps in U.S. information privacy protections.”); JONATHAN M. GAFFNEY, CONG. RSCH. SERV., LSB10441, WATCHING THE WATCHERS: A COMPARISON OF PRIVACY BILLS IN THE 116TH CONGRESS (2020).
  5. *See* Kristin Shepard, Diane Duhaime & Scott Byers, *Trends in Privacy Class Action Settlements*, LAW360 (Oct. 18, 2011), <https://www.law360.com/articles/276960/trends-in-privacy-class-action-settlements> (discussing privacy class action lawsuits, including the amount of attorney’s fees in settlements).

Third-party data traffickers “combine online and offline data” to build databases of consumer information.<sup>6</sup> One’s data can be compromised through mundane aspects of daily life, such as posting information online that is then “scrap[ed]” from websites through purchasing items with a debit or credit card, having a social media account,<sup>7</sup> clocking into one’s employment, or creating a loyalty card or subscription. The data is then traded among businesses directly or among data brokers themselves indirectly. The data brokerage market has a “lack of transparency,” especially to consumers who are unaware of brokers collecting and using their data.<sup>8</sup> Many advocates find this trend problematic, as the transactions take place outside of a contract with the consumers, whose data is being collected and sold (usually) for profit,<sup>9</sup> and thus they support private litigation to either bring consumers monetary recovery or the businesses into compliance.

## I. DATA SET CONTEXT

### A. Methodology

This paper examined 80 data privacy class action settlements. They constitute a comprehensive sample of private data privacy class action settlements under the statutes listed in Section II occurring between 2010

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6. Lauren Henry Scholz, *Privacy Remedies*, 94 IND. L.J. 653, 663 (2019).

7. *Id.* at 663–65.

8. FED. TRADE COMM’N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY, at vii (2014), <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.

9. *See id.* at 14.

and 2020.<sup>10</sup> All but 5 settlements occurred in federal court. The universe of settlements was found through a variety of cross-checks. First, Bloomberg News Alert provided notice of the settlements and their respective case names and docket numbers through December 2020. Then, the Lexis Settlement and Verdict Analyzer allowed for examination of settlements that included the terms “class action” and “data” or “privacy.” The Settlement Analyzer also provided the settlements that were brought under each statute in Section II. Lastly, the final settlements and motions regarding attorney’s fees and incentive awards for each case were gathered on court dockets through Bloomberg and PACER. Settlements were taken out of the final data analysis if they did not have final approval, were in the appeals process, were state or federal enforcement actions, or had very limited public information available on their dockets through December 2020. From the original set, 57 settlements were taken out. Most relevantly, the data omitted:

- three settlements that are currently on appeal<sup>11</sup>;

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10. The set of 80 settlements are comprehensive within the databases of Lexis Settlement and Verdict Analyzer and Bloomberg News Alerts between the time parameters of January 1, 2010, and December 31, 2020. The search terms were ran in August and September of 2020. Alerts were made for the search terms of “class action” and “data” or “privacy” within Lexis and “settlements” under the “Privacy and Data Security News” in Bloomberg ensuring that settlements receiving final approval after the initial searches were ran were included through December 31, 2020. Lastly, each statute listed in Section II was run through Lexis Settlement and Verdict Analyzer to ensure all potential settlements under the relevant statutes were included. Fifty-seven settlements were then taken out of the analysis due to the exceptions noted.

11. Notice of Appeal, *Kamal v. J. Crew Grp., Inc.*, No. 15-00190 (D.N.J. Nov. 6, 2019); Notice of Appeal, *In re Google LLC St. View Elec. Commc’ns Litig.*, No. 10-2184 (N.D. Cal. Apr. 3, 2020); Notice of Appeal, *Acaley v. Vimeo, Inc.*, No. 19-07164 (N.D. Ill. June 18, 2020).

- four settlements that were not approved or awaiting approval<sup>12</sup>;
- three settlements that transitioned to bankruptcy proceedings<sup>13</sup>;
- two derivative shareholder suits where there were no causes under privacy statutes<sup>14</sup>;

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12. Order, *In re Citrix Data Breach Litig.*, No. 19-61350 (S.D. Fla. Oct. 1, 2020), ECF No. 51 (hereinafter “Citrix Order”) (denying Unopposed Motion for Preliminary Approval of Class Action Settlement, but granting the amended motion on Jan. 25, 2021); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020) (en banc) (remanding the to the district court); Plaintiff’s Notice of Motion and Unopposed Motion for Preliminary of Class Action Settlement, *In re Toll Roads Litig.*, No. 16-00262 (C.D. Cal. Nov. 4, 2020), ECF No. 585 (awaiting final approval); Opinion and Order, *Fox v. Iowa Health Sys.*, No. 18-327 (W.D. Wis. Sept. 16, 2020), ECF No. 94 (granting preliminary approval of a proposed settlement).
  13. Statement Regarding Bankruptcy Proceedings, *Remijas v. The Neiman Marcus Grp. LLC*, No. 14-01735 (N.D. Ill. Sept. 3, 2020), ECF No. 258; Defendant Stein Mart, Inc.’s Notice of Bankruptcy and Automatic Stay, *Kyles v. Stein Mart, Inc.*, No. 19-00483 (D. Del. Aug. 12, 2020), ECF No. 39; Notification of Docket Entry, *Redman v. RadioShack Corp.*, No. 11-6741 (N.D. Ill. May 12, 2016) (noting the automatic stay caused by the bankruptcy filing).
  14. Consolidated Class Action Complaint for Violations of the Federal Securities Laws at 7, *In re Equifax Inc. Sec. Litig.*, No. 17-3463 (N.D. Ga. Apr. 23, 2018), ECF No. 49 (“[l]ead Plaintiff . . . brings this action under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934); Plaintiff James Graham’s Motion for Preliminary Approval of Derivative Litigation Settlement at 7, *In Re The Wendy’s Company Shareholder Derivative Action*, No. 16-01153 (S.D. Ohio May 6, 2018), ECF No. 41 (alleging causes of action not related to privacy statutes).

- five federal agency actions,<sup>15</sup> and seven state enforcement actions<sup>16</sup>;
- three actions that are ongoing and have not reached a settlement<sup>17</sup>;
- six settlements where the terms of the settlements are not publicly or otherwise disclosed<sup>18</sup>; and

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15. United States of America v. RockYou, Inc., No. 12-01487 (N.D. Cal. 2017); Bureau of Consumer Fin. Prot. v. Sterling Infosystems Inc., No. 19-10824 (S.D.N.Y. 2019); FTC v. Wyndham Worldwide Corp, No. 13-01887 (D.N.J. 2015); Dept. Health & Human Servs., Resolution Agreement (June 26, 2020), <https://www.hhs.gov/sites/default/files/lifespan-ra-cap-signed.pdf> (resolution agreement with Lifespan ACE); Dept. Health & Human Servs., Resolution Agreement (Apr. 3, 2017), <https://www.hhs.gov/sites/default/files/cardionet-ra-cap.pdf> (resolution agreement with CardioNet, Inc.).
  16. People v. Dropbox, Inc., No. RG18904840 (Cal. Super. Ct., Alameda Cty. 2018); People v. TWC Prod. & Tech. LLC., No. 19-ST-00605 (Cal. Super. Ct., L.A. Cty. filed Jan. 7, 2019); Massachusetts v. S. Shore Hosp., Inc., No. 12-1925 (Mass. Sup. Ct., Suffolk Cty. dismissed May 24, 2012); Minnesota v. Accretive Health, Inc., No. 12-00145 (D. Minn. dismissed Aug. 7, 2012); Grewal v. ATA Consulting LLC, No. 90-18 (N.J. Super. Ct. Ch. Div. filed Oct. 24, 2018); People v. Aetna, No. 1903012 (Cal. Super. Ct., San Bernardino Cty. filed Jan. 30, 2019); *A.G. Underwood Announces Settlements With Five Companies Whose Mobile Apps Failed To Secure User Information Transmitted Over the Internet*, N.Y. STATE OFFICE OF THE ATTORNEY GENERAL (Dec. 14, 2018), <https://ag.ny.gov/press-release/2018/ag-underwood-announces-settlements-five-companies-whose-mobile-apps-failed-secure>.
  17. S.D. v. Hytto Ltd., No. 18-688 (N.D. Cal. 2019); In re: Google Location History Litig., No. 18-5062 (N.D. Cal. 2018); In re Google Referrer Header Priv. Litig., No. 10-04809 (N.D. Cal. 2014).
  18. Joint Stipulation of Dismissal of Plaintiff's Complaint, Woodard v. CenturyLink Inc., No. 20-00917 (W.D. Wash. Dec. 23, 2020); Notice of Dismissal, Valdez-Marquez v. Netflix, No. 9-05903 (N.D. Cal. Mar. 29, 2010); Stipulation for Dismissal of Action with Prejudice Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), Gardner v. Health Net, Inc., No. 10-02140 (C.D. Cal. June 23, 2011)

- two settlements with valuation problems, as the number of claims ultimately made to the settlement fund are not publicly accessible.<sup>19</sup>

A settlement must have received final approval by December 31, 2020 for inclusion in the data set. The following settlements were of interest but were not included due to a lack of final approval after their fairness hearings in December 2020: *Rushing v. ViacomCBS, Inc.*, No. 17-04492 (N.D. Cal. filed Aug. 7, 2017); *Rushing v. The Walt Disney Company*, No. 17-04419 (N.D. Cal. filed Aug. 3, 2017); *McDonald v. Killoo A/S*, No. 17-04344 (N.D. Cal. filed July 31, 2017); and *In re Facebook Biometric Information Privacy Litigation*, No. 15-03747 (N.D. Cal. filed Aug. 17, 2015).

Further, though federal and state enforcement actions constitute many of the positive injunctive results for consumers, the absence of attorney's fees and incentive awards for government entities would skew the arithmetic mean of the awards downwards. A further project could include comparing the tangible results for class members between private

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(acknowledging a settlement has been reached); Dismissal Order, *Goodman v. HTC Am.*, No. 11-01793 (W.D. Wash. Aug. 20, 2012) (acknowledging a settlement has been reached); Stipulation for Voluntary Dismissal of Action by Plaintiff Miguel Calzada, *Calzada v. Time Warner Cable LLC*, No. 11-01701 (C.D. Cal. Jan. 5, 2012), ECF No. 28 *and* Order and Notice to All Parties, *Calzada v. Time Warner Cable LLC*, No. 11-01701 (C.D. Cal. Jan. 5, 2012), ECF No. 29; Joint Report on Case Status, *Landeros v. Party City Corp.*, No. 11-01636 (C.D. Cal. Dec. 8, 2014), ECF No. 43; Order and Notice to All Parties, *Landeros v. Party City Corp.*, No. 11-01636 (C.D. Cal. Dec. 9, 2014), ECF No. 44.

19. *See* Order Granting Final Approval of the Class Action Settlement at 3, *Bray v. GameStop Corp.*, No. 17-01365 (D. Del. Dec. 12, 2018) (stating that settlement requires class members to submit claims); Order Re Motion for Attorney's Fees and Costs at 2–3, *Pabst v. Genesco, Inc.*, No. 11-01592 (N.D. Cal. Sept. 11, 2012), ECF No. 62 (“The Court does not know how many of these coupons have been or will be redeemed.”).



and public enforcement actions in the data privacy sphere, especially as there is debate on the most effective remedy for privacy injuries.<sup>20</sup>

Regarding the figures themselves, for attorney’s fees, Appendix A only includes fees where that information was available, not expenses and costs.<sup>21</sup> Finally, the total settlement figure only includes direct monetary relief to the class, attorney’s fees, incentive awards, and settlement expenses. Therefore, solely injunctive relief was not valued nor included in the total settlement fund. Unless the court could explicitly value the cost of credit monitoring and identity theft protection, that amount was also not included in the total settlement fund figure. This is notable because injunctive relief and credit monitoring play a major role in the settlement agreements for privacy class actions.

### ***B. Private Rights of Action Covered***

The 80 privacy class action settlements cover a range of statutes that provide for private actions.<sup>22</sup> The settlements were made under statutes including:

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20. See Scholz, *supra* note 6 (arguing that restitution—or the economic gain to the defendant—is the appropriate measure of privacy remedies); Peter C. Ormerod, *A Private Enforcement Remedy for Information Misuse*, 60 B.C. L. REV. 1893, 1916–19 (2019) (positing monetary awards should be increased with defendant’s culpability, but as a baseline should include attorney’s fees and nominal damages).
  21. Appendix A provides the data set used in this study. Appendix B provides the relevant case information for cases used in this study. Appendix C summarizes the results.
  22. The settlements do not include federal or state enforcement actions. But, the New York Attorney General, Massachusetts Attorney General, and California state and local legal offices have been particularly active in enforcing consumer data privacy. See, e.g., Consent Order, *New York v. Dunkin’ Brands, Inc.*, No. 451787/2019 (Sup. Ct. N.Y. Sept. 22, 2020), Doc. No. 39 (settling for \$650,000 in civil fines and injunctive relief for consumers); Joint Stipulation and Order Regarding

- Consumer Fraud and Abuse Act, 18 U.S.C. § 1030 (2012)
- Electronic Communications Privacy Act, 18 U.S.C. §§ 2510–2522 (2002)
- Driver’s Protection Privacy Act, 18 U.S.C. §§ 2721–2725 (2012)
- Fair Credit Reporting Act of 1970, amended by the Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. §§ 1681
- Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in sections of 42 U.S.C.)
- Video Privacy Protection Act, 18 U.S.C. § 2710 (2002)
- Children’s Online Privacy Protection Act, 15 U.S.C. §§ 6501–6505 (1998)
- Stored Communications Act, 18 U.S.C. §§ 2701–2712 (2018)
- Arizona Consumer Fraud Act, ARIZ. REV. STAT. §§ 44-1521 (2019)
- California Invasion of Privacy Act, CAL. PENAL CODE §§ 630–637.9 (2005)

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Settlement and Dismissal of the Case With Prejudice, *People v. TWC Prod. & Tech LLC*, No. 19-00605 (Cal. Super. Ct., L.A. Cty. Aug. 14, 2020) (achieving injunctive relief increasing Weather Channel App disclosures); *Privacy Enforcement Actions*, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL, <https://oag.ca.gov/privacy/privacy-enforcement-actions> (last visited Feb. 25, 2021); *AG Healey Settles With Debt Collection Agency Over 2019 Breach That Impacted 21 Million Consumers Nationwide*, OFFICE OF ATTORNEY GENERAL MAURA HEALEY (Mar. 11, 2021), <https://www.mass.gov/news/ag-healey-settles-with-debt-collection-agency-over-2019-data-breach-that-impacted-21-million>.

- California Confidentiality of Medical Information Act, CAL. CIV. CODE § 56.10(c) (2017)
- California Computer Crime Law, CAL. PENAL CODE § 502(c) (2020)
- California Customer Records Act, CAL. CIV. CODE § 1798 (2010)
- California Unauthorized Use of Name, Image, or Likeness, CAL. CIV. CODE § 3344 (2020)
- Song-Beverly Credit Card Act, CAL. CIV. CODE §§ 1747–1748.95 (1971)
- Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. § 501.201, *et seq.* (2005)
- Illinois Biometric Information Privacy Act, 740 ILCS 14/1 (2008)
- Illinois Consumer Fraud and Deceptive Business Practices Law, 815 ILCS 505/1 (2007)
- Michigan Preservation of Personal Privacy Act, MICH. COMP. LAWS § 445.17, *et seq.* (2016)
- Massachusetts Consumer Protection Act, MASS. GEN. LAWS ch. 93A (2020)
- New Jersey Data Breach Act, N.J. REV. STAT. § 56:8-163 (2013)
- Ohio Disclosure of Patient’s HIV Status, OHIO REV. CODE ANN. § 3701.243 (West 2017)
- Ohio Insurance Information and Privacy Protection Act, OHIO REV. CODE ANN. § 3904.01, *et seq.* (2021)

- Virginia Consumer Protection Act, VA. CODE. ANN. § 59.1-196 (2020)
- Washington Consumer Protection Act, WASH. REV. CODE. § 19.86 (2009)
- Washington Personal Information Statute, WASH. REV. CODE. § 19.255.020 (2010)
- Wisconsin Health Care Patient Confidentiality Laws, WIS. STAT. §§ 146.82, 146.84 (2017, 2011)

The most settlements (at least 10) occurred under the federal statutes of the Computer Fraud and Abuse Act and the Electronic Communications Privacy Act. State laws had some teeth as well.<sup>23</sup> California state law was used (in conjunction with other causes of action) in the highest number of settlements in the data set.<sup>24</sup> These California state laws had time to be tested in the courts; laws regarding computer crime have been in California legislative books since the late 1980s.<sup>25</sup> California laws continue to provide for private action. The California Consumer Privacy Act (CCPA) took effect on January 1, 2020, and includes a widespread affirmative duty for businesses to inform consumers of the categories and purposes of personal data collected.<sup>26</sup>

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23. Ormerod, *supra* note 18 at 1920–29 (arguing that state law creates an alternative to the constitutional standing doctrine connected to privacy harms).

24. California state law was included in at least 34 suits.

25. Katja C. DeGroot, *An Overview of Recent Changes in California Computer Crime Laws: The Criminalization of Computer Contamination and Strengthened Penalty Provisions*, *California Penal Code Sections 502, 502.01, 1203.047, 1203.048*, 6 SANTA CLARA HIGH TECH. L.J. 135 (1990).

26. Kamran Salour, *A Balancing Act: A Brief Overview of California Privacy Laws*, JDSUPRA (Oct. 25, 2019), <https://www.jdsupra.com/legalnews/a-balancing-act-a-brief-overview-of->

Further, the California Privacy Rights Act was approved as a ballot initiative in the 2020 election as an amendment to the CCPA. It creates additional consumer relief of up to \$2,500 per violation and \$7,500 per intentional violation or violation of minors, and it also creates a privacy protection agency tasked with enforcement.<sup>27</sup> Though there have been no final settlements under the CCPA yet in this data set, it may provide a powerful vehicle for consumer relief in the future. In contrast, the Illinois Biometric Privacy Act (BIPA) was effective since 2008 and remained largely out of use until 2015, when a series of class actions were brought regarding the collection and use of biometric data of Illinois residents.<sup>28</sup> Notably, BIPA allows for either \$1,000 or \$5,000 for each negligent or intentional violation of collection, storage, or use of biometric information without notice or consent, including attorney's fees and costs.<sup>29</sup> BIPA allows for compensation for several violations per individual,<sup>30</sup> so on a

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27. Cynthia Cole, Matthew R. Baker & Katherine Burgess, *Move Over, CCPA: The California Privacy Rights Act Gets the Spotlight Now*, BLOOMBERG LAW (Nov. 16, 2020, 3:00 A.M.), <https://news.bloomberglaw.com/privacy-and-data-security/move-over-ccpa-the-california-privacy-rights-act-gets-the-spotlight-now>.
28. Jackson Lewis, *Illinois Biometric Information Privacy Act FAQs*, 2–3 (Dec. 15, 2017), [https://www.jacksonlewis.com/sites/default/files/docs/Illinois\\_Biometric\\_Information\\_Privacy\\_Act\\_FAQs\\_12.15.2017.pdf](https://www.jacksonlewis.com/sites/default/files/docs/Illinois_Biometric_Information_Privacy_Act_FAQs_12.15.2017.pdf).
29. Biometric Information Privacy Act, 740 ILCS 14/20 (2008).
30. Kenneth D. Walsh & Mary Smigielski, *INSIGHT: Illinois Biometric Privacy Law Has Nationwide Potential in Pandemic*, BLOOMBERG LAW (Apr. 24, 2020, 3:01 A.M.), <https://news.bloomberglaw.com/privacy-and-data-security/insight-illinois-biometric-privacy-law-has-nationwide-potential-in-pandemic>.

large scale, it can result in high liability (as seen in the recent \$650 million settlement fund with Facebook).<sup>31</sup>

Finally, the settlements in the data set do not include those under a popular class action federal statute: the Telephone Consumer Protection Act (TCPA).<sup>32</sup> The TCPA is a powerful tool in battling unwanted robocalls<sup>33</sup> and text messages, but those perceived harms and the TCPA's jurisprudence can be seen as developing differently than data breaches, data trafficking, and other internet-age privacy violations.<sup>34</sup>

### *C. Types of Settlements Covered*

#### **1. Credit Monitoring and Identity Theft Protection**

Where the harm stems from a large data breach, identity theft protection and credit monitoring can be a high value addition to the settlement for consumers. At least twelve settlements resulting from data breaches included credit monitoring and identity theft protection for one

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31. See Order Granting Preliminary Approval of Class Action Settlement at 3, In re Facebook Biometric Information Privacy Litigation, No. 15-03747 (N.D. Cal. 2020), ECF No. 474 (stating that Facebook will pay \$650 million to a cash fund).

32. Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991).

33. See *FCC Actions on Robocalls, Telemarketing*, FEDERAL COMMUNICATIONS COMMISSION, <https://www.fcc.gov/general/telemarketing-and-robocalls> (last visited July 23, 2018) (explaining FCC action on robocalls).

34. TCPA's "lodestone principle" is that it is "unlawful to use automatic dialing systems," and therefore it has become "fertile ground for nuisance lawsuits ... with quick settlements," even in cases with little merit, as opposed to privacy class action lawsuits. See Justin Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules*, 84 BROOKLYN L. REV. 1, 2, 24 n. 133 (2018).

to two years.<sup>35</sup> However, this remedy is not as common as the author initially hypothesized due to the typical delay between the data breach and the settlement.<sup>36</sup> For example, when the settlement occurs three to five years after the initial data breach, theoretically the harm of an identity theft or credit card fraud would have already manifested. As law firms and businesses continue to focus on prevention and quick responses to data breaches, the addition of credit monitoring and identity theft protection is a valuable remedy that could end up being more cost-effective than reimbursing class members for losses already accrued after the fact.

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35. *E.g.*, Amended Order Granting Final Approval of Settlement, Certifying Settlement Class, and Awarding Attorney’s Fees, Expenses and Service Awards at 5, *In re Equifax Customer Data Sec. Breach Litig.*, No. 17-2800 (N.D. Ga. Mar. 17, 2020), ECF No. 1029 (credit monitoring); Order Granting Final Approval of Class Action Settlement, Attorneys’ Fees, Costs, and Incentive Award at 2, *Johansson-Dohrmann v. CBR Sys., Inc.*, No. 12-01115 (S.D. Cal. July 24, 2013), Doc. No. 29 (credit monitoring); Settlement Agreement at 8, *Burrows v. Purchasing Power LLC*, No. 12-22800 (S.D. Fla. Oct. 4, 2013), ECF No. 63-1 (credit monitoring fund); Settlement Agreement at 4, *Bishop v. Shorter Univ., Inc.*, No. 15-00033 (N.D. Ga. Mar. 29, 2017), ECF No. 80-1 (identity theft monitoring).

36. In *Orr v. Intercontinental Hotels Group*, the settlement agreement instead included a reimbursement for losses suffered. *See* Order Granting Final Approval of Class Action Settlement and Judgment at 6, *Orr v. Intercontinental Hotels Grp.*, No. 17-01622 (N.D. Ga. Sept. 2, 2020), ECF No. 81 (paying up to \$1.55 million in credit card reimbursements to injured class members).

## 2. Coupons

Before 2010, “coupons”<sup>37</sup> “vouchers,”<sup>38</sup> or “merchandise certificates”<sup>39</sup> were common remedies in class actions. The Class Action Fairness Act of 2005 (CAFA) added the requirement that attorney’s fees awards be based “on the value to class members of the coupons that are redeemed.”<sup>40</sup> Therefore, even if a coupon settlement with 10,000 members all receiving \$10 is valued *ab initio* at \$100,000, attorney’s fees cannot be calculated until those credits are redeemed, which could end up being far less than \$100,000. Due to these constraints, coupon settlements fell out of favor during the data set period of 2010 to 2020. The few coupon settlements after 2010 were not included here unless the number of claims filed was available. Though the value of the settlement could be estimated by taking the amount of potential class members and multiplying that by the coupon value (as attorneys argue), in reality the potential class does not submit all available claims. Thus, when the primary form of relief is coupons, it is difficult to determine the total value of the settlement fund without knowledge of the number of claimants. In the end, there were only seven such coupon settlements included in the data set.<sup>41</sup> For example, in *Monteferrante v. Container Store, Inc.*, only about

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37. See Shepard, *supra* note 5 (“Coupon settlements and settlements providing free services are common in privacy class actions.”).

38. *E.g.*, Order Approving Class Action Settlement and Judgment at 3, Scherer v. Tiffany & Co., No. 11-0532 (S.D. Cal. May 21, 2012), ECF No. 31.

39. *E.g.*, Order at 4, Morey v. Louis Vuitton N. Am., No. 11-1517 (S.D. Cal. Aug. 5, 2013), ECF No. 64.

40. 28 U.S.C. § 1712(a).

41. Order Approving Class Action Settlement and Judgment at 3, Scherer v. Tiffany & Co., No. 11-00532 (S.D. Cal. May 21, 2012), ECF No. 31 (stating that Tiffany & Co. will issue vouchers); Memorandum and Order Re: Motion for Final Approval of Class Action Settlement at 9, Anderson-Butler v. Charming Charlie,



1,600 of the 87,000 class members submitted claims for \$10 coupons at the time the judge issued the Final Order Approving Class Action Settlement.<sup>42</sup> However, the court still approved \$120,000 in attorney's fees and a \$3,000 incentive award.<sup>43</sup> To the court's ire, the attorneys outmaneuvered the CAFA requirement that attorney's fees be based on the value of coupons actually redeemed (here, \$16,270), by bringing the action

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Inc., No. 14-01921 (E.D. Cal. Nov. 3, 2015) (each class member receiving a \$20-26 store voucher); Order for Final Judgment at 7, *Anderson v. Nelson*, No. 10-01929 (D. Minn. Jan. 20, 2012), ECF No. 98 (approving settlement in which class members would receive a \$10 food voucher) *and* Memorandum in Support of Unopposed Motion for Final Approval of Class Action Settlement and Plaintiffs' Request for Attorneys' Fees and Costs and the Plaintiffs' Representative Awards at 4, *Anderson v. Nelson*, No. 10-01929 (D. Minn. Jan. 10, 2012), ECF No. 94; Final Order Approving Class Action Settlement at 4, *Monteferrante v. The Container Store Inc.*, No. 13-11362 (D. Mass. Feb. 4, 2015) (stating that class relief is a single voucher); Order Granting Unopposed Motion for Award of Attorneys' Fees, Costs and Incentive Awards at 2–3, *Petersen, et al. v. Lowe's HIW, Inc.*, No. 11-01996 (N.D. Cal. Aug. 24, 2012), ECF No. 52 ("The net settlement amount . . . provides each [class member] with a \$9 Lowe's gift card which is redeemable for cash, transferrable, and will not expire."); Order at 4, *Morey v. Louis Vuitton N. Am., Inc.*, No. 11-01517 (S.D. Cal. Jan. 9, 2014), ECF No. 70 (stating that those who submitted a valid claim "will receive Merchandise Certificates in the amount of \$41.00"); Final Judgment and Order Approving Settlement, *O'Connor v. Euromarket Designs, Inc.*, No. 11-02140 (N.D. Cal. June 28, 2013), ECF No. 34 (approving settlement that provides \$5 credit for common law claims and \$10 credit or a 20% off coupon for statutory claims) *and* Memorandum of Points and Authorities in Support of Plaintiff's Unopposed Motion for Final Approval at 9, *O'Connor v. Euromarket Designs, Inc.*, No. 11-02140 (N.D. Cal. June 21, 2013), ECF No. 29-1.

42. Memorandum on Final Order Approving Class Action Settlement at 2, *Monteferrante v. The Container Store*, No. 13-11362 (D. Mass. Feb. 4, 2015).
43. Final Order Approving Class Action Settlement at 5, *Monteferrante v. The Container Store*, No. 13-11362 (D. Mass. Feb. 4, 2015).

under the State of Massachusetts’ Consumer Protection Act.<sup>44</sup> Therefore, the \$120,000 fee award was “roughly 600%” of the value of the CAFA fund, but since “the stakes are too low to draw even the most obdurate of professional objectors to protest,” the court begrudgingly approved it.<sup>45</sup>

### 3. Cy Pres

Seven of the 80 privacy class action settlements included entirely *cy pres* relief for the class, usually in addition to injunctive relief.<sup>46</sup> In 2010, the \$8.5 million *cy pres* settlement in *In re Google Referrer Header Privacy*

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44. Memorandum on Final Order Approving Class Action Settlement at 2, *Monteferrante v. The Container Store*, No. 13-11362 (D. Mass. Feb. 4, 2015).

45. *Id.* at 2, 4.

46. Report and Recommendation at 2, *Wiles v. S.W. Bell Tel. Co.*, No. 09-4236 (W.D. Mo. June 6, 2011), ECF No. 46; Order and Final Judgment at 8–9, *Valentine v. NebuAd Inc.*, No. 8-5113 (N.D. Cal. Dec. 19, 2011), ECF No. 251 (hereinafter “Valentine Order”); Amended Order Granting Final Approval of Class Action Settlement; Approval of *Cy Pres* Awards; and Awarding Attorney Fees at 7, *In re Google Buzz Priv. Litig.*, No. 10-00672 (N.D. Cal. June 2, 2011), ECF No. 129; Order Granting Final Approval of Class Action Settlement; Approval of *Cy Pres* Awards; Award of Attorneys’ Fees and Expenses and Incentive Award at 3, *In re Netflix Priv. Litig.*, No. 11-00379 (N.D. Cal. Mar. 18, 2013), ECF No. 256; Findings of Fact, Conclusions of Law, and Order Approving Settlement, *Lane v. Facebook, Inc.*, No. 8-3845 (N.D. Cal. Mar. 17, 2010) (hereinafter “Lane Order”) and Plaintiffs’ Notice of Motion and Motion for Preliminary Approval of Class Action Settlement at 9–10, *Lane v. Facebook, Inc.*, No. 8-3845 (N.D. Cal. Mar. 17, 2010) (hereinafter “Lane Motion”) (stating that the settlement fund will be used “to establish and operate a privacy foundation”); Final Order and Judgment at 13–14, *In re Quantcast Advertising Cookie Litig.*, No. 10-05484 (C.D. Cal. June 13, 2011), ECF No. 83 (hereinafter “Quantcast Order”); Order Granting Motion for Final Approval of Proposed Class Action Settlement at 2, *Jane Doe v. Twitter, Inc.*, No. CGC-10-503630 (Cal. Super. Ct., San Francisco May 9, 2016). *See also* *Frank v. Gaos* (*In re Google Referrer Header Priv. Litig.*) 139 S. Ct. 1041, 1043 (2019) (vacating and remanding case back to district court to be decided consistent with *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)).

*Litigation* went up to the Supreme Court in *Frank v. Gaos*.<sup>47</sup> Three other settlements with entirely *cy pres* relief for the class—*Valentine v. NebuAd Inc.*,<sup>48</sup> *In re Quantcast Advertising Cookie Litigation*,<sup>49</sup> and *Lane v. Facebook*<sup>50</sup>—occurred in 2011 and 2012. These three settlements were in the same timeframe as *In re Google Referrer Privacy Litigation*, and before the decision in *Frank v. Gaos*. Since 2012, no privacy settlement in the data set achieved entirely *cy pres* relief for the class.<sup>51</sup> However, it was common for residual settlement fund money to go to *cy pres* recipients instead of reverting back to the defendant company.<sup>52</sup> In fact, 29 settlements included some sort

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47. The Court remanded the case back to the Northern District of California based on *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), where it is still ongoing. *Frank*, 139 S. Ct. at 1046.

48. Valentine Order at 8–9.

49. Quantcast Order at 13–14.

50. Lane Order *and* Lane Motion at 9–10 (stating that the settlement fund will be used “to establish and operate a privacy foundation”).

51. The Ninth Circuit is currently reviewing a \$13 million entirely *cy pres* settlement. *See* Opening Brief for Appellant David C. Lowery, *In re Google LLC St. View Elec. Commc’ns Litig.*, No. 20-15616 (9th Cir. 2020) (appealing the \$13 million settlement that includes *cy pres* relief).

52. *See, e.g.* Order Granting Motion For Final Approval and Granting in Part Motion For Attorneys’ Fees, Costs, and Service Awards at 8–9, *Ronquillo-Griffin v. Transunion Rental Screening Sols., Inc.*, No. 17-129 (S.D. Cal. May 9, 2019); Order Granting Plaintiffs’ Motion for Final Approval and Granting in Part and Denying in Part Plaintiffs’ Motion for Award of Attorneys’ Fees, Etc. at 9, *In re Carrier iQ Consumer Priv. Litig.*, No. 12-02330 (N.D. Cal. Aug. 25, 2016); Order (1) Granting Plaintiffs’ Motion for Final Approval of Class Action Settlement (Doc. 311) and (2) Granting Plaintiffs’ Motion for Attorneys’ Fees, Costs, and Class Representative Incentive Awards (Doc. 310) at 4, *In re: Vizio, Inc. Consumer Priv. Litig.*, No. 16-02693 (C.D. Cal. July 31, 2019) (hereinafter “Vizio Order”); Order Granting (1) Final Approval of Class Action Settlement, and (2) Motion for Attorney Fees, Litigation Expenses, and Plaintiff Enhancement

of *cy pres* component, whether that be residual fund money going to *cy pres* recipients or *cy pres* recipients included as grantees in the settlement fund from the start.

#### 4. Injunctive Relief

Injunctive relief was the most common remedy included in the settlements, often in conjunction with monetary compensation. The focal point of at least 41 settlements included commitments to update privacy policies and disclosures and to increase security measures to protect consumer data.<sup>53</sup> For example, in the two Driver’s Privacy Protection Act cases, the primary settlement remedy included the defendant business deleting all of the improperly gained driver data.<sup>54</sup> Further, where the company failed to disclose its tracking and sale of consumer data, or was negligent in protecting their consumer’s data, the settlement included an updated data policy.<sup>55</sup> These settlements had a low total settlement fund,

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Award at 4, *Reed v. 1-800 Contacts, Inc.*, No. 12-02359 (S.D. Cal. Jan. 2, 2014); Order Granting Final Approval of Settlement, *Cy Pres Distribution*, and Award of Attorney’s Fees and Service Awards to the Class Representatives at 22–23, *In re Ashley Madison, Customer Data Sec. Breach Litig.*, No. 15-02669 (E.D. Mo. Nov. 20, 2017) (hereinafter “Ashley Madison Order”).

53. *E.g.*, Final Judgment and Order Approving the Class Action Settlement Agreement and Dismissing Claims with Prejudice at 5–6, *Missaghi v. Blockbuster LLC*, No. 11-02559 (D. Minn. Nov. 27, 2012) (adjusting privacy policy and awarding attorney’s fees and an incentive award).
54. Order and Judgment at 3, *Johnson v. Washington Univ.*, No. 10-04170 (W.D. Mo. 2011), ECF No. 23; Order Granting Final Approval of Class Action Settlement at 8, *Wilcox v. Swapp*, No. 17-00275 (E.D. Wash. July 23, 2020), ECF No. 160 (hereinafter “Wilcox Order”) *and* Plaintiff’s Unopposed Motion for Preliminary Approval of Class Action Settlement at 15–16, *Wilcox v. Swapp*, No. 17-00275 (E.D. Wash. Oct. 25, 2019), ECF No. 139.
55. *See* Order Granting Final Approval to Class Action Settlement at 4, *Campbell v. Facebook, Inc.*, No. 13-05996 (N.D. Cal. Aug. 18, 2017), ECF No. 251, *aff’d* 951

as the injunctive relief had no discernible monetary value. For example, in *In re Yahoo Mail Litigation*, the attorney’s fees and incentive award constituted nearly all of the monetary award since the settlement requires Yahoo to make technical changes on how it analyzes user emails for advertising purposes.<sup>56</sup> Arguably, updated data and security measures should be a goal of bringing such actions, as they are the most cost-effective way to prevent repeat consumer data abuse. But, in reality, consumers just click through disclosures on websites and the same behavior is in practice allowed.

### 5. Direct Cash Payments

By far the most common remedy for the class was direct monetary payments. Fifty-eight of the settlements were structured in such a way that class members received automatic pro rata payments from the settlement fund, pro rata payments based on the number of claims filed, or could apply for compensation based on their actual losses suffered

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F.3d 1106 (9th Cir. 2020) (updating Data Policy and adding a temporary message on its United States Help Center website); Opinion & Order at 12, *In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 17-2807 (N.D. Ohio Aug. 12, 2019), ECF No. 174 (“Further, even though Sonic changed certain security practices before the Settlement Agreement, the settlement requires Sonic to continue those practices.”).

56. *See* Order Granting Motion for Final Approval of Class Action Settlement at 5–6, 20–21, *In re Yahoo Mail Litig.*, Nos. 13-04980, 13-4989, 13-5326, 13-5388 (N.D. Cal. Aug. 25, 2016) (“At class certification and summary judgment, Plaintiffs sought only injunctive and declaratory relief and did not seek monetary damages. Thus, the Court could not certify a class for monetary damages, Class Members could not receive monetary damages in the Settlement, and Class Members are free to pursue monetary damages claims against Yahoo notwithstanding the Settlement.”).

through the data breach.<sup>57</sup> There were 10 settlements where class members automatically received a pro rata cash payment, 31 settlements where class members received a variable cash payment based on how many claims were submitted to the settlement fund, and 17 settlements where class members could apply for compensation based on actual loss suffered. In practice, many of the settlements were a mixture of reimbursements for documented losses and pro rata payments for undocumented losses.<sup>58</sup> Though direct cash payments were prevalent in the settlements, it is unclear how helpful low-level monetary compensation is to vindicating privacy rights of consumers, unless the settlements required reimbursement for identity theft or fraud. The calculation depends on the statute under which the claim is brought; for example, it could be inferred that Illinois residents who could get \$500-1,000 or more for BIPA violations would prefer direct cash payments.

Finally, valuation was a consistent problem in gathering and identifying data privacy class action settlements. This was especially true where monetary compensation was not the main form of recovery for

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57. *See, e.g.*, Final Approval Order and Judgment at 4–5, *Doe One v. Caremark, LLC*, No. 18-00488 (S.D. Ohio Jan. 30, 2020), ECF No. 101 (offering each class member who mailed a claim \$400); *Vizio* Order at 4 (distributing the residual sum of the settlement fund “to members of the Settlement Class . . . who submit valid claims.”); *Ashley Madison* Order at 4 (“Any funds remaining after allocations . . . will be divided equally amongst those whose Personal Information was released publicly as a result of the Data Breach . . . for such claims. These case benefits will be distributed on a *pro rata* basis up to a maximum of \$3,500 per class member.”) (internal citation omitted).

58. *See, e.g.*, Memorandum and Order at 2, *In re Target Corp. Customer Data Sec. Breach Litig.*, No. 14-02522 (D. Minn. Nov. 17, 2015), ECF No. 645 (compensating up to \$10,000 based on ability to document losses and compensating undocumented losses with a \$40 pro rata payment after fees and expenses).

consumers (i.e., injunctive relief and compliance efforts). There were some valid privacy class action settlements that were still not included in the final analysis due to the difficulty in determining the total settlement fund upon which to compare both attorney's fees and incentive awards. For example, in the recent case of *Bray v. GameStop Corporation*, plaintiffs alleged that GameStop's customers' data was compromised if they used a payment card between 2016 and 2017 at a GameStop store.<sup>59</sup> Per the settlement, those customers could initially apply for up to \$235 in expense reimbursement and up to \$10,000 for extraordinary expenses related to the breach.<sup>60</sup> However, the total size of the settlement depended upon how many claimants actually applied. That information was not publicly available, and it is improbable to assume all eligible class members filed a claim. The court still awarded \$557,500 in attorney's fees based on the lodestar calculation and \$3,750 in incentive awards, without knowing the full settlement's worth.<sup>61</sup> This valuation problem could continue to be an issue for courts to grapple with, especially if privacy class action settlements move toward *cy pres* or injunctive relief rather than direct cash payments. However, courts could avoid the valuation problem with increased federal and state enforcement actions on behalf of consumers.

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59. Class Action Complaint at 1, *Bray v. GameStop Corp.*, No. 17-01365 (D. Del. Sept. 29, 2018).

60. Order Granting Final Approval of the Class Action Settlement, *Bray v. GamesStop Corp.*, No. 17-01365 (D. Del. Dec. 19, 2018), ECF No. 54 *and* Settlement Agreement at 10–12, *Bray v. GamesStop Corp.*, No. 17-01365 (D. Del. July 16, 2018), ECF No. 40-1.

61. Order Granting Final Approval of the Class Action Settlement at 5, *Bray v. GamesStop Corp.*, No. 17-01365 (D. Del. Dec. 19, 2018), ECF No. 54, at 5 *and* Memorandum of Law in Support of Plaintiff's Unopposed Motion for Attorneys' Fees, Expenses and Incentive Awards at 5–8, *Bray v. GamesStop Corp.*, No. 17-01365 (D. Del. Nov. 26, 2018), ECF No. 47.

Further, as mentioned above, the settlements that include primarily injunctive relief have attorney’s fees and incentive awards that constitute proportionately *all* of the settlement fund’s monetary value, which can be misleading. The question then becomes whether the class representative deserves a monetary award (median being \$5,000) when the rest of the class recovers no compensatory award.

## II. INCENTIVE AWARDS

Incentive awards for class representatives are in dispute generally, not just in data privacy settlements. In September 2020, the Eleventh Circuit decision in *Johnson v. NPAS Solutions, LLC* decided a \$6,000 incentive award barred the settlement’s approval in part.<sup>62</sup> There, the court found that the class representative awards were precluded by two Supreme Court cases decided in the late 1800s, which together state that class plaintiff “can be reimbursed for attorneys’ fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or reimbursed for his personal expenses.”<sup>63</sup> Moving from this current debate, this paper looks into how incentive awards for data privacy settlements practically operate in courts nationwide.

The text of Federal Rule of Civil Procedure 23 does not mention granting incentive awards to class representatives. Neither do the federal consumer privacy statutes. However, incentive awards are now ubiquitous, especially in privacy class actions. Courts gave incentive awards to class representatives in all but one of the 80 settlements

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62. 975 F.3d 1244, 1264 (11th Cir. 2020).

63. *Id.* at 1257 (referring to *Trs. v. Greenough*, 105 U.S. 527 (1882) and *Cent. R.R. & Banking Co. of Ga. v. Pettus*, 113 U.S. 116 (1885)).



analyzed.<sup>64</sup> The last major survey of class action incentive awards was conducted by Theodore Eisenberg and Geoffrey Miller in 2006 and looked at 374 class action opinions from 1993 to 2002.<sup>65</sup> In sum, Eisenberg and Miller found “little evidence of systematic abuse in incentive awards.”<sup>66</sup> Similarly, the analysis here found there is still “coherence and modesty”<sup>67</sup> in incentive awards in privacy class action settlements because the arithmetic mean and median were both about \$5,000 (or about 1% of the settlement fund), suggesting the award is constant regardless of the settlement fund. This data could also be used to reiterate Eisenberg and Miller’s 2006 conclusion that courts are aptly capable of awarding appropriate incentive award amounts without undue burden, and thus “case-by-case adjudication may be more appropriate than fixed legislative or judicial rules” governing incentive awards.<sup>68</sup> However, this data could alternatively prove that courts lack a consistent framework to determine the size of incentive awards and are instead essentially making up incentive awards as they go along based on custom and reasonableness. Either way, this article serves as a resource on the state of incentive awards in data privacy settlements moving into the next decade.

There are a few note-worthy trends in incentive awards for data privacy settlements. First, it could be said that the granting of incentive

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64. Order re Motion for Final Approval of Class Settlement at 6, *Fishman v. Tiger Nat. Gas, Inc.*, No. 17-05351 (N.D. Cal. June 20, 2019) (hereinafter “Fishman Order”).

65. Eisenberg & Miller, *supra* note 3, at 1303.

66. *Id.*

67. *See id.* at 1347 (“[O]ur results suggest a degree of coherence and modesty in the pattern of incentive awards.”).

68. *Id.* at 1303.

awards was in line with Rule 23’s “reasonableness” requirement for the approval of class action settlements because courts commonly grant incentive awards at an amount around \$5,000.<sup>69</sup> Second, courts increasingly moved toward “tiered” incentive awards, giving the original class representative a higher award, then distributing between \$2,000 and \$5,000 among the rest of the representatives.<sup>70</sup> Third, the median incentive award per class representative is \$5,000, with an arithmetic mean (hereafter “average”) incentive award of \$4,728.67. This figure remained steady even when the size of the settlement fund increased and is unconnected to the size of attorney’s fees. Finally, the total incentive award made up less than one percent (0.7%) of the total settlement fund on average. In comparison, attorney’s fees constituted 35.06% of the settlement fund.

Looking at the second trend of tiered incentive awards, courts granted differing incentive awards to class representatives based on their involvement in the case. This was especially true where there were a large number of class representatives. In *Beckett v. Aetna, Inc.*, Aetna’s mailing

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69. Fed. R. Civ. P. 23(e)(B)(2) (allowing courts to approve class action settlements only when finding them “fair, reasonable, and adequate”).

70. *See e.g.*, Order at 1–2, *Beckett v. Aetna, Inc.*, No. 17-03864 (E.D. Pa. Oct. 16, 2018), ECF No. 71 (hereinafter “Aetna Order”) (ordering 7 class representatives to receive \$5,000 and 30 other class members to receive \$2,000); Lane Order at 10 (granting tiered incentive awards of \$1,000, \$5,000, and \$10,000); Order Adopting in Part Special Master’s Report and Recommendation Re: Motion for Attorneys’ Fees, Litigation Expenses, and Service Awards to Class Representatives; Order Granting Administrative Motions to File Under Seal at 56, *In re Anthem Data Breach Litig.*, No. 15-02617 (N.D. Cal. Aug. 17, 2018) (hereinafter “Anthem Fees and Incentive Awards Order”) (ordering incentive awards of \$5,000 to 76 class representatives and \$7,500 to 29 class representatives).

materials revealed a patient’s HIV status,<sup>71</sup> which resulted in a settlement fund of over \$17.1 million.<sup>72</sup> For incentive awards, the court split \$95,000 among 37 class representatives.<sup>73</sup> The 7 class representatives who filed the complaints that were subsequently consolidated received \$5,000 each, while the 30 additional class representatives who brought claims in the amended complaint received \$2,000 each.<sup>74</sup> Though the court did not elaborate on their rationale, it could be implied that the court viewed the seven original complainants potentially as “first movers” who carried a heavier litigation burden than the representatives added later.

Next, the median and average incentive award hovering around \$5,000 passes the knee-jerk reasonableness inquiry. That reasonableness could explain why it was the most common and approved award figure,<sup>75</sup> since courts lacked a comprehensive framework or formula upon which to determine incentive awards. Further, there were only three settlements with individual incentive awards above \$10,000.<sup>76</sup> Notably, there was no scaling effect of the incentive award to the size of the total settlement

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71. Amended Class Action Complaint at 3–4, *Beckett v. Aetna, Inc.*, No. 17-03864 (E.D. Pa. Dec. 5, 2017), ECF No. 39.

72. *See* *Aetna Order at 1* (ordering \$4,290,300 in attorneys’ fees, which is 25% of the settlement fund, meaning the total settlement fund is \$17,161,200).

73. *Id.* at 1–2.

74. *Id.*

75. Twenty-nine settlements included a \$5,000 individual incentive award.

76. Order at 2, *Flaum v. Doctor’s Assocs., Inc.*, No. 16-61198 (S.D. Fla. Mar. 15, 2019) (clarifying \$20,000 in statutory and incentive awards to Plaintiff Shane Flaum); Order Approving Class-Action Settlement, Dismissing Case, and Entering Final Judgment at 4, *Roberts v. Wyndham Int’l, Inc.*, No. 12-5083 (N.D. Cal. Oct. 27, 2016) (approving a \$15,000 incentive award); Final Judgment and Order of Dismissal with Prejudice at 6, *Harris v.comScore, Inc.*, No. 11-05807 (N.D. Ill. Oct. 1, 2014), ECF No. 369 (approving an \$11,000 incentive award).

fund. For example, looking at two comparable settlement funds, in *In re Yahoo! Inc. Customer Data Security Breach Litigation*, each class representative received \$7,500, \$5,000, or \$2,500 based on their involvement, for a total incentive award of \$87,500.<sup>77</sup> The total incentive award constituted only about 0.07% of the \$117.5 million total settlement fund.<sup>78</sup> In *In re Anthem Data Breach Litigation*, class representatives got either \$5,000 or \$7,500, summing up to \$597,500.<sup>79</sup> The total incentive award constituted about 0.52% of the total \$115 million settlement fund.<sup>80</sup> Both cases were decided in the Northern District of California by Judge Lucy Koh two years apart. The disparity in the proportion of total incentive awards to the settlement fund suggests that unlike attorney’s fees—where the proportion to the fund is a significant factor in determining reasonableness—courts are primarily looking to the individual award per class representative to determine reasonableness. Further, there is no evidence that incentive awards are correlated with lead class representative attorney’s fees. Privacy class actions can be likened to the “large-scale, small-claim consumer cases” that Eisenberg and Miller sampled.<sup>81</sup> There, they found that incentive awards were consistently recommended to the

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77. Second Amended Order Granting Plaintiffs’ Motion for Final Approval of Class Action Settlement; Granting in Part Plaintiffs’ Attorneys’ Fees, Costs, and Expenses and Service Awards at 88, *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-02752 (N.D. Ca. July 22, 2020), ECF No. 497.

78. *Id.* at 10.

79. *Anthem Fees and Incentive Awards Order* at 65.

80. *See Order Granting Plaintiffs’ Motion for Final Approval of Class Action Settlement, In re Anthem Data Breach Litig.*, No. 15-02617 (N.D. Cal. Aug 15, 2018) (approving of a settlement fund of \$115 million).

81. Eisenberg & Miller, *supra* note 3, at 1304–05, 09.

courts by attorneys.<sup>82</sup> This was true even though they had hypothesized that with a very large number of affected consumers, the attorneys could easily find alternative class representatives who would be willing to receive no extra award.<sup>83</sup> However, in the privacy class action settlements surveyed here, “[i]ncentive awards [were] not higher . . . where the attorneys’ fees award [was] low, suggesting that courts are not compensating the representative plaintiff[s] for monitoring counsel to be keep fees” down.<sup>84</sup>

Finally, the incentive award constituted on average less than one percent (0.7%) of the total settlement fund. This suggests a higher total incentive award for privacy class action settlements than other case types that Eisenberg and Miller surveyed. In the 104 cases covering a range of class action categories where incentive awards were reported, Eisenberg and Miller found that on average, incentive awards constituted only 0.16% of the class recovery.<sup>85</sup> This disparity could partially be explained by the increased frequency of incentive awards in privacy settlements,<sup>86</sup> a lower total settlement fund in privacy settlements, or the larger number of class representatives that leads to a higher total incentive award. Especially in privacy class actions where the monetary recovery per class member is low or tied to actual losses, without an incentive award, the class representative may “experience a net loss” for their costs of acting as class

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82. *See id.* at 1309 (“If attorneys were acting in their self-interest when they recommend awards to the court, we might expect to see the rate of awards increase with increased fees.”).

83. *Id.*

84. *Id.*

85. *Id.* at 1338–39.

86. For example, Eisenberg & Miller found that incentive awards were given in 59 percent of consumer credit actions, whereas this data set had a 98 percent incentive award grant. *Id.* at 1307.

representative.<sup>87</sup> For example, Eisenberg and Miller’s data found that consumer credit cases showed lowest recoveries per class member, along with the highest rates of incentive awards.<sup>88</sup> This finding is in line with the privacy settlement data here, where each consumer recovered minimal compensatory damages.<sup>89</sup> Therefore, data privacy suits could be said to mirror the “cost-reimbursement hypothesis” where class representatives need an incentive so that they do not experience a loss in acting as class representative.<sup>90</sup>

In sum, courts do not appear to have any comprehensive framework upon which to calculate or adjust incentive awards. However, they do have built-in limitations in granting incentive awards, even if the text of the statutes and Rule 23 is not explicit. In determining whether a settlement is “fair, reasonable, and adequate,” the court should look to whether “the class representatives and class counsel ... adequately represented the class.”<sup>91</sup> Further, that “the proposal treats class members equitably relatively to each other.”<sup>92</sup> Thus, the court must balance the reasonableness of the incentive award with the work provided by the class representative and the equity among the class members.

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87. *Id.* at 1305.

88. *Id.* at 1305–07.

89. The highest pro rata payment per consumer was *Ronquillo-Griffin v. Transunion Rental Screening Sols., Inc.*, where each of the 73 class members received \$3,703.64. Order Granting Motion for Final Approval and Granting in Part Motion for Attorneys’ Fees, Costs, and Service Awards at 2, *Ronquillo-Griffin v. Transunion Rental Screening Sols., Inc.*, No. 17-129 (S.D. Cal. May 9, 2019).

90. *See* Eisenberg & Miller, *supra* note 3, at 1324–25 (explaining that the consumer credit cases are consistent with the cost-reimbursement hypothesis).

91. Fed. R. Civ. P. 23(e)(2)(A).

92. Fed. R. Civ. P. 23(e)(2)(D).

Though courts and academics have articulated differing purposes for incentive awards, in the privacy class actions surveyed here the court themselves seemed to buy into the “reward for performance” purpose of incentive awards.<sup>93</sup> In *In re Equifax Customer Data Security Breach Litigation*, the court found that the “modest” incentive award of \$2,500 was “deserved” for lead representatives’ “substantial time and effort” and their “instrumental” nature in gaining relief for the class.<sup>94</sup> Alternatively, courts in some settlements do not describe their rationale at all and presumed find the award facially reasonable.<sup>95</sup> Maybe the incentive awards are in fact a reasonable amount, due to the hours that the class representative put into the case reviewing documents, being deposed, and other administrative tasks and do not need much scrutiny. Named plaintiffs “incur costs” in order to satisfy the Rule 23 “adequacy” requirement.<sup>96</sup> Or, almost one percent of the settlement can be seen as a sizeable portion of the class relief. Interestingly, there was no evidence of entrepreneurial class representatives;<sup>97</sup> while there were the same circle of lead class

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93. See Eisenberg & Miller, *supra* note 3, at 1316–17 (explaining the reward for performance hypothesis).

94. Amended Order Granting Final Approval of the Settlement, Certifying Settlement Class, and Awarding Attorney’s Fees, Expenses and Service Awards at 108, *In re Equifax Customer Data Sec. Breach Litig.*, No. 17-2800 (N.D. Ga. Mar. 17, 2020), ECF No. 1029.

95. See, e.g., Motion for Attorneys’ Fees, Costs, and Service Awards at 2, *Corona v. Sony Pictures Ent., Inc.*, No. 14-09600 (C.D. Cal. Apr. 12, 2016), ECF No. 166 (finding the awards “fair and justified ... [u]pon review of the records).

96. Eisenberg & Miller, *supra* note 3, at 1305.

97. By entrepreneurial class representative, I mean an individual who repeatedly serves as the class representative in multiple different class actions.

attorneys appearing in the settlements,<sup>98</sup> there were no repeat class representatives attempting to garner another \$5,000 from a settlement.

Though the data could show the median \$5,000 incentive award is not facially troubling, what may in fact be a cause for concern is the lack of a comprehensive framework for courts to determine a proper incentive award. If anything, the settlements reveal that the justification for incentive awards relies upon its facially “reasonable” amount: the median incentive award of \$5,000 seems about right to courts, class members, and defendants.

### III. ATTORNEY’S FEES

Attorney’s fees are also a popular source of contention for objectors and judges alike. From the 80 settlements included, the median attorney’s fee for privacy class action settlements was \$1,300,000. The average attorney’s fee was \$3,886,162.59. The high average is due to 8 settlements awarding attorney’s fees over \$10 million.<sup>99</sup> Further, the average

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98. Girard Gibbs (now Girard Sharp and Gibbs Law, respectively); Morgan & Morgan Law Firm, and Edelson PC (formerly known as Edelson McGuire LLC) represented the class in more than 5 cases each.

99. Amended Order Granting Final Approval of Settlement, Certifying Settlement Class, and Awarding Attorney’s Fees, Expenses, and Service Awards at 11, *In re Equifax Customer Data Sec. Breach Litig.*, No. 17-2800 (N.D. Ga. Mar. 17, 2020) (awarding \$77.5 million) (hereinafter “Equifax Order”); Anthem Fees and Incentive Awards Order at 65 (awarding over \$31 million); Second Amended Order Granting Plaintiffs’ Motion for Final Approval of Class Action Settlement; Granting in Part Plaintiffs’ Attorneys’ Fees, Costs, and Expenses and Service Awards at 88, *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-02752 (N.D. Cal. July 22, 2020) (awarding over \$22.76 million); Final Approval Order and Judgment at 5, *First Choice Fed. Credit Union v. Wendy’s Co.*, No. 16-00506 (W.D. Pa. Nov. 6, 2019) (awarding “Class Counsel 30% of the gross Settlement Fund,” which is \$50 million) *and* Memorandum of Law In Support of Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement at



proportion of attorney's fees to the total settlement fund was 35.06%. This stand in comparison to incentive awards, which on average constituted 0.7% of the total settlement fund. The lowest proportion was 12.28%: \$564,922 in attorney's fees for a \$4.6 million settlement.<sup>100</sup> On the other hand, 7 settlements had attorney's fees which were over 90% of the settlement fund.<sup>101</sup>

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Appendix A, *First Choice Fed. Credit Union v. Wendy's Co.*, No. 16-00506 (W.D. Pa. Feb. 13, 2019), ECF No. 176; Order Granting Motion for Attorney's Fees, Costs, and Service Awards at 3, *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, No. 15-2633 (D. Or. Mar. 2, 2020) (awarding over \$12.7 million); Final Judgment at 5, *In re Experian Data Breach Litig.*, No. 15-01592 (C.D. Cal. May 29, 2019) (awarding \$10.5 million); Order at 2, *Flaum v. Doctor's Assocs., Inc.*, No. 16-61198 (S.D. Fla. Mar. 15, 2019), ECF No. 178 (awarding \$10.5 million); Order Granting Final Approval of Settlement; Granting Attorneys' Fees at 19, *Ebarle v. Lifelock, Inc.*, No. 15-00258 (N.D. Cal. Sept. 20, 2016) (awarding \$10.2 million).

100. Final Order Approving Class Action Settlement and Judgment at 3, *Skuro v. BMW N. Am., LLC*, No. 10-08672 (W.D. Cal. Aug. 27, 2012), ECF No. 56 *and* Notice of Motion and Unopposed Motion for Final Approval of Class Action Settlement at 9, *Skuro v. BMW N. Am., LLC*, No. 10-08672 (W.D. Cal. July 20, 2012), ECF No. 51.
101. Order Approving Settlement at 7, *In re Michaels Stores Pin Pad Litig.*, No. 11-3350 (N.D. Ill. Apr. 17, 2013) (approving an award of attorney's fees and costs of \$1.2 million) *and* Defendant Michaels Stores, Inc.'s Memorandum in Support of Joint Motion for Final Approval of Settlement at 8–9, *In re Michaels Stores Pin Pad Litig.*, No. 11-3350 (N.D. Ill. Mar. 22, 2013) (supporting a settlement fund starting at \$600,000 with the ability to increase it to \$800,000); Order Granting Plaintiffs' Motion for Final Approval of Class Action Settlement at 4, *Matera v. Google LLC*, No. 15-04062 (N.D. Cal. Feb. 9, 2018) (approving an award where attorneys' fees and expenses and "Class Counsel's actual out-of-pocket expenses" make up 99.82% of the award); Order Granting Final Approval to Class Action Settlement; Granting Motion for Attorneys' Fees and Service Awards at 12–13, *Campbell v. Facebook, Inc.*, No. 13-5996 (N.D. Cal. Aug. 18, 2017) (99.74%); Order Granting Motion for Final Approval of Class Action Settlement and Order

This 35.06% proportion to the fund is high. In a 2004 study of attorney's fees in class actions, Eisenberg and Miller found the mean fee percentage award across various class actions types to be 21.9%.<sup>102</sup> Here, the high proportion could be due to the prevalence of injunctive relief in privacy class actions. It is hard to value non-monetary injunctive relief or credit monitoring. Unless a court readily and independently values non-monetary injunctive relief, the case was not included in the total settlement fund figures here.

Overall, attorney's fee awards were unconnected to the incentive awards. For example, with identical attorney's fee awards of \$375,000, one settlement for recording consumer calls without consent awarded a \$10,000 incentive award,<sup>103</sup> while another that alleged improper gathering

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Granting Motion for Attorney's Fees, and Costs and Class Representative Service Awards at 20–21, 20 n. 3, *In re Yahoo Mail Litig.*, No. 13-04980 (N.D. Cal. Aug. 25, 2016) (99.5%); Representative Plaintiffs' Motion for and Memorandum in Support of Final Approval of Class Action Settlement, *Roberts v. The Source for Pub. Data*, No. 08-4167 (W.D. Mo. Sept. 9, 2010), ECF No. 238 (96.67%); Order and Judgment at 5, *Johnson v. Washington Univ.*, No. 10-04170 (W.D. Mo. 2011) (approving the settlement, including \$25,000 in attorneys' fees) *and* Representative Plaintiffs' Motion for and Memorandum in Support of Final Approval of Class Action Settlement, and Award of Attorneys' Fees, Costs and Expenses at 3, *Johnson v. Washington Univ.*, No. 10-04170 (W.D. Mo. 2011) (stating that the settlement includes \$25,000 in attorneys' fees and \$500 for each of the two class representatives, resulting in 96.15% in attorneys' fees); Final Judgment and Order Approving the Class Action Settlement Agreement and Dismissing Claims with Prejudice at 6, *Missaghi v. Blockbuster LLC*, No. 11-02559 (D. Minn. Nov. 27, 2012) (99.47%).

102. Theodore Eisenberg & Geoffrey Miller, *Attorney's Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 27 (2004).

103. Final Order Approving Class Action Settlement and Judgment; Notice of Entry of Judgment at 4, *Stone v. Howard Johnson Int'l, Inc.*, No. 12-01684 (C.D. Cal. Nov. 30, 2015), ECF No. 123.

of personal credit card and zip code data awarded \$5,000.<sup>104</sup> Even when attorney’s fees were four times higher at \$1 to 1.3 million, incentive awards for a credit card data breach were \$5,000<sup>105</sup> and for an improper sale of driver’s license data \$10,000.<sup>106</sup> The courts themselves provided little insight into their rationale for the differing fees. For the \$10,000 incentive award granted in *Wilcox v. Swapp*, the court’s purported rationale for the award was that it was “reasonable and proper to compensate Ms. Wilcox for her work done on behalf of the Class.”<sup>107</sup> The court was equally curt in *Torres v. Wendy’s International, LLC*, stating the \$5,000 “payment is justified by [class representative’s] service to the Settlement Class.”<sup>108</sup> Meanwhile, the attorney’s fees were determined on a finding that the lodestar calculation was “reasonable,”<sup>109</sup> or “fair and reasonable.”<sup>110</sup>

Finally, looking at two extremes as a point of comparison, the settlement with the highest attorney’s fees was *In re Equifax Customer Data Security Breach Litigation*, at \$77.5 million, which constituted about 20% of the total \$380.5 million settlement fund.<sup>111</sup> In second was *In re Anthem Inc. Data Breach Litigation* at \$31.05 million, which constituted 27% of the total

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104. Order at 17–18, *Morey v. Louis Vuitton N. Am, Inc.*, No. 11-01517 (S.D. Cal. Jan. 9, 2014), ECF No. 70.

105. Final Approval Order and Judgment at 5, *Torres v. Wendy’s Int’l LLC*, No. 16-00210 (M.D. Fla. Feb. 26, 2019) (awarding \$1.02 million in attorney’s fees) (hereinafter “Torres Order”).

106. Order Granting Final Approval of Class Action Settlement at 7, *Wilcox v. Swapp*, No. 17-00275 (E.D. Wash. July 23, 2020) (awarding \$1.27 million in attorney’s fees) (hereinafter “Wilcox Order”).

107. *Id.*

108. Torres Order at 5.

109. Wilcox Order at 7.

110. Torres Order at 5.

111. Equifax Order at 5, 122.

\$115 million settlement fund.<sup>112</sup> On the other extreme, two settlements had attorney's fees of only \$25,000. Ironically, the lowest attorney's fees settlements constituted two of the highest percentages of the total settlement fund. For example, in *Patton v. Swifty Oil*, the \$25,000 attorney's fee was 83.33% of the settlement fund.<sup>113</sup> Likewise, in *Johnson v. Washington University*, the \$25,000 attorney's fee was 96.15% of the total settlement fund.<sup>114</sup> Further analysis into attorney's fees in privacy class action settlements (compared to other class action settlements) would be useful to determine potential abuse. However, as a check in comparison to incentive award calculations, courts do in fact have frameworks upon which to judge the propriety of attorney's fees, such as the lodestar number and proportion of the settlement calculations.

#### IV. SETTLEMENTS NOT INCLUDED BUT OF INTEREST

There are a few noteworthy privacy settlements that were not included in this analysis as the final terms and approval are forthcoming in early 2021 or they were overturned in 2020. They are relevant due to the plaintiffs involved and the size of the proposed settlement and may provide some insight into future settlement trends in the 2020s. Of note are *In re Facebook Biometric Information Privacy Litigation*<sup>115</sup> and the overturned

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112. Anthem Fees and Incentive Awards Order at 28, 65.

113. Entry on Final Approval of Class Action Settlement Agreement at 2, *Patton v. Swifty Oil Co.*, No. 9-0099 (S.D. Ind. dismissed May 18, 2011).

114. Order and Judgment at 5, *Johnson v. Washington Univ.*, No. 10-04170 (W.D. Mo. 2011) (approving the settlement, including \$25,000 in attorneys' fees) *and* Representative Plaintiffs' Motion for and Memorandum in Support of Final Approval of Class Action Settlement, and Award of Attorneys' Fees, Costs and Expenses at 3, *Johnson v. Washington Univ.*, No. 10-04170 (W.D. Mo. 2011) (stating that the settlement includes \$25,000 in attorneys' fees and \$500 for each of the two class representatives).

115. No. 15-03747 (N.D. Cal. filed Aug. 17, 2015).

settlements of *Muransky v. Godiva Chocolatier*<sup>116</sup> and *In re Citrix Data Breach Litigation*.<sup>117</sup>

Some of the terms of these settlements have been released through preliminary approval. For the *Facebook* litigation, the expansive Illinois BIPA statute garnered a settlement fund of \$650 million.<sup>118</sup> Facebook users who lived in Illinois and uploaded a picture to Facebook after June 7, 2011 will receive a pro rata cash payment between \$200 and 400,<sup>119</sup> a much higher amount per class member than the median direct cash payment for privacy claims of the same nature and the highest settlement amount out of the data set. The only other settlement fund even close to this amount—*In re Equifax Customer Data Breach Security Litigation*—was also approved in 2020.<sup>120</sup> In comparison to the relatively small number of affected Illinois Facebook users, the *In re Equifax* settlement totaled over \$380 million and involved 147 million customers' data nationwide. Further, the *Facebook* litigation is the largest settlement under BIPA since it was enacted in 2008: there were only two other BIPA settlements in the data set, each having a settlement fund of over \$1 million.<sup>121</sup>

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116. 979 F.3d 917 (11th Cir. 2020) (en banc).

117. No. 19-61350 (S.D. Fla. filed May 30, 2019).

118. Notice of Amended Stipulation of Class Action Settlement at 14, *In re Facebook Biometric Information Privacy Litigation*, No. 15-03747 (N.D. Cal. July 22, 2020), ECF No. 468 (hereinafter “Facebook Settlement”).

119. *Id.* at 61.

120. *See* Equifax Order at 5 (stating the settlement fund is \$380.5 million).

121. *Sekura v. LA Tans Enters., Inc.*, No. 15-16694 (Cook Cty. Cir. Ct. 2016); Melissa Daniels, *Tanning Co. Settles for \$1.5M Under Illinois Biometric Law*, LAW360 (Dec. 6, 2016), <https://www.law360.com/articles/869828/tanning-co-settles-for-1-5m-under-illinois-biometric-law>. Order Granting Approval of Attorneys' Fees, Costs, and Service Payment to the Class Representative at 2, *Bryant v. Loews Chi. Hotel, Inc.*, No. 19-03195 (N.D. Ill. Oct. 30, 2020).

In October 2020 the Eleventh Circuit invalidated *Muransky v. Godiva Chocolatier, Inc.* for lack of standing. It was then taken out of the data set. *Muransky* was a Fair and Accurate Credit Transactions Act (FACTA) suit brought by Dr. David Muransky alleging that a receipt revealing his credit card digits led to an increased risk of identity theft.<sup>122</sup> The settlement was upheld by the Eleventh Circuit in 2019 and included \$2.1 million in attorney’s fees and a \$10,000 incentive award.<sup>123</sup> However, the Eleventh Circuit agreed to rehear the standing issue and remanded the case without prejudice after determining Muransky alleged a “naked assertion” of harm.<sup>124</sup> The legal reasoning of the court was similar to that in *Frank v. Gaos*, questioning whether there was truly an injury-in-fact from just a revealing receipt without subsequent fraud.

Further, there will continue to be effects of the Eleventh Circuit’s *Johnson v. NPAS Solutions* decision regarding incentive awards. In October 2020, the \$2.275 million settlement in *In re Citrix Data Breach Litigation* did not receive preliminary approval by the Southern District of Florida.<sup>125</sup> Based on the September 2020 *Johnson* ruling, Judge Roy K. Altman found the settlement’s \$3,500 incentive awards to seven class representatives improper and precluded by the Eleventh Circuit.<sup>126</sup> However, in January 2021, Judge Altman gave preliminary approval to the deal after class representatives removed their requests for \$3,500 services awards.<sup>127</sup> It

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122. *Muransky*, 979 F.3d at 921–22.

123. *Id.* at 922–23.

124. *Id.* at 933, 936.

125. Citrix Order at 3.

126. *Id.* at 3.

127. Order Preliminarily Approving Class Settlement, *In re Citrix Breach Litig.*, No. 19-61350 (S.D. Fla. Jan. 26, 2021), ECF No. 56; Lauren Berg, *Judge Greenlights Altered \$2.3M Citrix Data Breach Deal*, LAW360 (Jan. 26, 2021),

remains to be seen whether other circuits will follow the Eleventh Circuit's lead regarding the commonplace incentive awards. Thus, these privacy settlements remain of interest due to their constitutional questions and high settlement fund totals. Even though these settlements were not included in the final analysis, they may preview some of the challenges courts and practitioners will face in bringing consumer privacy class actions in the next decade.

## CONCLUSION

In sum, privacy class actions are a developing and active area of the law. The last ten years have seen courts, attorneys, and defendants come together to craft creative and detailed settlement agreements to benefit the class and prevent the abuse of consumer data in the future. This article serves as a useful resource to view how incentive awards and attorney's fees operated within the last decade in the data privacy sphere. While the efficacy of each type of privacy class action settlement can be debated, the overall finding regarding incentive awards points towards no widespread abuse and that they are generally ubiquitous across all state and federal courts. Courts could benefit, however, from a framework upon which to judge incentive award amounts, rather than a case-specific determination based on attorney and judicial discretion.

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[https://www.law360.com/articles/1348749?e\\_id=59eb1891-e060-4dec-a3a1-e32e1a2c3b03&utm\\_source=engagement-alerts&utm\\_medium=email&utm\\_campaign=case\\_updates:%20](https://www.law360.com/articles/1348749?e_id=59eb1891-e060-4dec-a3a1-e32e1a2c3b03&utm_source=engagement-alerts&utm_medium=email&utm_campaign=case_updates:%20).

## APPENDIX A

Case Name	Attorney's Fees (\$)	Incentive Award (per plaintiff) (\$)	Total Incentive Award (\$)	Total Settlement Fund (\$)	Attorney Fee Percentage (%)	Individual Incentive Award Percentage (%)	Incentive Award Total Percentage (%)
Matera v. Google, Inc.	2,200,000	2,000	4,000	2,204,000	99.82	0.09	0.18
Fraley v. Facebook, Inc.	4,684,628	1,500	4,500	20,000,000	23.42	0.01	0.02
Haug v. PetSmart, Inc.	190,000	10,000	10,000	950,000	20.00	1.05	1.05
Anderson-Butler v. Charming Charlie, Inc.	140,000	5,000	10,000	500,000	28.00	1.00	2.00
Beckett v. Aetna, Inc. - Tier 1	4,290,300	5,000	95,000	17,161,200	25.00	0.03	0.55
----- Tier 2		2,000					
Stone v. Howard Johnson Int'l, Inc.	375,000	10,000	10,000	1,500,000	25.00	0.67	0.67
Springer v. Stanford Hosps. & Clinics	1,300,000	-	-	4,125,000	31.52	0.00	0.00
Morey v. Louis Vuitton N. Am., Inc.	375,000	5,000	5,000.00	1,380,000	27.17	0.36	0.36
Lane v. Facebook, Inc. – Tier 1	2,322,763	10,000	41,500.00	9,500,000	24.45	0.11	0.44
----- Tier 2		1,000					
----- Tier 3		5,000					
Petersen, et. al v. Lowe's HIW, Inc.	640,000	5,000	20,000.00	2,900,000	22.07	0.17	0.69
In re Anthem Inc. Data Breach Litig. – Tier 1	31,050,000	5,000	597,500.00	115,000,000	27.00	0.00	0.52
----- Tier 2		7,500					



Case Name	Attorney's Fees (\$)	Incentive Award (per plaintiff) (\$)	Total Incentive Award (\$)	Total Settlement Fund (\$)	Attorney Fee Percentage (%)	Individual Incentive Award Percentage (%)	Incentive Award Total Percentage (%)
Campbell v. Facebook, Inc.	3,890,000	5,000	10,000.00	3,900,000	99.74	0.13	0.26
Torres v. Wendy's Int'l LLC	1,020,000	5,000	20,000	3,400,000	30.00	0.15	0.59
Wilcox v. Swapp	1,270,357	10,000	10,000.00	2,160,000	58.81	0.46	0.46
Ronquillo-Griffin v. Transunion Rental Screening Sols., Inc.	114,533	3,000	9,000.00	561,000	20.42	0.53	1.60
In re Yahoo Mail Litig.	4,000,000	5,000	20,000.00	4,020,000	99.01	0.12	0.50
Harris v. comScore, Inc.	4,662,000	11,000	22,000.00	14,000,000	33.30	0.08	0.16
Missaghi v. Blockbuster LLC	140,000	750	750.00	147,750	94.75	0.51	0.51
Bryant v. Loews Chi. Hotel, Inc.	345,120	10,000	10,000	1,050,000	32.87	0.95	0.95
Orr v. Intercontinental Hotels Grp. PLC	545,483	1,500	6,000.00	2,101,483	25.96	0.07	0.29
First Choice Fed. Credit Union v. Wendy's Co. – Tier 1	15,000,000	7,500	127,500.00	50,000,000	30.00	0.02	0.26
----- Tier 2		2,500					
In re Experian Data Breach Litig.	10,500,000	2,500	142,500.00	30,808,739	34.08	0.01	0.46
In re Premera Blue Cross Customer Data Sec. Breach Litig.	12,752,611	5,000	100,000.00	32,000,000	39.85	0.02	0.31
Moeller v. Advance Magazine Publishers, Inc.	4,124,916	10,000	10,000.00	13,800,000	29.89	0.07	0.07

Case Name	Attorney's Fees (\$)	Incentive Award (per plaintiff) (\$)	Total Incentive Award (\$)	Total Settlement Fund (\$)	Attorney Fee Percentage (%)	Individual Incentive Award Percentage (%)	Incentive Award Total Percentage (%)
In re Lenovo Adware Litig.	2,490,000	5,000	20,000.00	8,300,000	30.00	0.06	0.24
Flaum v. Doctor's Assocs., Inc. – Tier 1	10,300,000	20,000	30,000.00	30,900,000	33.33	0.06	0.10
----- Tier 2		10,000					
In re Google Inc. Cookie Placement Consumer Priv. Litig.	1,925,000	1,000	3,000	5,500,000	35.00	0.02	0.05
Opperman v. Kong Techs, Inc. – Tier 1	1,590,000	7,500	75,000.00	5,300,000	30.00	0.14	1.42
----- Tier 2		5,000					
Guarisma v. Microsoft Corp.	398,232	10,000	10,000.00	1,194,696	33.33	0.84	0.84
In re Equifax Customer Data Sec. Breach Litig.	77,500,000	2,500	232,500.00	380,500,000	20.37	0.00	0.06
In re Banner Health Data Breach Litig.	2,900,000	5,000	30,000.00	8,900,000	32.58	0.06	0.34
In re The Home Depot, Inc. Cust. Data Sec. Breach Litig.	7,536,498	1,000	88,000	27,250,000	27.66	0.00	0.32
Kokoszki v. Playboy Enters., Inc.	1,347,000	5,000	5,000.00	3,850,000	34.99	0.13	0.13
Gordon v. Chipotle Mexican Grill, Inc.	1,200,000	2,500	15,000.00	2,822,250.00	42.52	0.09	0.53
Veridian Credit Union v. Eddie Bauer LLC	1,738,528	10,000	10,000.00	9,800,000	17.74	0.10	0.10

Case Name	Attorney's Fees (\$)	Incentive Award (per plaintiff) (\$)	Total Incentive Award (\$)	Total Settlement Fund (\$)	Attorney Fee Percentage (%)	Individual Incentive Award Percentage (%)	Incentive Award Total Percentage (%)
Doe One v. Caremark, LLC	1,466,666	3,500	14,000	4,400,000	33.33	0.08	0.32
In re Sonic Corp. Customer Data Sec. Breach Litig.	1,441,667	1,722	15,500.00	4,325,000	33.33	0.04	0.36
Fishman v. Tiger Nat. Gas Inc.	870,718	-	-	3,700,000	23.53	0.00	0.00
In Re Carrier iQ Consumer Priv. Litig. – Tier 1	2,250,000	5,000	75,000.00	9,000,000	25.00	0.06	0.83
----- Tier 2		3,000					
In re Google Buzz Priv. Litig.	2,125,000	2,500	20,000	8,500,000	25.00	0.03	0.24
In re Vizio, Inc., Consumer Priv. Litig.	5,610,000	5,000	30,000.00	17,000,000	33.00	0.03	0.18
In re Netflix Priv. Litig. – Tier 1	2,250,000	6,000	30,000.00	9,000,000	25.00	0.07	0.33
----- Tier 2		3,000					
In re LinkedIn User Priv. Litig.	312,500	5,000	5,000.00	1,250,000	25.00	0.40	0.40
N.P. and P.S. v. Standard Innovation Corp. d/b/a We-Vibe	1,120,000	5,000	10,000	4,000,000	28.00	0.13	0.25
Skuro v. BMW N. Am., LLC	564,922	5,000	5,000	4,600,000	12.28	0.11	0.11
Taylor v. Trusted Media Brands, Inc.	1,347,500	5,000	5,000.00	8,225,000	16.38	0.06	0.06
Mount v. Wells Fargo Bank, NA – Tier 1	1,634,000	10,000	25,000.00	5,600,000	29.18	0.18	0.45

Case Name	Attorney's Fees (\$)	Incentive Award (per plaintiff) (\$)	Total Incentive Award (\$)	Total Settlement Fund (\$)	Attorney Fee Percentage (%)	Individual Incentive Award Percentage (%)	Incentive Award Total Percentage (%)
----- Tier 2		5,000					
Reed v. 1-800 Contacts, Inc.	2,925,000	10,000	10,000.00	11,700,000	25.00	0.09	0.09
Valentine v. NebuAd Inc. – Tier 1	722,853	5,000	6,000	2,409,510	30.00	0.21	0.25
----- Tier 2		1,000					
Johansson-Dohrmann v. CBR Sys., Inc.	585,936	5,000	5,000	2,000,000	29.30	0.25	0.25
In re Quantcast Advertising Cookie Litig.	544,887	1,500	30,000	3,150,000	17.30	0.05	0.95
Johnson v. Washington Univ.	25,000	500	1,000.00	26,000	96.15	1.92	3.85
Ebarle v. LifeLock, Inc.	10,200,000	2,000	8,000.00	80,808,000	12.62	0.00	0.01
Corona v. Sony Pictures Ent., Inc. – Tier 1	2,292,030	3,000	33,000.00	8,000,000	28.65	0.04	0.41
----- Tier 2		1,000					
Perkins v. LinkedIn Corp.	3,250,000	1,500	13,500	13,000,000	25.00	0.01	0.10
Monteferrante v. Container Store Inc.	120,000	3,000	3,000.00	877,000	13.68	0.34	0.34
Halaburda v. Bauer Publ'g Co.	232,500	5,000	5,000.00	775,000	30.00	0.65	0.65
Landwehr v. AOL Inc.	820,685	9,900	9,900.00	5,000,000	16.41	0.20	0.20
In re Michaels Stores Pin Pad Litig.	1,200,000	2,500	25,000	800,000 (max)	150.00	0.31	3.13

Case Name	Attorney's Fees (\$)	Incentive Award (per plaintiff) (\$)	Total Incentive Award (\$)	Total Settlement Fund (\$)	Attorney Fee Percentage (%)	Individual Incentive Award Percentage (%)	Incentive Award Total Percentage (%)
Roberts v. Wyndham Int'l, Inc.	1,831,250	15,000	15,000.00	7,325,000	25.00	0.20	0.20
Burrows v. Purchasing Power LLC	200,000	3,500	3,500.00	428,500	46.67	0.82	0.82
Anderson v. Nelson	50,000	1,666	5,000.00	287,870	17.37	0.58	1.74
Sekura v. LA Tans Enters., Inc.	600,000	5,000	5,000.00	1,500,000	40.00	0.33	0.33
Roberts v. The Source for Pub. Data	87,000	1,500.00	3,000.00	90,000	96.67	1.67	3.33
Shughrou v. Euromarket Designs, Inc.	490,000	3,000	21,000	3,000,000	16.33	0.10	0.70
Curry v. AvMed, Inc.	750,000	5,000	10,000	3,000,000	25.00	0.17	0.33
Cohost v. BRE Properties	1,540,000	5,000	15,000	5,500,000	28.00	0.09	0.27
Wiles v. S.W. Tel. Co.	300,000	1,500	3,000	900,000	33.33	0.17	0.33
In re Ashley Madison Customer Data Sec. Breach Litig.	3,733,333	5,000	90,000	11,200,000	33.33	0.04	0.80
Saunders v. StubHub, Inc.	312,500	10,000	10,000	1,250,000	25.00	0.80	0.80
Bishop v. Shorter Univ., Inc.	65,000	1,000	11,000	175,000	37.14	0.57	6.29
Scherer v. Tiffany & Co.	142,000	2,000	2,000	1,144,000	12.41	0.17	0.17
Patton v. Swifty Oil Co.	25,000	1,000	2,000	57,000	43.86	1.75	3.51
In re Yahoo! Inc. Customer Data	22,763,643	7,500	87,500	117,500,000	19.37	0.01	0.07

Case Name	Attorney's Fees (\$)	Incentive Award (per plaintiff) (\$)	Total Incentive Award (\$)	Total Settlement Fund (\$)	Attorney Fee Percentage (%)	Individual Incentive Award Percentage (%)	Incentive Award Total Percentage (%)
Sec. Breach Litig. – Tier 1							
----- Tier 2		5,000					
----- Tier 3		2,500					
In re Target Corp. Customer Data Sec. Breach Litig. – Tier 1	6,750,000	3,000	58,000	23,300,000	28.97	0.01	0.25
----- Tier 2		500					
Abdelmessih et al. v. Five Below, Inc.	93,750	1,500	1,500	207,250	45.24	0.72	0.72
Jane Doe v. Twitter, Inc.	740,431	2,000	2,000	2,690,000	27.53	0.07	0.07

## APPENDIX B

Case Name	Final Approval	Court	Docket #	Judge	Statute	Defendant
Matera v. Google, Inc.	2018	N.D. Cal.	15-cv-04062	Lucy H. Koh	Electronic Communications Privacy Act; Cal. Invasion of Privacy Act	Google, Inc.
Fraley v. Facebook, Inc.	2013	N.D. Cal.	11-cv-01726	Richard G. Seeborg	Cal. Use of Name Image or Likeness; Cal. Unfair Competition Act	Facebook, Inc.
Haug v. PetSmart, Inc.	2011	E.D. Cal.	10-cv-00990	Morrison C. England, Jr.	Song Beverly Credit Card Act	PetSmart Inc.
Anderson-Butler v. Charming Charlie, Inc.	2015	E.D. Cal.	14-cv-01921	William B. Shubb	Song Beverly Credit Card Act	Charming Charlie LLC
Beckett v. Aetna, Inc.	2018	E.D. Pa.	17-cv-03864	Juan R. Sanchez	HIPPA	Aetna, Inc
Stone v. Howard Johnson Int'l, Inc.	2015	C.D. Cal.	12-cv-01684	Phillip S. Gutierrez	Cal. Invasion of Privacy Act	Howard Johnson; Wyndham Hotel Group LLC
Springer v. Stanford Hosps. & Clinics	2014	Cal. Super. Ct. Los Angeles	BC470522	Elihu Berle	Cal. Confidentiality of Medical Information Act	Stanford University Hosps. & Clinics
Morey v. Louis Vuitton N. Am., Inc.	2014	S.D. Cal.	11-cv-01517	William Q. Hayes	Song Beverly Credit Card Act	Louis Vuitton N. Am. Inc.
Lane v. Facebook, Inc.	2012	N.D. Cal.	8-cv-038450	Richard G. Seeborg	Electronic Communications Privacy Act; Video Privacy Protection Act; Computer Fraud and Abuse Act; Cal. Consumer Legal Remedies; Cal. Computer Crime Law	Facebook, Inc.
Petersen, et. al v. Lowe's HIW, Inc.	2012	N.D. Cal.	11-cv-01996	Richard G. Seeborg	Song Beverly Credit Card Act	Lowe's HIW, Inc.
In Re Anthem Inc. Data Breach Litig.	2018	N.D. Cal.	15-md-02617	Lucy H. Koh	Common Law Tort Claims	Anthem, Inc.
Campbell v. Facebook, Inc.	2017	N.D. Cal.	13-cv-5996	Phyllis Hamilton	Computer Fraud and Abuse Act; Cal. Invasion of Privacy Act; Electronic Communications Privacy Act	Facebook, Inc.
Torres v. Wendy's Int'l LLC	2019	M.D. Fla.	16-cv-00210	Paul G. Byran	Fla. Deceptive and Unfair Trade Practices Act	Wendy's International LLC

Case Name	Final Approval	Court	Docket #	Judge	Statute	Defendant
Wilcox v. Swapp	2020	E.D. Wash.	17-cv-00275	Rosanna Malouf Peterson	Driver's Privacy Protection Act	Attorney James Craig Swapp
Ronquillo-Griffin v. Transunion Rental Screening Sols., Inc.	2019	S.D. Cal.	17-cv-129	Jeffrey T. Miller	Cal. Invasion of Privacy Act	TransUnion Rental Screening Sols.; Transactel, Inc.
In re Yahoo Mail Litig.	2016	N.D. Cal.	13-cv-04980	Lucy H. Koh	Stored Communications Act; Wiretap Act; Cal. Invasion of Privacy Act	Yahoo Inc.
Harris v. comScore, Inc.	2014	N.D. Ill.	11-cv-05807	James F. Holderman	Stored Communications Act; Computer Fraud and Abuse Act; Ill. Consumer Fraud Act; Electronic Communications Privacy Act	comScore Inc.
Missaghi v. Blockbuster LLC	2012	D. Minn.	11-cv-02559	John R. Tunheim	Video Privacy Protection Act	Blockbuster LLC
Bryant v. Loews Chi. Hotel, Inc.	2020	N.D. Ill.	19-cv-03195	Charles Norgle, Sr.	Ill. Biometric Information Privacy Act	Loews Chicago Hotel; Loews Corp.; Loews COH Operating Co.
Orr v. Intercontinental Hotels Grp. PLC	2020	N.D. Ga.	17-cv-01622	Michael H. Brown	Common Law Tort Claims	Intercontinental Hotels Grp. PLC; Intercontinental Hotels Corp.; Intercontinental Grp. Res., Inc.
First Choice Fed. Credit Union v. Wendy's Co.	2019	W.D. Pa.	16-cv-16506	Magistrate Maureen P. Kelly	Common Law Tort Claims	Wendy's Co.; Wendy's Restaurants, LLC; Wendy's Int'l, LLC
In re Experian Data Breach Litig.	2019	C.D. Cal.	15-cv-01592	Josephine L. Staton	Fair Credit Reporting Act; Ca Unfair Competition Law; N.J. Consumer Fraud Act; N.J. Data Breach Act	Experian PLC
In re Premera Blue Cross Customer Data Sec. Breach Litig.	2019	D. Or.	15-md-02633	Michael H. Simon	Wash. Consumer Protection Act; Ca Confidentiality of Medical Information Act	Premera Blue Cross
Moeller v. Advance Magazine Publishers, Inc.	2019	S.D.N.Y.	15-cv-05671	Naomi Reice Buchwald	Mich. Preservation of Personal Privacy Act	Advance Magazine Publishers, Inc. d/b/a Conde Nast
In re Lenovo Adware Litig.	2019	N.D. Cal.	15-md-02624	Haywood S. Gilliam, Jr.	Electronic Communications Privacy Act; Computer Fraud and Abuse Act; Cal. Computer Crime Law; Cal.	Lenovo Group Ltd.; Superfish



Case Name	Final Approval	Court	Docket #	Judge	Statute	Defendant
					Consumer Legal Remedies Act	
Flaum v. Doctor's Assocs., Inc.	2019	S.D. Fla.	16-cv-61198	Cecilia M. Altonaga	Fair and Accurate Credit Transactions Act	Doctor's Assocs., Inc.
In re Google Inc. Cookie Placement Consumer Priv. Litig.	2017	D. Del.	12-md-2358	Sue L. Robinson	Electronic Communications Privacy Act; Stored Communications Act; Computer Fraud and Abuse Act	Google
Opperman v. Kong Techs., Inc.	2018	N.D. Cal.	13-cv-00453	Jon S. Tigar	Cal. Consumer Legal Remedies Act	Apple, Foodspotting Inc.; Foursquare Labs Inc.; Gowalla Inc.; Kik Interactive Inc.; Kong Technologies Inc.
Guarisma v. Microsoft Corp.	2017	S.D. Fla.	15-cv-24326	Cecilia M. Altonaga	Fair and Accurate Credit Transactions Act	Microsoft Corp.
In re Equifax Customer Data Sec. Breach Litig.	2020	N.D. Ga.	17-md-2800	Thomas W. Thrash Jr.	Fair Credit Reporting Act	Equifax
In re Banner Health Data Breach Litig.	2020	D. Ariz.	16-cv-02696	Susan Bolton	HIPPA; Ariz. Consumer Fraud Act	Banner Health
In re The Home Depot, Inc. Customer Data Sec. Breach Litig.	2016	N.D. Ga.	14-md-02583	Thomas W. Thrash Jr.	Various state consumer protection laws (AK, CT, IL, MA, WA)	Home Depot, Inc.
Kokoszki v. Playboy Enters., Inc.	2020	E.D. Mich.	19-cv-10302	Bernard A. Friedman	Mich. Preservation of Personal Privacy Act	Playboy Enterprises Inc.
Gordon v. Chipotle Mexican Grill, Inc.	2019	D. Colo.	17-cv-01415	Christine Arguello	Ariz. Consumer Fraud Act	Chipotle Mexican Grill, Inc.
Veridian Credit Union v. Eddie Bauer LLC	2019	W.D. Wash.	17-cv-00356	James L. Robart	Wash. Consumer Protection Act	Eddie Bauer LLC
Doe One v. Caremark, LLC	2019	S.D. Ohio	18-cv-00238	Edmund A. Sargus	Ohio Insurance Information and Privacy Protection Act	Caremark LLC; Fiserv, Inc.; Fiserv Sols. LLC
In re Sonic Corp. Customer Data Sec. Breach Litig.	2019	N.D. Ohio	17-2807	James S. Gwin	Fair Credit Reporting Act	Sonic Corp.
Fishman v. Tiger Nat. Gas Inc.	2019	N.D. Cal.	17-5351	William Alsup	Cal. Recording Law	Tiger Nat. Gas Inc.

Case Name	Final Approval	Court	Docket #	Judge	Statute	Defendant
In Re Carrier iQ Consumer Priv. Litig.	2016	N.D. Cal.	12-md-02330	Edward M. Chen	Wiretap Act	Carrier IQ
In re Google Buzz Priv. Litig.	2011	N.D. Cal.	10-cv-00672	James Ware	Electronic Communications Privacy Act, Stored Communications Act; Computer Fraud and Abuse Act; Wiretap Act	Google
In re Vizio, Inc., Consumer Priv. Litig.	2019	C.D. Cal.	16-ml-02693	Josephine L. Staton	Video Privacy Protection Act; Wiretap Act	Vizio Inc.
In re Netflix Priv. Litig.	2013	N.D. Cal.	11-cv-00379	Edward J. Davila	Video Privacy Protection Act; Cal. Customer Records Act	Netflix, Inc.
In re LinkedIn User Priv. Litig.	2015	N.D. Cal.	12-cv-03088	Edward J. Davila	Cal. Consumer Legal Remedies Act; Ca Unfair Competition Act	LinkedIn Corp.
N.P. and P.S. v. Standard Innovation Corp. d/b/a We-Vibe	2017	N.D. Ill.	16-cv-08655	Virginia M. Kendall	Wiretap Act	Standard Innovation Corp.
Skuro v. BMW	2012	C.D. Cal.	10-cv-08672	George H. Wu	Cal. Invasion of Privacy Act	BMW of N. Am; ATX Group, Inc.
Taylor v. Trusted Media Brands, Inc.	2017	S.D.N.Y.	16-cv-01812	Kenneth M. Karas	Mich. Preservation of Personal Privacy Act	Trusted Media Brands, Inc.
Mount v. Wells Fargo Bank, NA	2014	Cal. Super. Ct. Los Angeles	BC395959	Amy D. Hogue	Cal. Invasion of Privacy Act	Wells Fargo Bank NA
Reed v. 1-800 Contacts, Inc.	2014	S.D. Cal.	12-cv-02359	Jeffrey T. Miller	Cal. Invasion of Privacy Act	1-800 Contacts Inc.; Does 1-50
Valentine v. NebuAd Inc.	2011	N.D. Cal.	08-cv-5113	Thelton E. Henderson	Electronic Communications Privacy Act; Computer Fraud and Abuse Act; Cal. Invasion of Privacy Act; Cal. Computer Crime Law	NebuAd Inc.
Johansson-Dohrmann v. CBR Sys., Inc.	2013	S.D. Cal.	12-cv-01115	Michael Anello	Confidentiality of Medical Information Act; Cal. Security Notification Law	CBR Sys., Inc.
In re Quantcast Advert. Cookie Litig.	2011	C.D. Cal.	10-cv-05484;10-cv-05948	George H. Wu	Computer Fraud and Abuse Act; Electronic Communications Privacy Act; Video Privacy Protection Act; Cal. Computer Crime Law; Cal. Invasion of Privacy Act	Quantcast Corp.; MySpace, Inc.; ABC, Inc.; ESPN, Inc.; Hulu, LLC; JIBJAB Media, Inc.; MTV Networks, Inc.;

Case Name	Final Approval	Court	Docket #	Judge	Statute	Defendant
						NBC Universal, Inc.; Scribd, Inc.
Johnson v. Washington Univ.	2011	W.D. Mo.	10-cv-04170	Nanette Laughrey	Driver's Privacy Protection Act	Washington University
Ebarle v. LifeLock, Inc.	2016	N.D. Cal.	15-cv-00258	Gilliam S. Haywood Jr	Ariz. Consumer Fraud Act	Lifelock Inc.
Corona v. Sony Pictures Ent., Inc.	2016	C.D. Cal.	14-cv-09600	Gary Klausner	Cal. Confidentiality of Medical Information Act; Cal. Consumer Protection Act	Sony Pictures Ent., Inc.
Perkins v. LinkedIn Corp.	2016	N.D. Cal.	13-cv-04303	Lucy H. Koh	Wiretap Act; Stored Communications Act	LinkedIn Corp.
Monteferrante v. Container Store Inc.	2015	D. Mass.	13-11362	Richard G. Stearns	Mass. Consumer Protection Act	The Container Store Inc.
Halaburda v. Bauer Publ'g Co.	2015	E.D. Mich.	12-cv-12831	George Caram Steeh	Mich. Video Rental Privacy Act	Bauer Publishing Co.
Landwehr v. AOL Inc.	2013	E.D. Va.	11-cv-01014	Claude M. Hilton	Electronic Communications Privacy Act; Va. Consumer Protection Act	AOL, Inc.
In re Michaels Stores Pin Pad Litig.	2013	N.D. Ill.	11-cv-03350	Charles P. Kocoras	Stored Communications Act; Ill. Consumer Fraud Act	Michaels Stores Inc.
Roberts v. Wyndham Int'l, Inc.	2016	N.D. Cal.	12-cv-5083	Laurel Beeler	Ca. Invasion of Privacy Act	Wyndham International, Inc.; Wyndham Worldwide Operations, Inc; Wyndham Hotel Group LLC
Burrows v. Purchasing Power LLC	2013	S.D. Fla.	12-cv-22800	Ursula Ungaro	Fla. Deceptive and Unfair Trade Practices Act	Purchasing Power LLC
Anderson v. Nelson	2012	D. Minn.	10-cv-01929	Susan Richard Nelson	Fair Credit Reporting Act	Burrito Union
Sekura v. LA Tans Enters., Inc.	2016	Cook Cty. Cir. Ct.	15-ch-16694	James F. Holderman	Ill. Biometric Information Privacy Act	LA Tans Enterprises, Inc.

Case Name	Final Approval	Court	Docket #	Judge	Statute	Defendant
Roberts v. The Source for Pub. Data	2009	W.D. Mo.	08-cv-4167	Nanette Laughrey	Driver's Privacy Protection Act	Shadowcraft, Inc.; The Source for Public Data
Shughrou v. Euromarket Designs, Inc.	2013	N.D. Cal.	11-cv-02325	Jeffrey S. White	Song Beverly Credit Card Act	Euromarket Designs, Inc.
Curry v. AvMed, Inc.	2013	S.D. Fla.	10-cv-24513	James Lawrence King	HIPPA	AvMed, Inc.
Cohost v. BRE Props.	2011	S.D. Cal.	10-cv-02666	Jeffrey T. Miller	Cal. Invasion of Privacy Act	Level One, LLC; L1 Holdings, Inc.; BRE Properties, Inc.
Wiles v. Sw. Tel. Co.	2011	W.D. Mo.	09-cv-4236	Matthew J. Whitworth	Driver's Privacy Protection Act	Southwestern Telephone Co. d/b/a AT&T
In re Ashley Madison Customer Data Sec. Breach	2017	E.D. Mo.	15-cv-02669	John A. Ross	Stored Communications Act	Ruby Corp.
Saunders v. StubHub, Inc.	2015	Cal. Super. Ct. San Francisco	CGC-12-517707	Ernest H. Goldsmith	Cal. Invasion of Privacy Act	StubHub, Inc.
Bishop v. Shorter Univ., Inc.	2017	N.D. Ga.	15-cv-00033	Harold L. Murphy	HIPAA; Mass. Consumer Protection Act	Shorter University, Inc.
Scherer v. Tiffany and Co.	2012	S.D. Cal.	11-cv-00532	Marilyn Huff	Song Beverly Credit Card Act	Tiffany and Co.
Patton v. Swifty Oil Co.	2011	S.D. Ind.	09-cv-0099	Tanya Walton Pratt	Fair and Accurate Credit Transactions Act	Swifty Oil; Swifty Gas
In re Yahoo Customer Data Sec. Breach Litig.	2020	N.D. Cal.	16-md-02752	Lucy H. Koh	Cal. Consumers Legal Remedies Act; Cal. Unfair Competition Law; Cal. Customer Records Act	Yahoo!, Inc.
In re Target Customer Data Sec. Breach Litig.	2015	D. Minn.	14-md-02522	Paul A. Magnuson	All possible state consumer and data privacy statutes	Target Corp.
Abdelmessih et al. v. Five Below, Inc.	2020	D. Pa.	19-cv-1487	John R. Padova	Fla. Deceptive and Unfair Trade Practices Act	Five Below, Inc.
Jane Doe v. Twitter	2016	Cal. Super. Ct. San Francisco	CGC-10-503630	Curtis E.A. Karnow	Cal. Consumer Legal Remedies Act; Cal. Unfair Competition Law; Cal. Online Privacy Protection Act	Twitter, Inc.

## APPENDIX C

<b>Number of Cases Catalogued</b>	<b>80</b>
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	Sum	Median	Mean
<b>Attorney's Fee</b>	\$ 299,234,519.74	\$ 1,300,000.00	\$ 3,886,162.59
<b>Incentive Awards</b>	\$ 435,038.00	\$ 5,000.00	\$ 4,728.67
<b>Settlement Fund</b>	\$ 1,205,206,247.76	\$ 4,000,000.00	\$ 15,652,029.19

<b>Average Proportion Attorneys' Fees to Settlement</b>	35.06%
<b>Average Proportion Total Incentive Award to Settlement</b>	0.7%