

**Take-Up Rates:  
The Real Measure of “Access to Justice”**

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### I. Introduction

Everyone knows the tale of Robin Hood: He robbed from the rich and gave to the poor, stealing back the hard-earned dollars of medieval serfs from their abusive lords. No one would know about Robin Hood today if he had stopped his work after robbing from the rich, whether the rich's riches were ill-gotten or not.

In theory, class actions are valuable even if class members do not see a cent. After all, access to justice is only one piece of the trinity of class actions objectives. Deterrence

and judicial economy figure just as prominently.<sup>1</sup> However, access to justice is both a worthy end in itself and the objective most easily understood by a public repulsed by the image of class counsel collecting bags of money while the wronged class goes without. That image is not the stuff that folk heroes are made of, and adds arrows to the quiver of defence counsel and lobbyists who insist that class actions fail to address legitimate consumer concerns: If class members really cared, they would be collecting.

The question of take-up rates—the percentage of possible claimants who actually collect from a class action settlement fund—has been a hot one in the debate around the desirability, social utility, and effectiveness of class actions around the world. This paper will address the current state of take-up rates by examining the data that we do and do not have. It will make recommendations for how to improve our current knowledge of take-up rates, and finally offer suggestions for strategies to actually increase take-up rates for class action settlements.

## **II. Do take-up rates matter?**

The first question to be addressed is one of relevance. Do take-up rates matter at all? Does a poor take-up rate indicate that the action was simply manufactured by counsel? If a class member cannot be bothered to find out about the litigation, fill out the forms, and claim what is rightfully theirs, is that the fault of counsel? Is the question of take-up rates something we should try to address?

Class actions are supported by three pillars – access to justice, deterrence or behavior modification, and judicial economy. Few would argue that these are not all worthy goals, but class action literature often prefers one to the others or, worse still, pits them against each other.

For instance, Miriam Gilles and Gary B Friedman rail against what they call a “compensationalist hegemony” in class action literature and policy in the United States. They say this focus on making sure class members collect ignores the salutary effects of entrepreneurial plaintiff-side lawyers hunting down potential claims and acting as

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<sup>1</sup> *Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68 at para 15.

private regulators.<sup>2</sup> In their view, it would be wiser to view class actions “through the one true lens of deterrence”, focusing on making wrongdoers pay rather than on compensating the wronged.

On the other end of the spectrum, Paul Morrison and Michael Rosenberg have written that not only should courts put the emphasis on access to justice, but should take a step further and filter out actions brought on behalf of “non-litigious classes”, whose members would not have litigated independently without entrepreneurial class counsel leading the charge.<sup>3</sup>

These conflicting claims show why take-up rates matter. For those steeped in compensationalist hegemony, take-up rates are one of the only possible measures of how well class counsel are representing their class. For entrepreneurial class counsel, high take-up rates can offer a feather in the hat and keep the compensationalists at bay, all without hurting the bottom line. In the few cases where counsel fees are tied to take-up rates, a high rate will actually help the bottom line. Last but certainly not least, high take-up rates offer evidence to courts, policymakers, and the general public that the class being represented really does care about their case, and that they are being compensated for the wrongs that they suffered.

### **III. How high or low are take-up rates?**

For all the discussion of the importance of take-up rates as a measure of the success or failure of class actions, we know surprisingly little about what those rates really are. Are the rates really too low? We believe so, but a general lack of information means that we cannot be certain. The next two sections will discuss the difficulties with assessing take-up rates and look at some of the few studies that have produced real numbers on the question.

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<sup>2</sup> Myriam Gilles and Gary B Friedman, “Exploding the Class Action Agency Costs Myth: The social utility of entrepreneurial lawyers” (2006) *University of Pennsylvania Law Review* Vol 155 at 108

<sup>3</sup> F Paul Morrison and H Michael Rosenberg, “Missing in Action: An Analysis of Plaintiff Participation in Canadian Class Actions”, prepared for “Accessing Justice” Class Actions Conference, University of Windsor Faculty of Law, March 28-29, 2011.

## 1. What numbers?

Generally speaking, take-up rates can be calculated with two pieces of data: the number of class members and the number who collected from the settlement fund. Divide the number of claimants by the number of potential claimants, and you will have your take-up rate.

This simple equation is complicated by the difficulties in getting accurate numbers for either of these variables. This section will discuss the reasons for the lack of data, and why this situation needs to change.

In some cases, it will be possible to count the class size precisely. This is most often the case when the defendants is able to provide a database listing everyone who may be included in the class, or for classes that are so small that it is possible to track down each of the class members individually.

More often, counsel are left to estimate the size of the class. Unfortunately, class size estimation is far from an exact science. Consider a product liability case. Should you count class size based on the number of units sold? What if more than one person in a household used the product in question, or what if one person bought several of the product?

Even in cases where the class size would seemingly be easy to determine, there can still be practical problems. A report from Canadian Claims Management suggests that class sizes are often underestimated in securities class actions due to poor methodologies and a difficulty in establishing the number of beneficial owners.<sup>4</sup>

Finally, the need for objective class definitions in order to achieve certification may undermine the ability to calculate the proper figure. For example, although it is arguably proper to certify a class definition that is “all persons who consumed Drug X”, the settlement is obviously only going to compensate those who were actually injured. Calculating the take-up rate on the basis of the broader class figure arguably

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<sup>4</sup> Paul Battaglia and Jonathane Ricci, “A Preliminary Research Study on Take Up Rates and Class Action Settlements in Canada”, Canada Claims Management Working Paper, 18 March 2011, unpublished, at 3, cited in Morrison and Rosenberg, *supra* note 3 at p 8.

understates the take-up rate. Everyone in this case would appreciate that no every person who took the drug is eligible to make a claim.

The number of claimants to a settlement should be much easier to count, but that does not mean that the claimant side of the equation has been solved from the perspective of the public or the court. Even though they could or should have reliable numbers in hand, counsel and settlement administrators are notoriously secretive with data regarding take-up rates.

This transparency of the legal system largely breaks down after a class action has been settled. In class actions, a complete court record is generated at the outset of the litigation, from statement of claim and defence through to motion records and evidence. Notices are issued. Websites are established. But this document trail often comes to an abrupt halt at the approval of a settlement. Once the process is finalized and the judge signs off on settlement approval, the rest of the process is generally sealed off from public view. Unless there are serious issues with the administration of the settlement that require further review, the process often takes place outside of the view of the court as well. This secrecy is also bound up in issues such as solicitor-client privilege (for lawyers), and contractual confidentiality (for administrators)

The take-up rate for class action settlements gets sealed behind this wall. As most settlements are handled by counsel and settlement administrators and without the active oversight of the court, policy-makers and researchers are left without access to data that would allow them to assess what current take-up rates are like, let alone the factors contribute to increasing or decreasing these rates.

In the United States, a study undertaken by the RAND Institute for Civil Justice was only allowed to access data pertaining to settlements in 20% of the 88 cases they examined.<sup>5</sup> The situation even bleaker in Canada, where no broad-based quantitative

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<sup>5</sup> Nicholas M Pace and William B Rubenstein, "How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data" (2008) RAND Institute for Civil Justice. Last accessed March 20, 2011. Available online: <http://ssrn.com/abstract=1206315>

study has assessed take-up rates.<sup>6</sup> Hope springs eternal, however: even during the writing of this paper, we were contacted several times with requests for quantitative data by Canadian researchers who had heard rumors that this paper would finally deliver the hard numbers.<sup>7</sup>

Between difficulties in determining class size and the secretive nature of settlement claims, determining the take-up rate will be impossible when claims data is not available, and unreliable in cases when the actual class size is at question.<sup>8</sup>

The RAND paper sets out the problems inherent in the current situation quite plainly:

How can class members and government officials make informed responses to proposed notice and claiming programs without some sense of the likely distributional outcome? On what basis are judges approving settlements and awarding fees without knowing the most likely results of their orders? Who ultimately benefits from class cases? Can different forms of notice and different types of distributional programs improve claiming rates? If so, which ones? If compensation programs are unlikely to change, should compensation remain a central feature of class actions or should the deterrent aspects be emphasized instead? If so, how? Despite the importance of these questions, it is unclear whether the data needed to answer them are available to policymakers and the public.<sup>9</sup>

There has been much talk about addressing these questions in Canada, but the discussion has been in the context of a void of information. When we talk about take-up rates today, we are largely operating on assumptions, hunches, and anecdotal evidence. We cannot reliably say that we know what the current situation is. If we make

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<sup>6</sup> Luis Millan, "Class Action Conundrum", *The Lawyers Weekly*, April 23, 2010. Last accessed March 21, 2011. Available online: <http://www.lawyersweekly.ca/index.php?section=article&articleid=1146>

<sup>7</sup> We are sorry to disappoint.

<sup>8</sup> In their review of take-up rates, Morrison and Rosenberg point to a U.S. case with a 300% take-up rate, "suggesting that the class size had been badly underestimated". See Morrison and Rosenberg, *supra* note 3 at p 10.

<sup>9</sup> Pace and Rubenstein, *supra* note 4 at p 2.

changes to how notice is provided to class members or how claims forms work, we are only guessing as to whether the change made a positive or negative impact, or any impact at all.

## 2. What we do know

Much of the data that does exist is not flattering to the sought-for image of class counsel as folk hero. While the numbers vary wildly, a review of the statistics from various studies conducted in Canada and the United States show that, for whatever reason, the majority of class members do not make claims from settlement funds.

In a quantitative review of our firm's own settlements acting for both plaintiffs and defendants, the take-up rates have ranged between 2-40% of the estimated class (where it was necessary to make a claim – more on this below) . A similar self-analysis performed by Morrison and Rosenberg of settlements handled by McCarthy Tetrault LLP showed take-up rates in various kinds of settlements ranging from 23% to above 100%.<sup>10</sup>

Other studies had trouble accessing data, resulting in small sample sizes and unusual results. These studies reported take-up rates ranging between under 1% and over 100%.<sup>11</sup> The biggest study, part of Jasminika Kalajdzic's LLM thesis at the University of Toronto, surveyed 16 plaintiff-side class action firms in Ontario to develop an understanding of their practices.<sup>12</sup>

The responses to the Kalajdzic's survey were telling. Two large class actions firms reported that "take-up rates can't be determined in most cases", that rates were "impossible to give" because the number of claimants is usually unknown, and that when claims are tracked the class size is uncertain, making calculation impossible. Other firms simply reported that take-up rates were "unknown".<sup>13</sup> In the end, Kalajdzic's

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<sup>10</sup> Morrison and Rosenberg, *supra* note 3 at p 10.

<sup>11</sup> Morrison and Rosenberg, *supra* note 3 at p 9-10.

<sup>12</sup> Jasminika Kalajdzic, "Access to Justice for the Masses? A critical analysis of class actions in Ontario", 2009, LLM Thesis, Graduate Department of the Faculty of Law, University of Toronto, at p 131.

<sup>13</sup> *Id.*

survey found take-up rates of between 1% and 100%. Despite these outliers, many first reported rates of below 50% for their actions.<sup>14</sup>

In *Moody v. Sears, Roebuck and Co.*, the North Carolina Superior Court heaped skepticism on a settlement approved by the Illinois Superior Court, and refused to bind North Carolina residents to the terms of the Illinois settlement. Only 317 class members out of a potential class of 1.5 million made claims. Judge Tenille blamed the failure on notice, both in its content and how notice was distributed.<sup>15</sup>

Take-up rates appear to be a problem no matter the size of the claim or the sophistication of the potential claimants. While a busy class member may have no time to fill out a five page form to make a \$10 claim, it seems that large claims by ruthlessly economically-self interested claimants are also going unmade. A U.S. study by James D Cox and Randall S Thomas showed that in 118 securities class actions, only 28% of institutional investors filed claims. The other 72% abandoned claims with an average value of \$850,000.<sup>16</sup> These numbers challenge stereotypical notions of unsophisticated or lazy class members not understanding claim forms or not bothering to fill the forms out.

In summary, we know very little about current take-up rates except that the rates are, in most cases, below 50%, and that they can be significantly lower than that. We know that small claims are less likely to be collected than large ones, but even class members who are supposedly purely rational economic actors are failing to collect.

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<sup>14</sup> *Id.*

<sup>15</sup> *Moody v. Sears, Roebuck and Co.*, N.C. Superior Court, Case No. 02 CVS 4892. See also: *Wrobel v. Sears, Roebuck and Co.*, Illinois Superior Court, Case No. 02-CH-23058. While this case offers an example of a dismal take-up rate, it also offers a hopeful look at how judges may start to force themselves into the black box of settlement administration to see if the ultimate goals of class actions are truly being met. The role the judiciary could play will be discussed in Section IV of this paper.

<sup>16</sup> James D Cox and Randall S Thomas, "Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements" (2005) *Stanford Law Review*, Vol 58, p 411 at 424. Last accessed March 23, 2011. Available online: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=655181](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=655181)

## IV. Forcing better data

We propose that Canadian jurisdictions move toward requiring class counsel or settlement administrators to report their best estimate of take-up rates and other claims data as part of the settlement process. Mandatory and public oversight would provide useful metrics for assessing the success or failure of certain settlement models, and allow researchers to begin to determine what elements contribute to higher take-up rates.

### 1. Mandatory oversight regimes

From the perspective of a single case, reporting data about take-up rates may add little value. It imposes an additional cost, which will be paid by either the defendant or from the fund available to class members. Nor does reporting improve the take-up rate in that particular case. Reporting numbers simply lets the public know how many or how few people collected, and exposes even the best settlement to criticism if the rate is too low.

But the rationale for not requiring a report of take-up data begins to break down when taken in aggregate. The data might not benefit the class in question, but it would benefit future classes, who will be able to learn what practices work to get class members involved and what practices should be avoided.

As we have seen, class counsel, settlement administrators, and defence counsel have been unable or unwilling to shine a light on what happens after the settlement is concluded. The RAND study states that a “lack of mandatory oversight and disclosure may have played a role in the difficulties some researchers have experienced in gathering systematic information on class action settlement benefit distributions.”<sup>17</sup> We will go one step further—the lack of mandatory oversight has meant that there is no data available to the researchers to gather.

The U.S. National Association of Consumer Advocates (“NACA”) has published a set of guidelines for best practices in class action litigation. In a section titled “Monitoring

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<sup>17</sup> Pace and Rubenstein, *supra* note 4 at p 16.

Settlement Compliance”, the NACA suggests that post-settlement monitoring and reporting should be a mandatory part of class action settlements:

Information regarding defendants’ compliance with settlements or court orders should be compiled into a report, when appropriate. Monitoring reports should detail the efforts the defendant has made to comply with the class settlement or order. These reports should contain enough factual information to permit a monitor or judge to determine independently that the defendant is complying in a timely way with the provisions of the class settlement or order. Monitoring reports also should be filed with the court or otherwise should be available to class members and their counsel upon request.<sup>18</sup>

While the focus of the NACA recommendations is on ensuring that the terms of the settlement agreement are complied with, the same principles could easily be applied to monitoring take-up rates and that these numbers could be included in any post-settlement report made to the court.

## **2. Judicial oversight**

In our view, Canadian class actions require mandatory reporting of take-up rates, and the judiciary is best placed to force a shift. What will really motivate counsel to start sharing their take-up rates is not the carrot of good feelings, but a menacing stick waved by judges who have taken up the take-up challenge. The judge’s role can no longer end with settlement approval.

In the words of Winkler J., the court has an important role to play in “ensuring that the administration and implementation of the settlement are done in a manner that delivers the promised benefits to the class members”.<sup>19</sup> Taking a more active role in requiring data on take-up rates would certainly be a step toward seeing those benefits delivered to class members. We suggest the following required term in every settlement:

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<sup>18</sup> NACA, “NACA Class Action Guidelines (As Revised 2006)” (2006) at p 69. Last accessed March 24, 2011. Available online: <http://www.naca.net/about-naca/class-action-guidelines>

<sup>19</sup> *Baxter v Canada (Attorney General)* (2006), 80 OR (3d) 481 at para 12.

At the conclusion of the settlement, class counsel shall file an affidavit with his or her best estimate of the take up rate, after consultation with defence counsel and the administrator. If the defence counsel or administrator do not support the estimate, they shall file their own affidavits. These affidavits shall be posted on the class action website and the National Class Action Database.

There have been some indications that Canada may be moving in this direction. In some situations, like cases in which class counsel's fees have been made dependant upon take-up, Canadian courts are mandating a review process. Morrison and Rosenberg review several of these cases, finding that review processes are still exceedingly rare and generally limited to "idiosyncratic" cases.<sup>20</sup> Most interestingly, in *Wilson v Servier*, Cumming J. insisted on seeing "how the claims process has worked for claimants, the actual take-up by claimants, and the overall achievement of the settlement for class members before determining ... the full and final amount of counsel fees", despite the fact that fees were not expressly based on take-up.<sup>21</sup>

### **3. Building the infrastructure**

Even once counsel and the courts are on board with the idea of mandatory oversight, the work is not finished. The final piece in the data collection puzzle will be developing the standards for what data should be collected and how it will be stored.

As previewed above, storing it should require an open, public repository where the data can be maintained. The obvious choice is further developing the Canadian Bar Association's National Class Action Database (the "Database"). In most jurisdictions filing of the claim is mandatory. Filing of take up rate would ensure that the Database

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<sup>20</sup> Morrison and Rosenberg, *supra* note 3 at p 18.

<sup>21</sup> *Wilson v Servier Canada Inc.*, [2005] OJ No 1039 (SCJ) at para 29. However, as noted by Morrison and Rosenberg, the court was not simply requesting information on the take-up rate for the take-up rate's sake. The defendant was entitled to recover funds that were not claimed, and also had to pay more if claims exceeded the original settlement fund.

has the beginning and end of the story.<sup>22</sup> Posting on the settlement website should also occur, although these sites are not always permanently maintained.

It will also be necessary to build standards for the data that should be provided in the affidavits. The more information collected, the more useful the results will be in assessing best practices. Simply providing a percentage would be better than the current situation, but far less useful than providing actual claims, the estimated class size, methodology used to estimate class size, and other information.

An example of what this information could look like has emerged from the Residential Schools Settlement Agreement. Indian and Northern Affairs Canada has created a website displaying detailed statistical breakdowns of the payments made to class members in that case, including the number of applications, reconsiderations, appeals, and payments made.<sup>23</sup> The page also includes definitions for each of these categories, making it clear exactly what the provided numbers mean. Despite the obvious efforts made to keep the settlement process in plain view of the public, even this data is missing a critical piece of the puzzle. It does not include the estimated class size, meaning that the take-up rate cannot be established.

Providing this information to the public will be a dramatic shift for everyone involved in class actions, especially the class counsel, defence counsel, and settlement administrators who will have to get used to the idea of increased transparency. There will likely be a great deal of resistance to the idea at first, as the greater transparency will expose all parties to greater scrutiny. However, if increasing take-up rates is a worthwhile goal, this data will be absolutely essential to achieving it.

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<sup>22</sup> See the CBA National Class Action Database “About” page, which provides links to practice directives pertaining to submission to the Database. Last accessed March 24, 2011. Available online: <http://www.cba.org/classactions/main/gate/index/about.aspx>

<sup>23</sup> Indian and Northern Affairs Canada, “Common Experience Payment Statistics” (2010). Last accessed March 26, 2011. Available online: <http://www.ainc-inac.gc.ca/ai/rqpi/cep/st/index-eng.asp>

## **V. Encouraging better results**

### **1. Mandatory oversight regimes**

Again here, greater judicial oversight would be of tremendous assistance. Judges have been increasingly alive to the challenges of effective notice and to the importance of the claims process in ensuring that class members are informed of their rights and can actually take advantage of them. By asking hard questions about whether notice is sufficient, the claim forms are appropriate, and whether class counsel have discharged their obligations to the class, the judiciary has taken an active role in creating good settlements. In our view, the following questions must be asked on every settlement approval:

1. Why can't direct notice be provided to everyone?
2. Why can't my spouse understand the notice?
2. Why can't the claim form be one page or less?
3. Why can't the claim be submitted over the Internet?

Without a satisfactory answer to each of these, the settlement should be rejected.

### **2. Be sensitive to the nature of the class**

When designing the particulars of notice and claims programs remember that each class is special. What worked for one class may not work for another. Each group has its own unique issues and circumstances that will make the best way to reach it slightly different than any other group before, and what worked well for one action may be a total failure for the next. Keeping these differences in mind in designing notice and claims processes will ensure that your class is at least given the opportunity to learn about their rights and take advantage of any benefits the settlement gives them.

### **3. Keep it simple, stupid**

No matter who the class is – except in the rare situation when a class is made up of lawyers, your communication with class members should not be written for lawyers.

Terms of art and legal jargon have no place in notice designed to inform class members of their rights, or in forms designed to get the necessary information. When considering this question, keep in mind that if you are a lawyer, you will have a difficult time remembering what non-lawyers do and do not know. Asking a non-lawyer if they can understand the language of the notice you propose to send to class members may go a long way to increasing participation in the settlement.

#### **4. Getting it into their hands**

Class action lawyers have long recognized that the traditional means of notifying potential class members – a small type notice in the back of a newspaper or a nondescript piece of direct mail – do not reach their class members.

What will constitute effective notice will be different for each class. Todd B. Hilsee discussed the importance of taking into account the unique characteristics of the members of a class in his examination of notification efforts in the various class action lawsuits that followed Hurricane Katrina.<sup>24</sup> For obvious reasons, the addresses on file for many class members were no longer valid. Hilsee concluded that not only would ordinary notice schemes fail to reach many of the claimants who needed compensation the most, but also that the usual means of updating addresses would fail as well because of the demographics of the groups affected.

The credit reporting agencies that are usually used to update addresses are notoriously inaccurate at the best of times,<sup>25</sup> and lower income groups like those hit hardest by Katrina are even less likely to check the accuracy of their reports, or have reports at all.<sup>26</sup>

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<sup>24</sup> Todd B Hilsee et al, "Hurricanes, Mobility, and Due Process: The "desire-to-inform" requirement for effective class action notice is highlighted by Katrina" (2006) 80:5-6 Tul L Rev 1771.

<sup>25</sup> U.S. Public Interest Resource Group, "Mistakes Do Happen: A Look at Errors in Consumer Credit Reports" (2004). Last accessed March 21, 2011. Available online: <http://www.uspirg.org/home/reports/report-archives/financial-privacy--security/financial-privacy--security/mistakes-do-happen-a-look-at-errors-in-consumer-credit-reports>

<sup>26</sup> Hilsee at 1791-2, *supra* note 24.

## 5. Getting the claim into the administrator's hands (or computer)

The claims process also offers significant room for improvement. Kalajdzic points out that a system that requires claimants to send in a form to make a claim creates a *de facto* opt-in regime.<sup>27</sup> Whenever possible, potential class members should receive any benefit they are entitled to automatically, without the burden of filling in claims forms being placed on them. As previewed earlier, we have been involved in several cases where monies were simply deposited direct into class member accounts, allowing us to achieve a perfect 100% take up rate for that group.

Of course, in many instances an automated claims process will not be possible. The identities of class members may be unknown, or additional information may be required before claims can be processed. In these cases, the process should be streamlined.

Forms should require no more information than is absolutely necessary to complete the claim. Several pages of blanks will intimidate all but the most committed claimant, and even a short form that requests certain kinds of information may result in fewer claims. For example, requests for Social Insurance Numbers or other sensitive information could raise suspicions in class members who are already skeptical of the process. A requirement that a receipt be provided to prove the purchase of a small item made several years ago would be insurmountable for all but the most meticulous record-keepers. The easier it is for claimants to complete the form, the more likely they will be to send it in.

Settlements must move into the Internet Age. We are doing electronic banking and shopping, but for some reason, we are doing "paper and pen" class action settlements. This is shameful.

Finally, the claims process should involve as few steps as possible. Each time a group of people is asked to take an action, a percentage of them will not. The fewer steps the class members must take, the more likely they will be to make it through to the end and make their claim successfully.

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<sup>27</sup> Kalajdzic, *supra* at p 129.

## **VI. Conclusions**

Despite the fact that take-up rates are one of the few possible measures for how well class action settlements are delivering relief to class members, we have very little knowledge of actual take-up rates for class actions in Canada. What we do know suggests that the numbers are disturbingly low, and steps should be taken to improve these rates.

As we have discussed above, the first steps on the road to improving these rates must be to create a meaningful benchmark for what rates are now against which to measure successes and failures in the future.

The quickest way to get the attention and cooperation of counsel will be for judges to insert themselves in the debate by refusing to approve settlements that do not include (1) monitoring and reporting provisions; and (2) a satisfactory explanation for every additional question and step required to access the benefits.