Information on Potentially Deceptive Banking and Claims Administration Practices in Class Action Settlement "Digital Payment" Distribution and Reporting re: Alleged Systematic Misappropriation of Qualified Settlement Fund Money Without Court Approval.

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Overview

I have served as an expert on class action notice and claims processes for 34 years. Often rewarding, it is also a challenge to address potential abuses. In 2016, I wrote about electronic notice fraud and an aversion to constructive critique, saying: "I want the class action to remain an effective device … our courts to be respected for overseeing a fair process."[1] But practice changes gave way to massive fraud in electronic claims filing.[2] These outcomes became a "new normal."

In 2022, the last thing I expected to see in industry correspondence was that a broad money taking scheme may be occurring inside class action settlement "digital payment" banking and administration. Then late last year, executives of a leading qualified settlement fund ("QSF") custodian bank sought me out to say that court-appointed claims administrators ("Admins") are systematically accepting payments that financial technology companies ("FinTechs") offer them from QSF money, apparently without court knowledge. Here's how it was described:

To distribute a class action QSF electronically (*i.e.*, "digitally"), Admins hire FinTechs to offer payment options to class members. One option is to receive a Virtual MasterCard Disbursement Card ("Digital Card") by email. But, if people do not read the emails to access the money and actively spend it, FinTechs recapture the leftover QSF money by inactivity fees called "fee downs." Industry parlance calls this "breakage."[3] Here's the rub: Email readership is low,[4] the breakage is substantial, and correspondence shows a FinTech offering to kick some of this QSF money back to an Admin (calling it a "discount" and "additional revenue") if they are hired.[5]

Even though Admins submit sworn reports to courts in charge of QSFs, from what I've found in public records they do not report "discounts" or ask courts for permission to keep "additional revenue." I have not found where email readership, breakage, or fee downs are explained to courts. Instead, I was told it works this way: To issue $100 to a claimant by Digital Card, the FinTech does not require the whole amount, because of the significant breakage. However, the entire $100 is transferred from the QSF to the Fintech anyway, to both activate the $100 Digital Card *and* pay the "discount" back to the Admin. Apparently, this leaves a "clean" QSF banking record—*i.e.*, showing a $100 claim payment, but not the discount paid to the Admin, and not the breakage.

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[1] *See* U.S. Courts, May 24, 2016, last visited Sept. 3, 2024.
[2] *See Jiminez v. Artisana*, 21-07933, S.D.N.Y, ECF No. 116, 8/30/24: 8.94M fraudulent claims out of 8.98M filed. Fraudulent claims have grown 19,000% since 2021: *See* 2024 Digital Payments Report, last visited Oct. 7, 2024.
[3] "Breakage" is money left on stored-value cards. *See* "what is breakage" below.
[4] *See* "email readership deficiency." *And see* "payment email skepticism."
[5] *See* **Exhibit 1**, "*Each card carries a different discount rate, meaning we actually pay you to issue these cards*."

The meteoric rise of digital payment distribution in class actions since about 2019, coupled with historically large settlement levels, could mean that tens or even hundreds of millions of dollars may be involved in this puzzling practice—money taken from QSFs. *See* "Scope" below.

This paper reflects my opinions. It covers a) information conveyed to me; b) why these practices may be concerning; and c) how they could mislead counsel and courts and go unnoticed.[6]

Summary of Situation top

Any discounts deducted from QSFs during the process of "digitally" paying class member claims would seem to be money that would otherwise belong to the QSF, subject to court oversight under U.S. Treasury regulation 26 CFR § 1.468B-1. Public records I have found suggest that courts would understand that all the money withdrawn from a QSF to pay class member claims has in fact been used to compensate those class members. Are courts being misled? After all, digital distribution methods are marketed as more cost-efficient, more effective, and safer than paper checks.[7]

In 2018, federal class action rules changed to specify that electronic means (*e.g.*, email) were a permissible way of satisfying notification requirements.[8] Since about 2019, Admins, banks, and FinTechs have promoted class action settlement payment distribution by digital means to lawyers, government agencies,[9] and courts. Today, both digital payment and email notice (to notify class members of their rights, and to send payments) are prevalent.

Admins tout their expertise and reliability.[10] Counsel convey such virtues to courts when advocating for their appointments.[11] Courts trust Admins to manage settlement administration.[12] Considering this, and considering what Admins do and do not report to courts, the practices revealed to me have apparently gone unnoticed.

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[6] Note: I am independent of any Admin, and I have no vested interest in payment distribution services. I analyze and opine on notice and administration practices for courts. The descriptions of practices in this paper are based on first-hand reports. Identities may be privileged, protected by law, and subject to government actions.

[7] *See* "digital payment marketing" below.

[8] Fed. R. Civ. P 23(c)(2) "… *the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means*…"

[9] Notably, a 2019 Federal Trade Commission Class Action Workshop discussed below.

[10] By way of example, "*Receive expert guides to consult, educate, and collaborate with you to understand intricacies better than any objector — in some cases, better than the judge overseeing the settlement*." https://bit.ly/3zzx1hh, last visited July 15, 2024.

[11] Common Motion for Preliminary Approval language includes, "*The Parties propose that ___ an experienced and reputable national class action administrator—serve as Settlement Administrator to provide notice, administer the claims process, and provide other services necessary to implement the Settlement … The Settlement Administrator will administer the entire process, including validating the claims and calculating the Settlement Payment amounts.*"

[12] A typical Preliminary Approval Order indicates, "*The Court appoints ____ to serve as the Settlement Administrator. ___ shall supervise and administer the notice procedures, establish and operate the Settlement Website, administer the claims processes, distribute cash payments according to the processes and criteria set forth in the Settlement Agreement, and perform any other duties that are reasonably necessary and/or provided for in the Settlement Agreement*."

Information Disclosed top

In April of 2022, an Admin shared with me a 2020 email indicating that a "discount" of between 2% and 3.5% of the QSF money to be distributed to class members on Digital Cards was being offered by a FinTech as "additional revenue" to Admins.

I began studying this, and I discerned these "discounts" to be in anticipation of the "breakage"[13] that FinTechs/banks recapture when consumers do not access (or actively spend) the money transferred to them electronically. After a pre-determined period, fees are applied against the unused funds (called "fee downs") which depletes the remaining stored value and creates the "breakage." Research suggested that any "discounts" offered to Admins would be based on modeling the anticipated breakage.[14] Central questions arose: If less money is needed to pay the claims, why is the extra money removed from the QSF at all? Who does QSF money belong to? May Admins take it? Do they ask the courts? How much gets taken back from class members? How much have Admins taken?

I could not find any disclosures to courts responsible for QSFs that "discounts" were shared back to Admins. Thus, if the "discount" offers were indeed being *accepted*, the practice started to seem curious. Based on facts that court-appointed Admins *do* report in sworn declarations, and what they apparently *omit*—courts would infer that QSF money withdrawn to pay class members digitally *is* successfully paid to them. Would courts be surprised if QSF money was quietly kept by/paid to Admins out of QSF money, over and above their requested and court-approved fees/expenses? What about the promises of digital payment "savings"?

Throughout 2022, I researched the matter. One digital payment vendor told me they "knew nothing about breakage," which seemed odd given industry reliance on breakage. Then in October 2023, a Law.com article appeared on an industry report on class action settlement distributions by digital payment.[15] In the article, I am quoted stating:

> "*The devil is in the details… It's one thing to take money from a qualified settlement fund and place it onto a digital payment card. It's another thing on whether that money actually makes it into the class member's bank account*." [16]

After that, a large bank proposed a meeting, explaining that they were concerned about digital payment practices. When we met, they confirmed that QSF monies are accepted by Admins in "discounts" from FinTechs. They explained how money flowed from QSF custodians to FinTechs to be loaded onto Digital Cards, but with QSF money paid back to Admins in anticipation of breakage taken from class members in "fee downs." The bank revealed that discount offers of 2% to 3.5% from 2020 had grown to 20% due to the scale of breakage from

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[13] "Breakage" is a digital payment industry term to describe unused money on stored value cards that is recaptured by FinTechs/banks through inactivity fees. *See* "what is "breakage" below.
[14] *See* Accounting for Gift Cards: Revenue, Breakage, and Reporting, last visited September 9, 2024.
[15] *See* 2023 Digital Payments Report, last visited July 1, 2024.
[16] *See* 91% Want Digital Payments of Class Action and Mass Tort Settlement Funds, last visited July 1, 2024.

email notices that go unread/unclicked,[17] or forgotten/unused Digital Cards.

Further, I was told that if a settlement is distributed by what is called a "push" method *(i.e.*, where digital payments are active upon sending an email to a claimant instead of first requiring a "click to activate" process), the breakage may be staggering: upwards of 80-90% of class action QSF money distributed on Digital Cards may be reclaimed by FinTechs/banks—therefore the "discount" to Admins could be markedly higher.

The bank expressed a concern for "fairness": Smaller banks handling Digital Card "fee downs" were not subject to the Durbin Amendment to the Dodd-Frank Act's limits on "interchange fees,"[18] and thus able to collect large amounts of breakage. The bank was also concerned about the ethics of it, and that it may bring ill-repute to class actions—a concern I shared. The bank described the practices as unfair and deceptive.

In addition to digital payment breakage "discounts," the bank also told me that Admins were asking banks to share the interest a QSF account would otherwise earn. This occurred, it was explained to me, because courts and counsel were not informed of fully available interest rates, had no reason to question interest rates during the recent past low-interest rate environment, and counsel and courts increasingly rely on Admins to handle more settlement duties. And yet, typical court-approved settlement terms call for interest on QSFs to accrue to the QSF.[19] If interest rate sharing occurs as I was told it does, I have found no court disclosure of this practice.

Key Elements of Class Action Settlement Administration re: Potentially Deceptive Digital Payment Practices top

To inform an assessment of the practices, the following provides some background on the elements involved, and how the practices intersect with statements to courts—as well as omissions. I refer to examples of typical content in publicly filed class action settlement motions, Admin declarations, and court orders,[20] among many cases I have reviewed on PACER where digital payment has been utilized for QSF distribution.[21]

Class action settlement funds are regulated Qualified Settlement Funds top

It is typical in class action settlements that when a common fund is established to pay class members' claims, it is a "Qualified Settlement Fund" ("QSF") pursuant to Title 26 of the Code of Federal Regulations, Chapter 1, Internal Revenue Service, Department of the Treasury, 26 CFR § 1.468 B-1, *et seq*. For example, a sample Settlement Agreement states:

[17] Class action emails come from unknown senders and often look like SPAM. The rates at which they are opened and acted upon thus may be lower than other commercial email messages. *See* "Email readership" below.
[18] 15 U.S.C. § 1693o-2.
[19] *See* "bank interest belongs to the QSF" below.
[20] The sample language in court filings in this paper are for demonstrative purposes only re: prototypical settlement terms, pleadings, Admin reporting, and court orders.
[21] I do not know whether any "discount sharing" was involved in any sample cases referenced in this paper.

"*The Settlement Fund shall be an account established and administered by the Settlement Administrator at a financial institution approved by Class Counsel and Defendant, and shall be maintained as a qualified settlement fund pursuant to Treasury Regulation § 1.468 B-1, et seq*."

The court initially approves a settlement agreement and establishes a QSF through a "Preliminary Approval Order." A sample Preliminary Approval Order states:

"*The Court therefore GRANTS the preliminary approval of the Settlement Agreement and all of the terms and conditions contained therein*."

QSFs are subject to a courts continuing jurisdiction top

Treasury regulations for a QSF state at 26 CFR § 1.468 B-1(c)(1):

"*A fund, account, or trust satisfies the requirements of this paragraph (c) if-(1) It is established pursuant to an order of, or is approved by, the United States, any state (including the District of Columbia), territory, possession, or political subdivision thereof, or any agency or instrumentality (including a court of law) of any of the foregoing and is* ***subject to the continuing jurisdiction of that governmental authority.***" (emphasis added)

A sample Settlement Agreement demonstrates this:

"*The Settlement Administrator shall, under the supervision of the Court, administer the relief provided by this Settlement Agreement…*"

When a bank is selected to hold a QSF as a custodian or escrow agent, a leading bank's publicly available sample Custodian/Escrow Agreement ("Sample Custodian Agreement") demonstrates the understanding that a QSF is subject to court jurisdiction:

"*The Settlement Fund shall remain subject to the jurisdiction of the Court until such time as the Fund shall be distributed, pursuant to the Settlement Agreement and on further order(s) of the Court*."[22]

Claims administrators are court-appointed to manage QSFs top

Class action settling parties (counsel for the class of plaintiffs, and counsel for a settling defendant) typically agree on a recommendation to the court as to which Admin should supervise the settlement notice and claims process, including distribution of the payments to class members. One sample of such verbiage in a Settlement Agreement is as follows:

"'*Settlement Administrator' means [Admin] subject to approval of the Court.*"

[22] *See* Sample Custodian/Escrow Agreement, last visited April 29, 2024.

The Preliminary Approval Order in one sample case shows that courts appoint Admins:

> "*The Court appoints [Admin] to serve as the Settlement Administrator. [Admin] shall supervise and administer the notice procedures, establish and operate the Settlement Website, administer the claims processes, distribute cash payments according to the processes and criteria set forth in the Settlement Agreement…*"

When courts appoint Admins, in my experience they understand they have a duty to the court during the pendency of the matter in which they are appointed.

Disbursements from QSFs are subject to bank controls and court approval top

The Sample Custodian Agreement referenced above shows how such bank agreements govern QSF disbursements:

> "*This Custodian/Escrow Agreement governs the deposit, investment and disbursement of the settlement funds that, pursuant to the Stipulation of Settlement (the 'Settlement Agreement')…*"

The Settlement Agreement in a sample case has typical language also recognizing court authority over QSF disbursements:

> "*No amounts from the Settlement Fund may be withdrawn unless (i) expressly authorized by the Settlement Agreement or (ii) approved by the Court…*"

The Sample Custodian Agreement referenced above also states:

> "*Disbursements other than those described in paragraph 7(a), including disbursements for distribution of Class Settlement Funds, must be authorized by either (i) an order of the Court, or (ii) the written direction of [Name] of Class Counsel and [Name] of Defense Counsel.*"

It is commonly expected in class actions that QSF custodial banks adhere to the terms of custodial agreements and court-approved settlement agreements.

Bank interest on funds in a class action QSF belongs to the QSF top

The Settlement Agreement in one example case contains a typical provision memorializing that interest available from the custodian bank accrues to the QSF to increase the value of the QSF for class members on whose behalf the settlement is reached:

> "'*Settlement Fund' means the non-reversionary cash fund that shall be funded by [name of defendant] in the total amount of [dollar amount of QSF] (the "Settlement Amount")* ***plus all interest earned thereon*** *after deposit into an escrow account.*" (emphasis added)

The Sample Custodian Agreement has a typical provision stating that a QSF includes "all interest accrued thereon":

> "*Custodian/Escrow Agent shall receive the Settlement amount into the Custodian/Escrow Account; the Settlement Amount and all interest accrued thereon shall be referred to herein as the 'Settlement Fund.*"

Any sharing of QSF bank interest with Admins, without court permission, would run counter to typical bank custodian agreements and court orders on settlement agreements.

Payments not cashed/accepted subject to re-allocation by the court top

Taking unused class action QSF money as "discounts" by Admins would run counter to motions for terms subject to court orders. For example, the Motion for Preliminary Approval in one case states:

> "*The Settlement is designed so that any residual funds are distributed to Class Members if economically feasible … If not so feasible, however, any residual funds will be distributed to the [cy pres recipient] and the [cy pres recipient], two Section 501(c)(3) non-profit organizations whose work relates directly to the subject matter of the Action and benefits Class Members …*"

If Admins do not report breakage discounts, courts cannot decide how to re-allocate those funds, despite typical court orders on settlements, and typical bank custodial agreements.

Claims administrators have sworn reporting obligation to the court top

Court-approved class action settlement agreements typically establish a reporting obligation for Admins to swear the whole truth about notice and claims administration. For example, the Settlement Agreement in one case states:

> "*The Settlement Administrator shall also provide reports and other information to the Court … including those set forth in the Preliminary Approval Order.*"

In practice, Admins file sworn declarations to support counsel requests for preliminary court approval of class action settlements. Such reports set forth the relevant facts about a proposed notification and claims process, as well as the claims administrator's anticipated costs and fees. Such reports are also filed in support of motions for final approval, setting forth the facts about the notice and claims process, as executed. They file additional sworn reports as needed.

Digital payment marketed as more effective/less costly top

Since approximately 2019, FinTechs have marketed digital payment for settlement distributions as less costly / more efficient / less risky / serving the "unbanked," and preferred by recipients.[23]

[23] *See e.g.,* Fintech Press Release, last visited July 25, 2024.

One global payment Fintech states in a May 2022 article:

> "*Prepaid cards are more effective solutions than checks when it comes to paying out class action lawsuits and offer cost saving solutions from start to finish*." And it states, "*It's expensive to issue checks. Research found that paper checks can cost businesses as much as $3.15 per paper check issued in addition to the value of the check itself. These costs are incurred when businesses cut the checks, print them, mail them, and follow up when they are not cashed*."[24]

A leading Fintech's class action brochure from 2020 (no longer online) states:[25]

> "*Simpler, Faster and More Economical. Checks, ACH transactions and other legacy payment methods are slow, expensive, and risky … more efficient, security-minded solution for paying class action members that features nearly instant delivery and can be customized—Mastercard prepaid cards*."

Other commentators have written white papers touting fraud protection and privacy as benefits of digital payment, in addition to time and cost savings:

> "*[P]ayments to consumers have quickly morphed to digital using consumer-friendly options such as virtual debit cards, popular ecommerce hubs, and C2C payment platforms. This has significantly cut down on required lead times and costs while increasing consumer confidence and overall process efficiency*."[26]

Another leading class action FinTech stated in a 2023 report:

> "*Payment Success Rates For Paper Checks and Digital Payments. Check Without Claims Process 55%, Check With Claims Process, 77% Digital Payments, 98% … Until just a few years ago … The claims administrator faced the burdensome and expensive tasks of printing, mailing, and tracking tens of thousands (or hundreds of thousands) of checks, and then stale-dating and/or reissuing a significant portion of the checks that went uncashed*." [27]

Admins have echoed similar themes. Banks and Admins have published articles highlighting the benefits of digital payment in class actions, including:

a. "*Modern life increasingly relies on digital solutions … In terms of class action settlement payments, the impetus has never been greater to transition to the e-*

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[24] *See* How businesses can streamline the burdens of class action lawsuit payouts, last visited April 30, 2024.
[25] On file with author.
[26] *See* Moving the Needle for Class Actions in Europe, last visited April 30, 2024.
[27] *See* 2023 Digital Payments Report, last visited July 1, 2024. The meaning of "success rate" is unclear, *i.e.*, whether it means 98% of the payment email notices responded to—or 98% of all payment emails sent, or something else. The success rate for "pre-paid" vs. other digital payment options is also unclear. Note: the success rates for checks appear be from a 2019 FTC Notice Report, last visited July 1, 2024, citing percentages of all checks sent.

payment realm for security, convenience, cost-reduction, and improved fund disbursement."[28]

b. "*On the other hand, digital payment tools have driven down the cost of distributing proceeds to the class, leaving fewer and fewer instances where cy pres makes the most economic sense*."[29]

c. "*Digital payments are also an effective way to reduce costs associated with settlement administration. As postage and print costs increase, these costs are added to the administrative fees, which limits the amount of funds available to distribute to the class*.[30] and

d. "*Distributing individual prepaid VISA cards is a worthy alternative to checks for providing benefits to class members. The PYMNTS.com study found an estimated 833,000 consumers would have liked to receive disbursements via debit card, and more than 1.6 million would have preferred them via prepaid card in 2018*.[31]

In short, counsel and courts have heard such positive reports about digital payment, that it sounds like nothing but a panacea for class action settlement distribution.

Government/courts/academics echo the benefits of digital payment top

A "Class Action Study" of notice efficacy and claims rates was released in 2019 by the Federal Trade Commission ("FTC").[32] In conjunction, a Workshop was held by the FTC which included discussion by Admins and others on the benefits of digital payment.[33] The period thereafter began the proliferation of digital payment in class actions.[34]

A draft "Guidelines and Best Practices in Class Actions" published by the James F. Humphreys Complex Litigation Center of the George Washington Law School soon followed in October of 2021. A class action digital payment FinTech was listed in the draft as a "Founding Patron" of the Center, and also identified contributors that included banks, FinTechs and Admins.[35] The "Guidelines" pertaining to digital payment in class actions include:

a. "*The increasing digitization of payments in the United States and globally suggests that payment methods other than by paper checks may be more*

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[28] *See* Digital Payments Best Practices for Efficiency in Class Actions, last visited April 30, 2024.
[29] *See* Cy Pres Objectors Quick Pay Report, last visited April 29, 2024.
[30] *See* The Advantages of Digital Disbursement for Class Action Settlements, last visited April 30, 2024.
[31] *See* Electronic Payments in Class Action Settlements, last visited July 25, 2024
[32] *See* Consumers and Class Actions: A Retrospective and Analysis of Settlements, last visited July 1, 2024.
[33] *See* Consumers and Class Action Notices: An FTC Workshop, *See* Transcript p. 79-80, last visited April 30, 2024.
[34] Digital payment and its promise of "distributable" funds provided one answer to frequent objections to *cy pres* at a time when settlement claims rates were extremely low. Coupled with the rise of class action claimant aggregators (S*ee e.g.*, Find No Proof Open Class Action Settlements Lawsuits and Rebates), fraudulent claims rose as did electronic claims filing, digital payment, and "black box" fraud detection and administration processes. Admins began to withhold full disclosure of data and details, despite being court-appointed to work in the public sphere.
[35] *See* Humphreys Class Action Guidelines and Best Practices, last visited April 30, 2024.

effective in distributing relief, particularly when class members are individuals. Staying abreast of the wide variety and frequent emergence of new digital payment methods requires dedicated attention. Settlement administrators and banks with class-action experience have the knowledge and expertise necessary to make informed judgments." p. 28;

b. "*Virtual and physical prepaid cards and retail gift cards are particularly effective methods for making payments to unbanked individuals. Some prepaid cards can be added to digital wallets and used with Apple Pay, Samsung Pay, Google Pay, and other platforms*." p. 26; and

c. "*Although the actual effectiveness of any payment method cannot be known until after the court approves the settlement, the parties should provide information at the preliminary-approval stage, including estimates of costs and projected efficacy, sufficient for the court to find that the effectiveness of the payment method is adequate*." p. 28.

Then in August of 2022, modifications to the influential Northern District of California's "Procedural Guidelines for Class Action Settlements" included alternate payment methods:

> "*Identify the proposed settlement administrator … what methods of notice and claims payment were proposed ….* and "*Class counsel should consider the following ways to increase notice to class members … distributions to class members via direct deposit*." [36]

If courts hear the benefits of digital payment without disclosure that "discounts" are being taken, or the reasons that discounts are available, courts' ability to exercise their QSF oversight is deterred. This includes facts on email readership upon which digital payment relies.

Digital payment relies on email notices being opened, read, and clicked top

Fed. R. Civ. P. 23(c)2 ("Rule 23") changed in 2018 to endorse specify that electronic means of notice satisfied the individual notice requirement of Rule 23. One article at the time noted:

> "*While initially skeptical of electronic notice, courts can no longer disregard the option given the increasing sophistication and entrenchment of internet advertising through means such as banner ads, targeted ads on social media, emails, and texts—as well as its cost effectiveness*."[37]

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[36] *See* N.D. Cal. Procedural Guidance for Class Action Settlements, last visited June 10, 2024.
[37] *See* Gary E. Mason & Jennifer S. Goldstein, Unveiling the New Class Action Rules, TRIAL MAG. (Nov. 2018); *See also* Alexander W. Aiken, Class Action Notice in the Digital Age, 165 U. PA. L. REV. 967 (2017); Caley DeGroote, Note, Can You Hear Me Now? The Reasonableness of Sending Notice Through Text Messages and its Potential Impact on Impoverished Communities, 23 WASH. & LEE J. C.R. & SOC. JUST. 279 (2016); Brian Walters, "Best Notice Practicable" in the Twenty-First Century, 7 U.C.L.A. J. LAW & TECH. 4 (2003); and Robert H. Klonoff, Class Actions in the Year 2026: A Prognosis, 65 Emory L. J. 1569 (2016).

Beyond cost savings however, a belief that email notice is effective—*i.e.*, opened, read, and not ignored as SPAM—is the prerequisite upon which digital payment relies. And, when lawyers largely supported the 2018 Rule 23 change sanctioning electronic notice, Admins (despite their own and research on deficiencies) were largely either silent or supportive.

Electronic notice unlocked the door for digital payment and, allegedly, to the undisclosed diversion of QSF money to Admins as "discounts" from hefty breakage levels.

Admins are aware of email notification response deficiency research top

I have written on electronic-reliant notice risks, and about concomitant problems: misinformation in sworn submissions, and fraud.[38] In 2016, I provided extensive comments to The Advisory Committee on Civil Rules of the Judicial Conference of the United States, and to Members of the Rule 23 Subcommittee, including citing Admin email readership and response rate studies, and other data.[39] Thereafter, I submitted unrebutted research in class actions.

Today, about half of all emails in the U.S. are SPAM, and this has been the case for the past decade.[40] In about 2013, an Admin report famously ranked methods of notice in order of effectiveness at generating class action claims, showing that email notice ranked lower than all forms of postal mail. Another Admin presented a study to the FTC in 2016 showing substantially lower claims rates from email notice than all forms of postal mail notice.[41]

And, in 2019, the FTC announced the results of an "Administrator Study" pursuant to subpoenas that the FTC had issued to Admins.[42] The claims rate for notice campaigns that sent claim form packets by postal mail was triple that of notice campaigns that relied on email. The FTC also undertook a consumer "Notice Study" of factors relevant to email notice.

Admins have noted the FTC's 2019 class action studies. For example:

> "*Both studies challenge the prevailing thought that email is the most practicable method … the report concluded that email notification did not increase class member participation in settlements. In fact, according to the studies cited in the report, it turned out to be the least effective notice mechanism…Hopefully, future studies will examine how email skepticism affects class action notice opening and claim rates…reducing consumers' concerns on email frauds will prove difficult since people receive countless spam emails each day, some of which mention fake class actions or settlement opportunities*."[43]

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[38] *See also*, Jan. 4, 2017, Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure, Transcript, p.53, last visited July 18, 2024.
[39] *See* U.S. Courts, March 23, 2016, last visited May 1, 2024.
[40] In 2023, nearly 45.6 percent of all e-mails worldwide were identified as SPAM. In 2015, 55.2% of emails were SPAM. *See* Global Spam as Percentage of Total E-mail 2011 to 2023, last visited April 30, 2024.
[41] *See* U.S. Courts, May 24, 2016, Exhibits 2 and 3, last visited July 1, 2024.
[42] *See* Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns, last visited May 1, 2024. *See also* Reuters: FTC's comprehensive study on consumer class action claims rates, last visited May 1, 2024. *And see* Law.com: FTC Email Notice Report, last visited May 1, 2024.
[43] *See* Class Action Email Notifications: Separating The Settlements From The Spam, last visited May 1, 2024.

Recent studies confirm poor email "open" and "click" rates, on average:[44]

a. "*A good email open rate should be between 17-28%, depending on the industry you're in*."[45]

b. "*According to our 2022 Email Marketing Benchmarks Report, the average email open rate was 21.5%, across all industries in 2021*."[46]

c. "*Average Open Rate: 34.23%, Average Click-Thru Rate: 2.66%.*"[47] and

d. "*Average Open Rate: 32.55%, Average click-thru rate 2.03%*."[48]

Based on the above statistics indicating that between 60-80% of emails are not opened, and that 97-98% of the links in such emails are not clicked, one might reasonably expect today's class action email open and click rates—where the sender is an unknown entity to a class member—may be lower than these averages. And yet, Admins rarely report email open rates in their sworn reports to courts, despite possessing the knowledge that technology provides.[49]

If an overwhelming number of emails are not opened, and links are not clicked, how successful is digital payment in class actions, which relies on response to email?[50] What is the effect if counsel and courts do not have all the relevant facts? Courts must understand: email notices must be read and clicked to successfully distribute digital payments and allow consumers to use the money before "fee downs," and that data is known.

Admins know skepticism surrounds digital payment class action emails top

To distribute class action QSF money using digital methods, an email is sent to class members. They must click to access / use / be reminded of the payment.

Numerous public bulletin-board posts of consumers questioning the legitimacy of digital payment emails indicates significant a skepticism of these emails:

a. "*I got 2 emails now that I'm due $32 & change. I hovered over the link they sent & the url looks suspicious to me. I'm not clicking on it … I also saw that there were scams like this in 2022 & many articles about a real suit. There*

[44] Email "Open Rate" is a measure of the number of emails opened compared to the number of emails sent.
[45] *See* What are good open rates, CTRs, & CTORs for email campaigns?, last visited May 1, 2024.
[46] *See* Ultimate Email Marketing Benchmarks for 2022: By Industry and Day, last visited May 1, 2024.
[47] *See* Email Marketing Benchmarks and Metrics Businesses Should Track, last visited May 1, 2024
[48] Note: measures the number of people who clicked a link in the email against the number of emails that were successfully delivered. *See* Average industry rates for email as of August 2024, last visited May 1, 2024.
[49] *See* an example of available technology How to Track Email Open Rates, last visited July 3, 2024. Note: Typically, the sender of class action notice emails is a vendor for the Admin. While recipient addresses may have originated from a list of customers, the "sender" is not typically the defendant itself, or an address the recipient would recognize, even if it did not go into SPAM. This hinders readership and response.
[50] *See* Footnote 15 and Footnote 27 *supra*.

might be a real suit AND scams. I'm going to continue to look into it, not click on the email links."[51]

b. "*I got this message in my gmail this morning, and it looks odd to me, all caps, some other things that seem to scream SPAM or PHISHING, I am going to post a screenshot of it and would welcome all comments*."[52]

c. "I *received an email about a class action settlement notice. It went to the spam folder in my Gmail account and the return address is @assistancefeesettlement.com, which both seem like red flags… Is there a website I can use to check whether this is legit and file a claim, rather than using the link in the email*?"[53]

Message postings such as these suggest that many emails offering payments to class members are not acted upon. Money can be lost or forgotten and then "fee'd down" if an email is at the bottom of an inbox or in a SPAM folder. If a settlement calls for a "push" distribution on a Digital Card, significant amounts could become "breakage" and subject to "discount" sharing / QSF depletion. And yet, as discussed below, I have found that Admins rarely, if ever, report skepticism or email open rates while touting success in executing notifications to courts.

What is "Breakage" in digital payment distribution? top

"Breakage" is an accounting term that refers to revenue recognized from services that are paid for but not used.[54] In the digital payment industry, breakage revenue arises from the unredeemed funds on stored value payment cards. A recent *Forbes* article explains:

"*Breakage can greatly increase profits for retailers, banks, airlines and hotels. In fact, a large part of the business model of gift cards is breakage. Retailers and sellers of gift cards understand that some percentage of gift cards they sell will never be redeemed. Some sources say that breakage rates are typically around 2-4%, but they can be much higher than that.*"[55]

The Consumer Finance Protection Bureau discusses common fees for prepaid cards that result in breakage revenue:

"*A monthly fee is a fixed fee you pay each month even if you don't use the card. The fee is automatically deducted from your account balance … An inactivity fee is charged if you don't use your card for a certain period of time. The length of time that triggers an inactivity fee can vary and not all prepaid cards charge inactivity fees.*"[56]

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[51] *See* Zoom Community Forum, last visited June 11, 2024.
[52] *See* Neowin.net Forum, last visited June 11, 2024.
[53] *See* Reddit Class Action Notice Comments, last visited June 11, 2024.
[54] *See* Accounting Tools Breakage Definition, last visited July 25, 2024.
[55] See Forbes What is Breakage and Why Does it Matter?, last visited May 1, 2024.
[56] *See* CFPB What Types of Fees do Prepaid Cards Typically Charge?, last visited May 1, 2024.

According to the *Forbes* article mentioned above:

> "*[C]onsider Blackhawk Network's SEC filings for 2015. Blackhawk Network is one of the largest distributors of gift cards… In 2015, Blackhawk Network reported commissions and fees of $1.26B on gift card activations of $16.6B, which represents a 7.6% commission. If retailers are willing to pay Blackhawk Network an average of 7.6% commission on their gift cards, there is a good chance that their breakage rates are higher than that.*"[57]

Despite these statistics, I have found no Admin reporting to courts on how much breakage there is in class action digital payment distributions, nor have I found in public records any disclosure to courts that there *is* breakage. I have found no information on the disposition of the breakage. Yet, payment industry reports such as above, and class action informant disclosures, suggest substantial breakage from class action QSF distributions.

Admins being offered class action digital payment QSF breakage top

Class action digital payment literature and marketing language for key FinTechs operating in the class action settlement payment space once hinted at some kind of "discounts" and "commissions" paid to Admins.[58] One brochure (no longer available on the internet) stated:

> "*Better for Administrators, Too. As easy and convenient as our prepaid cards are for class action members, they're also a smarter alternative for administrators. Significantly reduced cost compared to PayPal®, Venmo, Zelle®, ACH or paper checks (we can even pay you a commission!)*"

Another FinTech which has served as a "payment partner" in class actions, once suggested on its website (language now removed) that senders qualified for some kind of discount:

> "*Better than free…Sending $200k+ per year? You likely qualify for a discount.*"

And, breakage and "discounts" to Admins are revealed in an email between a FinTech and an Admin as early as 2020, when digital payment was relatively new to class actions (**Exhibit 1**). It alludes to breakage in explaining that remaining balances are "fee'd down," how setting a Digital Card expiration date for class members would increase the "discounts" to the Admin, and how more than a hundred thousands dollars would accrue to the Admin in "additional revenue" from only a modest settlement distribution on Digital Cards.

Based on the assumptions in that email, just one settlement distribution of $5,000,000 in Digital Card payments affords $100,000 to $175,000 of "additional revenue" for an Admin.

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[57] *See* Blackhawk Network Holdings, Inc., 2016 Securities and Exchange Commission, Form 10-K, p.8*:* "*We derive a material amount of our revenue from our program-managed proprietary open loop products, which include our proprietary Visa gift and open loop incentive cards. For the year ended December 31, 2016, these programs represented 17.6% of our total operating revenues [$1.382B]…The issuing banks hold cardholder funds, charge applicable fees on certain products and collect interchange fees charged to merchants when cardholders make purchase transactions using prepaid open loop cards. Our issuing banks remit some or all of those fees to us plus additional fees for our program management services*."

[58] On file with author.

This is significant compared to the "Scope" section below: There have now been at least 567 digital payment cases, and $117 billion in class action settlements since 2022.

And, based on reports by QSF bank executives, such "discounts" have increased to 20%, due to high levels of breakage in class actions. If true, that is a ten-fold increase over the earlier 2% to 3.5% offers, suggesting "additional revenue" may be $1,000,000 for an Admin from one modest $5,000,000 Digital Card distribution—and potentially far greater in a "push" distribution.

Admins tout effectiveness–omit email facts and QSF "discount" references top

I have studied reports sworn by Admins in support of settling parties' motions for preliminary and final approval of settlements. Every report is unique, but commonly included language in digital payment distribution cases is language that provides comfort to the court that:

a. "best practices" will be used to ensure email notice success, *e.g.*, to "overcome SPAM filters";

b. notice will reach "virtually the entire class."[59]

c. digital payment is less expensive and more effective than checks—leaving "more of the net settlement to distribute to the class."

Example language in sample sworn Admin reports includes:

a. "*Industry standard best practices will be followed for the Email Notice efforts. The Email Notice will be drafted in such a way that the subject line, the sender, and the body of the message overcome SPAM filters and ensure readership to the fullest extent reasonably practicable…*"

b. "*Throughout the Notice Plan, we will continuously monitor the effectiveness of the Plan and, in consultation with counsel, will make cost-effective adjustments as appropriate to maximize reach*."

c. "*The option of receiving a digital payment has become more commonplace in class action settlement administration. Beyond meeting the expectations of many Settlement Class Members that digital payments should be an option, they have the added benefit of being less expensive to administer (because of no postage or potential for check reissue requests), leaving more of the Net Settlement Fund available to distribute to the Settlement Class. Also, digital payments can be made more quickly – and directly to whatever option Settlement Class Members may select*."

[59] Reach is a term that refers to the number or percentage of the members of the class who will be exposed to a form of notice—in this instance an email.

d. "*The above-described notice program is designed to reach virtually the entire Settlement Class and provide them with information necessary to understand their rights and options*."

e. "*Industry standard best practices were followed for the Email Notice efforts. The Email Notice was drafted in such a way that the subject line, the sender, and the body of the message were designed to overcome SPAM filters and ensure readership to the fullest extent reasonably practicable … Although there are few settlements with email notice efforts of this magnitude, the approximate 9% undeliverable rate here is consistent with other successful, large email notice efforts we have implemented*."

f. "*The [Name] Objection asserts that the Email Notice sent to members of the Settlement Class was 'indistinguishable from Junk/SPAM mail.' However, as reported in my earlier declarations, industry standard best practices were followed for the Email Notice program specifically designed to avoid and overcome SPAM filters*."

Notably omitted from typical Admin reports is language that discloses:

a. the number of email notices that are not opened or read;

b. the number of emails that are not clicked or responded to;

c. that there is "breakage" from money distributed by digital payment methods;

d. how much breakage there is;

e. digital payment "fee down" sharing;

f. the value of class member claims to be paid, compared with QSF disbursements to pay those claims.

g. "discounts" offered by a FinTech to an Admin from QSF money, based on anticipated fee downs (breakage);

h. "discounts" accepted from QSF money by a Admin based on anticipated fee downs (breakage); and

i. the process of paying QSF money back to Admins from a FinTech/bank to pay "discounts" to an Admin.

Without such disclosures in the preceding paragraph, reasonable inferences from the information that Admins do include in sworn reports to a court would be:

a. All of the money withdrawn from a QSF to pay a class member's claim was used to satisfy their claim;

b. The QSF money sent to pay to class members was kept by them;

c. Any savings from QSF money not needed to pay their claim or money not used by class members was retained in the QSF, or returned to the QSF pending court instructions; and

d. If savings were available from the payment distribution method, the Admin would so advise, and court instructions would be sought.

Based on information given to me, coupled with what appears in public records, significant amounts of QSF money that courts would think class members have received in satisfaction of their claims, has instead been kept by FinTechs/Admins. How much?

Class Counsel echo email/digital payment effectiveness and cost-savings top

When seeking preliminary and final approval of settlements, class counsel typically submit pleadings to courts that echo Admin statements about email effectiveness and the cost-savings and effectiveness of digital payment methods. Examples from one sample case include:

a. "*[T]he Settlement Administrator went to great lengths to design the email Notice program to avoid and overcome SPAM filters, consistent with industry best practices*";

b. "*[W]e're giving class members the option to check boxes, such as a Venmo or direct payment to their bank account, something easy for them and easy to understand … the costs account for that. We're shooting everything possible to make it at the very low end of the range … We did make, like I said, a bidding process. We received different ranges. They were all very comparable, but these were the low end of the -- and these were the biggest class administrator companies. So we think we're confident that these are reasonable expenses. We recognize that they're, you know, high, in the millions of dollars. But, you know, we're going to do everything we can to keep them at the low end of the range*"; and

c. "*Notice was successfully disseminated to the Settlement Class by Court-approved Settlement Administrator … The Settlement Administrator completed distribution of the notices to the Settlement Class, in compliance with the Preliminary Approval Order … The multipart notice program was designed to, and did, provide the 'best notice that is practicable under the circumstances*."

I have not found information indicating class counsel are aware of "discounts" offered from QSFs, or about "breakage." Such knowledge would be at odds with typical pleadings. For example, one class counsel submission in support of final approval argues:

"*[A] court's goal in distributing class action damages is to get as much of the money to the class members in as simple a manner as possible … reasoning that*

> *'redistribution of unclaimed class action funds to existing class members is proper and preferred' because it 'ensures that 100% of the [settlement] funds remain in the hands of class members…*"

Class counsel typically trust Admins to effectuate notice and claims distributions. In my experience, because Admins are historically careful in their work and reporting, counsel encourage courts to trust that Admins have been vetted. In one sample case, counsel wrote:

> "*After the Parties decided to seek designation of [Admin], Class Counsel spent significant time negotiating the specific terms of their engagement … collaborated with notice experts at [Admin] to create and oversee one of the largest class notice programs in class action history … As part of the class action administrator vetting and bidding process, Class Counsel had already discussed at length with [Admin] their thorough and rigorous practices … Class Counsel worked with [Admin] and [Defendant] to ensure that the Settlement Website and Notice forms were prepared correctly, that Notice was disseminated within the time frame established by the Preliminary Approval Order, responded to numerous Settlement Class Member inquiries, vetted financial institutions in which the Settlement Fund was to be deposited, monitored the claims, oversaw the reminder email process, and generally ensured that the administration of the Settlement was performed in a timely and correct manner*."

If Admins withhold information—*e.g.*, the readership of email notices upon which digital payment distribution depends, or money taken from the QSF without court knowledge—then counsel is hindered in their oversight of claims administration, despite their promises to courts.

Courts vest authority in Admins based on counsel and Admin reporting top

Based on counsel submissions, courts often vest Admins with decision-making authority in the payment process. The Final Approval Order in one example case reflects this:

> "*The Settlement Administrator shall have the authority to determine whether a claim form is valid, timely, and complete*."

For example, one sample Preliminary Approval Order states:

> "*[Admin] shall supervise and administer the notice procedures, establish and operate the Settlement Website, administer the claims processes, distribute cash payments according to the processes and criteria set forth in the Settlement Agreement, and perform any other duties that are reasonably necessary and/or provided for in the Settlement Agreement.*"

Courts rely on Admin reports in overruling objections re: email "SPAM" and often indicate a belief (due to statements and omissions) that SPAM filters are "avoided and overcome." For example, the Final Approval Order in one case includes:

"*[T]he Administrator followed "industry standard best practices…for the Email Notice program specifically designed to avoid and overcome SPAM filters.*"

Court findings show no awareness of unauthorized depletions of QSFs top

Typical final approval orders I have studied show a presumption that Admins and banks have followed settlement terms. Courts order any unused QSF money to be redistributed. For example, the Final Approval Order in one case states:

"*Uncashed checks and unactivated digital payments will be distributed as follows. If economically feasible, they will be distributed to Settlement Class Members on a pro rata basis "without regard to the type of Settlement Claim submitted… [otherwise to] the Non-Profit Residual Recipients in equal amounts*."

If a court knew its Admin had accepted "discounts" from FinTechs, or that QSF bank interest was diverted and shared, orders would presumably memorialize this, and not presume to redirect class member funds that had already been redirected by the FinTech/bank/Admin.[60]

Scope is large—digital payment cases/settlement amounts increasing top

The potential scope of an unauthorized QSF taking practice could be on a very large scale.

In public records studied have thus far, I have identified some 110 cases, and a partial total of $15.1 billion in class action settlements distributed or being distributed by digital payment.[61] If, hypothetically, 50% of such settlements are used for attorneys' fees, costs, and court-approved Admin fees, then $7.5 billion would be available for class members. If between 8% and 15% of them chose Digital Cards,[62] then between $600 million to $1.125 billion would be issued on these cards (assuming all payments equal). If, as information indicates, between 2% and 20% of such funds are paid to Admins in "discounts," then **between $12 million and $225 million in QSF funds** may have been taken—just in this partial study of cases.

Yet, there are far more digital distribution cases than the metrics in the preceding paragraph are based upon. One digital payment FinTech released a 2023 report indicating:

a. "*The data for this retrospective report comes from 267 class action and mass tort distributions awarded to Digital Disbursements by 22 different settlement administrators between 2019 and 2022*;"[63]

b. Some twenty federal and state courts have overseen class actions with digital payment distributions; and

[60] Final approval orders commonly memorialize Admin fees and expenses but not "additional revenue" they do not know is deducted from QSF funds to pay class member claims but instead paid back to Admins.
[61] This is a work-in-progress based on public information, subject to verification.
[62] Based on information and estimate shared by Fintechs and banks.
[63] *See* 2023 Digital Payments Report, last visited June 18, 2024.

c. Some fifty leading plaintiff and defense law firms have served in cases with digital payment distributions between 2019 and 2022.

A 2024 report showed a marked uptick in digital payment cases in just one year:

> "*the data for this year's report comes from 597 class action and mass tort distributions … from 24 different settlement administrators between 2019 and 2023. The number of distributions is almost double that of last year's report …*"[64]

In terms of the amount of money potentially involved, settlement funds in the class action digital payment era (2019-date) are staggering:

a. 36 settlements reached final approval in 2020 totaling $3.2 billion;[65]

b. 20 settlements reached final approval in 2021 totaling $1.7 billion;[66] and

c. 36 settlements reached final approval in 2022 totaling $2.9 billion.[67]

According to a leading law firm which annually reports on class action settlement trends, the total amount of recent settlement money is far greater than even the preceding paragraph suggests. The 2024 Duane Morris Class Action Review states:

> "*On an aggregate basis, across all areas of litigation, class actions and government enforcement lawsuits garnered more than $51.4 billion in settlements in 2023 … Such numbers are second only to the value of class actions and government enforcement settlements in 2022, which topped $66 billion. Combined, the two-year settlement total eclipses any other two-year period in the history of American jurisprudence*."[68]

At a February 1, 2024 seminar to discuss that report, the author remarked:

> "*The transfer of wealth from corporate defendants in these recent two years alone in class action settlements would require 113,000 Brinks trucks to deliver the cash. The amount equates to $154 million per day, or $6 million per hour*."[69]

With these historically-high settlement amounts, the meteoric rise in digital payment use in class actions, the greater regularity of incomplete factual recitations and omissions in sworn Admin reports, and the seemingly greater relaxation of Admin oversight from increased trust in them—a perfect storm seems to be in place. In sum, the potential scope of the practices disclosed to me by practitioners may be very concerning.

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[64] *See* 2024 Digital Payments Report, last visited June 18, 2024.
[65] *See* 2020 Antitrust Annual Report: Class Action Filings in Federal Court, last visited July 2, 2024.
[66] *See* 2021 Antitrust Annual Report: Class Action Filings in Federal Court, last visited July 2, 2024.
[67] *See* 2022 Antitrust Annual Report: Class Action Filings in Federal Court, last visited July 2, 2024.
[68] *See* Duane Morris Class Action Review 2024, last visited June 18, 2024.
[69] *See* 2024 Book Launch Event, last visited July 2, 2024.

Conclusions top

Consider a typical class action settlement prior to 2019. The court-appointed claims administrator distributes compensation to a class member from a QSF by check. The class member cashes or deposits the check.[70] Imagine a procedure like this: *If the class member does not actively spend the money, the bank takes it back and shares it with the claims administrator without court knowledge. QSF records show the money went to the class member.* Presumably, such a practice would be unthinkable. And yet, something very similar is apparently occurring today in class action QSF digital payment distributions.

The so-called "*additional revenue*" offered to Admins from QSF funds appears to be the result of "breakage" on digital payments—breakage that is large and at least in part due to class action email SPAM and class member skepticism of those emails—about which courts have been told precious little. A practice of depleting and sharing QSF money is apparently an unexplained feature of digital payment that FinTechs, Admins, and banks omit when touting it to lawyers, courts, and government agencies such as the FTC.

What Admins do report to courts: Digital payment reaches the "unbanked."[71] It is less expensive and more effective. Email notices re: digital payments "overcome" SPAM filters. The claimants were paid. The settlement was completed successfully.

What Admins do not report to courts: How many email notices are unread? How many payment links are unclicked? Is there breakage? How much? What happens to the breakage? Are "discounts" offered to Admins from breakage? Do Admins accept discounts? How much? Was bank interest diverted from the QSF? Is there any, or sufficient, disclosure?

Admins earn markups on notice and claims administration costs. That is how notice and claims administrators have traditionally been paid. But those markups are included in total administration costs disclosed to courts that approve those deductions from QSFs. If Admins now keep extra money that courts believe was paid to class members, out of money earmarked for class members (and which may have been a basis of their approval of the settlement itself), that would be misleading and deceptive.

Outside the class action context, breakage lets FinTechs issue Digital Cards and other payments on behalf of companies, without costing the company anything. Breakage is the revenue that these payment FinTechs operate on. One article states:

> "*By one estimate, up to 47% of the collected value of gift cards in the United States in 2022, nearly $21 billion, went to waste. That's nearly $175 per person in the United States. You can realize some fairly legitimate profit from gift cards that are never redeemed alone.*"[72]

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[70] If they do not cash or deposit the check, the money remains in the QSF; available to redistribute to other class members or subject to further and necessary court instructions on disposition, *e.g.*, to *cy pres* recipients.
[71] *See* 2021 FDIC National Survey of Unbanked and Underbanked Households, last visited September 26, 2024.
[72] *See* SwipeSum How Companies Make Money From Gift Cards, last visited July 1, 2024.

In that corporate setting, the FinTech offering a discount allows the company to save its own money—money that otherwise belongs to that company. The FinTech and the bank profit from the anticipation of breakage, and the company is agreeable. In class actions however, does the discount a FinTech offers to an Admin belong to either one? Courts oversee money in a QSF to benefit class members, under Treasury guidelines subject to disposition by their orders.

Admins are appointed by courts and have a reporting obligation to courts. They possess special information courts rely upon. Courts expect the whole truth and nothing but the truth in sworn reports. One who testifies under oath knows that relevant facts that bear on the understanding the court would have cannot be omitted.[73]

Admins are trusted to handle settlement administration. They have traditionally served courts with honor. Court-appointed Admins perform a duty that courts rely upon. The offer of "additional revenue" in "discounts" from FinTechs might surely bias Admin decisions and recommendations to those courts. Offers accepted from money that doesn't belong to either Fintechs or Admins would appear to be a significant issue.

This paper reflects my opinions. The legitimacy of the class action device would be undermined if courts are misled at the expense of class members. Based on the prevalence of digital payment, today's massive settlement amounts, and potential omissions in Admin reports, large amounts of money may be involved without courts, or the class action bar, knowing. If so, practitioners, courts, and others should consider the propriety of these practices.

* * *

[i] Todd B. Hilsee is the President of The Hilsee Group LLC. He is a mass communications professional who has served courts as an expert on class action notice and claims administration issues for 34 years. He was the first person court-recognized as a notice expert in the United States (1992) and in Canada (2000). Todd has been judicially commended some 75 times. He collaborated with the Federal Judicial Center to create notice and claims administration practice standards (Illustrative Plain-Language Notice Models (2002); Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide (2010)) and contributed to the FJC's Managing Class Action Litigation: A Pocket Guide for Judges, 3rd Ed. (2010). Mr. Hilsee has exposed deficient class action notice and settlement practices including on CBS television's *60 Minutes* (defective Remington rifles) (2017). His work in major class actions includes 250+ cases where he was responsible for notice in over 200 countries, and in over 50 languages, notifying Holocaust survivors, hurricane victims, and Indigenous survivors of Canada's residential schools, among many ground-breaking efforts. Todd has addressed judges, lawyers, and law students, including for the American Bar Association, Harvard Law School among other law schools, the Federal Judicial Center, and the Federal Trade Commission. He has published law review articles including in the GEORGETOWN JOURNAL OF LEGAL ETHICS, THE TULANE LAW REVIEW, and the SUPREME COURT LAW REVIEW of Canada, among many other outlets. He may be reached at thilsee@hilseegroup.com.

[73] *See* False and Misleading Statements by Omission, last visited July 25, 2024.

Exhibit 1

From: [redacted]
Sent: Monday, November 2, 2020 3:35 PM
To: [redacted]
Subject: [redacted]

Hi [redacted] –

It was nice speaking with you this afternoon about your possible consumer settlement. This value works out nicely for our Virtual MasterCard Disbursement card. The virtual card is delivered via email directly to the carries an expiration and remaining balances are "fee'd down" after expiration and a period of inactivity. Funds technically never expire, so cards with remaining balances can be replaced after expiration prior to being fee'd down. There is a $10,000 limit on this product but it doesn't sound like that will come into play for this settlement.

This virtual disbursement card is issued with an expiration ranging from 6-24 months, with a monthly inactivity fee of $5.95 per month matching the expiration date, meaning the card will never fee down while it is still active. Each card carries a different discount rate, meaning we actually pay you to issue these cards. The shorter the expiration, the greater the discount. At these rates you would net $100,000 to $175,000 additional revenue plus whatever costs you save vs printing checks, issuing PayPal etc. Here are the discount rates:

Virtual MasterCard options:

1. 6 month expiration; with 6 month inactivity fee of $5.95/mo 3.5% Discount
2. 12 month expiration; with 12 month inactivity fee of $5.95/mo 3.0% Discount
3. 18 month expiration; with 18 month inactivity fee of $5.95/mo 2.5% Discount
4. 24 month expiration; with 24 month inactivity fee of $5.95/mo 2.0% Discount

Assumptions: 500,000 virtual payments @ $10 ea. A significant difference in volume and/or value could influence discount rates.

Attached is a one pager summarizing some of the benefits vs other payment methods. I also forgot to mention the most important part: because these are actual bank accounts, you are no longer responsible for unclaimed property. [redacted] and our issuing bank fully indemnify [redacted] against all escheat liability.

Let me know how else we can help, best of luck with it!