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Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment

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I. Introduction

There has been a recent debate in the literature on the relative merits of arbitration, individual litigation, and class action litigation in providing adequate remedies for disputes arising out of the employment relationship. For the last decade and a half, the debate centered on whether arbitration provided a fair forum for plaintiffs, despite the relative informality of the process, the employer's ability to tailor procedures, and the claimed propensity of arbitrators to curry the favor of repeat-player employers. The empirical literature has not borne out these criticisms. Almost without exception, the studies find that employment arbitration is quicker; less costly; and results in a win-loss rate that is no different than in litigation, with median awards somewhat lower (perhaps due to the fact that low-value claims are more likely to proceed to hearing in the more informal process of arbitration).[1]

With the introduction by employers of express provisions in employment arbitration agreements purportedly barring class action claims,[2] the debate has shifted to the relative merits of individual arbitration versus class action litigation of employment claims. Proponents of class action litigation make two empirical arguments for the superiority of their preferred mode of dispute resolution over individual arbitration. First, it is maintained, class actions are likely to do a better job of providing compensation for claimants (and thus deterring employer wrongdoing) because by aggregating claims in a single proceeding, the employer will not be able to benefit from the costs of delay or costs of relitigating underlying liability in individual proceedings. Second, it is further argued, class actions provide the only practicable vehicle for obtaining redress of certain low-value claims which, if required to be asserted on an individual

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[1] *See* David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557 (2005); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., November 2003-January 2004 at 44; Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998); Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amongst the Sound and Fury?*, EMP. RTS. & EMP. POL'Y J. (forthcoming, 2007); but cf. Lisa B. Bingham, *Is There A Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369 (1995) (comparing employee damage awards in arbitration to the amounts actually demanded).

[2] This occurred in response to the Supreme Court's ruling in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), that in the absence of an express limitation in the arbitration agreement, the arbitrator in the first instance has the authority to decide whether the agreement authorizes a class-wide proceeding.

basis, would never be championed, thus allowing the employer to escape with impunity. Thus, plaintiff advocates argue, with some support in the courts,[3] there should be a nearly blanket rule banning agreements precluding class action treatment for certain types of employment claims.

Unfortunately, very little empirical work has been done to test either of these propositions. We begin in this paper the process of bringing some facts to light on potential recoveries in employment class actions. This is intended as preliminary assessment, to stimulate further research.

Few class actions go to trial. Most settle well before trial. Some settlements may be private because they occur prior to class certification, but the overwhelming number of class actions cannot be settled without judicial approval. The actual terms of settlement, once approved by the court, should be part of the public file in the case. Moreover, in many cases, the terms have been publicized in the labor and employment press.

For this study, we have assembled a data set of major employment settlements reached since 1993. Employment claims are those arising under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act of 1967 ("ADEA"), the Americans with Disabilities Act of 1990 ("ADA"), and other federal and state anti-discrimination laws, the Fair Labor Standards Act ("FLSA") and similar state wage-hour laws, and the Employee Retirement Income Security Act ("ERISA").

Our essential finding is that, contrary to assumptions of some academic commentators and courts, average individual potential recoveries and (with the exception of certain ERISA and state wage-hour claims) median potential individual recoveries are not trivial, negative-value amounts. One therefore cannot assume as a prima facie matter that such claims would not be pursued by individual employees, whether in arbitration or litigation. Much, of course, depends on institutional design -- the costs of access to the forum and whether attorney representation is required. Class actions arguably reduce access costs and provide a mechanism for funding legal counsel but do so in a manner which through aggregation of claims may reduce the value of individual claims and entail a considerable loss of party autonomy. We hope to provoke additional empirical research on whether class actions do a better job at providing compensation, both as to amount (net of costs) and time from claim to recovery, than individual arbitration; and whether any such difference outweighs the loss of party autonomy inherent in class adjudication.

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[3] *See Muhammed v. County Bank of Rehoboth Beach*, 189 N.J. 1, 16-17, 21, 912 A.2d 88, 97, 100 (2006) ("'By permitting claimants to band together, class actions equalize adversaries and provide a procedure to remedy a wrong that might otherwise go unredressed.' … Other courts have referred to such small damage cases as 'negative value' suits recognizing that they 'would be uneconomical to litigate individually.' … The finance charge for the loan in this matter was $ 60. The class of people whom plaintiff seeks to represent may have similar claims about that size. In fact, plaintiff had to roll-over her loan two times, bringing her compensatory claims to $ 180 that, with the possibility of treble damages available under CFA, may add up to a maximum of less than $ 600. One may be hard-pressed to find an attorney willing to work on a consumer-fraud complaint involving complex arrangements between financial institutions of other jurisdictions when the recovery is so small.") Cf. *Gentry v. Superior Court*, 42 Cal. 4th 443, 458 , 165 P.3d 556 (2007) (discussing lower court decision "reject[ing] the argument that even an award as large as $37,000 would be "ample incentive" for an individual lawsuit for overtime pay, and would obviate the need for a class action, pointing to the expense and practical difficulties of such individual suits.").

II. **Procedure for Settlement**

In class action practice, settlement procedure is more complicated than it is in a single-party case. Under Rule 23 of the Federal Rules of Civil Procedure, after a class has been certified, the court must approve any settlement before it becomes final.[4] Before the court can do so, it must conduct a hearing and find that the settlement is "fair, reasonable, and adequate."[5] Rule 23 also requires that notice be given to all class members who would be bound by the settlement.[6] This allows class members to object to the settlement.[7] The court also must approve, under separate motion, any award of attorney fees. [8] Most of the settlements in our data set were resolved in this manner, and have therefore been approved by courts.

There is, however, a small difference to be noted between employment settlements generally and FLSA settlements. Under Rule 23, and therefore most class actions, typically all members of the class are included in the final settlement unless they opt-out at the certification stage under 23(b)(3).[9] Under the FLSA, in order for a class member to be included in a settlement, he or she must specifically opt-in to the class.[10] However, FLSA litigants often bring a hybrid Rule 23 class action (respecting the state wage-hour claims) coupled with an opt-in collective action (respecting the FLSA claim); the effect is that the settlement may ultimately be applied to class members who have not specifically opted in. In pure FLSA collective actions, because of the opt-in structure, generally each class member has to consent to the settlement before it can be valid.[11] Furthermore, FLSA settlements typically have to be approved either by the Department of Labor or by the court after determining the settlement is fair.[12]

Some employment discrimination cases are separately prosecuted by the Equal Opportunity Employment Commission (EEOC) and the procedure for settling those cases is also somewhat different. First, the EEOC is exempt from the class representation requirements of Rule 23 and able to represent a class without meeting those requirements.[13] Though these technical requirements of Rule 23 do not apply, in some cases courts still conduct an evaluation of EEOC settlements and notice is to be provided in the same fashion as a typical Rule 23 action. Similarly, EEOC settlements usually provide that each party must pay its own attorney fees, rather than the fees being deducted from the total settlement, unless a plaintiff has separate private counsel.

[4] FED. R. CIV. P. 23(e)(1)(A).

[5] FED. R. CIV. P. 23(e)(1)(C).

[6] FED. R. CIV. P. 23(e)(1)(B).

[7] FED. R. CIV. P. 23(e)(4)(A).

[8] FED. R. CIV. P. 23(h).

[9] FED. R. CIV. P. 23(c)(2)(B).

[10] 29 U.S.C. § 216(b).

[11] Donald H. Nichols, *Sign Up and Settle: FLSA Collective Actions*, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, 2004 FIFTEENTH ANNUAL CONVENTION, June 25, 2004, at 4.

[12] *See* Lynn's Food Stores, Inc. v. U.S., 679 F.2d 1350, 1352-53 (11th Cir. 1982)

[13] *See* General Tel. Co. of the Northwest v. EEOC, 446 U.S. 318 (1980).

III. **Methodology**

Our data set is comprised of class action settlements of employment claims that were approved by courts from 1993 through July 2007 and reported in various labor and employment and class action reporters. While we do not purport to include every settlement reached during this period,[14] we were able to locate a large number of important settlements.[15]

The information we plumbed from these reports include the gross aggregate settlement amount, attorney's fees, costs, class size (number of employees or former employees in the class), the type of claim, job title of plaintiffs asserting claim, and any information on the disposition of residual, i.e., unclaimed, amounts and incentive payments for lead plaintiffs. When not all of this information about a settlement was available in the commercial reports, we tried to obtain the missing information from court records and other news articles. If the information could not be found, we have indicated that fact in our results.

The data were then separated by type of claim and average (and median) individual potential recoveries were calculated; we use the term "potential recovery" because our sources do not always reveal the amounts particular individuals received or will receive. To calculate the net aggregate settlement amount, attorney fees and costs, where known, were subtracted from the gross settlement. (Costs were not obtainable for every settlement.) Average individual potential recoveries were then calculated by dividing the net settlement amount by the total number of class members. Lead plaintiff payments and other distribution provisions were not taken into account in making this calculation but will be discussed later in this paper. At that point, averages were also calculated for gross settlement amounts, net settlement amounts, attorney fees, and class size, as well as a few other categories.

Because some of the settlements were unusually high or low, we also calculated medians for gross settlements, individual potential recoveries and attorney fees. Finding median amounts was very helpful in taking account of these types of cases because the median weighs each settlement once rather than giving undue effect to a very high or very low award. The standard deviations for individual potential recoveries were also calculated.

Two tables in this paper that contain most of the important data. Table 1 is the more inclusive presentation of the data we have accumulated. If we had data on a gross settlement amount, but not on attorney fees or class size, the gross settlement was still included in the

[14] A major reason why some settlements have not been included is that terms have been kept under seal or subjected to confidentiality provisions by the parties. [We are going to need some data on this down the road.]

[15] The data were drawn from Mealey's Class Action Reports and BNA's Daily Labor Report, Class Action Report and Employment Discrimination Report. Some data were also obtained from from *Attorney Fee Awards in Common Fund Class Actions*, 24 No. 2 CLASS ACTION REP. 4, (2003). Finally, we performed the same search of class action settlements performed in Theodore Eisenberg & Geoffrey Miller, The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues, 57 VAND. L. REV. 1529 (2004). To check on the accuracy of reporting in these commercial services, we randomly chose 12 settlements and examined the settlement documents found in the court files.

average and median gross settlement figures in Table 1, even though we were unable to calculate an average or median individual potential recovery without the class size information.

In Table 2, we present results for settlements for which we had all necessary information. This means that if we had a gross settlement amount but not class size or attorney fees, the gross settlement was not included in the average or median gross settlement amounts. Also, for this table, we excluded any settlements that did not list the amount of attorney fees or class size, so the average and median individual potential recoveries include only settlements for which attorney fees could be subtracted from the gross settlement. Also, for discrimination awards, EEOC settlements were excluded from this data set because the EEOC can pursue litigation even where employment contracts require arbitration; hence, the policy debate is limited to private litigation versus private arbitration.[16] Furthermore, the EEOC does not take attorney fees, so including these settlements would artificially inflate individual potential recoveries.[17]

There are potential errors or biases in the data sources we used. One source of error may be simply reporting errors by BNA and the other commercial services. To increase our confidence level, we used Westlaw, Lexis or PACER to verify the reported settlement amounts for a random sample of the settlements in this data set; we found the commercial services to be accurate. A second source of bias is what might be called publication bias – settlements are likely to published by the commercial services where lawyers, principally plaintiff lawyers, alert the services of their having received judicial approval. Presumably, they report only the more favorable settlements to the publications. This could skew our data set to be more favorable to plaintiffs than in average or median employment class action cases (counting all class action filings).

Other unknown factors include: the state of settlement, the timing from filing of claim to ultimate recovery, the value of any injunctive relief, and what happens to any residual of the total settlement amount. While we do know the state in which settlements were approved, this may not be the same state where the plaintiff initially filed the lawsuit. There are also three other variables for which we have only partial information: the amount of any lead plaintiff awards; the disposition of unclaimed sums; and the income of plaintiffs in FLSA suits.

In some cases, the parties may have stipulated the disposition of any unclaimed residual, but we are not able to include that information in our tables because of uncertainty over whether there in fact will be unclaimed sums and how large the residual amount will be. Out of the settlements where we have information about the disposition of any residuals, five agreements awarded the residual to a non-profit or government organization such as a women's rights organization, a scholarship fund, or a food bank, two redistributed the residual back to the class,

[16] EEOC v. Waffle House, Inc., 534 U.S. 279, 293-94 (2002) ("No one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty. Accordingly, the proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so.") (citations omitted). It should be noted that only those settlements to which the EEOC was a named party in the lawsuit were excluded.

[17] Our results broken down by type of claim are discussed in Part IV, B. Observations about attorney fees are presented in Part IV, C. The data are also separated by state to see if there any significant differences in the settlements or potential individual recoveries across states. These results can be seen in Part IV, D and Table 9.

two allowed the residual to go back to the defendant, and one mandated that any residual be applied towards paying for arbitration costs.

IV. Findings

A. General Findings

The general findings have been split into two tables, Table 1 including all settlements, and Table 2 including only those for which we have all the relevant information, such as attorney fees and class size. These tables include claims under Title VII, the FLSA, ERISA, state wage-hour laws, and other miscellaneous state and federal statutes. As can be seen in Table 1, the average gross settlement for all employment claims is approximately $42 million, while the median is only $8.5 million. Table 2 concerns only those settlements where we can calculate individual potential recoveries. Here, the average gross settlement increases to $58 million; the median is $9.5 million. Averages are especially misleading here because a few large settlements are increasing the average and raising it more so in the smaller data.

As also shown in Table 2, the average individual potential recovery for all claims is around $25,000 while the median is significantly lower, at $5,000.[18] The gap between median and average individual potential awards indicates that several extremely large settlements are raising the average, while most of the claims are more centered around the median. The differential is also partially explained by the wide spread of awards, shown by the standard deviation of $130,000.

TABLE 1 – Statistics for All Settlements in Data Set

[18] This is a relatively low amount when compared with mean demands in employment arbitration and single-plaintiff litigation. For example, Lewis Maltby found mean demands in arbitration and litigation to be $165,128 and $756,738, respectively. Maltby, *supra* note 1, at 48. His mean recoveries were lower amounts, $49,030 for arbitration and $530,611 for individual litigation, but still higher than the individual potential recoveries we have found here. *Id.*

Category of Claim	Sub-Category	Number of Settlements in Data Set[19]	Average Gross Settlement for Category	Median Gross Settlement for Category	Average Net Recovery
Discrimination	**All**	**50**	**$42,955,654**	**$7,875.000**	**$37,421,212**
	Race	14	$19,738,956	$5,700,000	$15,787,484
	Sex	13	$22,409,831	$11,750,000	$17,375,806
	Age	3	$20,950,000	$5,500,000	$13,235,000
	EEOC	12	$7,916,817	$635,000	$7,797,100
	Other	8	$120,087,500	$42,250,000	$111,912,500
FLSA[20]	**All**	**31**	**$23,500,186**	**$11,400,000**	**$20,184,922**
	Off the Clock	10	$18,455,968	$5,900,000	$14,587,613
	Classification	16	$29,402,813	$18,750,000	$27,261,288
	Other	2	$1,500,270	$1,500,270	$1,435,557
State Wage-Hour[21]	**All**	**21**	**$24,385,573**	**$11,000,000**	**$19,474,093**
	Off the Clock	10	$8,577,641	$8,250,000	$7,073,277
	Classification	7	$56,021,429	$14,900,000	$42,784,106
	Other	4	$8,592,657	$5,975,000	$6,583,407
ERISA	**All**	**59**	**$75,454,308**	**$16,850,000**	**$56,184,468**
	Stock Drop	30	$45,084,083	$16,100,000	$23,599,579
	Cash Balance	5	$393,748,600	$7,200,000	$302,555,362
	Other	24	$48,239,720	$26,000,000	$40,137,074
Other Claims[22]	**All**	**27**	**$12,162,104**	**$3,500,000**	**$10,228,566**
ALL CLAIMS		**188**	**$41,669,255**	**$8,500,000**	**$32,705,783**

[19] It should be noted that the total number of settlements within all sub-types do not total the number of settlements within each type of claim. This is because settlements for which we did not know the sub-type of claim or where more than one sub-type of claim were asserted were not included within any sub-type, but were included in the data set for the broad type of claim in general.

[20] If the class brought an FLSA claim and one or more state-FLSA equivalent claims, then the settlement was included under the FLSA category.

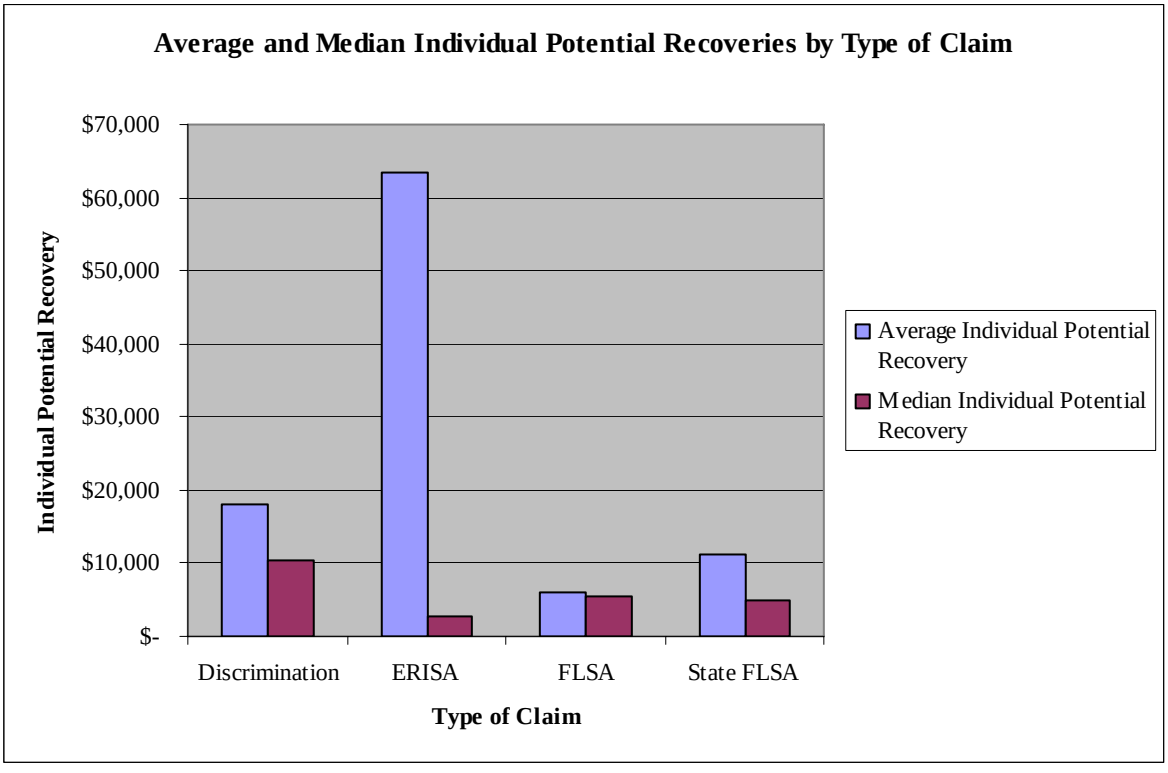
[21] In some cases, these state-FLSA equivalent claims have been brought in conjunction with claims under other state laws.

[22] The settlements within the "other claims" category include claims under the Seaman's Wage Act, state apparel statutes, and contractsuits, as well as others.

TABLE 2 – Statistics for Settlements Where Class Size and Attorney Fees are Known

Category of Claim	Sub-Category	Number of Settlements in Data Set	Average Gross Settlement for Category	Median Gross Settlement for Category	Average Net Recovery for Category	Average Number of Class Members for Category	Average Individual Potential Recovery for Category	Median Individual Potential Recovery for Category	Standard Deviation of Individual Potential Recovery
Discrimination	**All**	**24**	**$51,895,391**	**$8,550,000**	**$45,734,856**	**13,634**	**$18,127**	**$10,304**	**$23,956**
	Race	10	$15,344,538	$5,700,000	$12,086,705	1,285	$27,479	$14,903	$33,956
	Sex**	6	$31,565,666	$30,500,000	$24,400,666	6,342	$10,995	$11,245	$7,513
	Age	3	$20,950,000	$5,500,000	$13,235,000	761	$10,154	$7,576	$10,023
	Other	5	$167,960,000	$53,500,000	$158,132,100	54,806	$12,766	$5,038	$14,363
FLSA	**All**	**15**	**$21,244,643**	**$9,500,000**	**$16,056,702**	**10,958**	**$6,066**	**$5,476**	**$5,478**
	Off the Clock	6	$32,420,000	$10,000,000	$23,218,750	15,765	$5,213	$5,000	$4,633
	Classification	8	$16,590,625	$10,900,000	$12,367,254	8,597	$7,139	$6,584	$6,406
	Other	1							
State Wage-Hour	**All**	**12**	**$28,511,784**	**$12,723,207**	**$19,196,728**	**14,728**	**$11,262**	**$4,859**	**$15,843**
	Off the Clock	6	$9,956,902	$10,973,207	$7,568,248	28,009	$3,015	$1,211	$4,200
	Classification	5	$54,280,000	$14,900,000	$35,390,248	1,538	$21,812	$18,625	$20,601
	Other	1							
ERISA	**All**	**22**	**$131,647,109**	**$33,375,000**	**$108,066,844**	**36,992**	**$63,379**	**$2,787**	**$259,877**
	Stock Drop	9	$32,251,389	$30,750,000	$27,577,398	47,514	$1,917	$937	$2,071
	Cash Balance	3	$574,181,000	$6,400,000	$446,091,603	91,133	$2,171	$1,252	$2,528
	Other	10	$88,343,089	$58,454,000	$79,099,919	8,423	$137,056	$12,024	$382,780
Other Claims	**All**	**12**	**$18,460,173**	**$1,950,00**	**$15,875,809**	**23,561**	**$9,414**	**$984**	**$16,962**
ALL CLAIMS		**85**	**$58,343,770**	**$9,500,000**	**$47,694,472**	**21,552**	**$24,751**	**$5,034**	**$130,589**

In looking at the settlements and average individual potential recoveries by type of claim, clearly the highest individual potential recoveries tend to go to discrimination and ERISA plaintiffs. The average individual potential recoveries are highest for ERISA claims, at $63,379, followed by discrimination claims, at $18,127. In examining the median recoveries, however, discrimination plaintiffs tend to receive more. The median discrimination individual potential recovery is the highest of any type of claim, at $10,304, while the ERISA median individual potential recoveries are the lowest of any claim, at $2,787. FLSA and state wage-hour potential recoveries tend to be lower, and are similar in amounts both for median individual potential recoveries. This can be seen in the chart below.



One important variable to note is the presence of lead plaintiff incentive payments in some of these settlements. Because we did not have such data for most of the settlements, we have thus far not factored this element into our computations. In some cases, adding in these amounts will reduce the individual potential recoveries, especially in the settlements involving smaller classes. The following table summarizes the effect of accounting for incentive payments to lead plaintiffs in calculating individual potential recoveries. (It can readily be seen that subtracting these figures has a substantial effect on the individual potential recoveries involving smaller classes, but only has a minor effect on the recoveries involving larger classes.)

TABLE 3 – The Effect of Incentive Payments to Lead Plaintiffs on Individual Potential Recoveries (in 14 Settlements)

Total Incentive Payments	Individual Potential Recovery Adjusting for Incentive Payments	Individual Potential Recovery (without Adjustment)	Difference	Number of Class Members
$285,000	$55,000	$75,000	**$20,000**	6
$680,000	$4,947	$5,400	**$453**	1,500
$360,000	$48,000	$75,000	**$27,000**	8
$360,000	$1,910	$1,925	**$15**	20,000
$300,000	$8,559	$9,910	**$1,351**	222
$975,000	$88,500	$108,000	**$19,500**	50
$15,000	$1,878	$2,061	**$183**	5000
$90,000	$2,631	$2,761	**$130**	23,632
$170,000	$24,993	$25,000	**$7**	25000
$40,000	$43	$44	**$1**	136,000
$1,705,000	$20,209	$21,214	**$1,005**	1697
$500,000	$27,818	$62,000	**$34,182**	13
$20,000	$20,158	$20,158	**$0**	505
$56,000	$28,055	$27,423	**-$632**	800

B. Findings by Type of Claim

1. Discrimination Claims

According to our data, discrimination claims are potentially the most valuable claims for plaintiffs in employment litigation. The average discrimination settlement is $43 million when all settlements are included; the average individual recovery is $18,127. However, these individual plaintiff recoveries also have a relatively high standard deviation of approximately $23,956. This means that the individual recoveries in discrimination class action settlements are fairly varied. The data on discrimination suits in Table 4 reveal a wide spread, with the highest individual potential recovery being $108,000 and the lowest only $40. The $108,000 figure is likely also raising the average individual potential recovery, which partially explains the considerably lower median of $10,304.

TABLE 4 – Spread of Discrimination Settlements

Size of Average Plaintiff Potential Recovery	Number of Settlements Within Size Range in Data
Under $1,000	2
$1,000-10,000	9
$10,000-100,000	12

$100,000-$108,000	1

Another important factor is the size of the class. Discrimination classes tend to be smaller than ERISA or FLSA classes, with some exceptions. The average class size for a discrimination suit is similar to an FLSA class, with 13,634 members. The average class size for an FLSA claim is 11,000 potential claimants, and an enormous 37,000 for ERISA cases. These statistics do not fully reflect the true size of the differential, however, because there are several very large classes in our data set with over 10,000 class members. Furthermore, the average class size for each sub-type of discrimination class action is significantly lower. For a race claim, the average class size is 1,285, for a sex claim it is 6,342 and for an age claim it is only 761.

Class size is an important determinant of the size of potential individual recoveries. Gross discrimination settlements tend to be quite large; and with smaller classes, the individual plaintiff awards are similarly large.

There are also some other differences to note among sub-categories of discrimination claims.[23] The settlements are typically fairly different for each of these types of discrimination claims. As can be seen in Table 1 gender bias claims result in higher gross settlements, followed by age claims, and then race claims. These amounts are all lower than the overall average gross settlement for discrimination claims of $43 million. This is likely because the average settlement for all discrimination suits reflects settlements which may larger than the average for particular subtypes because they include claims asserting more than one type of discrimination.

Although there are these minor differences in settlement amounts, the disparities become more noticeable when looking at average and median individual potential recoveries. The average individual potential recovery for a race claim is around $27,000, but is only around $10,000 or sex and age claims. The median individual recoveries are also quite different, at $14,000 for race bias, $11,000 for sex, and $7,000 for age. Interestingly, race claims consistently produce higher individual potential recoveries than the sex or age claims.

There is also typically more variation in the size of potential individual recoveries for race claims than for sex and age claims. The standard deviation for race claims is over $30,000, while only around $10,000 for age claims, $7,000 for sex claims, and $14,000 for other claims. This may also partially explain the high average individual potential recovery for race claims when compared to other types of discrimination claims.

TABLE 5 – Standard Deviations of Discrimination Claims by Sub-Category

Sub-category	**Standard Deviation**
Sex	$7,513
Age	$10,023
Race	$33,956
Other or Combination	$14,363

[23] Unfortunately, our sample of disability and national origin discrimination settlements is too small to note any trends about them, so the main discussion will revolve around race, sex and age claims.

2. **FLSA & State Wage-Hour Claims**

The average gross settlements, median settlements and class sizes vary slightly for state wage-hour and FLSA claims. The average and median gross settlements are slightly higher for state than federal claims. The average class size also tends to be higher for state claims. The average individual potential recovery varies quite a bit more between state and federal settlements: $11,262 for a state claim, but a much lower $6,066 for a federal claim. The median individual potential recovery, however, is similar for a federal claim, at $5,476 but is lower for a state claim, at $4,859.

There is a large differential between gross settlement amounts for off-the-clock and classification suits, especially for settlements asserting only state law claims.[24] For settlements asserting FLSA claims, gross settlements in off-the-clock cases average around $32 million, whereas gross settlements in a classification suit are on average- worth $16.6 million. The median gross settlement amounts do not necessarily reflect this pattern, with federal off-the-clock claims yielding approximately the same settlements as the classification claims.

For settlements asserting only state law claims, gross settlements in off-the-clock cases average about $9.95 million, in contrast to $54.2 million for a classification claim. One explanation for this is that almost all of the state classification suits in our data set were settled in California, where settlements may typically be larger; by contrast, our federal claims data set contains settlements from a wide range of states. The median gross settlements show the same trend for state claims, but the differential between off-the-clock and classification claims is a bit smaller.

For both state and federal claims, classification suits tend to yield higher individual potential recoveries than off-the-clock suits. The differential is quite large for state claims: average individual potential recovery for an off-the-clock suit is $3,015, whereas it is $21,812 for a classification suit. The federal claims settlements do not diverge quite so much, but the classification claims still typically pay out about $2,000 more per plaintiff than the off-the-clock claims.

This large differential in potential individual payouts is likely a function of income level, which tends to be considerably higher for claimants in classification suits than for claimants in off-the-clock suits. We used proxies for deriving average incomes of plaintiffs in the classification and off the clock suits based on occupation, approximate location, and approximate date of the settlement. We obtained salary information from the Department of Labor's Occupational Employment Statistics (OES) Survey. For most cases, mean income figures for individuals having the identical job title involved were found. For a few cases, the exact job title salary was not listed, so the mean incomes of two very closely titled occupations were averaged together.

[24] "Off-the-clock" claims are typically asserted by hourly workers who believe they have not been paid for all time worked. "Classification" claims are typically asserted by salaried, non-overtime-eligible workers who believe they should have been classified as overtime-eligible and therefore should have been paid an overtime premium for any hours over 40 in a given work week.

Almost all of the cases involving classification claims in our data set were settled in California, which is largely due to the very large number of FLSA and state wage-hour actions brought in that state. For federal cases, we used the OES mean income levels for the largest metropolitan area in the particular federal district the case was brought in. This meant we used Los Angeles income levels for cases settled in the Central District of California, Oakland statistics for cases settled in the Northern District, and San Diego statistics for cases settled in the Southern District. For the state cases, we used the statewide average, since the specific area of settlement was unknown. Only one of the classification cases was settled in a different state, Minnesota, and that income information was found using statewide OES data and averaging together the mean income levels of two occupations closely titled to the occupation in question in the case.

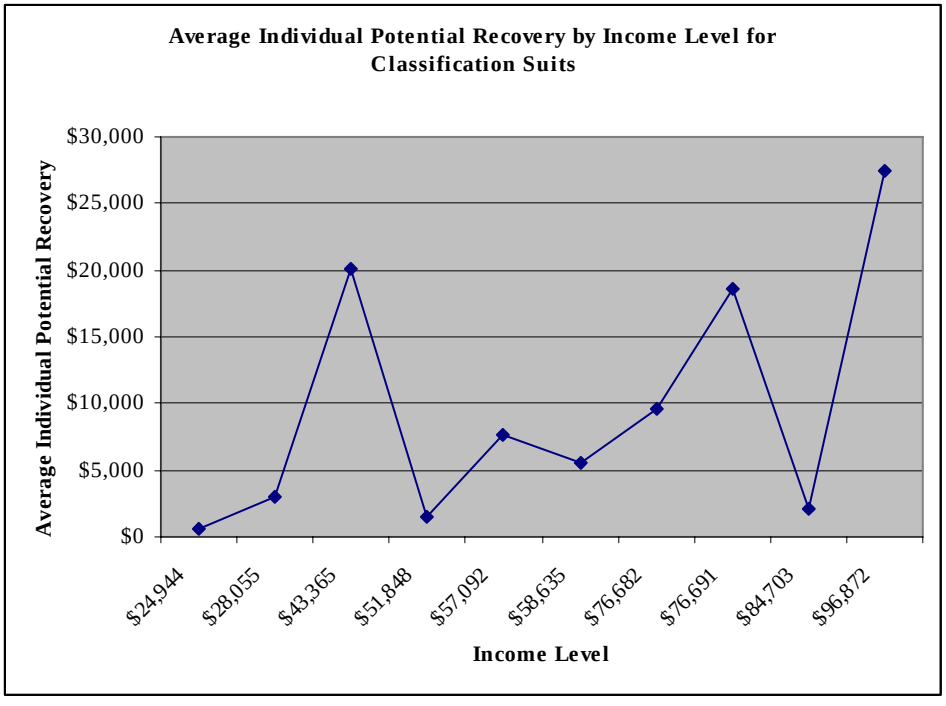
For the off-the-clock data set, there were again several settlements from California, for which the same data from the Occupational Employment Statistics (OES) Survey was used. There was one case in Washington and one case in New Jersey for which we used statewide data from the OES. For the Tennessee federal case, we used Nashville data, being the largest metropolitan area in that district, from the OES survey.

The following charts represent the average and median incomes for classification and off the clock claims. The graphs immediately afterwards summarize the correlation between income level and the average per plaintiff awards for both classification and off the clock claims.

TABLE 6 – Average and Median Income Levels for Classification and Off-the-Clock Claims

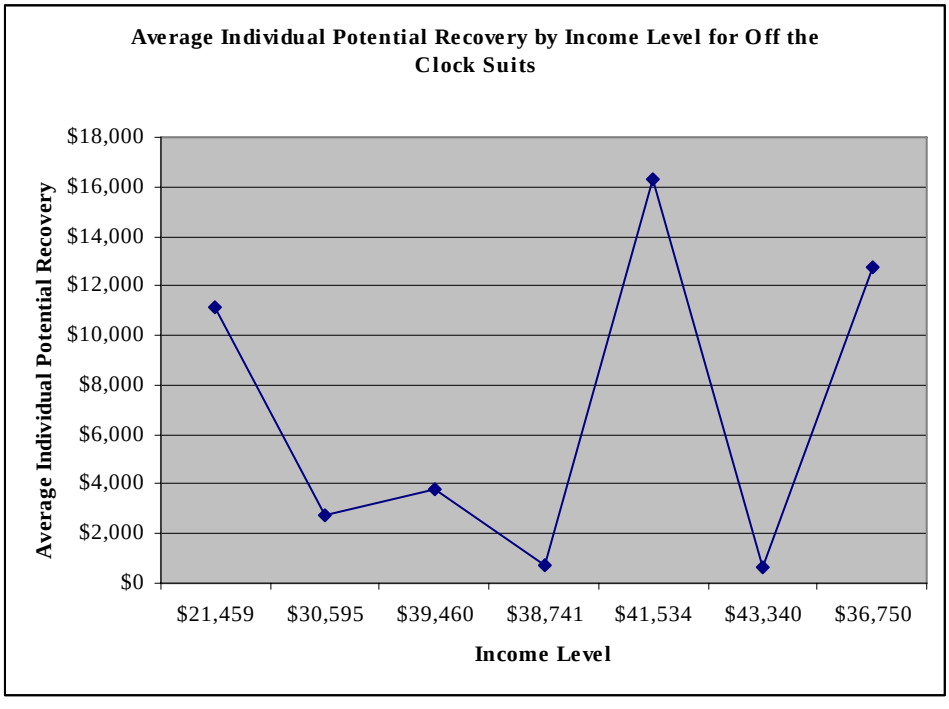
Classification Claims – Federal & State

Number of Settlements	10
Average Income	$59,889
Median Income	$57,864



Off the Clock Claims – Federal & State

Number of Settlements	7
Average Income	$35,983
Median Income	$38,741



The graph depicting settlements in classification cases suggests a positive correlation between salary and the amount of the individual potential recovery for classification claims. With some exceptions, claimants with higher income levels tend to be associated with higher individual potential recoveries. But for two outlier recovery amounts, there would be a linear relationship between the two variables. In fact these outlier data points are probably due to the specific facts involved in those lawsuits and the methodology of approximating income levels by job title.[25] In comparing the classification line with the off-the-clock line in the second graph, there is clearly a stronger correlation between income and average individual potential recovery in the classification than in the off-the-clock cases.[26]

Despite the median and average awards being generally lower for the off-the-clock claims, they are still over $5,000, with the exception of the median award for state off-theclock claims of $1,211. Importantly, while the lowest off-the-clock claim is only $44, every other settlement is for at least $600, so this low figure may be bringing the average for off-the-clock claims down slightly.

3. **ERISA Claims**

ERISA claims have the largest gross settlements of any of the major employment settlements, with the average being $131,647,109. The average gross settlement is also smaller in the larger data set, because there is more data to balance out a few extremely high settlements. However, the class size is also the largest, with 36,992 members on average. It is important to note that the overall average ERISA settlement is significantly larger than the stock drop sub-type in our data, largely because there are quite a few ERISA settlements in our data set which did not specifically fall into either sub-category of ERISA suits. Moreover, one of these uncategorized settlements was an extreme outlier, with an individual potential recovery of $1,225,074. [27]

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[25] In one particular outlier lawsuit, the employees were called "business consultants" and "business analysts" but the complaints alleged that the titles were created solely to sustain the illusion that the employees were managerial when in fact they mostly performed clerical, ministerial tasks such as filling out forms. Since we used job title to approximate what plaintiffs' income levels were, this means that the salary level we have listed, $84,703, is probably grossly inflated. If we actually had data on what these plaintiffs were earning, it likely would have correlated better with the individual potential recovery in that lawsuit. In the other outlier, off-the-clock claims were alleged along with classification claims, which may have made the overall recovery lower.

[26] There are also fewer data points on income level for off-the-clock suits, largely because occupation is a much more important factor in the classification suits, so it is reported more often. This may simply make finding a trend in the off-the-clock data more difficult. However, with the data we have here, there does not appear to be any type of correlation, positive or negative, between income level and average plaintiff award for this type of claims. Furthermore, while there are potentially explanative reasons for the outliers in the classification graph, there are not any significant reasons for the off the clock outliers. The only potential explanation for one of the outliers is that the settlement covered employees in 4 states, but it was settled in New Jersey and we used income level data from that state. It could therefore be possible that the income level for that particular settlement is slightly inflated because the income is higher in New Jersey than the other states involved.

[27] As well, the cash balance settlements tend to be larger than the stock drop settlements, but the sample size of our data also contains fewer cash balance settlements, making the figures less reliable. Further, one of the five cash balance settlements was for $1.7 billion, so this clearly skewed the data, making the average gross cash

Interestingly, the average and median potential recoveries for all types of ERISA claims are the lowest of any type of employment settlement. The median individual potential recoveries are $937 for a stock drop case and $1,252 for a cash balance case. There were no significant differences in median individual recoveries across sub-categories. The data indicate that there are three average plaintiff awards that are under $100 (two stock drop cases and one unknown), which are likely bringing these numbers down.

The standard deviation between ERISA awards was also the largest, at $259,877. This shows that, similar to discrimination claims, there is a wide disparity among settlements. Table 7 provides a basis for comparing the award disparity in ERISA cases to that in discrimination cases.

TABLE 7 – Spread of ERISA Settlements

Size of Average individual Potential Recovery	Number of Settlements Within Size Range
Under $1,000	9
$1,000-10,000	8
$10,000-100,000	4
$100,000-$1,225,074	1

4. Other Claims

It is difficult to note any major trends among the diverse set of claims that constitutes this category, ranging from the Seaman's Wage Act to state apparel statutes, to state contract claims. The average gross settlement is around $18 million and the average plaintiff award is approximately $9,000. The median individual potential recovery is also quite low, at $984. All three of these figures are lower than the average and median statistics for all employment settlements. There are no specific inferences to be drawn from this difference, however, because the claims in this category are so widely varied.

C. Observations about Attorney Fees

On a pure numerical level, ERISA claims produce the highest attorney fees, with state wage-hour claims coming in second, followed by FLSA and discrimination claims. The median attorney fees show a somewhat different trend, with state wage-hour claims receiving the highest fees, followed by ERISA claims, and then discrimination and FLSA claims. However, as to which claims produce the highest fee as a percent of net recovery, that distinction goes to discrimination cases where attorney fees account for approximately 30% of the ultimate

(continued…)

balance settlement around $574 million. Most cash balance cases also contain very large classes, so the individual potential recoveries are more on par with those of stock drop plaintiffs, both being around $2,000 per plaintiff.

recovery. Attorney fees in state wage-hour cases are generally about 29% of the total recovery, FLSA cases about 27%, and ERISA cases only about 23%. It is expected that ERISA cases represent a higher absolute amount for attorney fees but a low percentage of overall recovery, since the average gross settlement for ERISA claims is so high. This indicates that the fees for ERISA claims may be higher but only because the gross settlements are higher as well.[28]

However, the reasons behind the attorney fees and percentages of net recovery in other types of cases are less clear. Discrimination cases may be thought to be riskier than FLSA cases, which may partially account for the higher contingency fee percentage. The higher fees in state wage-hour cases when compared to the federal cases may simply be due to the cases being settled in different locations. Most of the state FLSA settlements came from California, while the federal settlements came from all over the nation.

For discrimination claims, the fees were fairly consistent among the sub-categories of cases, with age claims yielding slightly higher fees. However, since the number of age bias settlements in our data is small, it is likely one larger fee award which raised the average. In ERISA cases, the fees are larger for cash balance settlements, but that is largely a result of the larger gross cash balance settlements and the small sample size. There is no significant difference in fees between classification and off-the-clock FLSA claims. In the state cases, the value of the fees appears to be greater for classification claims, but the percentage of gross settlement is higher for off-the-clock claims.

[28] See generally , Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, J. EMPIRICAL LEGAL STUD., March 2004, at 27.

TABLE 8 – Attorney Fee Statistics for Settlements Where Known

Category of Claim	Sub-Category	Number of Settlements within Data Set	Average Gross Settlement	Median Gross Settlement	Average Attorneys Fees	Median Attorney Fees	Average Net Recovery	Fee as % of Gross Settlement
Discrimination	**All**	**33**	**$46,500,107**	**$8,400,000**	**$5,972,735**	**$2,165,000**	**$40,462,853**	**0.302**
	Race	13	$21,211,183	$5,900,000	$4,300,575	$1,450,000	$16,955,752	0.317
	Sex	10	$24,150,814	$13,375,000	$5,162,427	$3,000,000	$18,613,387	0.362
	Age	3	$20,950,000	$5,500,000	$7,711,000	$2,000,000	$13,235,000	0.335
	Other	7	$136,342,857	$53,500,000	$9,490,786	$10,850,000	$127,001,500	0.184
FLSA	**All**	**18**	**$19,408,901**	**$9,500,000**	**$4,452,439**	**$2,165,208**	**$15,419,327**	**0.266***
	Off the Clock	7	$25,233,526	$10,000,000	$4,949,420	$1,837,500	$21,141,248	0.258
	Classification	9	$18,858,333	$12,800,000	$4,969,491	$3,200,000	$14,076,448	0.269*
	Other	2	$1,500,270	$1,500,270	$386,270	$386,270	$1,435,557	0.278
State FLSA	**All**	**15**	**$26,028,744**	**$12,723,207**	**$8,673,102**	**$3,550,000**	**$17,678,552**	**0.288**
	Off the Clock	8	$8,568,059	$9,000,000	$2,742,275	$3,000,000	$6,508,498	0.307
	Classification	5	$54,280,000	$14,900,000	$18,877,500	$3,725,000	$35,390,248	0.275
	Other	2	$16,513,000	$16,513,000	$3,920,000	$3,920,000	$12,494,500	0.246
ERISA	**All**	**50**	**$73,098,170**	**$15,143,944**	**$14,073,879**	**$2,978,405**	**$58,851,983**	**0.233**
	Stock Drop	20	$24,008,625	$12,500,000	$4,589,008	$3,015,000	$19,292,424	0.259
	Cash Balance	5	393,748,600	$7,200,000	$90,997,639	$2,028,000	$302,555,362	0.251
	Other	25	$48,239,720	$26,000,000	$6,277,023	$3,078,810	$41,758,954	0.209
Other Claims	**All**	**23**	**$14,116,948**	**$5,087,607**	**$2,550,130**	**$1,350,000**	**$11,467,639**	**0.292**
ALL CLAIMS		**139**	**$45,129,453**	**$9,987,500**	**$8,413,148**	**$2,500,000**	**$36,715,048**	**0.269**

*Excludes fee as percentage of gross settlement in one settlement because the attorney fees were awarded separately and most of the settlement was based on injunctive relief rather than monetary damages so the gross settlement amount was significantly lower than the actual value of the settlement.

D. **Findings by State of Settlement**

Based on the differences in laws, courts, and attorneys in various states it may be helpful to analyze the settlements by the state in which they were approved. Generally, there are some clear differences across states, but much of this difference can be attributed to the differences in sample size among the states. The vast majority of these claims are all federal claims, with settlements ultimately approved in district courts in those states. Yet, there are a few settlements involving state claims that were settled in state courts. A large number of these settlements were approved in California, whereas a few were approved in New York, New Jersey and Pennsylvania. The following table summarizes the results. In this table, average and median recoveries were calculated using as much data as was available, since the sample of settlements for each state is not particularly large. This means that the average individual potential recoveries were calculated for awards where attorney fees were not known, which likely inflated the results.

TABLE 9 – Average and Median Individual Potential Recoveries by State

State*	**Number of Settlements**	**Average Potential**	**Median Potential**
Alabama	2	$109,315	$109,315
California	35	$12,469	$8,000
Colorado	2	$41,326	$41,326
District of Columbia	4	$8,378	$8,378
Florida	2	$291	$291
Georgia	2	$22,606	$22,606
Idaho	2	$4,448	$4,448
Illinois	7	$5,016	$4,444
Kansas	5	$9,559	$5,839
Louisiana	2	$8,965	$8,965
Maryland	2	$16,347	$16,347
Minnesota	3	$4,709	$5,400
New Jersey	5	$247,503	$2,118
New York	12	$72,068	$5,610
Ohio	4	$15,525	$1,329
Oklahoma	2	$35,429	$35,429
Pennsylvania	10	$13,526	$6,634
Tennessee	3	$6,940	$6,545
Texas	4	$34,208	$45,281
Washington	8	$11,339	$2,812

*Only states in which there was per plaintiff data on at least two settlements were included in this table.

For many of the states with higher average and median individual potential recoveries we had fewer settlements in our data set. The states with at least five settlements are italicized in the table. Among those states, the average individual potential recoveries by state are quite varied,

as can be seen above. Of these, New York and New Jersey are the highest, at $72,068 and $247,503 respectively. Yet, the median individual potential recoveries are significantly lower, at $5,610 for New York and $2,118 for New Jersey. This is likely because there was one settlement in each of those states that was unusually high, raising the ultimate average awards.

The other states with more data points have averages and medians within a smaller range. Washington, California and Pennsylvania all have averages within $3,000 of each other. The medians for Pennsylvania and California are also similar, at around $6,000 and $8,000 respectively. The median for Washington is lower, at approximately $3,000. Of these states with the larger sample sizes, the lowest average award is in Illinois, where the average is a mere $5,016 and the median is $4,444.

V. A Brief Comparison of Our Results to Recent Studies of Individual Recoveries in Arbitration

A study of American Arbitration Association (AAA) awards in 1999 and 2000 by Theodore Eisenberg and Elizabeth Hill suggests that arbitration awards obtained by individual employees may be higher than the potential individual recoveries in employment class actions (to the extent reflected in our data set.) Eisenberg and Hill separated their results by Civil Rights and Non-Civil Rights Employment Disputes, and split up claims made by higher paid employees from those made by lower paid employees.[29] Since our data has not been separated in these ways, comparisons are of necessity rough.

Eisenberg and Hill found the average AAA award for a Non-Civil Rights claim was $211,720 in the case of higher pay employees, and $30,732 for a lower pay employee.[30] Further, they found the median award for a higher pay employee to be $94,484, and for a lower pay employee, $13,450.[31] For Civil Rights claims, the mean was $32,500 for a higher pay employee and $259,795 for a lower pay employee.[32] The median awards for these actions were $32,500 for a higher pay employee and $56,096 for a lower pay employee.[33] A more recent paper by Alexander J.S. Colvin, which examined empirical research on arbitration, yielded similar results.[34]

These results are uniformly higher than the results we have found for mean and median individual potential recoveries in class action lawsuits. The highest average potential individual recovery in our data set is around $63,000 for an ERISA claim, but the rest of our mean and median results are all below $20,000.

[29] Eisenberg & Hill, *supra* note 1, at 51.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Colvin,*supra* note 1.

VI. **Conclusion**

While our data set does not include every settlement of employment law class or collective action over the past fourteen years, it includes a large sample of them. Although the numbers vary by type of claim, state of settlement, and income level of plaintiffs in some cases, the individual potential recoveries are typically rather substantial in these settlements, suggesting that – from the standpoint of size of individual claim alone – it cannot be said that these are claims that would not be individually pursued in arbitration. Much work needs to be done to determine if these potential recoveries would be obtainable in individual litigation or arbitration, or whether there is something special about the class action vehicle that makes possible such potential recoveries. We would also need to account for a selection bias in class action cases – that plaintiff lawyers may under-report less favorable settlements and are highly selective in picking cases for class action treatment. If so, the characteristics of individual and class claims may differ in systematic ways. In the interim, our data shows that potential individual recoveries for many types of employment disputes are valuable enough to place in question the arguments that these are "negative value" cases that will be brought forward, if at all, only through the class action vehicle.