Second-Generation Dispute System Design Issues in Managing Settlements

FRANCIS E. MCGOVERN*

In pushing the envelope of dispute system design, we have focused primarily on successes and productive innovation. We have neglected to concentrate as well on the less successful and less productive outcomes of designing dispute systems. One of the most fruitful approaches to second-generation design of dispute systems can be to focus on failure mode analysis. Second-generation learning can benefit as much from understanding why designs fail as it can from understanding why they succeed.

In the area of settlement distribution, success and failure comprise a continuum versus a dichotomy. There is typically more success or less success, or success in some domains and failure in others, rather than absolute failure. By examining levels of success in two recent settlement distribution plans, it may be possible to advance our understanding of design processes sufficiently to avoid modes of failure that might otherwise occur, and to inform the next generation of settlement plan developers of the tensions and tradeoffs that may result from features of their plans and their implementation.

In particular, it is helpful to study the inherent tensions that exist in those cases. Tensions derive from competing goals. For example, there is a tension between efficiency and equity in simplifying the claims process for legitimate claimants and minimizing fraud by requiring comprehensive documentation. These tensions can pose different issues for different stakeholders including filers, attorneys, claims administrators, courts, and regulators. The most critical tension arises over who should have the decisionmaking authority to resolve or minimize these inherent tensions.

This article is designed to use an examination of two settlement distribution designs to appreciate some of the second-generation problems and solutions in this area. In addition, this analytic process should be helpful in any second-generation evaluation.

---

* Professor of Law, Duke University School of Law, Durham, North Carolina. Professor McGovern was the Special Master for *In re Currency Conversion Fee Antitrust Litigation* and *In re Pharmaceutical Industry Average Wholesale Price Litigation* and, as a result, this paper recounts in large part his participation as special master in these cases. Special thanks to Ron Bertino, Pat Ebener, Tom Glenn, Jeanne Malone, and Ed Radetich for assistance with and review of earlier drafts of this article. In addition, recognition is due to the editorial staff of the Journal for ensuring that this paper met the standards of the *Ohio State Journal on Dispute Resolution.*

I. *IN RE* CURRENCY CONVERSION FEE ANTITRUST LITIGATION

In 2001, a lawsuit was filed against Mastercard, Visa, Diner's Club, and their related issuing banks alleging that they had overcharged their customers from 1%–3% in foreign currency conversion fees in the use of their credit, charge, debit, and ATM cards between 1996 and 2006.[1] The case was settled in 2006 for $336 million by Mastercard, Visa, Diner's Club, and six issuing banks.[2] The settlement amount included the administrative fees of the settlement distribution and attorney's fees.[3] As part of the settlement, the settling banks agreed to insert claim forms for the distribution process in the monthly paper bills for 20.8 million current MasterCard and Visa accounts with foreign currency transactions between February 1, 1996 and November 8, 2006.[4] On November 8, 2006, the court granted preliminary approval of the proposed settlement, including the claim form.[5] The court also appointed a claims administrator and made provisions for objections, opportunities to opt out, and the assessment of attorneys' fees, and set a date for a final fairness hearing.[6]

Counsel had developed a claim form and a notice campaign as part of their settlement agreement.[7] The claim form required that an eligible cardholder list the annual amount of their foreign transactions for each of their cards, as indicated in Appendix A. The claims forms were enclosed with one monthly account statement mailed to cardholders during the period from January through March of 2007. There was also a website from which a claim form could be downloaded and a toll free telephone number was made available for potential beneficiaries with questions.

As of June 30, 2007, there had been 90,000 claim forms filed—60% on paper and 40% electronically—representing an extremely low response rate of 0.45% in light of the 20.8 million notices mailed to card holders.[8] In addition, there were complaints filed with the court criticizing the reporting

---

[1] Consolidated Amended Class Action Complaint at 1, *In re* Currency Conversion Fee Antitrust Litigation, 265 F. Supp. 2d. 385 (S.D.N.Y. 2003) (Nos. 1409, M 21-95).

[2] Stipulation and Agreement of Settlement at 3, *In re* Currency Conversion Fee Antitrust Litigation, *supra* note 1.

[3] *Id.* at 41–42.

[4] *In re* Currency Conversion Antitrust Litigation, Nos. 1409, M 21-95, 2006 WL 3253037 (S.D.N.Y. November 8, 2006) (order certifying settlement classes).

[5] *Id.* at 5.

[6] *Id.*

[7] Memorandum from Francis E. McGovern, Special Master, to Judge William H. Pauley III (July 10, 2007) (on file with author).

[8] *Id.* at 2.

requirements in the claiming process and questioning why the data being requested was not already available to the claims administrator from the credit card companies.[9] At a hearing on May 11, 2007, the court suggested the appointment of a special master to assist the court and the parties in devising and implementing a revised notice and claim procedure. The court halted the notice campaign and appointed a special master on May 18, 2007.[10] After a series of meetings with counsel for the parties, the special master submitted a report to the court on July 10, 2007 that analyzed the initial filings, the feasibility of using the banks' data available in a computerized format, and possible mechanisms for a greater use of that computerized data in calculating payments, and suggested seven alternative approaches for structuring the claim filing, review, and payment mechanisms.[11] Each alternative was presented with accompanying assumptions and projected outcomes based on six variables: definition of claimant, size of claimant population, response rate, average payment per claimant, expected total payment, and expected total cost.[12] The presentation was made in a format that enabled the court and parties to change the assumptions about each alternative and readily determine how the outcomes would be affected by the changes in assumptions.

The special master's report recommended a new notice and claim form to incorporate three options for claimants to choose from depending on their estimated losses and ability to thoroughly document their claim: (1) a flat payment of $25; (2) an estimate of the number of days spent in foreign countries during the covered time period so an algorithm of typical expenses would be applied to estimate a payment; and (3) the original form of annual estimates of foreign expenditures by credit card. The new claim form is contained in Appendix B. The flat payment option was designed to take advantage of claimants' propensities to make claims only if the form is easy to understand and easy to complete, in comparison to having to obtain ten years of proof of foreign spending. Based upon the forms filed prior to June 30, 2007, it was recommended that an individual who spent no more than one week abroad or had foreign currency expenditures not greater than $2,500 would have been eligible for a $25 payment that would be consistent with the limited foreign conversion fees charged to most cardholders.[13] At the same time, the level of potential fraud was reduced from this option because only

---

[9] *Id.*

[10] *Id.*

[11] *Id.* at 2.

[12] *Id.*

[13] McGovern, *supra* note 7.

cardholders who had foreign currency expenditures were included in the mailings.

The second option was designed for customers who might feel that $25 was inadequate but that compiling annual records was too onerous or not feasible.[14] Most foreign travelers can remember how many days they spend overseas annually more easily than they can remember how much money they charged on their credit cards. In an optimal world, the issuing banks would have had a computerized listing of annual charges, but the databases for those charges were not accessible for a variety of reasons, including changes in bank ownership of cards, changes in card names, and incompatibility resulting from changes in databases and their management software over time. By listing the number of days spent overseas, however, a claimant would be more likely to feel that the settlement payment would be based upon their actual circumstances. The calculation of the algorithm could be accomplished from publicly available data from the travel industry about foreign expenditures. Although the public travel industry data was not a perfect fit, assumptions could be made to approximate the annual currency conversion fees based upon the number of days spent in a foreign country.

The third option was virtually identical to the one offered on the original claim form. The resulting cover letter and claim form options were reviewed by the lawyers and the claims administrator, and were further refined based on testing and feedback obtained from focused interviews with potential beneficiaries. There was a consensus developed among all the constituents that the resulting letter, claim form, notice campaign, website, and 800 telephone number scripts were acceptable.[15]

On September 17, 2007, the parties submitted a joint status report, and the court approved the revised claim form package, mailing lists, reduction of duplicate claims, publication notice program, and revised settlement distribution schedule.[16] The parties also included an allocation protocol in the event that the number and amount of claims exceeded the available funds. The cost of the mailings, which began on December 1, 2007, to approximately 38 million cardholders, was anticipated to be approximately

---

[14] The concept of the second option was developed by the special master during a series of meetings with the parties in order to allow claimants to quantify their foreign travel in an easier manner than the original claim form afforded.

[15] Joint Filing of Proposed Notice Schedule, Claim Form, and Claims and Administration Budget (S.D.N.Y. August 31, 2007), *In re* Currency Conversion Fee Antitrust Litigation, *supra* note 1; Order (S.D.N.Y. November 24, 2007), *In re* Currency Conversion Fee Antitrust Litigation, *supra* note 1.

[16] Joint Filing of Proposed Notice Schedule, Claim Form, and Claims and Administration Budget, *supra* note 15.

$14 million.[17] The revised summary notice contained in Appendix C was placed in twenty-seven newspapers and other print and electronic media at an advertising cost of $941,000.

On July 15, 2008, the plaintiffs' counsel filed a status report indicating, after elimination of duplicates, that there had been 10,115,836 claims filed, with 7,200,413 claimants choosing option 1; 2,600,315 claimants choosing option 2; and 315,108 claimants choosing option 3.[18] In addition, there were approximately 22,000 late claims filed, and 2,910 requests for exclusion were filed.[19] Total expenses of claims processing were almost $25,000,000 as of that time.[20]

As shown in the table below, an analysis of the claims reveals that 49% of option 1, 50% of option 2, and 58% of option 3 were filed electronically. The option 1 claims represent 71.2% of the total claims filed, option 2 claims represent 25.7%, and option 3 claims represent 3.1%. The overall response rate greatly increased over the first mailing. The response rate was approximately 27% of the mailings using the three option claim form. This rate takes into account that duplicates or suspected duplicates were deducted from the claims received but remain unknown among the mailings, and a small percentage of the claims were submitted by downloading the claim form from the internet site rather than from the mailings. A compilation of data from other consumer cases in which there have been similar numbers of potential beneficiaries reveal that this is an exceptionally high response rate.[21]

Option	Claims Filed	Percent Electronic	Percent of Total Filed
1	7,200,413	49	71.2
2	2,600,315	50	25.7
3	315,108	58	3.1
Total	10,115,836	50	100

[17] *Id.* at Tab B.

[18] Plaintiffs' Notice of Filing of Status Report Concerning the De-Duping of Claims and the Settlement Administration Process at 3 (S.D.N.Y. July 15, 2008), *In re* Currency Conversion Fee Antitrust Litigation, *supra* note 1.

[19] *Id.* at 4.

[20] *Id.* at 13.

[21] Analysis of historical case data compiled for presentation to the court in *In re* Global Research Analyst Settlement (on file with the author).

There is no way to know what the response rate would have been if the original claim form had not been changed. Indeed, most observers would probably conclude that the extremely low response rate of less than one-half percent was consistent with other similarly situated cases. What is certain is that with the addition of new options, as well as a different format and delivery mechanism, the publication of notice and media coverage around the case increased the response rate substantially. This increase in access to claiming among card holders, which could be considered a fairer form of distribution, was accomplished at significant additional costs and time, raising one of the inherent tensions between efficiency and equity in the distribution process.

II. *IN RE* PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION

In 2001, a lawsuit was filed against forty-two pharmaceutical manufacturers alleging that the defendants reported false and inflated average wholesale prices (AWP) for certain types of drugs administered through outpatient clinics.[22] AWPs are used to set prescription drug prices for payment by Medicare, consumers, and insurers.[23] The lawsuit sought damages for overpayments for the affected drugs. In 2006, GlaxoSmithKline (GSK) settled with the plaintiffs for $70 million.[24] After payment of $4.5 million to certain state attorneys general, attorneys' fees, and settlement fund administrative costs, 70% of the net fund was designated for third-party payers who made reimbursement payments for one or more of ten named drugs.[25] The remaining 30% was designated for individuals who made payments or co-payments other than flat or fixed payments. The time frame varied but was generally from 1991 to 2006.[26]

After preliminary approval of the settlement on November 15, 2006, nationwide notice by publication and by website was provided.[27] In addition,

---

[22] Complaint, *In re* Pharmaceutical Industry Average Wholesale Price Litigation, (D. Mass. 2001) (No. 01-CV-12257-PBS, MDL. No. 1456).

[23] *Id.*

[24] Settlement Agreement and Release of the GlaxoSmithKline Defendants at 4 (D. Mass. June 22, 2007), *In re* Pharmaceutical Industry Average Wholesale Price Litigation, *supra* note 22.

[25] *Id.* at 5.

[26] *Id.*

[27] Declaration of Katherine Kinsella in Support of Motion for Final Approval of the Settlement with GlaxoSmithKline at 10 (D. Mass. June 22, 2007), *In re* Pharmaceutical Industry Average Wholesale Price Litigation, *supra* note 22.

mail notice was sent in January 2007 to 2.5 million individuals who had been identified by billing codes in Medicare Part B records of the Centers for Medicare and Medicaid Services as associated with the GSK drugs at issue.[28] The notice by mail included an explanation of the settlement, and a claim form and an opt-out form as contained in Appendix D and Appendix E. The court appointed a special master on November 15, 2006, to review the proposed settlement, focusing on the adequacy of the amount of payment to the consumer class members and the method of distribution to those consumers.[29]

The claim form enabled class members to make a claim for qualified expenditures for each covered drug during the class period. Proof of payment included a written prescription, a receipt, a cancelled check or credit card statement reflecting payment, an explanation of benefits showing an obligation to pay, a letter from a physician proving an obligation to pay, or a notarized statement proving payment. See Appendix D. These kinds of required proof are typical of this type of consumer settlement. The deadline for filing exclusions was May 27, 2007, and the deadline for filing claims was May 28, 2007.

By the April through May 2007 period, approximately 10,000 consumer claim forms had been filed with a preliminarily estimated average value of about $230, and about 20,000 requests for exclusion, or "opt-outs," were made.[30] The large number of requests for exclusion, relative to the number of claim forms, led to a request to the court for the special master to delay the filing of a report until a greater understanding of the nature of these claims and opt-out requests could be analyzed. On May 21, 2007, the court approved the special master's request to conduct a survey of consumers who

---

[28] Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Settlement Agreement and Release of the GlaxoSmithKline Defendants at Exhibit B (D. Mass. June 22, 2007), *In re* Pharmaceutical Industry Average Wholesale Price Litigation, *supra* note 22; Order Granting Preliminary Approval of the GlaxoSmithKline Settlement, Certifying Class for Purposes of Settlement, Directing Notice to the Class and Scheduling Fairness Hearing at 8 (D. Mass. November 15, 2006), *In re* Pharmaceutical Industry Average Wholesale Price Litigation, *supra* note 22; Final Order and Judgment Granting Final Approval to Proposed Class Action Settlement with the GlaxoSmithKline Defendants, Approving Proposed Allocation of Settlement Funds, and Approving Class Counsel's Application for Attorneys' Fees, Reimbursement of Litigation Expenses, and Compensation to Class Representatives at 4 (D. Mass. August 17, 2007), *In re* Pharmaceutical Industry Average Wholesale Price Litigation, *supra* note 22.

[29] Report of the Special Master to the Court in *In re Pharmaceutical Industry Average Wholesale Price Litigation* regarding proposed settlement with Defendant GlaxoSmithKline (July 16, 2007) (on file with author).

[30] *Id.* at 6

filed exclusion forms.[31] The theory behind the survey was to analyze the responses—claim forms and exclusion forms—more carefully in order to understand the dimensions of the problems. When exclusions exceed claims, a settlement is suspect.

One thousand five hundred consumers were selected at random from the consumers who had submitted exclusion forms. Telephone numbers were located for 1,367 (91%) of those selected for the survey, and a pre-call letter was mailed to all 1,367 members of the phone survey sample.[32] A total of 876 consumers (64% of the telephone survey population) were interviewed by telephone by a professional call center staff.[33] Those who agreed to be interviewed answered a series of questions designed primarily to determine (a) whether they were truly class members, as opposed to, for example, persons who took a relevant GSK drug but had Medigap or other insurance that covered their co-payments and (b) if they were part of the class, why they chose to exclude themselves from the settlement.

A significant number of those surveyed did not remember taking any of the covered drugs, many had insurance that covered their co-payment obligation, and many had no recollection of a percentage co-payment or full payment for the drug. Of those surveyed, 15.65% were estimated to be actual class members based on recalling the covered drugs, being charged for the drugs, and either having no insurance or having a percentage co-payment.[34]

During the course of the phone survey, those determined to be actual class members were told that they may be able to reconsider their decision to exclude themselves if they wished to do so, and 18% indicated that they were interested in filing a claim. This, added to the 16% who said they originally intended to file a claim when they submitted the exclusion form, totals 34% of those determined to be class members who said they were interested in filing a claim form. The estimates derived from the survey were subject to unobserved sampling and response and measurement error, but nonetheless provided important insights about the eligibility and intentions of the opt-outs. In light of these results, new claim forms were mailed to everyone who had originally filed an exclusion form and might be interested in filing a

---

[31] Order Regarding Survey of Consumers who Filed a Notice of Exclusion from Settlement at 1 (D. Mass. May 22, 2006), *In re* Pharmaceutical Industry Average Wholesale Price Litigation, *supra* note 22.

[32] Report, *supra* note 29, at 6.

[33] *Id.* at 6.

[34] *Id.*

claim form, along with a letter saying that they could revoke their exclusion request and file a claim form by a new deadline of July 31, 2007.[35]

As of July 11, 2007, there were 21,365 consumers who had filed exclusion forms.[36] As noted above, the survey results suggested that 15.65% of those who submitted exclusion forms were, in fact, members of the class. This extrapolates to 3,344 actual class members who requested to opt out of the settlement. In addition, the survey results suggest that some 16% of the actual class members who sent in an exclusion form did so under the mistaken view that they were then filing a claim.[37] This could readily occur because the exclusion form was the first page of the claim form packet after the instructions, and included an instruction to sign and return the form. If this 16% is subtracted from the 3,344 total of class member opt-outs, there would be 535 fewer opt-outs, or a total of 2,809 actual class members intending to be excluded from the settlement.

An overall opt out rate can be calculated by projecting from the survey results. The estimated 2,809 exclusions filed by persons who were eligible class members and who actually intended to opt-out becomes the numerator needed to form the class member opt-out percentage. The calculation of the number of total actual class members—the denominator in determining an opt-out rate—started with the 2.5 million people who received mailed notice based on the CMS Medicare Part B list of those who took the relevant GSK drugs. The survey finding that 15.65% of those surveyed were actual class members may also be applied to the 2.5 million total, which would produce a result that the universe of actual class members would be 15.65% of 2.5 million, or 391,250 class members. In all probability, however, the universe of actual class members among the total who were mailed notice would be substantially less. This is because (a) the CMS list may have included those who paid for non-GSK drugs and are therefore not GSK class members, and (b) the survey sample was taken from persons who affirmatively sent in an exclusion form and therefore were even more likely to be class members than those who did nothing. Those who did not respond at all with either a claim form or an exclusion form may have had lower drug name recognition, no proof of payment, or a high chance of having full insurance coverage for their co-payment obligation, or they may have been less likely to be class members for other reasons, compared with those who actually responded in some way. It would be reasonable, therefore, to predict that the percentage of actual class members from the 2.5 million total persons who received notice

---

[35] *Id.* at 7.

[36] *Id.*

[37] *Id.* at 8.

by mail from the CMS list might be as low as half the estimated percentage of actual class members among those who filed an exclusion form and were studied in the survey. Given this assumption, a more conservative estimate of the number of actual Medicare Part B GSK class members might be between half of 391,250, or 195,625, and 391,250.

The estimated opt-out percentage of actual class members is between 2,809 of 195,625, or 1.4%, and 2,809 of 391,250, or 0.71%. Moreover, the traditional definition of opt-out is a person who opts out in order to preserve the right to sue or pursue a lawsuit.[38] In the survey, only 2.53% of the actual class members who intended to exclude themselves reported this reason for opting out. Extrapolating from the survey percentage to the number of estimated opt-outs by actual class members, an estimated 71 of the 2,809 opt-outs could be seen as traditional opt-outs under this definition. This would translate into an opt-out rate of between 0.036% and 0.018% among the estimated number of actual consumer class members.

As of July 2007, there had been 12,705 claims filed.[39] Using the predicted range of 195,625 to 391,250 as the universe of actual consumer class members, this would translate into a claims-filed rate of between 3% and 6%. Response rates for consumer class action settlements like this have historically been low.[40] In a sample of 10 cases of over one million class members per case, the response rate ranged from less than 1% to 11%, with a mean response rate of 3.4%.[41] Opt-out rates in those same cases ranged form 0% to 0.8%.[42] The response rate and opt-out rate in this case fall within that range.

A preliminary estimate of the average claim payment completed in April, 2007, from a random sample of 140 claims forms filed, suggested that the average claim payment would be $237.[43] Assuming this number reflects the average value of actual claims once they are all tabulated and approved, the total value of the claims paid out would be $3,014,515, the rough estimate of the average claims value multiplied by the 12,705 claim forms filed. This

---

[38] Report, *supra* note 29, at 9.

[39] *Id.*

[40] Analyses of historical case data were compiled for presentation to the Court in *In re Global Research Analyst Settlement* and for Report of the Special Master to the Court in *In re Pharmaceutical Industry Average Wholesale Price Litigation* regarding proposed settlement with Defendant GlaxoSmithKline (on file with author).

[41] *Id.*

[42] *Id.*

[43] Report of the Special Master to the Court regarding proposed settlement with Defendant GlaxoSmithKline at 9 (D. Mass. July 16, 2007), *In re* Pharmaceutical Industry Average Wholesale Price Litigation, *supra* note 22.

total represents a significant percentage of the total single damages estimate for consumers made prior to the settlement.

Based upon the projections using the survey estimates, the amount of money designated in the settlement was adequate to compensate the consumer class members, and the method of distribution, although not robust, was consistent with similarly situated settlements. As was the case in the *Currency Conversion Fee* settlement, a complicated, difficult-to-complete claim form does not create the optimal response.[44] This situation was exacerbated in AWP because of the characteristics of potential beneficiaries involved, including age, severity of illness, and lack of patient knowledge. Medicare consumers would be expected to be wary of any communication regarding their health benefits and many would err on the side of exclusion rather than jeopardize those benefits. The proof requirements would also be daunting for many potential claimants. Even the definition of the class itself deterred complete understanding of the rights involved.

III. INHERENT TENSIONS

These two case studies suggest that inherent in any settlement distribution process are various tensions that derive from the competing goals of equity and efficiency. These tensions seem to exist independent of the type of settlement, the size of the settlement, the number of potential beneficiaries, or the subject matter of the settlement. It is possible that characteristics such as the number of years included in the recovery period and pre-existing data used to define the pool of eligible claimants can increase or mitigate these tensions. The following list of ten inherent tensions illustrates the dilemmas facing the design of a settlement distribution process.[45] The settlement distribution system design process must confront each of these tensions and include decisions about them, either consciously or unconsciously. At the same time, it soon becomes apparent that there is a paucity of data to provide empirical assistance for evaluating the balance among the variables in tension, thereby hindering the search for optimal solutions. Most judgments, or lack of judgments, are made in an empirical vacuum based upon anecdotal evidence and experience.

---

[44] Memorandum from Francis E. McGovern, Special Master, to Judge William H. Pauley III, *supra* note 7.

[45] These tensions were the subject of presentations at two conferences, one being the Claims Administrators Conference in February of 2008 in San Francisco, the second, Distribution of Securities Litigation Settlements: Improving the Process, in September of 2008 in New York City.

First, one of the most fundamental tensions relates to the ease or burden of completing a claim form as opposed to the proof requirements necessary to prevent potential fraud. The more substantiation required to receive payment from a settlement, the fewer the number of potential beneficiaries who will file claim forms. At the same time, the easier the claiming process, the greater the potential for false claims unless the pool of eligibility can be identified and substantiated, as in MasterCard/Visa. Most claims administrators engage in audits of claims filed, but there is very little data to guide the auditing process other than trial and error in a given case. There is also the increased administrative cost associated with any audit. On the other hand, the individualized review of claims can become more expensive than the value of the false claims. The deterrent effect of auditing procedures is also reduced by the ad hoc nature of the practices employed by the various claims administrators. When a potential claimant does not know the potential efficacy of an audit, the incentives for fraud can increase.

A second and related tension arises in the context of the legal sufficiency of the claim form and the notice of settlement versus the clarity of the materials for different types of filers. Lawyers need to ensure that all of the legal requirements of a settlement are presented to the public in language that has been proven to be substantially adequate, as oftentimes legalese obviously conflicts with clarity. Lawyers and judges may appreciate the meaning and importance of the details of a settlement, whereas the general public may find the language and level of detail off-putting and incomprehensible. When confronting a settlement notice that rivals the Federal Register in its density and over-comprehensiveness, it is not uncommon to find a potential beneficiary unwilling to expend the necessary effort even to learn that they are, indeed, a potential beneficiary.[46] Notwithstanding the efforts of the Federal Judicial Center to suggest simpler and more accessible notice, there still remains much that can be done to satisfy both legal and practical goals of transferring information. Again, the literature on this tension is less than adequate to provide an empirical basis for decisionmaking.

Third, the tension between the desire of plaintiffs' lawyers during settlement negotiations to expand the number of potential beneficiaries in order to plead the maximum amount of damage potentially attainable in a lawsuit and the desire of defense lawyers, after settlement, to include the maximum scope of a release are often in conflict with the realities of those

---

[46] Report of the Special Master to the Court Regarding Proposed Settlement with Defendant GlaxoSmithKline at 9 (D. Mass. July 16, 2007), *In re* Pharmaceutical Industry Average Wholesale Price Litigation, *supra* note 22.

actual plaintiffs who suffered the most.[47] This tension among potential claimants who are included in the case to satisfy the needs of the lawyers as opposed to the claimants who are most likely harmed has the effect of diluting the payment from a settlement to any given deserving claimant. It is not uncommon, therefore, to see counsel satisfied with a low claiming rate because the proportionate payments to each claimant will be higher. The over-inclusiveness of the class is mediated by the under-inclusiveness of the claiming rate. This tension can raise expectations as to the number of potential beneficiaries of the lawsuit while creating an incentive to use a claims process that ensures that a lower and more realistic number of claims are actually filed. The plaintiffs for whom the suit is brought may not actually be the plaintiffs who legitimately should be paid. There are instances where a court or regulatory body has limited the definition of actual beneficiaries to a subset that will actually receive compensation in order to make payments that might otherwise be diluted into triviality.[48]

A fourth tension has ramifications similar to the over- and under-inclusiveness problem—the relationship between response rate and administrative expenses. The technology is available to expand or contract notice and, most importantly, follow up to encourage claim filings.[49] The more money spent on administrative costs, the less that is typically available from a fixed fund for distributions to claimants. The more money spent on outreach, the lower the per claim payment. Hence, the potential for a perverse incentive: lower the administrative expenses to create the appearance of a higher payment per claim when the reality is to lower the number of claims filed because insufficient monies are spent on administration. There is some data from the *Currency Conversion Fee* case and others suggesting trade-offs between cost and filing rates based upon different types of mailing and advertising mechanisms, but there is much more that could be done to systematize the evaluation of this tension.[50]

---

[47] The larger the number of people included in the class, the smaller the payment per claimant will be. By definition a fund will pay less per claim the more eligible claimants there are.

[48] GLOBAL RESEARCH ANALYST SETTLEMENT DISTRIBUTION FUND PLAN, APPENDIX B at 5, *available at* http://www.globalresearchanalystsettlement.com/fund.pdf.

[49] Memorandum from Francis E. McGovern, Distribution Fund Administrator, to Judge William H. Pauley III, August 7, 2007 (on file with author) (entitled "Report to the Court on the Progress of the Implementation of the Distribution Fund Plan in the Global Research Analyst Settlement and on the Approaches to Disburse Remaining Monies from the Global Research Analyst Settlement Funds").

[50] Executive Summary of the Claims Administrators Conference, San Francisco, CA (February 22, 2008), *supra* note 45 (on file with author).

Claims administrators could develop additional data if there were the incentive to do so.

The issue of an open-ended fund as opposed to a closed-ended fund raises a similar, fifth conflict. Defendants typically demand a fixed, all-in amount in a settlement to include administrative expenses and attorneys' fees. Once the dollar amount of a settlement is fixed, the variables subject to manipulation become the costs and the number of claimants. The fewer claimants there are, the lower the cost and the higher the payment per claimant. Because most cases are settled rather than litigated to establish a full recovery, there is, almost by definition, not 100 cents on the dollar to be paid to each beneficiary. A further reduction in per claimant payments because of a higher claiming incidence can exacerbate the perception of inadequate individual payments.[51] On the other hand, an open-ended fund creates major problems of predictability and even the potential for renewed litigation. If the administrative expenses are paid by defendants on top of a settlement figure, there is an economic incentive to reduce costs and divide control over the distribution process. If there is a residual right for the defendant to benefit from unexpended monies from either a fixed or open-ended fund, there are similar potential conflicts. The details of each case will typically provide insight into the relative risk of a failure mode related to the type of fund. The availability of systematic data in this regard is, however, limited.[52]

The mantra in most administrative processes often focuses on speed, cost, and quality.[53] It may be possible to satisfy two of those three attributes, but not all three. Thus, the sixth tension, over speed, often emerges when there is a threshold of administrative accuracy that must be met, yet there are pressures to expedite the distribution. Typically, the claimants need more time because the litigation process lags far behind the alleged misconduct. For example, claimants may face substantial difficulty obtaining minimum levels of proof of older transactions required to complete their claims. The lawyers for both plaintiffs and defendants are eager to finalize the process after a settlement has been completed. Oftentimes there are appeals that can lengthen finalization. Then there is the pressure on a court to grant a

---

[51] The scenario of a $336 million fund when divided by 90,000 claims will result in a larger payment per claim than when divided by 10.6 million claims.

[52] *See generally* James D. Cox and Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 STAN. L. REV. 411 (2005).

[53] There are trade-offs between these elements. For example, it may require more time and cost to produce a higher quality outcome.

preliminary or final approval before all the data concerning the number of claims forms filed and verified have been fully compiled. It is not unusual for decisions regarding the appropriate speed of a distribution plan to be made in the context of scheduling orders unrelated to the demands of the distribution.[54]

Efforts to be innovative in the distribution process can conflict with the desire to make the distribution plan appeal-proof, creating a seventh tension. There are lawyers whose proclivity seems to be to object to settlements. Regardless of motives, innovation fuels this proclivity because of the absence of appellate approval of any procedure that has not been used previously. Judges or lawyers who desire to improve a distribution process run the risk of prolonging a distribution pending the resolution of any appellate issues created by differentiation from previous procedures. The tension here is readily resolvable by the greater interests in speed and certainty that overrule any experimentation.

An eighth tension occurs in the context of the interests of claimants in their privacy and the interests of the public in litigation transparency and distribution accuracy which requires identification in order to eliminate duplicate filings. There are numerous instances where legitimate beneficiaries will not make claims if their name might become part of the public domain.[55] A related concern often occurs when a potential beneficiary wants to have no connection with a settlement out of fear that other rights or benefits might be jeopardized.[56] In other instances there are third parties who may have access to the names of legitimate beneficiaries but who feel unable to make those names available to a fund administrator because of privacy concerns.[57] There may also be additional defendants or holders of subrogation rights who will want access to the names of beneficiaries in order to advance their own interests. The ultimate arbiter of this tension will eventually be a court, but by the time a decision is made, the time may have passed for the claimant to make an individual decision of whether to participate in a settlement.

Many settlement funds confront the ninth tension of whether funds must be distributed to individual beneficiaries or can be given to surrogates for

---

[54] Order granting preliminary approval of settlement (S.D.N.Y. November 8, 2006) *In re* Currency Conversion Fee Antitrust Litigation, *supra* note 1.

[55] Claimant communications with claims administrators reported to author (on file with author).

[56] Report of the Special Master to the Court (D. Mass. July 16, 2007), *In re* Pharmaceutical Industry Average Wholesale Price Litigation, *supra* note 22.

[57] Third party communications with claims administrators' reported to author (on file with author).

those beneficiaries, particularly if the beneficiaries have not claimed the full fund. State attorneys general lawsuits may result in payments to the state general or other fund.[58] Judges may make *cy pres* awards to organizations or other entities that have some overlap in the rationale for the creation of the settlement fund.[59] Almost inevitably there will be monies remaining in a fixed fund from uncashed checks or reserves established for appeals in order to ensure that all claims are paid their pro rata share. Unless there is a residual right established in the settlement process, the parties may request the court to direct the distribution in a particular manner. Recent literature has been critical of the ease with which some judges determine how to distribute these monies.[60]

The tenth tension discussed here involves the decider of these and various other tensions and the tools available to the decisionmaker for making the best choices. Historically, defendants have preferred that plaintiffs' counsel bear the responsibility for the distribution process. Likewise, courts have usually not intervened in distribution procedures devised by the plaintiffs themselves. Lawyers for the plaintiffs have normally turned to claims administrators to perform the distribution. Almost by definition, the claims administrators are deferential to the lawyers who hired them and act accordingly. It is difficult for a claims administrator to overrule plaintiffs' counsel when confronted by one of these tensions. As a result, most of these tensions are resolved based upon less than transparent decisionmaking driven by the interests of the decisionmaking entity.

A more ideal situation could exist if the court had the benefit of both the expertise and allegiance of the claims administrators performing the distributions. The more available the data about the potential ramifications of resolving a tension one way or another and the more *ex ante* rather than *ex post* those tensions are resolved, the more transparent the decisionmaking process can be. And the more considered the expectations of the parties and the more accountable the implementer, the more likely the design of the distribution process could approximate a second generation dispute system design. The courts, the SEC, and other regulators also face tensions around data requirements which, while useful to the process, require specifications, costs, and effort to produce.

---

[58] CHARLES GASPARINO, BLOOD ON THE STREET: THE SENSATIONAL INSIDE STORY OF HOW WALL STREET ANALYSTS DUPED A GENERATION OF INVESTORS (2005).

[59] *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 (Tentative Draft No. 1, 2008).

[60] *Id.*

IV. CONCLUSION

Inherent in the design of any dispute system in general, and in particular any settlement distribution process, are the seeds of second generation design issues that will inevitably arise. By appreciating, in advance, the varieties of potential failure modes that may exist, it is possible to set expectations that can be consistent with the realities that emerge from the decisions made *ab initio*. The most critical issue in designing and managing a settlement distribution is the determination of who will bear the overall responsibility for the design and management of the distribution process. The optimal approach seems to be for the court, with the assistance of a neutral claims administrator, to make the choices among the various tensions inherent in the management of a settlement. These choices should be made with the benefit of empirical evidence of the ramifications of those choices and tailored to the specific details of the settlement at issue. The tasks of all second generation dispute system designers include a better understanding of tradeoffs to be made among the inherent tensions, the development of data to educate decisionmakers regarding the effects of their decisions, and the tailoring of those decisions to the realities of each case.

Appendix A

Claim Form

LEG0206E

If you used a Visa- or MasterCard-branded credit card or debit/ATM card, or a Diners Club card to make a foreign transaction from February 1, 1996 – November 8, 2006, you may have the right to a refund of all or part of the related foreign transaction charges. The deadline to file a claim: **January 9, 2008**

To ask for a refund, go to: www.ccfsettlement.com/claim

Or fill out this form and mail it to: Settlement Administrator, P.O. Box 290, Philadelphia, PA 19105

① Your name as it appears on your credit or debit/ATM card(s):

First *Middle* *Last*

② Any *other* name you have used on a credit or debit/ATM card:

First *Middle* *Last*

③ Your current billing address: _____

Street *City* *State* *Zip Code*

④ Your Daytime Phone #: (_____) _____ Your email address: _____

⑤ List the amount of all foreign transactions made with your Visa- or MasterCard-branded credit or debit/ATM card, or Diners Club card below. Do not include charges made with a government agency card, unless the agency has authorized you to do so.

Example								
Acct. # 1234 4567 2214 1111 Bank: USA Bank ☑ Personal card ☐ Corporate card	1215.00		203.00	199.50			3513.11		
Acct. # Bank: ☐ Personal card ☐ Corporate card									
Acct. # Bank: ☐ Personal card ☐ Corporate card									

* *Personal* claims are processed more quickly when the account number is provided. If you do not have your account number, you may provide only the last 4 digits of your Social Security number instead, but your refund may be reduced. If no account #, please list last 4 digits of SSN here: ____ ____ ____ ____
For corporate cards: You must list the account number and verify with your employer that no other claim (or opt-out letter) will be filed for this account.

⑥ You do not have to attach bank or credit card statements to your claim. But if you need bank or credit card statements to complete this claim, and you no longer have them, Citibank, Chase, Diners Club, Bank One/First USA, Bank of America, HSBC/Household, MBNA and Washington Mutual/Providian will give you copies of at least 6 of your old statements for free, if available electronically. If your card is from another bank, contact your bank. **All claims are subject to audit.** Please keep proof of your eligible transactions until your claim has been processed. By submitting a claim, you authorize your bank and the settlement administrator to provide and share information to verify your status or claim. All information you provide will be used only for that purpose.

⑦ Mail your completed form to: Settlement Administrator, P.O. Box 290, Philadelphia, PA 19105
Do not mail it to your bank or credit card company! **Do not contact the Court or the Defendants.**

I swear under penalty of perjury that the information I have provided on this claim is true and correct, that this is the only claim form that I have submitted, and that I am the primary card holder on each of the accounts listed above.

Date: _____ Sign your name: ▶ _____

LEG0206E

Questions? 1-800-945-9890
www.ccfsettlement.com

LEG0206E

Appendix B

U.S. District Court Settlement Administrator
P.O. Box 290
Philadelphia, PA 19105-0290

[DATE]

REFUND ID [xxxxxxxxxx]
[CARDHOLDER NAME]
[ADDRESS]

[CITY, ST ZIP]
Dear [Cardholder Name],
We are writing on behalf of the U.S. District Court because you are eligible to receive a Courtapproved refund of fees charged to your eligible cards, which are Visa, MasterCard, and/or Diners Club credit, charge, and/or debit/ATM cards. The fees were based on foreign transactions, including both purchases and ATM withdrawals, from February 1, 1996 to November 8, 2006.

Please read the enclosed Notice explaining the proposed $336 million settlement and all of your options under the settlement. If you choose to request a refund, you may use **one** of three Refund Options. Each of these Options will pay a single refund of fees charged for foreign transactions on ***ALL*** of your eligible cards. You may choose only ***ONE*** Option from the following:

Refund Option 1: Request an ***Easy Refund*** of $25. This Option is recommended if you traveled outside of the U.S. for less than one week or had foreign transactions of less than $2,500 using your eligible cards during the 1996 to 2006 period. (Green Form); ***OR***

Refund Option 2: Request a ***Total Estimation Refund*** based on typical spending during travel and your answers to a few questions about your own travel outside of the U.S. This Option is recommended if you traveled outside of the U.S. for more than one week or had foreign transactions of more than $2,500 using your eligible cards during the 1996 to 2006 period. Refunds will be a maximum of 1% of estimated foreign transactions. (Blue Form); ***OR***

Refund Option 3: Request a refund based on information that you provide concerning your ***Annual Estimated*** foreign transactions during the 1996 to 2006 period. This Option is recommended if you had extensive foreign travel or foreign transactions and are willing to provide year-by-year information. Refunds will be a maximum of 1% to 3% of foreign transactions. This is the only Option you can use to get a refund for corporate card use. (Red Form)

Enclosed are three forms, one for each Refund Option. You may also file online at the Settlement Administrator's website **www.ccfsettlement.com,** using your Refund ID on the top of this letter.
Please note that if the volume of claims is unexpectedly high, it may be necessary to adjust refund amounts.

Please disregard any earlier Notices that you may have received. Additional information is available
online at **www.ccfsettlement.com** or by telephone at 1-800-945-9890.

Sincerely,
Settlement Administrator

Refund Option 1
Easy Refund of $25

You can complete this form to request the ***Easy Refund*** of $25 or submit your application online at **www.ccfsettlement.com**.

You can apply for only ***ONE*** refund for ***ALL*** of the fees charged for foreign transactions for ***ALL*** of the Visa, MasterCard and/or Diners Club credit, charge, or debit/ATM cards you had from February 1, 1996 to November 8, 2006, no matter how many cards you used.

If your total travel time outside the United States from February 1, 1996 to November 8, 2006 was one week or less, or if you did not have more than $2,500 in foreign transactions during that time, you may prefer this Option.

To request the ***Easy Refund***, submit your application online or complete the following and mail this form as directed below:

1. Enter your current name and address in the boxes below.

NAME (Last Name, First Name)

ADDRESS (Street Address)

CITY (City)

STATE ZIP (State) (Zip)

2. For identification purposes, provide the last four (4) digits of your social security number in the following boxes:

3. Your refund will cover ALL fees for ALL eligible cards that you used for foreign transactions from February 1, 1996 to November 8, 2006. In order to establish your qualification for the Easy Refund of $25, you must provide information for ONE of your eligible cards. You must have been the primary cardholder during the 1996 to 2006 time period above. In the boxes below, please provide the account number and the name of the bank that issued the card for ONE of your eligible cards.

Visa, MasterCard, or Diners Club Account Number

Bank That Issued Card

4. Please date and sign below:

I certify that the information I have provided on this claim is true and correct to the best of my knowledge, and that this is the only claim form that I have submitted. I understand that I will receive only **ONE** payment from this settlement.

Date: _____ Signature: _____

5. Refund requests must be submitted by May 30, 2008. You may submit your application online at **www.ccfsettlement.com** or mail your completed form to:

Settlement Administrator
P.O. Box 290
Philadelphia, PA 19105-0290

Refund Option 2
Total Estimation Refund

You can complete this form to request the ***Total Estimation Refund*** or submit your application online at **www.cefsettlement.com**.

The ***Total Estimation Refund*** is based on a 1% refund for estimates of typical foreign transaction activity using Visa, MasterCard and/or Diners Club credit, charge, or debit/ATM cards. The Settlement Administrator will estimate a fee refund using your responses to a few simple questions and available information that can be accessed by computer.

If you spent more than one week outside the United States or had more than $2,500 in foreign transactions from February 1, 1996 to November 8, 2006, you may prefer this Option to the Easy Refund. If you had extensive foreign travel or foreign transactions, you may prefer to provide more detailed annual estimates by using the Annual Estimation Refund Option, which may allow for refunds of up to 3% of foreign transactions.

To request the ***Total Estimation Refund***, submit your application online or complete the following and mail this form as directed below:

1. Enter your current name and address in the boxes below.

NAME (Last Name, First Name)

ADDRESS (Street Address)

CITY (City)

STATE ZIP (State) (Zip)

2. For identification purposes, provide the last four (4) digits of your social security number in the following boxes:

3. Your refund will cover ALL fees for ALL eligible cards that you used for foreign transactions from February 1, 1996 to November 8, 2006. In order to establish your qualification for the Total Estimation Refund, you must provide information for ONE of your eligible cards. You must have been the primary cardholder during the 1996 to 2006 time period above. In the boxes below, please provide the account number and the name of the bank that issued the card for ONE of your eligible cards.

Visa, MasterCard, or Diners Club Account Number

Bank That Issued Card

4. Consider any trips that you took outside the United States from February 1, 1996 to November 8, 2006. For those trips, add up the total number of days that you spent outside of the U.S. Please enter your estimate of the total number of days outside of the U.S.:

Estimated Total Number of Days Outside of the U.S. From February 1, 1996 to November 8, 2006

5. Most travel has a major purpose: business, visiting friends or relatives, or leisure/vacation. For your total estimated foreign travel days from February 1, 1996 to November 8, 2006, how often did you travel for each of those purposes? Please check one box for each travel purpose.

	Never	Rarely	Sometimes	Often	Mostly
Traveling on business	☐	☐	☐	☐	☐
Visiting friends or relatives	☐	☐	☐	☐	☐
Vacation or leisure	☐	☐	☐	☐	☐
Other purpose for travel	☐	☐	☐	☐	☐

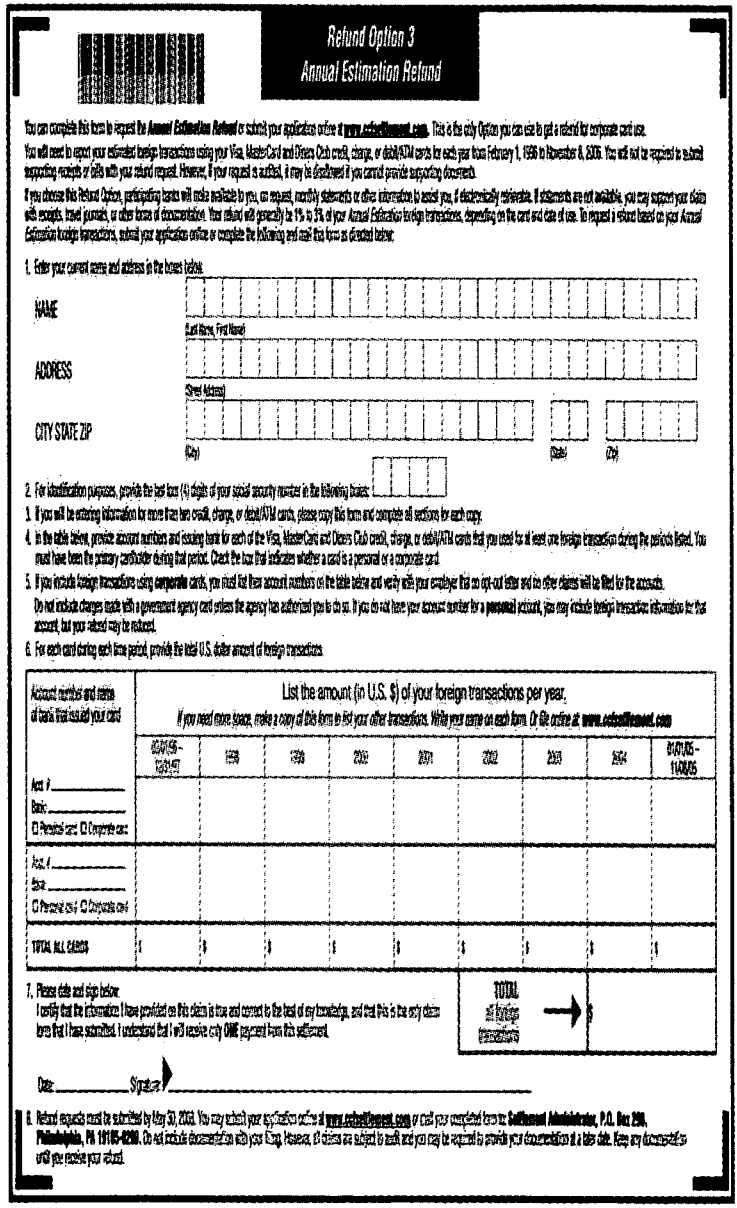
6. Please date and sign below:

I certify that the information I have provided on this claim is true and correct to the best of my knowledge, and that this is the only claim form that I have submitted. I understand that I will receive only **ONE** payment from this settlement.

Date: _____ Signature: ▶ _____

7. Refund requests must be submitted by May 30, 2008. You may submit your application online at **www.cefsettlement.com** or mail your completed form to:

Settlement Administrator
P.O. Box 298
Philadelphia, PA 19105-0290



Refund Option 3
Annual Estimation Refund

You can complete this form to request the **Annual Estimation Refund** or submit your application online at **www.refundforward.com**. This is the only Option you can use to get a refund for corporate card use.

You will need to report your estimated foreign transactions using your Visa, MasterCard and Diners Club credit, charge, or debit/ATM cards for each year from February 1, 1998 to November 8, 2006. You will not be required to submit supporting receipts or bills with your refund request. However, if your request is audited, it may be disallowed if you cannot provide supporting documents.

If you choose this Refund Option, participating banks will make available to you, on request, monthly statements or other information to assist you, if electronically retrievable. If statements are not available, you may support your claim with receipts, travel journals, or other forms of documentation. Your refund will generally be 1% to 3% of your Annual Estimation foreign transactions, depending on the card and date of use. To request a refund based on your Annual Estimation foreign transactions, submit your application online or complete the following and mail this form as directed below.

1. Enter your current name and address in the boxes below.

NAME _____
(Last Name, First Name)

ADDRESS _____
(Street Address)

CITY STATE ZIP _____ _____ _____
(City) (State) (Zip)

2. For identification purposes, provide the last four (4) digits of your social security number in the following boxes. _____

3. If you will be entering information for more than two credit, charge, or debit/ATM cards, please copy this form and complete all sections for each copy.

4. In the table below, provide account numbers and issuing bank for each of the Visa, MasterCard and Diners Club credit, charge, or debit/ATM cards that you used for at least one foreign transaction during the periods listed. You must have been the primary cardholder during that period. Check the box that indicates whether a card is a personal or a corporate card.

5. If you include foreign transactions using **corporate** cards, you must list their account numbers on the table below and verify with your employer that an opt-out letter and no other claims will be filed for the accounts.

Do not include charges made with a government agency card unless the agency has authorized you to do so. If you do not have your account number for a **personal** account, you may include foreign transaction information for that account, but your refund may be reduced.

6. For each card during each time period, provide the total U.S. dollar amount of foreign transactions.

Account numbers and name of bank that issued your card	List the amount (in U.S. $) of your foreign transactions per year. *If you need more space, make a copy of this form to list your other transactions. Write your name on each form. Or file online at* **www.refundforward.com**								
	02/01/98 - 12/31/98	1999	2000	2001	2002	2003	2004	01/01/05 - 11/08/05
Acct #: _____ Bank: _____ ☐ Personal card ☐ Corporate card								
Acct #: _____ Bank: _____ ☐ Personal card ☐ Corporate card								
TOTAL ALL CARDS	$	$	$	$	$	$	$	$	$

7. Please date and sign below.
I certify that the information I have provided on this claim is true and correct to the best of my knowledge, and that this is the only claim form that I have submitted. I understand that I will receive only ONE payment from this settlement.

TOTAL all foreign transactions → $ _____

Date: _____ Signature: _____

8. Refund requests must be submitted by May 30, 2008. You may submit your application online at **www.refundforward.com** or mail your completed form to: **Settlement Administrator, P.O. Box 250, Philadelphia, PA 19105-0250.** Do not include documentation with your filing. However, all claims are subject to audit and you may be required to provide your documentation at a later date. Keep any documentation until you receive your refund.

Appendix C

Authorized by the U.S. District Court for the Southern District of New York

— Notice of Class Action Settlement —

To: Visa, MasterCard and Diners Club Cardholders

This notice is to inform you of a hearing about an agreement to settle a class action lawsuit, which now includes improvements to the plan for distributing settlement proceeds. The lawsuit is about the prices that cardholders of Visa and MasterCard credit and debit/ATM cards, and Diners Club credit cards (including charge cards) were charged to make transactions denominated in a foreign currency or with a foreign merchant, including purchases, cash advances, cash withdrawals, and Internet transactions. The Visa cards include Visa-, Interlink-, and Plus-branded credit and debit/ATM cards; the MasterCard cards include MasterCard-, Cirrus-, and Maestro-branded credit and debit/ATM cards.

The Plaintiffs in this lawsuit (*In re Currency Conversion Fee Antitrust Litigation*, MDL 1409) challenge how the price of credit and debit/ATM card foreign transactions was set and disclosed, including claims that Visa, MasterCard, their member banks, and Diners Club conspired to set and conceal fees, typically of 1-3%, on foreign transactions, and that Visa and MasterCard inflated their base exchange rates before applying these fees. The Plaintiffs also claim that the amount of these fees and that the failure to adequately disclose them violated federal and state antitrust, disclosure, unfair competition, deceptive practices, and consumer protection laws, as well as common law and equity. The Defendants (Visa; MasterCard, Bank of America, Bank One/First USA, Chase, Citibank, Diners Club, HSBC/Household, MBNA and Washington Mutual/Providian) deny the Plaintiffs' claims and say they have done nothing wrong, improper, or unlawful. If you made a foreign transaction between February 1, 1996 and November 8, 2006 with a U.S.-issued Visa, MasterCard, or Diners Club card, you are a member of the *Settlement Damages Class*. If you had, as of November 8, 2006, a Visa, MasterCard, or Diners Club card, you are a member of the *Settlement Injunctive Class*, and will benefit from the settlement even if you did not use your card to make a foreign transaction.

The lawsuit asks for money damages and restitution for the *Settlement Damages Class*, and injunctive relief for the *Settlement Injunctive Class*.

What is the settlement?

This settlement includes certain agreements relating to disclosures on billing statements and other documents about foreign transaction pricing (including foreign transaction fees), and the Defendants have agreed to create a settlement fund of $336,000,000 to pay valid claims, attorneys' fees and expenses, and the costs of administering the settlement and notice. The Plaintiffs will also ask the Court for up to $350,000 in service awards from the settlement fund on behalf of the 20 class representatives for their efforts on behalf of the classes. The Defendants do not waive any right they may have to arbitrate your claim if you opt out of the settlement, or if the settlement does not become final.

Do I need to hire a lawyer?

The Court has appointed the lawyers listed below to represent you. You do not have to hire your own lawyer. But you can if you want to, at your own cost.

What are my options?

You may:

- **Ask for a refund.** Use one of the three claim forms to ask for a refund. Or file online at: **www.ccfsettlement.com/claim.** The amount of your refund will depend on the bank that issued your credit or debit/ATM card and:
  - which claim form you choose,
  - the dollar value of your claim, and
  - the amount of money available to pay claims and the number and total dollar value of all valid claims filed. (You might get only a partial refund.) Deadline: **May 30, 2008**
- **Exclude yourself** from the *Settlement Damages Class*. Send the "opt-out" form letter (available at: **www.ccfsettlement.com,** or by calling: 1-800-945-9890) to: P. O. Box 280, Philadelphia, PA 19105-0280. If you opt out, you will **not** get money from the settlement. You cannot opt out of the *Settlement Injunctive Class*. Deadline: **February 14, 2008**
- **Object** to the settlement. File your objection and proof of class membership with the Court. You must also give notice to the attorneys for the class by hand, overnight mail, or by certified mail, return receipt requested. The final approval hearing will be on March 31, 2008 at 11:00 a.m. at the U.S. District Court for the Southern District of New York, 500 Pearl Street, New York, NY 10007-1581. You do not have to go to court or hire an attorney. But you can if you want to, at your own cost. The hearing is to decide whether to approve the settlement, class counsels' requests for attorneys' fees and expenses, and awards for the class representatives. (The time and date may change without further notice to you.) Deadline to object and give notice: **February 14, 2008**

Are other cases affected by this settlement?

Yes. There are other cases in federal and state courts against Visa, MasterCard, and/or some Defendant banks concerning their disclosure of foreign transaction pricing, including fees. These cases are listed below.† Claims in those cases will be extinguished if this settlement is approved, but you can still make a claim here, as described above, for foreign transactions between February 1, 1996 and November 8, 2006.

MasterCard has agreed to pay a total of $3,557,000 in attorneys' fees and expenses in the cases marked below with an asterisk (*). In addition, Visa and MasterCard have agreed to pay $32,000,000 in attorneys' fees and expenses to the attorneys who, for 6 years, litigated *Schwartz v. Visa Int'l Corp.*, No. 822404-4 (CA), including a trial and appeals. The attorneys in the *Schwartz* case are some of the Plaintiffs' attorneys in this case. The case marked with a plus sign (+) has also been settled. **These payments will not reduce the $336,000,000 settlement fund.**

How will the attorneys be paid?

The lawyers for the class members will request 27.5% of the estimated $313,000,000 expected to remain in the settlement fund after deducting costs for administering the settlement and notice, plus interest, for attorneys' fees for investigating the facts, litigating and resolving the case. They will also request reimbursement of their expenses, not to exceed $5,000,000, to be paid from the settlement fund.

Release of claims and binding effect of the settlement

If the settlement receives final court approval and you are a member of the *Settlement Injunctive Class*, you will be bound by the settlement. If you are a member of the *Settlement Damages Class* and do not opt out, upon final court approval, you will be bound by the settlement and will release all claims, known or unknown, against each of the Defendants, each of the Visa and MasterCard member banks, and the related entities and individuals of each of the above, which (1) in whole or in part arise out of or relate to any foreign transaction, or the disclosure or pricing thereof, including, without limitation, any and all claims that are based in whole or in part on any act, agreement, conduct or omission up to November 8, 2006 that has or had, and/or allegedly has or had, the purpose or effect of fixing, inflating, embedding, concealing, or inadequately disclosing the nature, pricing, or any other aspect of any credit or debit/ATM card foreign transaction (including, but not limited to, foreign transaction fees, base exchange amounts, and/or any component of either), or (2) are, have been, or could have been asserted within the scope of the facts asserted in the litigation. For more information on the release, including certain limitations and defined terms, see the settlement agreement.

More information

This notice is only a summary. To see the settlement agreement, court orders, and other documents about this lawsuit and related cases, go to: **www.ccfsettlement.com.** This website has a *Common Questions* section with more information about this lawsuit, including the amounts of transaction fees involved. Or call 1-800-945-9890. You can also go to the Courthouse during regular business hours to see court documents: Clerk of the Court, United States Courthouse, 500 Pearl Street, New York, NY 10007-1581

Or mail your questions to the attorneys for the class:

Bonny E. Sweeney
Coughlin Stoia, et al, LLP
655 West Broadway, Ste. 1900
San Diego, CA 92101

Merrill G. Davidoff
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103

Questions?

Go to: **www.ccfsettlement.com**

Or call: **1-800-945-9890**

Do not contact the Court, the Defendants, or your bank with questions about this case.

---

†Certified nationwide classes: *Kendra v. MasterCard*, CT-000506-02 (Shelby Cty., TN), W2005-02422-SC-S2N-CV (TN Sup Ct) (conditionally certified on May 23, 2007); *Schwartz v. Citibank*, 03 Civ 2843 (SDNY, NY). Proposed nationwide classes: *Forster v. MasterCard*, 05055672/2005 (NY Cty., NY); *Friedman v. MasterCard*, CV 04-539139 (Cuyahoga Cty., OH); *Kaczanowski v. MasterCard*, CV 2004-783 (Lincoln Cty., AR); *Gilliard v. MasterCard*, 03 CH06559 (Cook Cty., IL), 05-3143 (IL Ct App., 1st Dist). *Hernandez v. MasterCard*, C-1066-03-C (Hidalgo Cty., TX); *Johnson v. MasterCard*, 02-C7-04-003631 (Harrison Cty., MS); *Perry v. MasterCard*, CV 2003-067154 (Maricopa Cty., AZ); *Rubio v. MasterCard*, 03-43953 CA 20 (Dade Cty., FL), 3D05-2373 (FL Ct App., 3rd Dist). *Stefan v. MasterCard*, 002643 (Phila. Cty., PA). 1741 EDA 2005 (PA Super Ct, Eastern Dist), *Sanders v. Bank of America*, CGC05-438404 (NDCA, CA) (transferred to MDL 1409, as 07-CV-05633); *Schlesinger v. MasterCard*, 03 Civ 5628 (SDNY, NY). Proposed nationwide classes: *Clarkson v. Diners Club*, 01 Civ 10857 (SDNY, NY), *Taylor v. MasterCard*, 042-01788 (St. Louis, MO) (withdrawn, except IL and CA) (subject to signing the settlement agreement), *Mattingly v. Visa*, 05051531143 (Alameda Cty., CA) (conditionally for Visa, CA for MasterCard), *Shurtz v. Visa*, 05051155997 (Alameda Cty., CA) (conditionally for Visa, CA for MasterCard, also on behalf of general public). Includes proposed nationwide class: *Hoover v. Visa*, 05-CV-15447 (SDNY, NY) (coordinated or consolidated with MDL 1409). General public nationwide: *Schwartz v. Visa*, 822404-4 (Alameda Cty., CA) (CA general public only for MasterCard), A126222 (CA Ct App, 1st Dist), S-158751 (CA Sup Ct). For more information about these cases, go to: www.ccfsettlement.com, or call 1-800-945-9890

Appendix D

Must be Postmarked On or Before May 28, 2007	*In re Pharmaceutical Industry Average Wholesale Price Litigation* Docket No. 01-CV-12257-PBS, MDL No. 1456 -- GSK Settlement	For Official Use Only

CONSUMER CLAIM FORM

G S K

I'd Like a Payment from the GSK Settlement Fund.

If you would like to submit a claim for part of the Settlement Fund, complete this form and mail it to the address below, along with one proof of payment for each drug (see Section D below). You may be asked for more information at a later time.

Your claim must be postmarked on or before May 28, 2007.

It should be mailed to: GSK AWP Litigation Administrator
c/o Complete Claim Solutions, LLC
P.O. Box 24743
West Palm Beach, FL 33416

Section A – Claimant Identification

Please indicate whether you are claiming on your own behalf as a Class Member or on behalf of someone else who is a Class Member:

☐ I am a Class Member

☐ I am an heir of a Class Member and am filing on behalf of the Class Member

If you are an heir filing on behalf of a Class Member, please indicate the Class Member's name and your relationship to the Class Member in the space provided below:

_____

_____

Section B – Contact Information for the Person Completing this Form

_____
Name

_____
Street Address *Apartment*

_____
City *State* *Zip Code*

13

Section C – Purchase Information

In the chart below, please provide the ***total amount*** paid (not monthly) by the Class Member, or the amount the Class Member is obligated to pay, for each of the GSK Covered Drugs listed below, during the Class Period listed at the top of the column. Please place the ***total amount*** (not monthly) of the payment under the column that corresponds to the Class to which the Class Member belongs. A Class Member may have payments in just one of the Classes or both. For the difference between the two Classes, please consult the Notice. **Do not include flat co-payments.**

	Drug Name	Medicare Part B Class January 1, 1991 – January 1, 2005	Private Payor Class January 1, 1991 – August 10, 2006
GSK Category A Drugs	Kytril Injection (granisetron HCL)	$	$
	Zofran Injection (ondansetron HCL)	$	$
GSK Category B Drugs	Alkeran (melphalan)	$	$
	Imitrex (sumatriptan)	$	$
	Kytril Tablets (granisetron HCL)	$	$
	Lanoxin (digoxin)	$	$
	Myleran (busulfan)	$	$
	Navelbine (vinorelbine tartrate)	$	$
	Retrovir (zidovudine)	$	$
	Ventolin (albuterol)	$	$
	Zofran Orals (ondansetron HCL)	$	$
	Zovirax (acyclovir)	$	$
	Zantac (ranitidine HCL)	$	$

Section D – Proof of Payment

For each of the drugs for which you have provided a purchase amount in the table in Section C above, you must provide one (1) proof of payment.

Proof of payment may be in the form of any of the following:

(1) a written prescription for the drug;

(2) a receipt, cancelled check, or credit card statement that shows that you or the Class Member have paid for the drug;

(3) an EOB (explanation of benefits) that shows you or the Class Member made or are obligated to make a percentage co-payment for the drug;

(4) a letter from your or the Class Member's physician stating that he or she prescribed and that the Class Member paid or is obligated to pay a percentage co-payment for the drug at least once and setting forth the amount of the co-payment; or

(5) a notarized statement signed by you or the Class Member indicating you or the Class Member paid or are obligated to pay a percentage co-payment for the drug between January 1, 1991 through August 10, 2006, including the total of all percentage co-payments for the drug during that time period.

Section E – Claimant Signature

I declare that the information provided here is correct. If not submitting this for myself, I declare that I am authorized to submit this form on behalf of the Class Member identified above.

_____ _____

Signature *Date*

_____

Print Name

15

Appendix E

Must be Received No Later Than May 27, 2007	In re Pharmaceutical Industry Average Wholesale Price Litigation Docket No. 01-CV-12257-PBS, MDL No. 1456 – GSK Settlement	For Official Use Only

CONSUMER EXCLUSION FORM

Only Complete this Form if You DO NOT Want to be Included in Either or Both of the GSK Settlement Classes

By Completing This Form You Are Excluding Yourself From Either or Both of The GSK Settlement Classes and You Will Not Be Included in the Proposed Settlement with GSK and You Will Not Be Able to File a Claim For Part of the Settlement Fund.

Please check the box(es) indicating which of the Classes you wish to exclude yourself from:

- ☐ *Both Classes: (Medicare Co-Payment Class and Private Payor Class)*
- ☐ *Medicare Co-Payment Class only*
- ☐ *Private Payor Class only*

I would like to be excluded from the Class(es) indicated above. I understand that by doing so I am excluding myself from either or both of the Classes and that as a result I will not be included in the Proposed Settlement as a member of the Class(es) from which I am excluding myself. I understand that I will not be able to file a claim for a part of the Settlement Fund as a member of the Class(es) from which I am excluding myself.

_____
Name

_____
Street

_____ _____ _____
City State Zip code

_____ _____
Signature Print

_____
Date

Exclusion must be received no later than May 27, 2007
GSK AWP Litigation Administrator
c/o Complete Claim Solutions, LLC
P.O. Box 24743
West Palm Beach, FL 33416

12