

EXHIBIT E

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

In re Mercedes-Benz Emissions Litigation

I. Introduction

You asked me to summarize the empirical data on fee awards in class action settlements from both my studies as well as the studies from other scholars. You will find my summary below.

II. Background and qualifications

I am a Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from the University of Notre Dame in 1997 and Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP.

My teaching and research at Vanderbilt have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, the Vanderbilt Law Review, the NYU Journal of Law & Business, and the University of Arizona Law Review. My work has been cited by numerous courts, scholars, and media outlets such as the New York Times, USA Today, and Wall Street Journal. I have also been invited to speak at symposia and other events about class action litigation, such as the ABA National Institutes on Class Actions in 2011, 2015, 2016, 2017, and 2019; and the ABA Annual Meeting in 2012. Since 2010, I have also served on the Executive

Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies. In 2015, I was elected to the membership of the American Law Institute.

In December 2010, I published an article in the *Journal of Empirical Legal Studies* entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter “Empirical Study”). This article is still the most comprehensive examination of federal class action settlements and attorneys’ fees that has ever been published. Unlike other studies of class actions, which have been confined to one subject matter or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period (2006-2007). *See id.* at 812-13. As such, not only is my study an unbiased sample of settlements, but the number of settlements included in my study is also several times the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements, including 66 from the Third Circuit alone. *See id.* at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. Since then, this study has been relied upon regularly by courts, scholars, and testifying experts.¹

¹ *See, e.g., Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *In re Wells Fargo & Co. S’holder Derivative Litig.*, 2020 WL 1786159 at *11 (N.D. Cal. Apr. 7, 2020) (same); *Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, 2020 WL 949885 at *52 (D. Mass. Feb. 27, 2020) (same); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *34 (N.D. Ga. Jan. 13, 2020) (same); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, 2019 WL 6327363, at *4-5 (N.D. Cal. Nov. 26, 2019) (same); *Espinal v. Victor’s Cafe 52nd St., Inc.*, 2019 WL 5425475, at *2 (S.D.N.Y. Oct. 23, 2019) (same); *James v. China Grill Mgmt., Inc.*, 2019 WL 1915298, at *2 (S.D.N.Y. Apr. 30, 2019) (same); *Grice v. Pepsi Beverages Co.*, 363 F. Supp. 3d 401, 407 (S.D.N.Y. 2019) (same); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *2 (S.D.N.Y. Nov. 29, 2018)

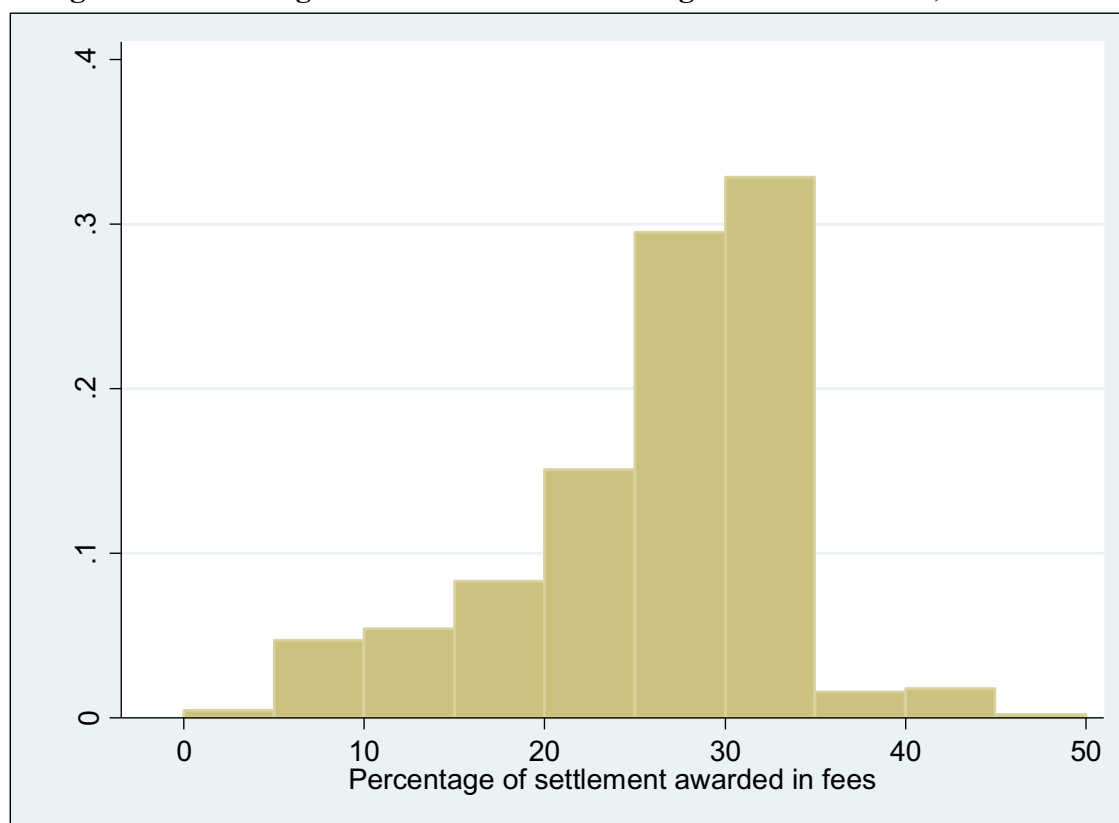
III. Nationwide empirical data

The average and median fee awards in class action settlements nationwide are right around 25% and perhaps even higher. See Fitzpatrick, *Empirical Study*, *supra*, at 833-34, 838 (average of 25.4% and median of 25%). See also Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 260 (2010) ("Eisenberg-Miller 2010") (mean of 24% and median of 25% before 2009); Theodore Eisenberg et al., *Attorneys' Fees in Class Action Settlements: 2009-2013*, 92 N.Y.U. L. Rev. 937, 951 (2017) ("Eisenberg-Miller 2017") (mean of 27% and median of 29% from 2009 to 2013).

(same); *Rodman v. Safeway Inc.*, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 23, 2018) (same); *Little v. Washington Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 38 (D.D.C. 2018) (same); *Hillson v. Kelly Servs. Inc.*, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017) (same); *Good v. W. Virginia-Am. Water Co.*, 2017 WL 2884535, at *23, *27 (S.D.W. Va. July 6, 2017) (same); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017) (same); *Brown v. Rita's Water Ice Franchise Co. LLC*, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 1629349, at *17 (S.D.N.Y. Apr. 24, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp 3d 1217, 1246 (D.N.M. 2016); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 2015 WL 605203, at *12 (N.D. Ill. Feb. 12, 2015) (same); *In re Neurontin Marketing and Sales Practices Litig.*, 2014 WL 5810625, at *3 (D. Mass. Nov. 10, 2014) (same); *Tennille v. W. Union Co.*, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Fed. Nat'l Mortg. Association Sec., Derivative, and "ERISA" Litig.*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Prod. Liab. Litig.*, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 98-99 (D.D.C. 2013) (same); *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

But the most common fee awards actually fall in the 30%-35% range. This can be depicted graphically in Figure 1, which shows the distribution of all of the percentage-method fee awards in my study. The figure shows what fraction of settlements (y-axis) had fee awards within each five-point range of fee percentages (x-axis). As the figure shows, the most populous range—the one comprising over thirty percent (i.e., .3) of all settlements—included fee awards that fell between 30% (inclusive) and 35%.

Figure 1: Percentage-method fee awards among all federal courts, 2006-2007

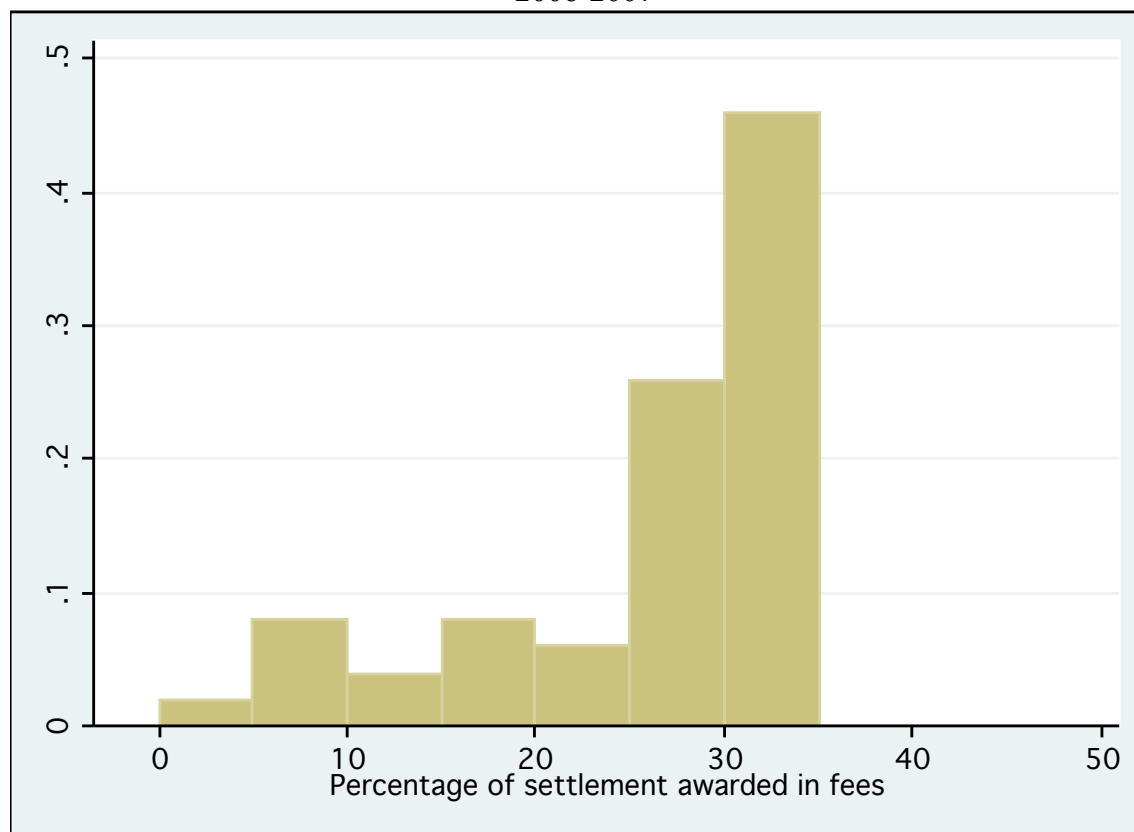


IV. Empirical data from the Third Circuit

The data from the Third Circuit is similar to the nationwide data. The mean and median are still at 25% or even higher. See Fitzpatrick, *Empirical Study*, *supra*, at 836 (mean of 25.4% and median of 29.3%). See also Eisenberg-Miller 2010, *supra*, at 260 (mean and median of 26%); Eisenberg-Miller 2017, *supra*, at 951 (mean of 29% and median of 32%).

But the 30%-35% range is even more populous in the Third Circuit than it is nationwide. The Third Circuit data from my study is depicted graphically in Figure 2. Nearly fifty percent of awards in the Third Circuit have been between 30% (inclusive) and 35%.

Figure 2: Percentage-method fee awards in the Third Circuit, 2006-2007



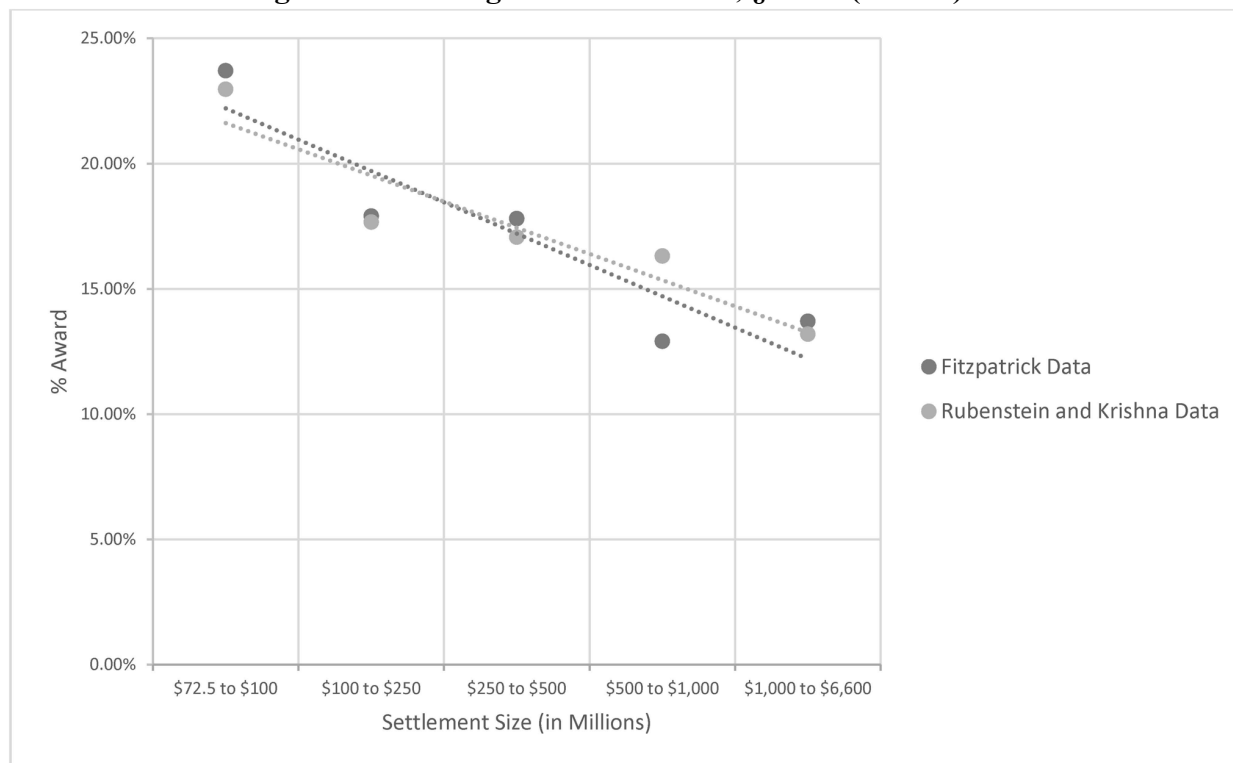
V. Empirical data from large settlements

The settlement here is extraordinarily large. There are very few class action settlements of this magnitude in a given year. Some courts slash fee percentages when settlements are very large. *See Fitzpatrick, Empirical Study, supra*, at 839 (noting this effect in settlements above \$100 million). Many scholars and judges oppose this practice as irrational because it can give class counsel the incentive to settle for less rather than more. *See, e.g., In re Cendant Corp. Litig.*, 264 F.3d 201, 284 n.55 (3d Cir. 2001) (“Th[e] position [that the percentage of a recovery devoted to attorneys’ fees should decrease as the size of the overall settlement or recovery increases] . . . has

been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply.” (alteration in original)). But I will discuss the data for large settlements nonetheless.

My study had only two settlements between \$500 million and \$1 billion and I am therefore hesitant to rely here on the average fee percentage number I found (12.9%). Indeed, this average fee percentage number is below the average fee percentage in even the billion-dollar settlements in my study. *See* Fitzpatrick, *Empirical Study, supra*, at 839. Unfortunately, the Eisenberg-Miller studies did not break down their data into a range near the size of this settlement. As such, the only other source of data near the size of this settlement comes from an unpublished database of fee awards from 2006 to 2011 maintained by Professor Bill Rubenstein at Harvard. Figure 3 is a chart reproduced from Professor Rubenstein’s treatise *Newberg on Class Actions* showing the average fee percentages I reported in my study along with the average fee percentages from his database for various large-settlement ranges. As the figure shows, Professor Rubenstein’s fee awards in the \$500 million to \$1 billion range come in above mine, with an average somewhere between 15% and 20%.

Figure 3: Newberg on Class Actions, §15:81 (5th ed.)



It is important to note that averages and medians depict only the middle of a range of data. There are many fee awards both higher and lower than the average and median. This is true because the facts and circumstances of every case are different. In 2014, for an expert declaration I prepared in the First Circuit, I supplemented my large-settlement data with any settlements I could find since my empirical study concluded. I found seven more recent settlements in the \$500 million to \$1 billion range. The fee awards in these settlements ranged from 7% to 33.33%, with an average of 17.5% and a median of 16%. This is consistent with the numbers reported by Professor Rubenstein. See *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028 (N.D. Ill. 2011) (20% of \$956 million); *In re UnitedHealth Grp. Inc. PSLRA Litig.*, 643 F. Supp. 2d 1094 (D. Minn. 2009) (7% of \$926 million); *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Mar. 9, 2012) (8% of \$760 million); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, No. 8:10ML-02151-

JVS (C.D. Cal., Jun. 17, 2013) (26.4% of \$757 million cash); *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371 (S.D.N.Y. 2013) (16% of \$730 million); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (12% of \$590 million); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp.2d 467 (S.D.N.Y. 2009) (33.33% of \$510 million).



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