Unfair, Inefficient, Unpredictable

Class Action Flaws and the Road to Reform

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Contents

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Executive Summary

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Class actions were intended to be an exception to the well-established rule that aggrieved parties must assert their claims in courts individually and that only the parties actually named in lawsuits may be bound by a resulting judgment. That principle remains the law,[1] but this form of aggregate litigation has become increasingly common, allowing a named plaintiff (and his or her attorney) to assert in a single lawsuit the claims of a loosely defined group of unnamed individuals without their prior knowledge or consent.

In theory, class actions are supposed to increase access to justice for aggrieved persons who might not otherwise be afforded their day in court by permitting plaintiffs to band together and collectively seek relief for all members of the proposed class that have allegedly experienced the same injury. The procedural device also incentivizes attorneys to represent such proposed classes. The amount of potential damages at stake in an individual lawsuit (e.g., the price of a purportedly deceptively marketed sandwich paid by a single consumer) is often negligible and far exceeded by the cost of litigating such an action. As a result, pursuing the claim of a single person in an individual case may not offer counsel prospects for a reasonable fee payment. However, seeking recovery for thousands of putative class members (if successful) could generate very large contingency fees, typically 20-33% of the total amount, making class actions a more attractive form of litigation for plaintiffs' lawyers.[2] Proponents of the class action system typically promote this idyllic view, holding class actions out as pro-consumer devices that effectively and efficiently provide compensation for injuries suffered by large groups of people.[3]

This sanguine picture, however, is belied by facts indicating that consumer class actions are often actually an inefficient—and unjust—mechanism for vindicating private rights. As set forth in this paper, in many instances, the only "winners" in the class action system are the plaintiffs' lawyers who are paid handsomely to file class actions (often based on meritless theories) that ultimately provide little (if any) real benefit to the absent class members, generate all sorts of ethical issues, and needlessly protract litigation.

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First, this paper explores the history of the modern American class action system, which was initially crafted at least in part to enable more efficient resolution of civil rights violations. While the progenitors of the rule focused on class litigation as a way for similarly situated citizens to remedy discrimination, class actions quickly morphed into a device for asserting a wide array of other types of claims. Today, class actions often focus on questionable claims of no real interest to the allegedly aggrieved putative class members—for example, allegations that consumers would not have purchased a particular product had the manufacturer more prominently disclosed that it was not manufactured in a particular location.[4] In short, consumer class actions have veered from their aspirational roots and become a vehicle for generating profit for the plaintiffs' bar.

Second, class actions typically provide very little benefit to the actual consumers who comprise the class. Specifically, through the use of "fee-centric" settlements, class action lawyers frequently bargain away large swaths of consumers' claims for little or no meaningful relief in return for an exorbitant fee award for their "efforts" in representing the class. Because the class members on whose behalf these lawsuits were supposedly filed often do not feel aggrieved by the alleged misconduct, few of them ever submit claims for their portion of a class award, leading some courts to distribute that money to non-party organizations (which often have an ideological bent not necessarily shared with class members) through a dubious practice known as *cy pres.* These class actions not only fail to deliver any meaningful direct benefits to consumers, but they ultimately leave them worse off in the long run, as businesses faced with the mounting litigation expenses associated with class actions are forced to charge higher prices for their products and services.

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Third, the class action system has also been plagued by ethical abuses resulting from attorney self-dealing and the proliferation of third party litigation funding (TPLF). Because absent class members typically have virtually no control over their claims and very little incentive to monitor ongoing litigation, class action attorneys are essentially given carte blanche to run the show. This presents a unique opportunity for self-dealing, one that class action attorneys frequently exploit, to the detriment of the absent class members to whom they owe a duty of loyalty. This dynamic has only been exacerbated by the increasing use of TPLF in class actions, which further dilutes the class

representatives' control over the litigation and siphons off even more class money to a financially interested non-party.

Fourth, to the extent class actions do provide some benefit to consumers, they are a remarkably inefficient method of doing so. One example of this inefficiency is the phenomenon of "no-injury" classes, which have resulted in defendants paying out "claims" in a manner wholly disproportionate to the harm they allegedly caused to disparate "claimants" who neither needed nor wanted any sort of payment given their lack of injury. Although the U.S. Supreme Court has taken an important step in curbing such class actions asserting violations of federal law in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the ultimate effect of that ruling on state-law-based consumer protection class actions remains to be seen, and enterprising plaintiffs' lawyers are likely to seek ways to circumvent the Supreme Court's decision. A related form of inefficiency has arisen with so-called "issues class actions," in which courts certify classes only as to certain issues, such as whether a particular product was defective, leaving individualized questions of causation and damages for separate follow-on trials. Such a lax approach to class certification is highly inefficient because it does little more than needlessly prolong litigation and increase costs.

Finally, although there is no "magic bullet" to eliminate all of these problems, there are certain sensible measures that would go a long way towards mitigating them and reining in abusive class action practices. For example, Congress should limit the prospect of frivolous class actions and "fee-centric" settlements by requiring that lawyers demonstrate up front that it is possible to deliver direct monetary relief to absent class members and substantially limiting the use of *cy pres*. In addition, Congress should shine much-needed light on potential personal and economic relationships between class counsel and the named plaintiff in a given lawsuit and the increasingly common (but secretive) practice of TPLF by requiring that these relationships and arrangements be disclosed at the outset of class litigation. And Congress should consider enacting common-sense structural changes to the class action system (e.g., minimizing the use of "issues class actions," staying discovery during the pendency of threshold motions, and expanding interlocutory review of class certification rulings), which would help minimize the extent to which class actions are being used as a weapon to unfairly burden American businesses with abusive settlements—the costs of which are ultimately passed on to consumers.

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Class Actions Fail to Serve Their Intended Purpose

Chapter

02

When the modern class action system was instituted in 1966 pursuant to Federal Rule of Civil Procedure 23, the drafters of that rule did not envision that it would be widely used for consumer protection or personal injury cases. They were focused on other aspects of the rule, including modifying it to help effectuate the U.S. Supreme Court's landmark civil rights decision in *Brown v. Board of Education of Topeka* and to encourage the filing of other civil rights cases.[5]

The previous rule had proven unworkable to achieve that goal.[6] Even more troubling, the inconsistent application of the old rule was providing those "who opposed integration a sword with which to castrate *Brown*," affording attorneys and courts with nefarious motives the opportunity to slow down the burgeoning civil rights movement.[7]

Although civil rights enforcement was one focus,[8] there was some talk about the use of the procedural class action rule outside of that area, including among members of the committee tasked with formulating Rule 23, the federal Judicial Conference's Advisory Committee on Civil Rules (the Committee). In particular, some on the Committee "thought the procedure should be available to aggregate small claims that economically could not be brought as individual cases—what we now call negative value cases," or cases where an injury—though widespread—is worth no more than a few dollars to each claimant, making it not worth bringing, since legal costs would dwarf any recovery.[9] The theory was that by allowing many plaintiffs with "negative value" claims to split the costs of litigation, these injuries would not go unaddressed, as now plaintiffs could afford to bring their claims as one unified action.

Some members of the Committee expressed misgivings about codifying this procedural tactic, noting that it "might be misused by lawyers who put their own financial or other interests ahead of those of the absent class members or engage in settlements that were not in the best interest of their clients or bring suits that would threaten the economic viability of companies and governmental programs."[10] This debate ultimately resulted in a compromise Rule 23(b)(3), or the damages class action, which contains "several procedural safeguards" meant to promote efficiency and protect the rights of absent class members, while still providing the opportunity for plaintiffs to band

together and seek relief for widespread injuries.[11]

Importantly, the consensus at the time of Rule 23(b)(3)'s adoption was that the provision would be used rarely, if at all. One leading scholar, Charles Alan Wright, predicted that the rule would be of minimal importance, claiming that he expected that the particular provision would not have much impact.[12] A member of the Committee who drafted the rule similarly described Rule 23(b)(3) as "well confined."[13] And, at least in the beginning, their predictions were correct. In the early years after its inception, the modern class action device was used primarily as a method for redressing civil rights violations.[14] But as the use of class actions to enforce civil rights began to wane in the late 1970s, a new form of litigation—mass tort personal injury litigation—was steadily growing, and it quickly became the basis for damages class actions in the U.S.[15]

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"creativity of the plaintiffs' bar," which "increasingly recognized the possibilities it presented for economic rewards."[16] The Supreme Court eventually ruled that personal injury cases are too individualized to be litigated through the class device.[17] However, putative consumer protection class actions (e.g., lawsuits alleging that a manufacturer's marketing is deceptive or misleading) have become increasingly common—a trend that continues today, with the number of consumer class actions filed nearly tripling from 2009 to 2018[18] and constituting a quarter of all consumer protection actions filed in 2020.[19] According to one recent report, the litigation of purported class actions has created a multi-billion dollar industry, reaching a new high in 2021 of $3.37 billion

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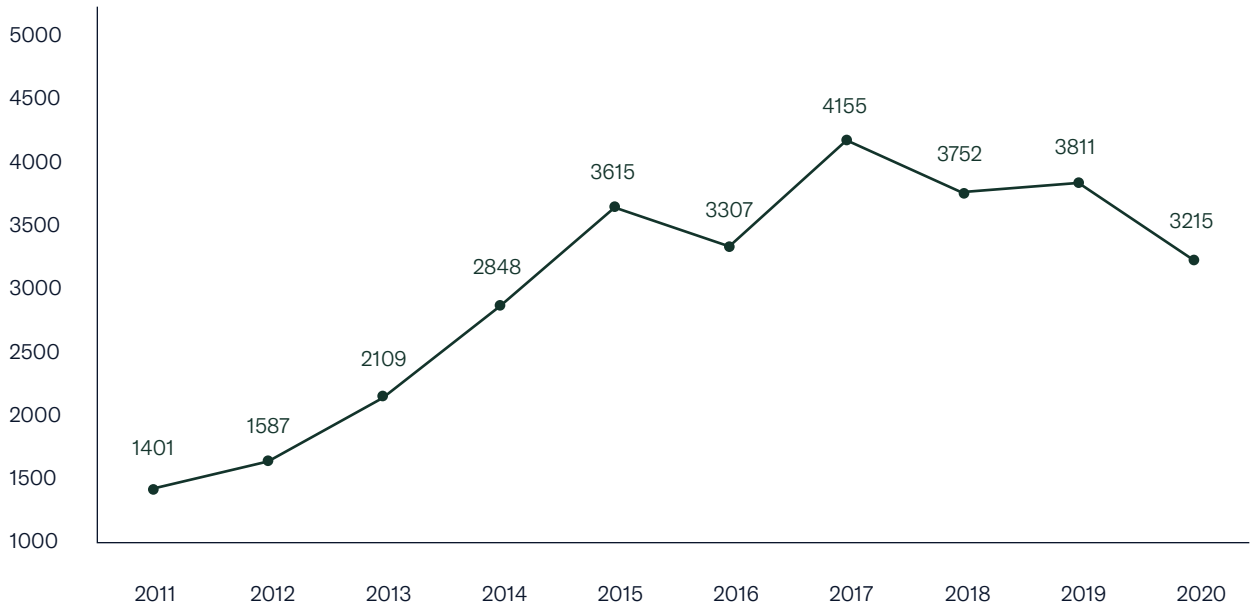
Figure 1: Total Consumer Class Actions Filed Per Year, 2011 - 2020



The Opt-Out System

For a class certified under Rule 23(b)(3) (i.e., one involving money damages), class members do not affirmatively "opt in" to the action. Instead, if a court decides to certify a matter for class treatment, the class members who do not wish to participate in the lawsuit must take affirmative steps to remove themselves from the class upon receiving notice—i.e., they must "opt out" by providing notice to the court that they decline to participate. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (explaining how the opt-out class action replaced the earlier format, which "generally functioned as a permissive joinder ('opt-in') device"). Once a certain time period has passed, all class members who have not opted out are considered part of the lawsuit, and the court is able to adjudicate their claims despite their absence. On the one hand, this system affords class action defendants a degree of finality and predictability and limits their potential liability exposure by binding those who do not opt out into the class action. On the other hand, it means that many persons who did not receive or understand the court notice may become plaintiffs in a lawsuit in which they have no interest, or as to which they would affirmatively object. The "opt-out" approach can also drive up the cost of any settlement by including members who do not feel that they have been aggrieved by the defendant's alleged misconduct.

in spending by defendants alone—a "record-breaking 16%" increase in spending from the prior year.[20] That same report predicted that, in 2022, defendant spending in class actions would total more than $3.6 billion, strongly suggesting that damages class actions will continue to increase.[21]

While proponents of consumer class actions are not troubled by this extraordinary growth, it has been accompanied by significant abuse.[22] That abuse includes "entrepreneurial lawyering … stirring up class litigation, strike suits of dubious merit, self-serving counsel selling out class members … problematic settlements green-lighted by accommodating judicial officers … and insufficient or negligible compensation to class claimants."[23] These abuses are discussed in greater detail below and establish that the modern class action device—while originally envisioned as a tool to remedy unlawful discrimination—has essentially become a "lucrative business enterprise" that rarely benefits consumers, raises significant ethical challenges, and generates wasteful litigation.[24]

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Class Actions Benefit Attorneys—Not Consumers

Chapter

03

The primary reason the consumer class action system has failed to advance its essential purpose is that it rarely delivers any meaningful benefits to consumers. Even when class actions are "successful" (e.g., by way of settlement), most of the recovery does not end up in the hands of consumers. In fact, "every study that has" looked at consumer class action settlements has "reached the same conclusion: The overwhelming majority of [such] class actions deliver nothing to class members."[25]

According to one of those studies, which analyzed purported consumer and employee class actions filed in or removed to federal court in 2009, nearly 35% were dismissed voluntarily by the plaintiff, likely "meaning a payout to the individual named plaintiff and the lawyers who brought suit—even though the class members receive *nothing*."[26] Notably, a study by the Consumer Financial Protection Bureau found that, of its sample of 562 cases, 87% of resolved class actions resulted in no benefit to absent class members—i.e., they were either dismissed by the court or settled with the named plaintiff only.[27] Even those who defend class actions are forced to admit that "the class action is not known for its success at delivering compensation to class members: sometimes it does it well … but, in the run-of-the-mill case, only a small percentage of victims are made whole."[28] Instead, the bulk of the proceeds from class actions ends up in the pockets of class counsel or other parties (e.g., charitable organizations) through a dubious practice called *cy pres*. Even worse, to make up for the litigation and settlement costs that businesses are forced to incur in resolving these lawsuits, companies have no choice but to pass these expenses on to consumers by raising the prices of goods and services.

Fee-Centric Class Settlements Abound

A defining feature of current class action practice is that settlements purportedly entered into on behalf of consumers are structured to reward class counsel with excessive fees while providing class members with little—if any—relief. These "fee-centric" class

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actions typically provide little or no compensation to class members or offer injunctive or other relief that is often meaningless. With regard to injunctive-based settlements that are supposed to benefit the class, the injunctive relief is very often "window-dressing, neither necessary to stop wrongful conduct nor significantly altering the defendant's practices."[29]

As the examples in this paper illustrate, injunctive relief can take the form of adding to product labels or advertising unremarkable asterisks and disclaimers that disclose information that any reasonable consumer already knows (e.g., that each loaf of bread at a sandwich store chain will not always be exactly 12 inches or greater in length after baking). Even in cases where some portion of a monetary award is earmarked for class members, most of that money ends up going to the lawyers. In fact, one study of class action settlements from 2019-2020 found that "*more than half* of [class] settlement[s] on average went to attorneys or others who were not class members."[30] And in "claims-made" settlements, where the amount paid out is based

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on the number of valid claims submitted by class members, "class members received less than 30% of any monetary award" on average.[31] Accordingly, the only real "winners" in class actions are the plaintiffs' attorneys who negotiate these fee-centric settlements, not the members of the class.

One recent example of this recurring problem is *Hilsley v. General Mills, Inc.*,[32] a putative class action alleging that the defendants had deceived consumers by claiming there were "no artificial flavors" in their snack products despite the products containing "malic acid," a purportedly artificial ingredient.[33] The parties eventually reached a purely injunctive relief settlement, under which defendants would add an asterisk next to their "No Artificial Flavors" label, directing consumers to the statement "*Learn more at [the General Mills website]," which would contain more information.[34] In contrast to the class members—who were to receive zero compensation despite releasing "all of [their] claims against Defendants"—class counsel were poised to obtain a $725,000 fee award.[35]

Judge M. James Lorenz of the U.S. District Court for the Southern District of California recently rejected that proposed settlement, reasoning that the agreement contained features of a case where "class counsel … allowed pursuit of their own self-interests and that of certain class members to infect the negotiations."[36] In so doing, the court expressed dismay at the fact that "the class [would have] receive[d] no monetary reward" and "no meaningful benefit," while class counsel [would have] received nearly $1 million.[37] The court also questioned whether the plaintiffs' attorneys had even considered the actual value of the claims they were attempting to resolve on behalf of the absent class members given that they did not "address the aggregate amount of monetary relief they would recover had they

"… [T]he agreement contained features of a case where 'class counsel … allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.'"

prevailed on the merits."[38] Further signaling the impropriety of the deal was the inclusion of a "clear sailing" arrangement, which provided that the defendant would not oppose class counsel's petition for a fee award, potentially enabling the defendant "to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class."[39] In light of these infirmities, the court concluded that the fee being claimed by the lawyers—nearly $1 million for simply "investigating and drafting an initial complaint, defending a motion to dismiss, written discovery without depositions, and

settlement negotiations"—was "excessive on its face."[40]

A settlement involving Subway's "footlong" sandwiches also illustrates this problem. The litigation began in January 2013 after an Australian teenager tweeted about a "not-quite-footlong Subway Footlong sandwich," which "spawn[ed] nine U.S. lawsuits that were eventually centralized in federal court in Milwaukee."[41] After nine years of negotiations regarding class counsel's fee award, the parties agreed to a settlement under which Subway would require franchisees to keep a measuring tool on their premises, mandate monthly inspections of the bread, and adopt other practices designed to ensure that the sandwiches would be 12 inches, and include a disclaimer on its website stating: "Due to natural variations in the bread baking process, the size and shape of bread may vary."[42] As part of the settlement, Subway also agreed to provide $525,000 in cash; however, "every cent of that amount ended up with class counsel and the class's 10 named representatives."[43]

On appeal, the Seventh Circuit reversed, calling the settlement "utterly worthless."[44] With respect to the mandated disclosure on Subway's website (i.e., that a loaf of bread will not always be 12 inches or longer), the Court of Appeals reasoned that "[i]t's safe to assume that Subway customers know this as a matter of common sense."[45] In addition, the court noted that early discovery in the case confirmed that the plaintiffs' claims were "factually deficient" and "extinguished any hope of certifying a damages class."[46] The court further noted that Subway was nonetheless forced to defend against these claims for several years.[47] Rather than "'be[ing] dismissed out of hand'"—which the Seventh Circuit concluded should have been the outcome—the lawsuit culminated in a "racket" by plaintiffs' attorneys that "'seeks only worthless benefits for the class' and 'yields [only] fees for class counsel.'"[48]

"While *Hilsley* and *In re Subway* are examples of courts courageously blocking or overturning abusive settlements, such vigilance is the exception, rather than the norm. In truth … courts frequently rubber-stamp similar settlements that enrich plaintiffs' counsel, while delivering little actual benefit to the absent consumer class members."

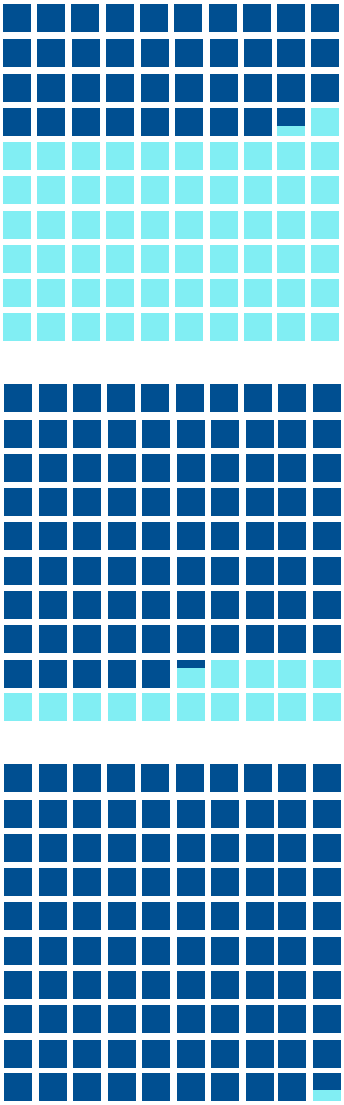
While *Hilsley* and *In re Subway* are examples of courts courageously blocking or overturning abusive settlements, such vigilance is the exception, rather than the norm. In truth, and as the examples discussed below illustrate, courts frequently rubber-

stamp similar settlements that enrich plaintiffs' counsel, while delivering little actual benefit to the absent consumer class members.

Farrell v. Bank of Am., N.A., 327 F.R.D. 422 (S.D. Cal. 2018)

In *Farrell*, a putative class action was brought against Bank of America for charging overdraft fees in excess of what was allowed by the National Banking Act. Each class member had been charged an improper $35 overdraft fee at least once, with some class members being charged multiple fees. The district court eventually approved a proposed settlement that, *inter alia*, would provide a cash fund for claimants who had paid the $35 fees and injunctive relief for those who had not, requiring Bank of America to forgive the debt of up to $35 per claimant. However, this recovery worked out to only $1.07 in damages per $35 overdraft charge paid—i.e., claimants would receive only a 3% refund for each allegedly unlawful charge—and debt forgiveness of up to $35 even if a class member had debt in excess of that amount because of multiple overdraft fees.[49] Class counsel, on the other hand, received a $14.5 million fee award, despite only putting in 2,158 hours of work, coming out to a rate of more than $6700/hour for their time spent securing this

Figure 2: Attorneys' Fees as a Proportion of Total Cash Disbursement from Class Action



***Farrell v. Bank of Am., N.A.*, 327 F.R.D. 422 (S.D. Cal. 2018), *aff'd sub nom. Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628 (9th Cir. 2020)**

Total Cash Fund: $37.5 million

Attorneys' fees: $14.5 million

Cash Fund to Class: $23 million

***In re Vioxx Prods. Liab. Litig.*, No. 2:05-md-01657-EEF-DEK (E.D. La. filed Sept. 1, 2017)**

Total Potential Cash Fund: $23 million

Total Disbursement to Class and Attorneys: $4,723,676.22

Attorneys' fees: $4,025,000

Cash Fund to Class: $698,762.22

***Spillman v. RPM Pizza, LLC*, No. CIV.A. 10-349-BAJ, 2013 WL 2286076 (M.D. La. May 23, 2013)/ECF No. 244-4**

Total Amount Added to Cash Fund: $4 million

Total Disbursement to Class and Attorneys: $2,543,795

Attorneys' fees: $2,535,000

Cash Fund to Class and Class Representative: $8,795

"relief."[50] The settlement and fee award were subsequently upheld on appeal by the U.S. Court of Appeals for the Ninth Circuit.[51]

In re Vioxx Prods. Liab. Litig., No. 2:05-md-01657-EEF-DEK (E.D. La. filed Sept. 1, 2017)

A federal judge approved a settlement of consumer fraud claims asserted by individuals alleging economic injuries stemming from their purchase of the drug Vioxx, which the plaintiffs alleged was deceptively marketed.[52] The settlement allocated a common benefit fund of up to $23 million, from which consumer class members could obtain recovery for their out-of-pocket provable costs for purchasing Vioxx. "Despite Herculean efforts" to publicize the settlement to the more than 20 million users of the product throughout the U.S., only 8,757 filed claims, and the total amount paid to class claimants was $698,767.22—a tiny fraction of the $23 million.[53] Class counsel nonetheless requested attorneys' fees of $7,174,419.09, arguing that the fee award should be based on 32% of the entire potential settlement amount, rather than limited to a percentage of the amount actually paid to claimants. The district court lowered the requested percentage amount, noting that "it [could] not be ignored … that the amount of actual recovery in this case was low."[54] However, the court still awarded attorneys' fees of 17.5% of the entire potential settlement amount, or $4,025,000—a grossly disproportionate amount when compared to the relatively small amount of money that ended up in the class members' pockets.

Spillman v. RPM Pizza, LLC, No. 3:10-cv-00349-BAJ-SCR, 2013 WL 2286076 (M.D. La. May 23, 2013)

Spillman involved allegations that a defendant pizza company violated the federal Telephone Consumer Protection Act through unsolicited robocall cell phone messages advertising promotions for pizza purchases at the defendant's franchise pizza stores. The court gave final approval to a class settlement that produced a claims rate of less than one percent. The essential components of the notice plan were print publication, internet, the settlement website and press releases. While the settlement created a common fund of $9,750,000, at the time of the fairness hearing only 770 claims had been filed on the settlement website, which was "less than one percent of the total class." And when the final distribution order was entered, only 253 claimants elected to receive a cash payment, resulting in a total cash disbursement of $8,795 to the class.[55] By contrast, attorneys received $2,535,000 in fees and costs.[56]

These examples illustrate an unfortunate reality: that many class action attorneys, when given the opportunity to pocket a massive fee for very little work, can and do structure settlements in ways that primarily benefit

themselves. The upshot is that the consumers who were supposedly injured by the conduct giving rise to the lawsuit in the first place do not benefit.

Low Participation Rates and Meaningless *Cy Pres* Awards

By even the most generous metrics, the overwhelming majority of class members in lawsuits like those previously discussed do not even bother to submit claims for their portion of any class award. As one 2021 study found, "the average participation rate [in 2019-2020 class actions] was 4.91% and the median participation rate was 3.90%, with only two cases having rates higher than 15%."[57] The Federal Trade Commission conducted a similar study in 2019 and found that even when class members were provided direct notice of the settlement—i.e., they were informed by mail, email, or otherwise that they could submit a claim—the overwhelming majority of class members (more than 90%) chose not to submit a claim for relief.[58] Even prominent plaintiffs' lawyers have had to concede that "the percentage of class members who submit claims and receive any money has been embarrassingly low—often 1%-2%."[59] As these members of the plaintiffs' bar further explain, "[c]urrent settlements justify paltry claims rates by pointing

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to the scores of former cases with similarly paltry claims"—a dubious cycle that is unlikely to change anytime soon.[60] While some members of the plaintiffs' bar have lamented this reality, others have openly boasted about it, going so far as to admit that the best part of class action work is that they have no clients to whom they must answer.[61]

One reason why so few class members opt to participate in consumer class action settlements is because they are frequently satisfied with the product or service challenged in the lawsuit.[62] In other words, they do not subscribe to what the attorneys allege. With no real injury to complain of or benefits to seek, there is no reason for consumers to jump through the various hoops involved in submitting a claim. Recognizing this reality, many courts and class action attorneys have resorted to the use of *cy pres,* the practice of distributing unclaimed class action settlement funds to third parties that were not injured by the defendant's alleged conduct and have no relationship to the class members. In some cases, these funds are distributed to organizations or groups dedicated to the subject matter underlying the lawsuit—which arguably provides a sort of indirect benefit to the class. While the goals of *cy pres* may seem laudable at first blush, they do not further the purpose of the U.S. consumer protection system—which is to compensate those supposedly injured by a defendant's alleged misconduct. If few class members are submitting claims for relief, then it stands to reason that there is no "harm" to redress or consumer to "make whole" and, therefore, no need for the *cy pres* award. As one court succinctly put it, "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else."[63]

This is all the more true because the use of *cy pres* essentially removes any incentive for class counsel to encourage those purportedly injured by the alleged conduct to actually participate in any settlement. After all, class counsel usually get the same fee award regardless of how many class members seek compensation from the settlement fund. Indeed, in most cases, the fees are determined before the claims period ends—i.e., before participation levels are known. And because courts will often calculate class counsel's fee award based on the total amount a defendant agrees to pay out—whether to the class or to third parties—using the *cy pres* route gives class

counsel a much easier and more certain path to their fee award, one untethered to delivering any direct benefits to the class members on whose behalf they are supposed to be litigating the lawsuit in the first place.

For example, in *In re LivingSocial Marketing & Sales Practice Litigation*, a class of plaintiffs alleged that the defendants sold "gift certificates" that violated federal and state laws with respect to their expiration dates and various other allegedly "unfair or unconscionable terms."[64] The parties ultimately reached a settlement in which defendants agreed to create a $4.5 million settlement fund, entitling each claimant to a "one-time cash payment equal to the purchase price (also known as the 'paid value') of unredeemed, expired LivingSocial Deal Vouchers, up to a maximum of 100%."[65] However, only 26,830 valid claims were submitted, "representing a mere .25% of the purported class of 10.9 million" and an aggregate dollar value of $1.89 million in claims.[66] Rather than provide the allegedly injured class members with the leftover money from the fund pro rata, the residual amount of $2,551,244.86 was donated as *cy pres* to the National Consumers League and the Consumers Union over the protests of objecting class members.[67] By counting that *cy pres* donation as supposed relief to the class (even though no class member actually saw a dollar of it), class counsel were able to artificially inflate the value of the settlement and obtain a disproportionate fee award of $1.35 million—i.e., 71% of the total amount that was actually paid to the class members combined—for a case in which "only three depositions were taken and two motions were briefed."[68]

Similarly, in *Poertner v. Gillette Co.,* the plaintiffs commenced a putative class action, alleging that the defendants violated the Florida Deceptive and Unfair Trade Practices Act by falsely claiming that their Ultra Advanced Batteries would last longer than Duracell CopperTop batteries.[69] The parties reached a settlement under which defendants agreed at the outset that they would donate $6 million worth of battery products to various unnamed charitable organizations. Defendants also agreed to pay claimants between $6.00 and $12.00 per household, depending on whether they submitted proof of purchase. Because

"While the goals of *cy pres* may seem laudable at first blush, they do not further the purpose of the U.S. consumer protection system … If few class members are submitting claims for relief, then it stands to reason that there is no 'harm' to redress or consumer to 'make whole' and, therefore, no need for the *cy pres* award."

"By counting that *cy pres* donation as supposed relief to the class (even though no class member actually saw a dollar of it), class counsel were able to artificially inflate the value of the settlement and obtain a disproportionate fee award of $1.35 million—i.e., 71% of the total amount that was actually paid to the class members combined."

there was no limit on the total amount payable by the defendants under the agreement, defendants could have theoretically ended up paying $50,000,000 to the class. However, a mere 55,346 claims were filed (out of 7.2 million proposed class members), with a total payout of $344,850. In other words, the settlement yielded a 0.76% claims rate, leaving the overwhelming majority of class members unpaid. By contrast, the plaintiffs' attorneys were awarded $5,407,724.40 in fees, plus $272,275.60 in expenses. The court justified the substantial fee award based on defendants' $6 million in-kind contribution of batteries to various charitable organizations and certain marginal injunctive relief offered by the defendants—i.e., an agreement to stop selling the Ultra batteries. On appeal, the Eleventh Circuit affirmed, rejecting an objector's argument that class counsel's "slice of the settlement pie [was] too large" in light of the "substantial nonmonetary benefit and the *cy pres* award."[70]

Beyond failing to provide any direct benefit to class members, *cy pres* often results in class money being funneled to advocacy-based organizations whose ideology or partisan bent is at odds with that of certain class members. For example, some advocacy organizations rely on *cy pres* dollars to "turn around and file pro-plaintiff amicus briefs in other litigation .... They also fund specialty clinics at law schools to train still more lawyers and invent more expansive liability theories, all for the purpose of pursuing still more unprovable class actions."[71] The National Consumer Law Center, which has been a repeat recipient of *cy pres* awards (and actively solicits such awards), likewise has a particular ideological (e.g., pro-litigation) bent.[72] Needless to say, not all members of a class will agree with this point of view, yet class action settlements designating these organizations as recipients of *cy pres* awards continue to be approved with great frequency.[73] Nominating these pro-litigation groups as *cy pres* recipients makes perfect sense for class action attorneys. By funneling funds meant for aggrieved class members to organizations that provide support to the plaintiffs' bar through amicus briefs, public commentary, and legislative testimony, and who themselves actively

encourage litigation against companies, the class action attorney's job only becomes easier. Such *cy pres* awards do nothing to benefit the class, instead providing more fuel for the class action litigation engine.

As the discussion above demonstrates, low claims rates in consumer class actions, coupled with the increasingly frequent use of *cy pres*, raise serious questions about the real purpose of the class action device. It is unclear why courts are allowing lawyers to bring suits on behalf of people who have no interest in suing, essentially forcing companies to fund the efforts of various unrelated organizations, all in an elaborate effort to obtain excessive attorneys' fees.

Incentivizing Frivolous Lawsuits Costs Consumers

Another reason why class actions have not benefitted American consumers is that they are increasingly being brought based on weak (or downright frivolous) allegations that accomplish nothing more than imposing litigation costs on businesses that are ultimately passed on to consumers in the form of higher prices. These often "silly" class actions would never be filed as individual lawsuits because they involve negligible or no real alleged harm to the consumer. However, the prospect of aggregating thousands of weak or frivolous individual claims into a single sprawling class action—with the potential to coerce companies into settlement—

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has invited a bevy of dubious consumer class action suits. While courts sometimes dismiss these lawsuits, such outcomes are a Pyrrhic victory for defendants, who have to spend significant sums of money in legal fees to terminate litigation that should have never been initiated in the first place. And where questionable lawsuits are allowed to proceed, companies have to choose between entering into "*in terrorem*" settlements or rolling the dice on a class trial and relying on the judgment of an unpredictable jury.[74] Either scenario is an

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expensive proposition for U.S. companies—and ultimately for U.S. consumers—and reflects a broader trend (illustrated below) of frivolous consumer class actions that have taken hold in the U.S.

Amin v. Subway Rests., Inc., No. 4:21-cv-00498-JST (N.D. Cal. 2021)

In a barebones complaint, the plaintiffs sought millions of dollars in damages and initially alleged that Subway had tricked and misled consumers into believing they were purchasing a tuna product when, in fact, it was nothing more than "a mixture of various concoctions that do not constitute tuna, yet had been blended together by Defendants to imitate the appearance of tuna."[75] Six months later, however, the plaintiffs amended their complaint and abandoned their theory, alleging instead that Subway's sandwiches "do not contain 100% sustainably caught skipjack and yellowfin tuna."[76] While the court concluded that the amended complaint was facially deficient, it nonetheless allowed plaintiffs to amend their complaint once again,[77] which culminated in an entirely new theory—i.e., that the "tuna" also contains "other fish species, animal products, or miscellaneous

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products" when a consumer would expect "that the products they are paying for contain *only* tuna."[78] The court recently dismissed any claims based on allegations that the word "tuna" could be misconstrued to indicate that the products contained "100% tuna *and nothing else*"—i.e., mayonnaise and other ingredients—but allowed plaintiffs to amend their complaint for the third time based on allegations that Subway's tuna products either "wholly lack[] tuna as an ingredient" or contain "other fish species, animal products, or miscellaneous products."[79] In short, the putative class action remains pending notwithstanding plaintiffs' ever-shifting and inconsistent theories of liability.

Sharpe v. A&W Concentrate Co., No. 19-CV-768 (BMC), 2021 WL 3721392 (E.D.N.Y. July 23, 2021)

Plaintiffs brought a class action against A&W alleging that its root beer label, which contained the phrase "MADE WITH AGED VANILLA," was deceptive because the root beer was made "predominantly—if not exclusively—from an artificial, synthetic ingredient called ethyl vanillin." The court refused to dismiss the complaint, even though the label also contained the phrase "Natural and Artificially Flavored," which clearly disclosed the fact that there was artificial flavoring in the root beer.[80] Although defendants reiterated this disclosure at the class certification stage, the court found that the plaintiffs had satisfied the requirements for class certification. Perhaps signaling its awareness of the frivolity of the litigation while recognizing that its hands were tied, the court went out of its way to flag that there were still "serious questions" that the court and jury would need answered regarding the claims, and that "[a]lthough plaintiffs have met the requirements for obtaining class certification, this is not to suggest that they will prevail on the merits of their claims at summary judgment, trial, or post-trial motions if they do prevail at trial."[81]

"In short, the putative class action remains pending notwithstanding plaintiffs' ever-shifting and inconsistent theories of liability."

Hesse v. Godiva Chocolatier, Inc., 463 F. Supp. 3d 453 (S.D.N.Y. 2020)

Plaintiffs brought a class action against Godiva alleging that its products, storefronts and marketing were deceptive since they all bear the phrase "Belgium 1926," which misleads consumers into believing that its chocolate is made in Belgium when—in fact—it is made in Pennsylvania. Despite taking judicial notice of numerous documents such as the company website, a news article, a trademark and company disclosures showing that "Belgium 1926" was a reference to Godiva's corporate origins and that

"The case eventually reached a final settlement, with class counsel taking home more than $2.8 million in fees while class members were eligible to claim $1.25 per Godiva Chocolate Product purchased ...."

the manufacturing location of its chocolate was publicly and openly disclosed, the court denied the defendant's motion to dismiss as to the consumer protection claims. The case eventually reached a final settlement, with class counsel taking home more than $2.8 million in fees while class members were eligible to claim $1.25 per Godiva Chocolate Product purchased (up to $15 or $25, with proof of purchase).[82]

***Juan De Dios Rodriguez v. Olé Mexican Foods Inc.*, No. EDCV202324JGBSPX, 2021 WL 1731604 (C.D. Cal. Apr. 22, 2021)**

Plaintiff brought a putative class action alleging that Olé Mexican Foods, Inc. misled consumers as to the origin of its products, which contained labels with phrases such as "El Sabor de Mexico!" or "A Taste of Mexico," which could lead consumers to believe the products were manufactured in Mexico. The labels also included the phrase "Made in the U.S.A." and clearly disclosed the city, state and country of manufacture. The court nonetheless ruled that these clear disclosures did not foreclose the plaintiff's claims as a matter of law, reasoning that they were on the back of the packaging, while the challenged phrases were on the front. Accordingly, the defendant's motion to dismiss was denied, and the case is ongoing.

As these examples reveal, federal courts are allowing dubious class actions to proceed past the motion-to-dismiss (and, in some cases, class certification) stage, unlocking the doors to burdensome and expensive discovery.[83] Such discovery is uniquely taxing on class action defendants because they are typically corporations that store vast amounts of discoverable electronic information. On the other side of the litigation, however, are individual plaintiffs who generally have very little discoverable information, resulting in nearly non-existent discovery costs. And because the scope of permissible discovery is so broad, courts are often very reluctant to sanction parties for abusing the discovery process. Recognizing that asymmetry and lack of any downside risk for propounding broad discovery, plaintiffs' attorneys have every incentive to gain leverage over corporate defendants by demanding excessive, unnecessary discovery and by litigating supposed "discovery deficiencies," driving up litigation costs to make settlement a more attractive option for the defendant. Faced with mounting discovery obligations, which typically equal a substantial percentage of all litigation

costs, many class action defendants simply choose to settle rather than continue the litigation, regardless of the frivolity of the claim.[84]

Excessive litigation costs are particularly onerous for small businesses, which provide the backbone for the U.S. economy by "account[ing] for 44% of U.S. economic activity" and 62% of new job creation.[85] Because these companies generally lack in-house legal departments, any litigation requires the business that is sued to hire defense lawyers, which is generally expensive. The specter of class action litigation is particularly daunting for small businesses given their "significantly fewer financial resources," which may render them "unable to conduct the necessary discovery to defend themselves against class certification" or "defend against class action claims at trial," subjecting them to even greater unfair settlement pressure.[86] And concerns about small businesses being particularly vulnerable targets for litigation are far from theoretical. According to one recent study, even though small businesses accounted for about a fifth of business revenues earned in 2018, they bore more than half of the costs of the commercial tort system. "In other words, small businesses bear a disproportionate burden of the costs of the tort system."[87] Needless to say, these litigation costs are not just bad for business. The widespread consensus is that such costs are passed on to the American consumer in the form of higher-priced goods and services, ultimately harming the very people the litigation purportedly benefits.[88]

In sum, to the extent there are any winners in class actions, they are not consumers. The prevalence of fee-centric settlements and low claims rates in most consumer class actions ensures that class members receive little or no benefit for releasing their claims while their lawyers are paid millions—a problem that is exacerbated by the increasing use of *cy pres.* In addition, because attempting to fend off even frivolous consumer class actions is an expensive exercise for American companies, businesses have no choice but to pass those litigation costs on to the consumer in the form of higher prices for goods and services at the marketplace. Essentially, the only people who are receiving any real benefit from class actions are the lawyers who bring them, not the consumers that they purportedly represent.

Abuses in Securities Class Actions

Another hotbed of class action abuse has been in the securities arena. Class actions alleging violations of federal securities laws were originally authorized to serve the dual purpose of deterring companies from committing fraud while also providing compensation to investors harmed by fraudulent conduct, and spurring confidence in the public securities markets. By the mid-1990s, however, it had become clear that securities class actions were even more vulnerable to abuse than other types of class actions. Essentially, class action attorneys were able to keep a list of "professional plaintiffs" on retainer (usually regular people who purchased a few shares of stock in many large companies) that would consent to the attorneys filing securities class actions on their behalf. This allowed the attorneys to then "race to the courthouse" with a photocopied and typically frivolous complaint any time one of those companies' stock price dropped, alleging some sort of generic "fraudulent" behavior by the company. Faced with ever-mounting litigation, most publicly traded companies had no choice but to settle as quickly as possible to keep their legal costs down. The situation

eventually became so dire that in 1995, Congress enacted the Private Securities Litigation Reform Act (PSLRA) in an attempt to curb the abuses inherent in class action securities litigation. The PSLRA did, for a time, mitigate the rapidly growing filings by adding securities class action-specific measures such as a scienter—i.e., intent or knowledge—requirement, a damages cap, an increased emphasis on imposing sanctions for abusive practices and various pleading requirements to deter frivolous litigation. Thanks to the creativity of the plaintiffs' bar, however, questionable and potentially abusive securities class actions have exploded to levels above where they were before the enactment of the PSLRA, resulting in more clamors for reform. *See* Andrew J. Pincus, *A Rising Threat: The New Class Action Racket That Harms Investors and the Economy*, U.S. Chamber of Commerce Institute for Legal Reform (Oct. 2018); *see also* Stephen J. Choi, Jessica Erickson and Adam C. Pritchard, *Frequent Filers Revisited: Professional Plaintiffs in Securities Class Action*s, U.S. Chamber of Commerce Institute for Legal Reform (April 2022).

Class Actions Are Prone to Ethical Abuses

Chapter

04

A major distinguishing feature of class actions (versus individual lawsuits) is the lack of control a named plaintiff (much less an absent class member) has over his or her own claim.

Because class counsel are essentially allowed to run the show, there is a significant risk that they will engage in self-dealing—a risk that has materialized in the form of named-plaintiff-only settlements and pre-suit demand letters. In addition, the growth of TPLF in class actions has only exacerbated this dynamic by introducing yet another financially interested third party into the calculus whose primary interest is maximizing its return on investment.

Self-Dealing, Named-Plaintiff-Only Settlements, and Extortionary Demand Letters

While in a typical individual lawsuit, a plaintiff has full control over her claim and the ability to direct her attorney to take whatever actions she considers appropriate, absent class members have no control over "their counsel"—or even a basic awareness of the decisions being made in their case. Instead, class counsel "exercise[s] nearly plenary control" over the lawsuit and is "subject to only minimal monitoring by their ostensible 'clients,' who are … dispersed and disorganized."[89] And "[b]ecause each class member's interest in the case is typically small, class members may have relatively little financial interest in the outcome of the litigation for the class as a whole" and, thus, have little reason to monitor the litigation.[90]

Accordingly, it is typically class counsel—motivated by fee awards—who control the litigation and the class claims. Recognizing that this is a "fox guarding the henhouse" situation, courts have established safeguards in an attempt to ensure that class counsel recognize a duty of loyalty to the class. However, these protections can be—and frequently are—circumvented through self-dealing practices.

One of those safeguards is the requirement in Fed. R. Civ. P. 23(a)(4) that the lead plaintiff fairly and adequately represent the class, which includes

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keeping a watchful eye over class counsel.[91] In theory, this measure is supposed to create a check on class counsel control by ensuring that someone whose interests are aligned with the class is keeping counsel on track. However, the lawyers who decide to bring suit frequently recruit as the lead plaintiffs individuals with whom they have a pre-existing personal, familial, or professional relationship.[92] Courts have abided this troubling practice, even though such relationships necessarily implicate the independence of the class representative and her lawyer and present a significant (non-theoretical) risk of self-dealing.

One common form of self-dealing is the "named plaintiff only" settlement, in which "class" counsel and the lead plaintiff agree to voluntarily dismiss their "class" action against the defendant in return for a premium settlement price. In this scenario, some money is paid to the named plaintiff, a more substantial amount is paid to class counsel—often in the six-figure range, perhaps higher—and the unnamed class members get nothing. In entering into these arrangements, class counsel and the named plaintiff—who initially promised to represent the interests of the class by filing the putative class action complaint—are effectively cashing in on their purported representation of the class by abandoning it. This practice is particularly widespread, potentially affecting about one-third of all filed class actions.[93] And because these settlements are made before any attempt to certify the class, current class action rules afford federal courts no authority to even see (much less carefully review) the terms of the dismissal. In short, the class counsel simply files a one-page notice of voluntary dismissal, and the case is over.

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Another form of self-dealing involves the use of an extortionary pre-suit demand letter, sometimes called "stealth class actions."[94] In those situations, attorneys will send a demand letter to a corporation, claiming they have a class action ready to be filed and outlining in "broad strokes the areas where the organization is potentially liable."[95] Rather than filing the formal action immediately, the attorney in the letter gives the company the option of settling the claim quickly and quietly on a confidential basis.[96] For class action attorneys, this approach can be a lucrative business model. It requires minimal investment of their time and

no real costs. And it often works because enough companies will enter into these agreements to stave off the costs of uncertain class action litigation.[97] And there is no court involvement in the practice because no lawsuit is ever filed. Some class action practitioners describe this practice as "blackmail" and note that "[t]here are attorneys out there that do nothing but send out demand letters and have no intention of filing actual lawsuits."[98] Even worse, these are often empty threats of frivolous claims given that many of these demands are "not meaningful class action complaints" but "attempts by plaintiffs' lawyers to leverage the class action to try to shake down a company" and secure "an individual settlement at a premium."[99] Some companies ignore these letters or send strong responses challenging the purported claims. But given the enormous costs of addressing even the weakest lawsuits, other businesses will sometimes agree to pay modest amounts in an effort to avoid new litigation.

In both scenarios, class counsel and their individual client (likely a friend, relative or employee) advance their own personal interests, while purportedly acting on behalf of a large group of consumers whose interests are totally ignored. Such self-dealing is unseemly, and it is yet another respect in which consumers are simply used as pawns in the class action system.

TPLF Generates Additional Ethical Problems

Another driver behind questionable behavior in class actions is the use of third party litigation funding, or TPLF.[100] In TPLF, entities "invest" in lawsuits by providing the up-front costs of bringing an action, theoretically providing court access to allegedly injured plaintiffs who do not have the means to pay for litigation alone. In return for their "efforts," third party litigation funders receive a direct

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financial interest in the result of the litigation—a promised return that is contingent on the outcome. Sometimes this payment to the funders may come from the attorneys' fee award, which raises ethical issues under rules prohibiting lawyers from sharing fees with non-lawyers.[101] In other instances, funding agreements provide that payments to TPLF entities are to be made from class members' recoveries, even though those persons may have never received notice or given approval of those arrangements (as discussed further below). Because there is no uniform federal rule requiring the disclosure of TPLF agreements, the existence of the practice in a

given case and the potential ethical implications it raises frequently evade detection by the defendant and the court.[102]

Once reserved for individual business-to-business or consumer litigation, TPLF is now increasingly being used in class action lawsuits.[103] For example, one prominent hedge fund, EJF Capital, specifically targets putative class actions at "hefty interest rates," with the loans to be repaid by plaintiffs' law firms "as they earn fees from settlements and judgments."[104] "[C]lass actions [also] make up a significant portion of the cases" in which Law Finance Group invests.[105] The increased use of TPLF arrangements in class actions raises serious ethical questions, as well as concerns about the named plaintiffs' adequacy of representation, as funders may seek to maximize their own pecuniary interest in the litigation.

These ethics and adequacy issues were well illustrated in *Gbarabe v. Chevron Corp.,* a putative class action arising out of an explosion on an oil drilling rig off the coast of Nigeria. In that case, the defendants sought production of the plaintiffs' agreement with a third party funder, arguing that it could be relevant to the class certification decision.[106] The judge granted their request, agreeing that the "funding agreement is relevant to the adequacy [of representation] determination [required for class certification] and should be produced to [the] defendant."[107] Ordering production of the agreement proved to be the right move, as it contained several provisions that allowed the TPLF entity to exercise substantial control over the litigation. For example, the agreement included a "Project Plan" developed by class counsel and the funder, which restricted counsel from deviating from the plan as the litigation unfolded.[108] Further, the agreement expressly prohibited the lawyers from engaging any co-counsel or experts "without [the funder's] prior written consent."[109] The agreement even required counsel to "give reasonable notice of and permit [the funder] where reasonably practicable, to attend as an observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the Claim."[110] And even more worryingly, the funding agreement required that the lawyers endeavor to "recover the maximum possible Contingency Fee"—which obviously would make it difficult to reach a

"Because there is no uniform federal rule requiring the disclosure of TPLF agreements, the existence of the practice in a given case and the potential ethical implications it raises frequently evade detection by the defendant and the court."

settlement, even if beneficial to the class—and provided that the funder would be repaid its $1.7 million investment with a "success fee" of $10.2 million, plus 2% of the amount received by the putative class members.[111] Essentially, the putative class would have been required to pay a portion of their recovery to the funder, without their prior knowledge or approval.

Both the agreement and the underlying circumstances of it also raised serious questions about how the named plaintiff—who was obligated to ensure that the interests of the absent class members were being properly served—could possibly discharge that responsibility. After all, not only was the plaintiff fully aware of the funder's ability to control the litigation (he did "not dispute that his counsel … [we]re dependent on outside funding to prosecute th[e] case"), but he was also "under a contractual obligation to preserve the confidentiality of the funder's identity, as well as the terms of the agreement."[112] Accordingly, the agreement in *Gbarabe* is a plain example of how the use of TPLF in class actions casts very serious doubts on whether class counsel and the named plaintiff are actually looking out for the absent class members.[113]

Absent disclosure of TPLF usage in a particular case, however, it is impossible to know whether an outside funder with a direct financial interest in the result of the litigation has invested in the case, much less whether such an entity is seeking to exert undue influence over the action. In short, the lack of transparency and meaningful oversight and control by class members

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makes class actions fertile ground for self-dealing between class counsel and class representatives, to the detriment of the class members. And the rise of TPLF in class actions has only furthered this potential for abuse by allowing plaintiffs' attorneys to effectively sell control over the claims to financially interested third parties—often without knowledge of the class or the court.

Class Actions Are an Inefficient Method of Compensating Consumers

Chapter

05

To the extent class actions actually benefit consumers, they do so in an extremely inefficient way, often providing "relief" to large groups of dissimilarly situated consumers who never experienced any sort of injury in the first place or needlessly prolonging litigation, causing waste of judicial and party resources. Two trends illustrate these inefficiencies.

"No injury, no tort, is an ingredient of every state's law."

In "no injury" class actions, one plaintiff who is allegedly injured by a product or service brings a putative class action on behalf of all purchasers of that product or service, even though many of them are satisfied and have no injury about which to complain. Similarly, "issues classes"—classes that are certified only as to certain purportedly common questions or issues—are increasingly being used to circumvent requirements that classes be "cohesive," causing litigation to drag on and necessitating precisely the kind of individualized follow-on proceedings that the class action rule was designed to avoid. And finally, although some have contended that the class action device deters purported misconduct, that is not a proper—much less effective—purpose for aggregate litigation.

"No Injury" Class Actions

"No injury, no tort, is an ingredient of every state's law."[114] For many years, U.S. courts faithfully applied this principle, dismissing cases brought by plaintiffs who themselves had experienced no problem with the product at issue for lack of injury.[115] Presumably in reaction to these rulings, plaintiffs' attorneys began recruiting named plaintiffs whose products actually manifested the defect alleged in the litigation, making disposal of the claims at the motion-to-dismiss stage more difficult. But as most courts appropriately recognized, these lawsuits were just another variant of no-injury class actions because while the named plaintiffs may have allegedly suffered some injury (e.g., their vehicle actually malfunctioned), the overwhelming majority of the absent class members had not. According to these courts, this new variant of the no-injury class action was not amenable to classwide treatment for a variety of reasons, including that the claims of the named plaintiff were not typical of the absent class members—a fundamental requirement for class certification.[116]

Unfortunately, more and more courts started to buck that traditional approach, countenancing class actions

in which the overwhelming majority of class members experienced no problem with the allegedly defective product. For example, in *Bechtel v. Fitness Equipment Services, LLC,* the plaintiffs commenced a putative class action against a treadmill manufacturer, alleging that it could only achieve its advertised horsepower in a laboratory, but not when plugged into a residential power supply.[117] As the defendant pointed out in opposing class certification, the class likely included a large number of consumers who suffered no injury at all, because many either did not care about horsepower when purchasing the product and, thus, were not deceived, or because they would have not used that much horsepower in any event. Even so, the court determined that it was irrelevant whether "many consumers [were] fully satisfied with their treadmills" and certified the class, allowing it to go forward even though many class members may not have had any harm to redress.[118]

Unfortunately, more and more courts started to buck th[e] traditional approach, countenancing class actions in which the overwhelming majority of class members experienced no problem with the allegedly defective product.

Similarly, in *Glazer v. Whirlpool Corp.,* purchasers of the defendant's front-loading washing machine alleged that the product's design led to the growth of mold and mildew in the machine.[119] The defendant argued that the class was overbroad because the definition included product owners who had not experienced a mold problem and other purchasers who were pleased with their washing machines, unlike the named plaintiffs.[120] Indeed, a majority of the class members did not have a mold problem with their washing machines.[121] The Sixth Circuit issued two decisions in the case, both times holding that all class members, including those who had not experienced a mold problem, suffered economic damages by paying an inflated price for their washing machines. The court went on to hold that "[i]f Whirlpool can prove that most class members have not experienced a mold problem … then [it] should welcome class certification."[122] And in

"In addition to existing pressures to settle substantively meritless claims, defendants are increasingly facing settlement pressures from class actions defined in a wildly overbroad manner in which only a fraction of class members are even conceivably affected by the alleged misconduct giving rise to the litigation."

Wolin v. Jaguar Land Rover North America, LLC, the plaintiffs sought certification of a class of purchasers of Jaguar vehicles that contained a defect resulting in premature tire wear.[123] The district court had refused to certify the class, in part because a majority of the class members had not experienced the alleged problem with their vehicles.[124] The Ninth Circuit reversed, however, holding that whether class members' products manifested the alleged defect was a merits issue irrelevant to the question of class certification.[125]

These "no-injury" class actions undermine the proper administration of justice and put a strain on the U.S. economy. Defendants often opt for settlement following class certification, regardless of the merits of the underlying claims.[126] Indeed, it is well known that "[f]ollowing certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action."[127] In addition to existing pressures to settle substantively meritless claims, defendants are increasingly facing settlement pressures from class actions defined in a wildly overbroad manner in which only a fraction of class members are even conceivably affected by the alleged misconduct giving rise to the litigation. Classwide settlements in such cases essentially

The Potential for Punitive Damages

Another cause for concern is the potential for a punitive damages award even in cases where few class members are actually injured. Punitive damages are damages awarded on top of compensatory damages, intended to punish a defendant for particularly egregious conduct and to deter others from acting similarly in the future. *See* Restatement (Second) of Torts § 908 (1979). The permissible upper limit on punitive damages is somewhat uncertain under U.S. law, but it is generally believed to be a small multiple of the compensatory damages amount. *See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).* Some state laws prohibit punitive damages or set caps by statute.

Nevertheless, the mere availability of punitive damages has a "shadow effect" on defendants, often causing them to "settle compensatory damages at a higher level" than they normally would to avoid the potential for a punitive damages award at trial. Francis E. McGovern, *Punitive Damages and Class Actions,* 70 La. L. Rev. 435, 437 (2010). And this effect persists even though "punitive damages are awarded relatively infrequently and amounts are often reduced by appellate courts" given how devastating an award could be on the off chance it is affirmed. *Id.*

offer free money to class members who would never be able to recover (or even consider filing a lawsuit) individually against the defendant.[128] In essence, overbroad class actions are nothing more than a mechanism for expanding the size of a given class to justify a windfall for attorneys who claim to represent the interests of uninjured class members.

Overcompensation is as much a problem for consumers as it is for businesses. As the late Judge John Minor Wisdom once explained, damages paid in litigation to those consumers who are actually injured "are presumably incorporated into the price of the product and spread among" all purchasers.[129] But when compensation is potentially available to all consumers—injured and uninjured alike—manufacturers will act to include those costs in the price as well.[130] The result is that, "instead of spreading a concentrated loss over a large group, each [consumer] would cover his own [potential recovery] (plus the costs of litigation) by paying a higher price ... in the first instance."[131] Echoing this same logic, Judge Frank Easterbrook explained in a footnote in the Seventh Circuit's decision in *Bridgestone/Firestone* that allowing even modest compensation for uninjured class members could easily double a defendant's total liability for a product that rarely malfunctions or injures anyone, a result that "overcompensates buyers and leads to excess precautions" by manufacturers.[132] It is precisely this sort of inefficient economic distortion—which Judge Wisdom saw "little reason to adopt"—that the courts described above have encouraged by endorsing overbroad class actions.

A recent decision by the U.S. Supreme Court in the data privacy realm may rein in these kinds of lawsuits. In *TransUnion LLC v. Ramirez,*

"... [A]llowing even modest compensation for uninjured class members could easily double a defendant's total liability for a product that rarely malfunctions or injures anyone, a result that 'overcompensates buyers and leads to excess precautions' by manufacturers."

the Supreme Court held that three-quarters of a certified class of more than 8,000 Fair Credit Reporting Act (FCRA) class members lacked Article III standing, cutting down a rare class action jury verdict long after it was entered.[133] There, the plaintiffs had alleged that TransUnion violated the FCRA by including false alerts in consumers' credit reports incorrectly stating that they were on a federal government list of potential terrorists, drug traffickers and serious criminals and by improperly formatting some

"... *TransUnion* ... is a step in the right direction for mitigating the harmful impact of no-injury class actions ...."

of their reports. Although more than 8,000 individuals were part of the class, TransUnion had shared the reports of less than a quarter of the class with third parties, meaning that the vast majority of the class members were never injured by TransUnion. According to the Supreme Court, for those class members, it was "as if someone wrote a defamatory letter and then stored it in her desk drawer," causing no harm at all.[134] Such situations are fairly typical in the data privacy area—where many "breaches" result in no tangible harm to the majority of those whose data was leaked—making it fertile ground for "no-injury" class actions.

Although the full effects of *TransUnion* on consumer class actions remain to be seen, it is a step in the right direction for mitigating the harmful impact of no-injury class actions, especially given the Supreme Court's succinct and unambiguous pronouncement on Article III's requirement of an injury in fact: "No concrete harm, no standing."[135] Indeed, at least some believe that *TransUnion*'s "impact is likely to be significant, particularly in the consumer protection context: the Court's focus on the absence of evidence that class members relied on improper information could, for example, provide a defense in the false-advertising context."[136] Notably, the U.S. Court of Appeals for the Ninth Circuit has already applied *TransUnion* in requiring the dismissal of the claims asserted by plaintiffs who "were not concerned with" the content of an allegedly false label, "but rather with whether [defendant] was telling the truth on its product's labels."[137] Relying, in part, on *TransUnion*, the Ninth Circuit held that the plaintiffs lacked standing under Article III to bring a false advertising claim, noting that the "desire for [defendant] to truthfully label its products, without more, is insufficient" to satisfy the Article III injury requirements.[138]

The *TransUnion* ruling is welcome news for defendants and is likely to become an important tool for challenging such lawsuits. However, because plaintiffs' lawyers will inevitably espouse other novel and speculative theories of injury to evade the Supreme Court's ruling, defendants should not assume that no-injury class actions will disappear and should remain vigilant in forcefully opposing these kinds of lawsuits.

The Inefficiency and Unfairness of "Issues Classes"

Increasing judicial embrace of so-called "issues" class actions has also fueled significant inefficiency and unfairness in the American class action system. Under Rule 23(b)(3), class actions

seeking monetary relief can only be certified when "questions of law or fact common to class members predominate over any questions affecting only individual members."[139] This requirement is designed to ensure that only claims capable of being proven with common evidence are certified. Otherwise, class proceedings would devolve into highly individualized mini-trials on such fundamental questions as whether a product was defective; whether the product caused each class member's alleged injuries; or whether class members were misled by the purportedly deceptive labeling. However, over the last decade, plaintiffs' attorneys have sought to circumvent that fundamental requirement by persuading courts to pick only particular questions that are common to a proposed class—for example, whether a product has a design defect—and order a classwide trial that would resolve only those inquiries.

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The genesis of these "issues" class actions can be found in Rule 23(c)(4), which provides that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[140] Historically, courts have been skeptical of such an approach on the ground that certification of issues for class treatment is an end-run around Rule 23(b)(3)[141]—something never contemplated by the drafters of the rule. In fact, there is "no evidence in the Committee's official Rule 23 Note, its meetings, memoranda, or correspondence that the Committee ever conceived of (c)(4)(A) as authorizing certification of class actions that could not otherwise be certified under Rule 23," and the notion that the Committee intended for plaintiffs to avoid the Rule 23(b)(3) predominance requirement is "particularly implausible ... given the importance the Committee placed on that requirement."[142] As a result, Rule 23(c)(4) was originally used rarely, and only as "a housekeeping rule that allow[ed] courts to sever the common issues for a class trial."[143]

More recently, however, certain courts have adopted a laxer attitude toward class certification under Rule 23(c)(4), holding that one or two purportedly common issues can be certified for class treatment, while the remaining questions can be resolved in subsequent, individual proceedings. *Martin v. Behr Dayton Thermal Products LLC* illustrates the problems

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inherent in this approach. In *Martin,* the plaintiffs alleged that the defendants' contamination of nearby groundwater caused "vapor intrusion" on their properties, thus causing them potential injury.[144] After nearly seven years of litigation, plaintiffs moved to certify a damages class of property owners. As defendants argued—and the district court agreed—there were significant individualized issues "regarding injury-in-fact and causation," which precluded classwide resolution of the claims.[145] The court nonetheless certified an issues class as to seven different issues that were supposedly common to the entire class—none of which addressed the key point of whether there was actually any vapor intrusion on the class members' properties.[146] The Sixth Circuit upheld the decision on appeal over the argument that there were "highly individualized inquiries that would be required even after certification," reasoning that while the issues class would "not resolve Defendants' liability entirely, … it w[ould] materially advance the litigation."[147] However, the appellate court's premonition never panned out. More than three years after making that statement—and 13 years after the case was filed—the case remains pending before the district court, with no end in sight.[148]

As cases like *Martin* demonstrate, "issues" class actions are highly inefficient because of the need for numerous individual follow-on trials (potentially thousands in a product liability controversy). By definition, the certification of an issues class would normally require counsel to invest substantial resources in litigating the facts of the case common to all claims with no prospect of obtaining any damages award even if they "win" at trial. Although a common-phase victory would potentially set the stage for recoveries in individual follow-on suits, the recovery in such follow-on suits may be small and could well cost more to litigate than the follow-on suits could ever yield. Such "costs and delay[s]" are so "immense" that "issues" class actions

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may effectively guarantee a settlement because it would be nonsensical to spend the time and effort litigating those follow-on trials.[149] Thus, as one court put it, certifying a class as to the issue of liability and then "allowing myriad individual damages claims to go forward hardly seems like a reasonable or efficient alternative" to normal litigation.[150] Put simply, while class actions are supposed to provide an efficient mechanism for compensating common claims, issues class actions do the exact opposite.

Not only is this brand of class action remarkably inefficient, issues class actions are an inherently unfair form of litigation for defendants, who are unable to present the jury with a full and accurate picture of the claims at issue. For one thing, issues classes unfairly prejudice defendants because it is much easier for plaintiffs to secure a classwide verdict when the jury does not hear the actual facts of any individual plaintiff's claims.[151] An "issues" phase that focuses exclusively on a product's alleged defect, for example, does not tell the whole story, because although the plaintiff herself might complain of a problem with her product, the jury will not hear from the many absent class members who are entirely satisfied with their product and have never encountered the alleged defect. And because issues class actions necessitate a second jury considering issues already decided by a prior jury in the form of follow-on trials for individual plaintiffs, the approach also contravenes the Seventh Amendment of the U.S. Constitution.[152] As one court has explained, "the risk that a second jury would have to reconsider the liability issues decided by the first jury is too substantial to certify [an] issues class."[153]

In short, issues class actions have added even more inefficiency and unfairness to an already deficient system rife with abuse. The attendant delays and complexities generated by these proceedings, the inability of defendants to mount a fair and adequate defense in them, and the potential for impermissible jury reexamination of previously decided issues all weigh strongly against continued judicial embrace of issues classes.

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Class Actions Are Not Intended or Equipped to Deter Conduct or Enforce Law

Some have argued that class actions should—and actually do—serve a deterrence and enforcement function by deputizing class action counsel as "private attorneys general" who watch out for violations of (and enforce)

laws meant to protect consumers in general. These arguments are unpersuasive for two reasons.

First, the class action is not intended primarily to serve a deterrence or enforcement purpose because Rule 23 is supposed to be a vehicle for asserting the rights of and pursuing redress of injuries for individual claimants. Nothing in Rule 23 remotely authorizes plaintiffs' lawyers as third parties to use the claims of class members as a way to enforce the law and thereby purportedly protect the rights of the general public. Such an interpretation would dramatically alter the substantive law, thereby violating the Rules Enabling Act. Under that act, a rule of procedure or evidence may not "abridge, enlarge or modify any substantive right."[154] This is so because using a procedural rule to alter the substantive law would interfere with the powers of Congress and state legislatures to decide governing laws.[155] Applying the class action rule for purposes of deterring misconduct

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would run afoul of that principle because "Rule 23 … is meant to provide a vehicle to compensate class members and to resolve disputes" under the governing substantive law; it does not create a "free-standing device to do justice."[156] Deterrence and enforcement are functions of federal agencies, such as the Federal Trade Commission, not plaintiffs' lawyers seeking to cash in on dubious class action lawsuits.

Second, even if class actions were intended primarily to deter bad conduct or enforce regulations, they would be an inefficient method of doing so. As a threshold matter, there is no empirical proof that class actions effectively serve either of these goals. As one scholar succinctly explains, "the deterrence theory suffers from a lack of empirical evidence and is based on conjectured hypotheses about corporate behavior."[157] Indeed, what limited empirical evidence there is regarding the deterrence theory "suggest[s] that negative value class actions may not be as effective at deterring wrongful conduct" as people expect.[158] For example, even "corporations armed with high quality information about previous litigation against their competitors are virtually no more successful in avoiding subsequent litigation than corporations who lack this information," which could suggest that an awareness of the likelihood for potential consumer class actions does nothing to alter corporate conduct.[159] The deterrence theory is also easily rebuffed by the "equally likely" theory that corporations just consider class actions as a cost of doing business, "with costs passed along to consumers."[160] And the realities of the class action process—wherein defendants typically settle cases quickly and cheaply, with no admissions of wrongdoing—further undercut any deterrent or enforcement function.[161]

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Although proponents of the enforcement theory have touted the environmental litigation involving Volkswagen as proof that class actions serve a legitimate enforcement purpose, a closer look at that litigation tells a different story. The gravamen of that litigation was that Volkswagen installed a "defeat device"—software in some of its diesel vehicles that could detect when the car was being emissions-tested and would mask nitrogen oxide emissions to pass the test. While Volkswagen pledged just over $10 billion in restitution to American

consumers, many (if not most) European consumers have yet to receive any compensation—a result many have attributed to the unique availability of class actions in the U.S. as an enforcement mechanism.[162] But it is incorrect to suggest that U.S. consumers obtained compensation because of the availability of the class action device. Instead, Volkswagen negotiated a package of penalties and remedial steps—including consumer compensation—with U.S. government bodies (the Federal Trade Commission, the U.S. Department of Justice, the California Air Resources Board and the California Attorney General) in addition to the plaintiff lawyers involved. Had the matter been left only to private lawyers and the notoriously slow and difficult system of private actions (including class actions), no doubt the matter would have dragged on for many years, keeping armies of lawyers busy at vast expense, for unknowable eventual consumer benefit.

In short, the class action device was never meant to—nor does it—serve any deterrent or enforcement functions in the U.S.

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Potential Solutions

Chapter

06

Despite the serious challenges raised by current class action practice, all hope is not lost. Indeed, there are a variety of measures that could curb many of the abuses discussed throughout this paper. Below, we explore some of those potential reforms in greater detail, which can be divided into measures that are designed to reverse the trend of class actions rewarding lawyers rather than consumers; proposals intended to minimize conflicts of interest and increase transparency over potentially unethical relationships between counsel and named plaintiffs and third-party funders; and structural changes that would make class actions more efficient and mitigate the burdens of abusive class action litigation on American businesses and consumers.

Prioritizing Class Member Benefit

As elaborated above in Chapter 3, one of the most problematic aspects of current practice is the increasing tendency of class members to receive little (if any) direct benefit from consumer class action settlements, while the lawyers receive a huge windfall. This has become a dominant feature of consumer class actions because before allowing class actions to proceed, federal courts generally do not require class counsel to demonstrate that they will be able to distribute any monetary proceeds to the allegedly injured class members. Further, class counsel are often able to avoid the burden of ensuring that the class members receive any direct benefits by simply donating the class money to their favorite third-party organization (many of which have an ideologically-driven agenda at odds with the views of class members) through *cy pres* arrangements. Simply put, class counsel are effectively excused from working hard to deliver monetary relief to individual class members—the allegedly aggrieved people on whose behalf the class action was brought in the first place.

A potential solution to this "lawyers get all the money" problem is requiring class counsel to affirmatively

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demonstrate early in the litigation of a class action that they have a plan not only to identify absent class members, but also to deliver to them any award the attorneys secure. Requiring as much would ensure that any class action is actually being brought for the purpose of providing real relief. By contrast, those actions in which class counsel are unable to explain to the court how they intend to distribute any sort of award or settlement—i.e., class actions that do not provide relief to consumers—would not move forward. Adoption of this proposal would incentivize class counsel to focus on compensating their allegedly injured clients rather than seeking the maximum fee award.

A sensible complement to this proposal is prohibiting the use of *cy pres* arrangements in class action settlements except where absolutely necessary—i.e., where multiple attempts at direct distribution of money to class members have been made, and where such efforts result in an actual residue of class money. Such a proposal—which would make *cy pres* the exception, rather than the default—reflects the rudimentary principle that "funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members."[163] Additionally, the type of injunctive relief available in consumer class actions should be limited and carefully scrutinized, lest class counsel be permitted to evade the requirements just discussed through meaningless settlements that provide no benefit to class members. For example, class counsel should not be allowed to "secure" injunctions that require remedial action that a defendant is already undertaking to justify a bloated fee award, such as what likely occurred in the Subway "footlong" litigation discussed in this paper. In sum, without these reforms, we are likely to see even more class settlements that have no possibility of delivering any direct relief to the purportedly injured parties, undermining the purpose of consumer protection litigation.

Ethical Reforms

Policymakers should also consider measures aimed at curbing some of the ethical abuses highlighted throughout this paper. Far too often, class action lawsuits are dreamed up by lawyers simply to earn fees, with counsel recruiting people (sometimes their own relatives or employees) to assert claims they have concocted. This perversion of the traditional client-lawyer relationship has deleterious consequences on our civil justice system because named plaintiffs in such cases, who are closely tied to class counsel, do not perform their fiduciary duty to oversee that counsel's performance. The consequences of failed oversight can be seen in settlements that enrich lawyers but fail to compensate class members.

To address this problem—without unduly abridging the ability of genuine plaintiffs to choose their own lawyers—Congress should prohibit persons having familial or business relationships with counsel from serving as class representatives. Such a measure would preclude the most obvious instances in which lawyers are essentially bringing their own suits, and in which the economic or social incentives for named plaintiffs to please class counsel dwarf their incentives to advocate for the interests of class members. To guard against less severe potential conflicts, lawyers should have to disclose the circumstances under which each named plaintiff became involved in a class action.

As detailed above in Chapter 4, TPLF is more frequently being used in class actions. Class counsel are secretly signing up "investors" (e.g., hedge funds) who pay those lawyers "up front" money to use as they wish in exchange for a right to receive a portion of whatever the class members and/or lawyers may ultimately be awarded. Generally, neither the court nor class members are told about (let alone approve) these side deals, which may give away class members' money and may cede control of the case to an outsider with no fiduciary duty to the class members. As a result, there is no way for the court to properly supervise the litigation, much less ascertain whether attorneys' fees will be impermissibly shared with a non-lawyer in derogation of applicable ethics rules or know whether an outsider with a pecuniary interest may undermine the named plaintiff's ability to adequately and fairly represent the class. Accordingly, just as the circumstances surrounding the named plaintiff's involvement in a case should be disclosed, so too should TPLF arrangements be made completely transparent as a matter of course in class actions.

"Generally, neither the court nor class members are told about (let alone approve) these [TPLF] deals, which may give away class members' money and may cede control of the case to an outsider with no fiduciary duty to the class members."

"... Congress should prohibit persons having familial or business relationships with counsel from serving as class representatives."

Structural Reforms

Finally, Congress should consider various structural reforms to make class actions fairer, more efficient, and more predictable. These include: (1) closing the "issues class" loophole; (2) expanding interlocutory review of class certification rulings; and (3) staying

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discovery during the pendency of threshold motions.

The Issues Class Problem

Another problem detailed in Chapter 5, *supra,* is the increasing frequency with which courts are certifying for class treatment particular issues—such as whether a washing machine has a design defect—and ordering classwide trials to resolve those inquiries. This growing trend is bad for our civil justice system because: (1) it undermines the administration of justice by sanctioning a highly inefficient system in which a single purportedly common issues trial is subsequently accompanied by endless individualized follow-on proceedings; (2) it unfairly prevents defendants from being able to present the jury with a full and fair picture of the claims at issue; and (3) it threatens to violate the Seventh Amendment's proscription against juries reexamining issues decided by a prior jury. Congress should address this problem by precluding issues classes unless the entirety of the cause of action from which the particular issue arises satisfies all of the class certification prerequisites of Rule 23, which is exactly the approach taken by the Fifth Circuit.[164] In other words, courts would no longer be able to skirt the commonality and predominance requirements by focusing solely on a single or series of supposedly common issues. The result would be a fairer civil justice system, and one that fully comports with more recent Supreme Court precedent governing class actions.

The Appellate Review Problem

One explanation for the continued filing of meritless class actions is the rarity with which class certification decisions receive interlocutory review under Fed. R. Civ. P. 23(f). In 1998, subdivision (f) was added to Rule 23, which allows for permissive interlocutory appeal of orders denying or granting class certification.[165] A driving impetus behind this amendment was to alleviate the coercive effect of class certification rulings on defendants.[166] According to one recent study, when circuit courts grant review of class certification decisions under the current discretionary standard, they overturn more than half of the district courts' certification decisions.[167] That statistic is especially telling given that federal appellate courts overall only grant Rule 23(f) petitions approximately 25% of the time.[168] In light of the

significantly high reversal rate of class certification decisions that are reviewed under Rule 23(f), it stands to reason that many erroneous certification decisions ultimately evade any appellate review, resulting in needless settlements and creating bad law that is potentially applied in other cases. Expansion of interlocutory review of class certification rulings (e.g., requiring federal courts to hear all appeals from all such rulings, whether brought by plaintiffs or defendants) would mitigate this problem and promote correctness and uniformity of class certification decisions.

The Coercive Discovery Problem

As detailed above in Chapter 3, the discovery process imposes huge costs on American businesses both because of the astronomical expense associated with discovery of electronic information and because cost-shifting is so rare. Because defendants obviously would prefer to avoid these exorbitant costs, discovery is all too often used as a weapon to coerce them to settle. One way to limit this problem is to defer any discovery until the trial court resolves any threshold motions to dismiss the case (or similar challenges) and thereby determines that the case has enough merit to proceed past the pleading stage. Although some federal courts already do that as a matter of course,[169] others allow costly discovery to proceed even before deciding if a case has any merit.[170] A uniform bar on discovery in putative class actions until threshold motions are decided would eliminate the checkerboard of standards applied by federal courts and protect parties from abusive and wasteful discovery requests.

The myriad problems posed by current class action practice are not a reason to sit idly by and throw up our hands. Instead, they should serve as an impetus for considering the range of pragmatic proposals outlined above, which individually (and in the aggregate) would help ensure that class benefits end up in the right place, increase transparency in the class action system and make class proceedings fairer and more efficient for parties and courts.

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Conclusion

Chapter

07

Originally conceived as a narrow procedural vehicle for vindicating alleged civil rights violations, the class action device has become a weapon for plaintiffs' attorneys hellbent on maximizing profit under the guise of consumer protection.

While some class actions are legitimate, from a consumer perspective, most serve little purpose. As the examples detailed in this paper illustrate, through the use of "fee-centric" settlements and *cy pres,* class actions yield few (if any) tangible benefits for American consumers. In addition, class actions are replete with ethical issues, with class counsel routinely engaging in self-dealing and increasingly ceding control over their lawsuits to financially interested third party funders. And even assuming that class actions do redress harm on a large scale—which they generally do not—they do so in an utterly inefficient manner through "no-injury" and "issues" classes. Accordingly, the time is ripe for enacting the kind of meaningful reforms discussed above in Chapter 6, which would both restore at least some confidence in the class action device and promote the fair and efficient administration of civil justice.

Endnotes

[1] *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'") (citation omitted).

[2] Jones Day, Update: *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2019-2020)*, at 1 (July 2021), https://www.jonesday.com/en/insights/2021/07/update-an-empirical-analysis-of-federal-consumer-fraud-class-action-settlements-(20192020).

[3] *See, e.g.*, Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 Boston Univ. Int'l L.J. 141, 142 (2010) ("Proponents argue that class actions can significantly enhance a victim's ability to obtain compensation, contribute to the overall efficiency in the administration of justice, and provide a strong deterrent to corporate malfeasance."); Ilana Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy - Permitting Foreign Claimants to Be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 Cornell L. Rev. 1563, 1564 n.2 (2005) ("Consumer advocates and government regulators champion the class action."); Sara Randazzo, *Consumer Activists Decry Bill to Limit Class-Action Lawsuits*, Wall St. J. (Feb. 22, 2017), https://www.wsj.com/articles/consumer-activists-decry-bill-to-limit-class-action-lawsuits-1487774269?mg=prod/com-wsj ("Consumer advocates say [consumer class actions] have forced companies to pull unsafe drugs and faulty products from shelves, and compensate buyers for goods sold under misleading claims, such as Volkswagen AG's diesel-engine vehicles.").

[4] *See Hesse v. Godiva Chocolatier, Inc.*, 463 F. Supp. 3d 453 (S.D.N.Y. 2020) (alleging that the phrase "Belgium 1926" on chocolate misled consumers into believing that the product was made in Belgium despite multiple disclosures to the contrary). As set forth in Chapter 3, *infra*, other frivolous consumer protection class actions abound, including allegations that, *inter alia*, a manufacturer of root beer deceptively misled consumers into believing that it contained primarily natural vanilla despite statements making clear that the flavoring was both natural and artificial; and that a food manufacturer deceived consumers into thinking products were manufactured in Mexico despite statements that they were "Made in the U.S.A."

[5] Arthur R. Miller, *The American Class Action: From Birth to Maturity*, 19 Theoretical Inquiries L. 1, 5 (2018); Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 Kan. L. Rev. 325, 327-28 (2017) ("The [class action] rule itself is rooted in the turbulent history of the civil rights movement of the 1960s and was designed to enhance civil rights enforcement .... The rule's rich history makes clear that the drafters infused this procedural mechanism with the capacity of being used to challenge racial inequality and subordination.").

[6] Malveaux, *supra* note 5, at 329-30.

[7] *Id.* at 330.

[8] "Civil rights class actions typically involve injunctive relief for the plaintiff class as the primary claim." Angelo N. Ancheta, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. Rev. 283, 283 n.3 (1985). "Ancillary claims for damages may be raised under 42 U.S.C. § 1983 (1982)." *Id.*

[9] *See* Miller, *supra* note 5, at 5.

[10] *See id.* at 6.

[11] *See id.*

[12] Charles Alan Wright, *Recent Changes in the Federal Rules of Civil Procedure*, 42 F.R.D. 552, 567 (1966) ("I would guess that we will not see in the immediate future very many actions which the court permits to be maintained as (b)(3) class actions, and where we do see this there will be a good deal of experimentation, as there must be, because the rule itself leaves so much up to the particular judge which he is going to have to work out.").

[13] Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 395 (1967).

[14] Linda S. Mullenix, *The Death of Democratic Dispute Resolution*, 107 Northwestern Univ. L. Rev. 511, 518-20 (2013).

[15] *See id.* at 519-23.

[16] Maureen Carroll, *Class Action Myopia*, 65 Duke L. J. 843, 862-63 (2016); *see also* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L. J. 399, 439 (2014) ("With the advent of the mass tort litigation crisis in the 1980s and 1990s, followed by the wave of consumer class actions in the twenty-first century, damage class actions now dominate the litigation landscape."). Though there is debate as to when the class action decidedly moved towards being a tool for aggregating mass tort litigation, at least one scholar points to a pair of early 1980s decisions by "two judicial mavericks" who "[u]nder the guise of managing litigation ... took on sole responsibility for significant policy problems" in the *Dalkon Shield* and *Agent Orange* litigations as the moment when "the link between the class action and dispersed mass tort litigation really emerge[d]." *See generally* David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. Penn. L. Rev. 1565, 1567-75 (2017).

[17] *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (class certification requirements not met where individuals were "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods [and] [s]ome ... suffer no physical injury") (citation omitted).

Such claims comprise a significant portion of multidistrict litigation (MDL) proceedings, in which cases that present similar factual circumstances are assembled before a single federal court for coordinated pretrial management, including discovery on common factual matters. Of the 185 MDL proceedings pending as of April 2022, 62 (or nearly 34%) involve mass tort product liability, personal injury actions. *See* MDL Statistics Report, Judicial Panel on Multidistrict Litigation (Apr. 15, 2022), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-April-15-2022.pdf.

[18] *See* Amanda Bronstad, *Consumer Class Actions Nearly Tripled in the Past Decade, Report Says*, Law.com (Oct. 23, 2019), https://www.law.com/nationallawjournal/2019/10/23/consumer-class-actions-nearly-tripled-in-the-past-decade-report-says; *see also, e.g.*, Jessica Miller, Nina Rose & Jordan Schwartz, *What One Firm's Filings Reveal About Labeling Class Actions*, Law360 (Mar. 11, 2021), https://www.law360.com/articles/1363703/what-one-firm-s-filings-reveal-about-labeling-class-actions; Jessica Miller, Jordan Schwartz & Anthony Balzano, *The State of Consumer Class Actions Amid COVID-19*, Law360 (Dec. 2, 2020), https://www.law360.com/articles/1332607/the-state-of-consumer-class-actions-amid-covid-19.

[19] *See* Lex Machina, *Consumer Protection Litigation Report 2021*, at 5 (Aug. 2021). Although the total number of consumer class action filings has essentially plateaued in 2020 and 2021, that is consistent with an overall decline in total civil cases (including individual consumer lawsuits) in 2020 and 2021, which is presumably attributable to the pandemic and related reasons. *See, e.g.*, 2020 Year-End Report on the Federal Judiciary, at 6; 2021 Year-End Report on the Federal Judiciary, at 8; Lex Machina, *supra*, at 5.

[20] *See* Carlton Fields, *The 2022 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 6 (2022).

[21] *Id.* at 7; *see also* Bronstad, *supra* note 18 ("The number of consumer protection class actions has nearly tripled in the past decade, with cases over data privacy and unwanted text messages behind the increase.").

[22] *See* Mullenix, *supra* note 16, at 439.

[23] *See id.*

[24] *See id.*

[25] Andrew Pincus, *Assessing The Value of Class Actions*, Law360 (Aug. 22, 2017), https://www.law360.com/articles/956215.

[26] Mayer Brown, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, U.S. Chamber of Commerce Institute for Legal Reform, at 1-2 (Dec. 11, 2013).

[27] Consumer Fin. Protection Bureau, *Arbitration Study: Report to Congress 2015*, at section 6, p. 37 (2015), http://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015.

[28] Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?*, at 1 (Sept. 12, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020282.

[29] Andrew Pincus, *Unstable Foundation, Our Broken Class Action System and How to Fix it*, U.S. Chamber of Commerce Institute for Legal Reform, at 4 (Oct. 2017).

[30] Jones Day, *supra* note 2, at 1.

[31] *Id.* at 1.

[32] *Hilsley v. Gen. Mills, Inc.*, No. 3:18-CV-00395-L-BLM, 2021 WL 2290782, at *1 (S.D. Cal. June 4, 2021).

[33] *Id.*

[34] *Id.* at *2.

[35] *Id.*

[36] *Id.* at *3.

[37] *Id.*

[38] *Id.* at *4.

[39] *Id.* at *3.

[40] *Id.* at *4.

[41] Adam Schulman, *Subway Footlong Sandwich Settlement Now on Appeal*, Competitive Enterprise Institute (Mar. 30, 2016), https://cei.org/blog/subway-footlong-sandwich-settlement-now-appeal.

[42] *In re Subway Footlong Sandwich Mktg. & Sales Pracs. Litig.*, 316 F.R.D. 240, 242-44 (E.D. Wis. 2016), *rev'd*, 869 F.3d 551 (7th Cir. 2017); 869 F.3d at 557.

[43] *Id.*

[44] *In re Subway Footlong Sandwich*, 869 F.3d at 557.

[45] *Id.*

[46] *Id.* at 554.

[47] *Id.* at 552.

[48] *Id.* at 553 (citation omitted).

[49] *Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628, 632 (9th Cir. 2020) (Kleinfeld, J., dissenting).

[50] *Id.*

[51] *Id.*

[52] *In re Vioxx Prods. Liab. Litig.*, No. 2:05-md-01657-EEF-DEK (E.D. La. filed Sept. 1, 2017).

[53] *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2018 U.S. Dist. LEXIS 165201, at *10-13 (E.D. La. Sept. 26, 2018); *see also* Snigdha Prakash & Vikki Valentine, *Timeline: The Rise and Fall of Vioxx*, NPR (Nov. 10, 2007), https://www.npr.org/2007/11/10/5470430/timeline-the-rise-and-fall-of-vioxx.

[54] *In re Vioxx*, 2018 U.S. Dist. LEXIS 165201, at *31.

[55] *See Ex Parte* Motion for Settlement Distribution Protocol, Distribution of Attorneys' Fees, Costs and Incentive Payment and Incorporated Memorandum in Support, Ex. 3, *Spillman v. RPM Pizza, LLC*, No. 3:10-cv-00349-BAJ-SCR, ECF No. 244-4 (M.D. La. 2013) (noting that disbursement to claimants was $3,795, with a $5,000 class representative payment).

[56] Final Distribution Order ¶ 7, *Spillman v. RPM Pizza, LLC*, No. 3:10-cv-00349-BAJ-SCR, ECF No. 245 (M.D. La. 2013).

[57] Jones Day, *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)*, at 1 (Apr. 2020), https://www.jonesday.com/en/insights/2020/04/empirical-analysis-consumer-fraud-class-action.

[58] Fed. Trade Comm'n, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* (Sept. 2019), https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf.

[59] Jay Edelson & Amy Hausmann, *Plaintiffs Bar Should Work to Raise Class Action Claims Rates*, Law360 (Mar. 7, 2022), https://www.law360.com/articles/1470619/plaintiffs-bar-should-work-to-raise-class-action-claims-rates; *see also* Gary E. Mason, *What's Wrong With Consumer Class Action Settlements?*, Law360 (Apr. 14, 2017), https://www.law360.com/articles/913600 ("In the first place, it is a well-known fact that consumer class actions will at best draw claims of about 10 percent.")

[60] Edelson & Hausmann, *supra* note 59; *see also* Patrick Perotti, *As Close As Possible: The Cy Pres Doctrine in the Class Action Context*, Attorney At Law Magazine (Mar. 2, 2017) (Patrick Perotti, a prominent class action attorney, explaining that "[w]hen a class action settles, a large percentage of people … forget about the notice and don't make a claim" and advocating for the use of the *cy pres* doctrine as the solution).

[61] Trial Lawyers Inc., *Lawyers Without Clients*, Manhattan Institute for Policy Research, at 6 (2016), https://media4.manhattan-institute.org/sites/default/files/TLI-0116.pdf; *see also* Isha Marathe, *Class Action Settlements Still Paid Largely in Paper Checks. But Plaintiffs Bar Is Pushing for Change*, Law.com (Feb. 18, 2022), https://www.law.com/legaltechnews/2022/02/18/class-action-settlements-still-paid-largely-in-paper-checks-but-plaintiffs-bar-is-pushing-for-change/ ("'The old guard' is really trying to dampen participation rates. They don't want too many people to claim the money because then the settlement costs would be too low.... 'Making sure people can't collect money is a way for some attorneys to mask their low settlements.'").

[62] *See* Jones Day, *supra* note 57, at 2 ("Many class actions involve class members who have suffered little or no injury. There are all too many plaintiffs who have not been harmed 'in any way, financial or otherwise.'") (quoting Deposition of Sarah Samet 141-51, *Samet v. Proctor & Gamble Co.*, No. 3:12-cv-01891, ECF No. 148-1 (N.D. Cal. filed Sept. 28, 2015)).

[63] *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

[64] *See In re LivingSocial Mktg. & Sales Prac. Litig.*, 298 F.R.D. 1, 5 (D.D.C. 2013).

[65] *Id.* at 6.

[66] *Id.* at 18-19.

[67] *See* Settlement Agreement & Release § 2.3, *In re LivingSocial Mktg. & Sales Prac. Litig.*, No. 1:11-mc-00472-ESH, ECF No. 24-1 (D.D.C. filed Oct. 19, 2012); *see also In re LivingSocial*, 298 F.R.D. at 7-8.

[68] *Id.* at 20, 23.

[69] No. 6:12-cv-803-Orl-31DAB, 2014 U.S. Dist. LEXIS 116616 (M.D. Fla. Aug. 21, 2014), *aff'd*, 618 F. App'x 624 (11th Cir. 2015).

[70] 618 F. App'x at 630.

[71] James M. Beck, *Cy Pres Abuse Poster Child*, Drug & Device Law Blog (Sept. 11, 2017), https://www.druganddevicelawblog.com/2017/09/cy-pres-abuse-poster-child.html.

[72] National Consumer Law Center, *Cy Pres Awards*, https://www.nclc.org/about-us/cy-pres-awards.html (last accessed Aug. 16, 2022) ("The National Consumer Law Center welcomes *cy pres* designations of unclaimed settlement funds from class action lawsuits, which are used to support our consumer rights work advancing the core interests of underlying class members.").

[73] *See, e.g.*, *Beck-Ellman v. Kaz USA, Inc.*, No. 3:10-CV-02134-H-DHB, 2013 WL 10102326, at *2 (S.D. Cal. June 11, 2013) (AARP as *cy pres* beneficiary); *In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 582 (N.D. Cal. 2015) (World Privacy Forum as *cy pres* beneficiary); *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936-LB, 2015 WL 758094, at *8 (N.D. Cal. Feb. 20, 2015) (approving *cy pres* settlement naming National Consumer Law Center as recipient, which represents consumers and files amicus briefs in other courts); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1266 (C.D. Cal. 2016) (similar).

[74] As the Supreme Court has recognized, "even a small chance of a devastating loss" inherent in most decisions to certify a class produces an *"in terrorem"* effect that often forces settlement independent of the merits of a case. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.") (citation omitted).

[75] Compl. ¶¶ 2, 22, *Amin v. Subway Rests., Inc.*, No. 4:21-cv-00498-JST (N.D. Cal. filed Jan. 1, 2021).

[76] First Am. Compl. ¶¶ 4, 7, *Amin v. Subway Rests., Inc.*, No. 4:21-cv-00498-JST (N.D. Cal. filed June 7, 2021).

[77] Hannah Albarazi, *Subway Beats Tuna Label Suit As Judge Notes Fishy Citations* (Oct. 7, 2021), https://www.law360.com/articles/1429357/subway-beats-tuna-label-suit-as-judge-notes-fishy-citations.

[78] Second Am. Compl. ¶ 4, *Amin v. Subway Rests., Inc.*, No. 4:21-cv-00498-JST (N.D. Cal. filed Nov. 8, 2021).

[79] Order Granting in Part and Denying in Part Motion to Dismiss at 5-7, *Amin v. Subway Rests., Inc.*, No. 4:21-cv-00498-JST, ECF No. 62 (N.D. Cal. entered July 7, 2022); *see* Third Am. Compl. ¶¶ 4, 6, *Amin v. Subway Rests., Inc.*, No. 4:21-cv-00498-JST, ECF No. 63 (N.D. Cal. filed July 28, 2022).

[80] *Sharpe v. A&W Concentrate Co.*, 481 F. Supp. 3d 94 (E.D.N.Y. 2020).

[81] *Sharpe v. A&W Concentrate Co.*, No. 19-CV-768 (BMC), 2021 WL 3721392, at *11 (E.D.N.Y. July 23, 2021).

[82] Order Granting Final Approval of Class Action Settlement, *Hesse v. Godiva Chocolatier, Inc.*, No. 1:19-cv-00972-AJN, ECF No. 135 (S.D.N.Y. entered Apr. 20, 2022).

[83] *See* Carlton Fields, The 2017 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation, at 17 (2017); *see also* Carlton Fields, *supra* note 20, at 4, 7 (noting that class action defense spending had increased "for the [s]eventh [s]traight [y]ear" to $3.37 billion).

[84] *See* David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. Pa. L. Rev. 1001, 1048 (2021) (noting that discovery is a "substantial" cost, often equaling one-quarter to one-third of litigation costs).

[85] *See* Martin Rowinski, *How Small Businesses Drive The American Economy*, Forbes (Mar. 25, 2022), https://www.forbes.com/sites/forbesbusinesscouncil/2022/03/25/how-small-businesses-drive-the-american-economy/?sh=414fc63a4169 ("Successful small businesses put money back into their local community through paychecks and taxes, which can support the creation of new small businesses and improve local public services.").

[86] Matthew Grimsley, *What Effect Will* Wal-Mart v. Dukes *Have on Small Businesses?*, 8 Ohio St. Entrep. Bus. L.J. 99, 116 (2013); *see also* William P. Barnette, *There Is No Conservative Case for Class Actions*, 22 Fed. Soc. Rev. 192, 193 (2021) ("Class actions are a huge problem for big corporations, but they are even more likely to be an existential threat for smaller businesses.").

[87] David McKnight and Paul Hinton, *Tort Liability Costs for Small Businesses*, U.S. Chamber of Commerce Institute for Legal Reform, at 2 (Oct. 2020).

[88] *See, e.g.*, Citizens Against Lawsuit Abuse, *Economic Benefits of Tort Reform*, at 9 (Sept. 2018), https://www.nfib.com/assets/CALA-FL-Economic-Impact-Report-2018-2.pdf (explaining that "[a]s [tort] reform ameliorates companies' expected liability from such products, they respond by lowering prices and increasing product offerings for items such as pharmaceuticals, safety equipment, and medical services and devices"); H.R. Rep. No. 115-25, at 4 (2017) ("[U]ltimately these costs are paid by consumers, workers, and investors, throughout the economy–because the diversion of hundreds of millions of dollars away from productive purposes, as well as the time and attention of entrepreneurs, means prices are higher, new products are not brought to market, and new jobs are not created."); Arbitration Agreements, 82 Fed. Reg. 33,210, 33,302 (July 19, 2017) (CFPB acknowledges "risk that some or potentially even all [class action litigation] costs will be passed through to consumers"); Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique, Mercatus Working Paper* at 33, Mercatus Center at George Mason University, Arlington, VA (Aug. 2015) ("As an empirical matter, evidence shows that financial products firms do pass on changes in their costs.").

[89] Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 3 (1991); *see also* Kevin M. Lewis & Wilson C. Freeman, *Class Action Lawsuits: A Legal Overview for the 115th Congress*, Congressional Research Service, at 6 (2018) ("Just as class members usually have no direct control over the class representative, class members also typically 'have no control over class counsel.'").

[90] Lewis & Freeman, *supra* note 89, at 6.

[91] *See* Fed. R. Civ. P. 23(a)(4); Jason Jarvis, *A New Approach to Plaintiff Incentive Fees in Class Action Lawsuits*, 115 Northwestern Univ. L. Rev. 919, 927 (2020) ("The responsibilities of named plaintiffs include sitting for depositions, approving any settlement terms, and generally monitoring and corresponding with class counsel.").

[92] *See, e.g.*, *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603 (N.D. Cal. 2009) (lead plaintiffs consisted of an uncle of one class counsel and others knew class counsel in business and social contexts); *Nakamura v. Countrywide Home Loans, Inc.*, 225 P.3d 680 (Cal. Ct. App. 2010) (lead plaintiff's brother was a partner of firm representing class); *O'Shea v. Epson Am., Inc.*, No. CV 09-8063 PSG CWX, 2011 WL 4352458 (C.D. Cal. Sept. 19, 2011) (lead plaintiff was a former attorney at class counsel's firm), *aff'd sub nom. Rogers v. Epson Am., Inc.*, 648 F. App'x 717 (9th Cir. 2016); *Alhassid v. Bank of Am.*, 307 F.R.D. 684 (S.D. Fla. 2015) (class counsel was the daughter and son-in-law of putative lead plaintiff).

[93] Mayer Brown, *supra* note 26, at 5-6 ("These voluntary dismissals represent 30 percent of all cases studied, or 35 percent of cases that reached a resolution by the beginning of September 2013. In fourteen of the cases that were voluntarily dismissed—approximately one third of all voluntary dismissals in the data set—the dismissal papers, other docket entries, or contemporaneous news reports made clear that the parties were settling the claim on an individual basis, although the terms of those settlements were not available. Many of the remaining voluntary dismissals also may have resulted from individual settlements.").

[94] *See* Christina L. Feege et al., *Stealth Class Actions*, Littler Archive, at 1 (Jan. 31, 2005), https://www.littler.com/files/press/pdf/11456.pdf.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] Elaine Watson, *Food Litigation 101: Are you up to speed?*, FoodNavigator-USA (Nov. 29, 2016), https://www.foodnavigator-usa.com/Article/2016/11/29/FOOD-LITIGATION-TRENDS-101-Are-you-up-to-speed?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright.

[99] Nicholas Malfitano, *Cozen lawyers hoped 'gotcha' COVID-19 lawsuits wouldn't happen, say they've been disappointed*, Penn. Record (July 23, 2020), https://pennrecord.com/stories/543253605-cozen-lawyers-hoped-gotcha-covid-19-lawsuits-wouldn-t-happen-say-they-ve-been-disappointed.

[100] *See* Lisa Miller, *Perils of Third-Party Funding*, Los Angeles Lawyer, at 23 (Mar. 2017) ("The overall growth in third-party litigation funding extends to class actions."); *see also* Editorial Board, *Looting the Boy Scouts: The mass tort industry gins up thousands of dubious claims*, Wall St. J. (Mar. 2, 2021) ("Behind this assault is a sophisticated new tort machine that leverages Wall Street litigation funding, third-party brokers to collect and commoditize claims, and sweeping online marketing that recruits and coaches claimants. This is the new mass tort industry.").

[101] Model Rule 5.4(a) prohibits an attorney or law firm from sharing legal fees with a nonlawyer except in limited circumstances. *See* Model Rules of Prof'l Conduct, R. 5.4(a). "As stated in the comments to Rule 5.4, this prohibition is intended to 'protect the lawyer's professional independence of judgment.'" Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1291-1292 (2011) (quoting Model Rules of Prof'l Conduct, R. 5.4 cmt. (2003)).

[102] *See* Robert Huffman & Robert Salcido, *Blowing the Whistle on* Qui Tam *Suits and Third-Party Litigation Funding: The Case for Disclosure to the Department of Justice*, 50 Pub. Cont. L.J. 343, 344 (2021).

[103] *See Third-Party Litigation Funding: A Review of Recent Industry Developments*, IADC Defense Counsel Journal (Jan. 30, 2020), https://www.bradley.com/insights/publications/2020/01/third-party-litigation-funding-a-review-of-recent-industry-developments.

[104] Rob Copeland, *Hedge-Fund Manager's Next Frontier: Lawsuits*, Wall St. J. (Mar. 9, 2015), http://www.wsj.com/articles/hedge-fund-managers-next-frontier-lawsuits-1425940706.

[105] Ben Hancock, *New Litigation Funding Rule Seen as "Harbinger" for Shadowy Industry*, The Recorder (Jan. 25, 2017), https://www.law.com/therecorder/almID/1202777609784/New-Litigation-Funding-Rule-Seen-as-Harbinger-for-Shadowy-Industry/?slreturn=20190902111717.

[106] *See generally Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 U.S. Dist. LEXIS 103594 (N.D. Cal. Aug. 5, 2016).

[107] *Id.* at *6.

[108] Litigation Funding Agreement §§ 1.1, 10.1, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, ECF No. 186-4 (N.D. Cal. Sept. 16, 2016).

[109] *Id.* § 10.1.

[110] *Id.* § 10.2.4.

[111] *Id.* § 3.1.3.

[112] *Gbarabe*, 2016 U.S. Dist. LEXIS 103594, at *4-5.

[113] Ultimately, the district court denied certification in *Gbarabe* on several grounds, including adequacy of representation. Although the court did not expressly tie the TPLF agreement to its ruling on adequacy, it did find that plaintiffs' counsel "failed to diligently prosecute this case" – a failure the court suggested may have

been linked to their struggle in securing funding early on in the litigation. *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2017 WL 956628, at *7 n.7, *35 (N.D. Cal. Mar. 13, 2017).

[114] *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002).

[115] *See, e.g.*, *Lee v. Gen. Motors Corp.*, 950 F. Supp. 170, 174 (S.D. Miss. 1996) (dismissing all of the plaintiffs' claims because their vehicles had operated without any problems or difficulties for multiple years); *Yost v. Gen. Motors Corp.*, 651 F. Supp. 656, 657 (D.N.J. 1986) ("The basic problem in this case [was] that plaintiff Yost ha[d] not alleged that he ha[d] suffered any damages.... All he [was] able to allege [was] that the potential leak [was] 'likely' to cause damage and 'may' create potential safety hazards.").

[116] *See, e.g.*, *In re Bridgestone/Firestone, Inc.*, 288 F.3d at 1017 (decertifying nationwide consumer fraud and breach of warranty class involving allegations of defective tires, reasoning that "[i]f tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation"); *Burton v. Chrysler Grp. LLC*, No. 8:10-00209-MGL, 2012 U.S. Dist. LEXIS 186720, at *21 (D.S.C. Dec. 21, 2012) (proposed nationwide class "would ... include those persons and entities who never experienced problems" with their vehicles, a "problem ... highlight[ing] the lack of ... typicality among putative class members").

[117] No. 1:19-CV-726, 2021 WL 4147766 (S.D. Ohio Sept. 12, 2021).

[118] *Id.* at *16.

[119] 722 F.3d 838, 844 (6th Cir. 2013).

[120] *Id.* at 849.

[121] *Id.*

[122] *Id.* at 857.

[123] 617 F.3d 1168, 1170 (9th Cir. 2010).

[124] *Id.*

[125] *Id.* at 1176.

[126] *See Concepcion*, 563 U.S. at 350 ("even a small chance of a devastating loss" inherent in most decisions to certify a class produces an *"in terrorem"* effect that often forces settlement independent of the merits of a case); *see also Castano*, 84 F.3d at 746 ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.") (citation omitted).

[127] Bruce Hoffman, *Remarks, Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition).

[128] *See Supreme Laundry List*, Wall St. J. (Oct. 9, 2012) ("Without the governor of common injury required by *Wal-Mart*, product liability suits and consumer class actions become the tool of plaintiffs[']lawyers who gin up massive claims in the hope that companies will settle.").

[129] *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991); *see also* H.R. Rep. No. 115-25, at 4 (2017) ("[U]ltimately these costs are paid by consumers, workers, and investors, throughout the economy–because the diversion of hundreds of millions of dollars away from productive purposes, as well as the time and attention of entrepreneurs, means prices are higher, new products are not brought to market, and new jobs are not created.").

[130] *See Willett*, 929 F.2d at 1100 n.20.

[131] *Id.*; *see also, e.g.*, Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004) ("Class actions have had an economic impact as well.... Businesses spend millions of dollars each year to defend against the filing and even the threat of frivolous class action lawsuits. Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices.") (citation omitted).

[132] 288 F.3d at 1017 n.1.

[133] 141 S. Ct. 2190 (2021).

[134] *Id.* at 2210.

[135] *Id.* at 2214.

[136] William D. Thomson, *Supreme Court Precludes Unharmed Class Members from Recovering for Technical Statutory Violations* (June 29, 2021), https://www.stinson.com/newsroom-publications-supreme-court-precludes-unharmed-class-members-from-recovering-for-technical-statutory-violations; *see also* Anthony C. LoMonaco, *Supreme Court Clarifies Standing Requirements – Implications for Class Action Defendants in Data Security, Privacy, and False Advertising Cases* (Aug. 20, 2021), https://www.pbwt.com/misbranded/supreme-court-clarifies-standing-requirements-implications-for-class-action-defendants-in-data-security-privacy-and-false-advertising-cases-2 (noting that in "price premium" false advertising cases, *TransUnion* may provide a "strong defense that the plaintiff lacks standing" where "a consumer may not have suffered any injury or even truly cared about the attribute that, according to their pleadings, was important in their purchasing decision").

[137] *In re Coca-Cola Prods. Mktg. & Sales Pracs. Litig. (No. II)*, No. 20-15742, 2021 WL 3878654, at *2 (9th Cir. Aug. 31, 2021).

[138] *Id.* (quoting *TransUnion* that an "asserted informational injury that causes no adverse effects cannot satisfy Article III").

[139] Fed. R. Civ. P. 23(b)(3).

[140] Fed. R. Civ. P. 23(c)(4).

[141] *Castano*, 84 F.3d at 745 n.21.

[142] Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 764 (2003); *id.* at 711-712 ("This Article contends that neither (c)(4)(A)'s text, its structural placement, nor its rulemaking history provide support for an adventurous interpretation of the provision."); *see also* Mark A. Perry, *Issue Certification Under Rule 23(c)(4): A Reappraisal*, 62 DePaul L. Rev. 733, 741 (2013) ("In 1996, the advisory committee considered—and rejected—an amendment to Rule 23(c)(4) that would have referenced 'claims' and 'defenses' in addition to 'issues.' Professor Coffee's proposal would have courts read the rule as if it had been amended; but it was not. The language and structure of Rule 23 confirm that claims and defenses are not 'issues.'") (footnote omitted).

[143] *Castano*, 84 F.3d at 745 n.21.

[144] *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405 (6th Cir. 2018).

[145] *Id.* at 410.

[146] *Id.*

[147] *Id.* at 416.

[148] *See Martin v. Behr Dayton Thermal Prods. LLC*, No. 3:08-cv-00326 (S.D. Ohio).

[149] *McGaffin v. Argos USA, LLC*, No. 416CV00104RSBBKE, 2020 WL 3491609, at *5 (S.D. Ga. June 26, 2020).

[150] *Rahman v. Mott's LLP*, No. 13-CV-03482-SI, 2014 WL 6815779, at *9 (N.D. Cal. Dec. 3, 2014) (noting that court had earlier granted class certification as to "the issues of causation and defect, leaving the question of damages" to later follow-on trials, which would require "immense" "costs and delay[s]," making settlement attractive) *aff'd*, 693 F. App'x 578 (9th Cir. 2017).

[151] *See, e.g.*, *In re Paxil Litig.*, 212 F.R.D. 539, 547 (C.D. Cal. 2003) (refusing to certify class to resolve the purportedly "common" issue of general causation because such a trial would unfairly rob the defendant of the ability to present individualized "evidence rebutting the existence or cause of" the plaintiffs' alleged illnesses); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (rejecting issues class that "would have allowed generic causation to be determined without regard to those characteristics and the individual's exposure" as unfair and inefficient).

[152] U.S. Const. amend. VII ("[N]o fact tried by a jury, shall be otherwise reexamined in any [c]ourt of the United States ....").

[153] *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 698-99 (N.D. Ga. 2008).

[154] 28 U.S.C. § 2072(b).

[155] *See Schwab v. Philip Morris USA, Inc.*, No. CV 04-1945 (JBW), 2005 U.S. Dist. LEXIS 27469, at *13 (E.D.N.Y. Nov. 14, 2005) (noting that "courts must stay within the bounds of due process and avoid altering substantive law in violation of the Rules Enabling Act when shaping the remedies in Rule 23(b)(3) actions"); *see also Amchem*, 521 U.S. at 620 (noting that the Rules Enabling Act "limits judicial inventiveness" with respect to Rule 23).

[156] *In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d 1097, 1105 (D.N.M. 2012); *see also Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("The Federal Rules of Civil Procedure cannot work as substantive law. This core stricture demands a narrow construction of Rule 23, which must be 'applied with the interests of absent class members in close view.'") (footnote omitted) (quoting *Amchem*, 521 U.S. at 629).

[157] Mullenix, *supra* note 16, at 420.

[158] Linda Sandstrom Simard, *A View from Within the Fortune 500: An Empirical Study of Negative Value Class Actions and Deterrence*, 47 Ind. L. Rev. 739, 771 (2014).

[159] *Id.*

[160] Mullenix, *supra* note 16, at 420.

[161] *Id.* at 420-21.

[162] *See, e.g.*, Karin Matussek, *How U.S. and EU Differ in Handling Volkswagen Diesel Scandal* (June 29, 2016), https://www.insurancejournal.com/news/national/2016/06/29/418590.htm; *EU demands Volkswagen compensate all EU purchasers*, euobserver (Sept. 29, 2021), https://euobserver.com/climate/153063.

[163] Am. Law Inst., *Principles of the Law of Aggregate Litigation* § 3.07 cmt. b (2010); *accord Klier*, 658 F.3d at 474 ("The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.").

[164] *See Castano*, 84 F.3d at 745 n.21 ("The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.").

[165] *See* Fed. R. Civ. P. 23.

[166] *See* Fed. R. Civ. P. 23 advisory committee's note to 1998 amendments ("An order granting certification … may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

[167] *See* Bryan Lammon, *An Empirical Study of Class-Action Appeals*, J. of App. Prac. & Process (forthcoming 2022), at 23 (2020).

[168] *Id.* at 22.

[169] *See In re Mednax Servs., Inc., Customer Data Sec. Breach Litig.*, No. 21-MD-02994-RAR, 2021 U.S. Dist. LEXIS 195342, at *12 (S.D. Fla. Oct. 9, 2021) ("[G]iven the presence of jurisdictional and facial challenges to all of [p]laintiffs' claims, a temporary stay of discovery is warranted to save counsel, the parties, and the [c]ourt significant time and effort.").

[170] *See Nichols v. State Farm Mut. Auto. Ins. Co*., No. 2:22-cv-16, 2022 U.S. Dist. LEXIS 72551, at *5-7 (S.D. Ohio Apr. 20, 2022) ("[T]he [c]ourt is not convinced, as [d]efendant suggests, that the particular status of this case as a putative statewide class action weighs in favor of a complete stay.").

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