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# CONSUMER CLASS ACTIONS: WHO ARE THE REAL WINNERS?

## EDWARD S. GODFREY DISTINGUISHED VISITING PROFESSOR LECTURE

*Edward F. Sherman*<sup>1</sup>

The class action is one of the most controversial procedural devices in the American legal system. In the years since an expanded class action rule was adopted in 1966, class actions have grown in scope and number, and suits by consumers have accounted for an increasing share of class actions suits.<sup>2</sup> By allowing individuals to sue not only for themselves, but also on behalf of others similarly situated, the class action “empowers plaintiffs to bring cases that otherwise either would not be possible or would only be possible in a very different form.”<sup>3</sup> Business critics see this as enabling “lawyers [to] seek out opportunities to bring these large-scale suits in the expectation that they will receive large fees, whether or not the suit has underlying merit and whether or not the individuals on whose behalf the suit is brought benefit significantly from its resolution.”<sup>4</sup> Consumer advocates, on the other hand, see it as providing “a means of bringing a legal action on behalf of a large number of consumers who may be harmed when corporations engage in wrongful behavior” that can “succeed in eliminating inappropriate business practices that would otherwise impose unwarranted costs on individuals.”<sup>5</sup>

Other countries have eyed the American class action with both interest and suspicion. They recognize that the traditional single-party model of adjudication is often not suited to modern society when many persons may be harmed by the same conduct, product, or environmental condition. But they are wary of what they have heard about American class actions. When a class action rule was being considered in Australia, a government report stated:

A major reason for the Australian reticence about class actions is the horror stories from the United States. A *Fortune Magazine* headline says it all—*Lawyers from hell: slip up and guys like these will bankrupt your company*. A picture is

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1. Professor of Law, Tulane Law School. A.B., Georgetown University, 1959; M.A., University of Texas, 1962, 1967; J.D., 1962, S.J.D., 1981, Harvard Law School. In the fall of 2003, Professor Sherman visited the University of Maine School of Law as one of the Godfrey Distinguished Visiting Professors. An earlier version of this paper was presented as the Godfrey Lecture at the University of Maine School of Law on November 12, 2003.

2. Comprehensive statistics on the nature of class actions in state and federal courts do not exist, but the 2000 Rand Report found an increase in consumer class actions in reported judicial decisions and press and business reports. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 58-59 (Rand Institute for Civil Justice 2000), available at [www.rand.org/publications/MR/MR969](http://www.rand.org/publications/MR/MR969). “Two-thirds of the consumer cases resulting in reported judicial opinions involved either allegations of improperly calculated or excessive fees or more general allegations of ‘fraudulent business practices.’ A much smaller fraction (13 percent) involved charges of antitrust violations.” *Id.* at 54.

3. *Id.* at 9.

4. *Id.* at 4.

5. *Id.*

painted of aggressive plaintiff lawyers conjuring massive class claims based on spurious product faults, ruining a company financially with no social benefit. The lawyers are regarded as the villains, often being the main financial beneficiaries of the litigation.<sup>6</sup>

Despite the bad press, several countries have adopted, or are considering, some form of class action.<sup>7</sup> The class action serves the interests of economy by not having to try the same issues again and again in separate cases. It also serves the interests of consistency and finality by avoiding inconsistent outcomes in separate trials of similar cases and resolving all claims in a single case. In the consumer context, it provides access to the courts for persons who cannot themselves afford to sue. On the other hand, if there is insufficient commonality of interest among the class members, class treatment can deprive them and the defendant of an individualized determination of their disputes. Since the plaintiff is usually self-appointed, any person (or perhaps more properly any lawyer willing to finance a class action) can subject a defendant to the risks of a suit on behalf of a large group of persons. A class action affects the bargaining power of the parties, enabling plaintiffs to command more litigation resources by combining their cases and giving them greater leverage by compounding the defendant's risk of loss.

#### I. EVOLUTION OF THE CLASS ACTION

The American class action was the invention of equity, originally allowed in the limited situation when joint rights or rights against a specific property were asserted.<sup>8</sup> An example is the 1921 case *Supreme Tribe of Ben-Hur v. Cauble*.<sup>9</sup> Several members of the fraternal organization were allowed to sue on behalf of all 70,000 members to overturn a reorganization that had unfavorably reclassified their insurance certificates.<sup>10</sup> The class members all had a joint property interest that was threatened by the same act of the defendant.<sup>11</sup> However, suits involving such a close identity of interests are not common, and class actions at that time were still rare. The great change came in 1966 when the federal class action rule, Rule 23, was amended. In addition to providing for limited situations like *Ben Hur* where there was a close identity of interests, the new rule added two new categories of class actions.<sup>12</sup>

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6. *Proposal for a New Supreme Court Rule on Representative Proceedings in NSW to the Supreme Court Rule Committee*, 1998 CENTRE FOR LEGAL PROCESS OF THE NSW L. FOUND. & PUBL. INT. ADVOC. CENTRE 12.

7. See Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311 (2003); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401 (2002).

8. For differing views on the origins of class actions, compare ZECHARIAH CHAFFE, JR., *SOME PROBLEMS OF EQUITY* (1950) (discussing the English "Bill of Peace" allowing representative plaintiffs to represent the interests of a group) with STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987) (discussing medieval English representative actions for communal harm).

9. 255 U.S. 356 (1921).

10. *Id.* at 357.

11. *Id.*

12. See FED. R. CIV. P. 23(b)(1)(A) (when separate suits would risk inconsistent adjudications that would establish "incompatible standards" for the party opposing the class); FED. R. CIV. P. 23(b)(1)(B) (when separate suits would, as a practical matter, impede the ability of other persons to protect their interests in a common property or right, e.g., a "limited fund" where the claims of the class members exceed the defendant's assets, and separate suits could leave nothing for other potential class members).

The first category applies to suits for injunctive or declaratory relief against a party who "has acted or refused to act on grounds generally applicable to the class."<sup>13</sup> The paradigms are the "civil rights" suits of the 1960s and 1970s that helped bring an end to segregation and enforced the civil rights acts, and the "institutional reform" suits of the 1970s and 1980s that applied constitutional and statutory standards to institutions like prisons, mental hospitals, and welfare departments.<sup>14</sup> The principal defendants were often either governmental agencies or companies charged with unfair employment practices, and although there were complaints of abusive class actions, many class actions were successful, and significant reforms were sometimes achieved.

The second category of class action, known as a "(b)(3) class action," was more problematic. All that is required is that "questions of law or fact common to the members of the class predominate" and that a class action is "superior" to other available methods for the adjudication of the controversy.<sup>15</sup> Unlike the other categories, a (b)(3) class action can be for monetary damages, and so there was now money to be had, providing new entrepreneurial incentives for the plaintiffs' bar.

The 1966 amendments did not result in an immediate flood of class actions, and in the first couple of decades, most (b)(3) class actions were antitrust, securities, and civil rights suits.<sup>16</sup> Based on federal statutes, they did not present serious problems as to conflict of laws, identity of interests, or determination of damages. However, by the 1980s, class action suits were being filed for a broad spectrum of mass tort, product liability, commercial, and consumer claims under state law.<sup>17</sup> Class actions for mass torts arising from an accident, product defect, or exposure to a harmful substance have been highly controversial. The advisory committee to the federal rules had commented that mass torts are inappropriate for class certification.<sup>18</sup> However, as the courts became swamped with individual suits arising out of the same products—*asbestos, Agent Orange, Dalkon Shield, PCB's, breast implants*—judges turned to class actions as a means of avoiding the delay and expense of trying separate suits.<sup>19</sup> Mass torts, however, often involve individualized circumstances as to a class member's exposure or use of a product, as well as to damages, and class certification is still hard to come by in such cases.<sup>20</sup>

## II. EXPANDING CONSUMER CLASS ACTIONS

In recent years, consumer class actions have come to the fore and have even overshadowed mass torts as the bane of American business. Class actions on behalf of consumers, whether for defective products or improper or deceptive busi-

13. FED. R. CIV. P. 23(b)(2).

14. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (describing a "public law" model of litigation).

15. See FED. R. CIV. P. 23(b)(3).

16. HENSLER ET AL., *supra* note 2, at 52.

17. *Id.* at 51-61.

18. 39 F.R.D. 69, 103 (1966) advisory committee's note (commenting on the 1966 Amendments to Rule 23).

19. See Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 288.

20. See, e.g., *Southwest Ref. Co. v. Bernal*, 22 S.W.3d 425, 436-39 (Tex. 2000) (denying certification of a class of persons exposed to toxic substances resulting from an explosion and citing other federal circuit court decisions finding a lack of predominance of common questions in mass torts).

ness practices have dogged manufacturers and such service industries as insurance, banking and finance, credit reporting, and telecommunications.<sup>21</sup> Virtually every American has been a member of some class action, whether against airlines or CD makers for price fixing, credit card companies for unauthorized fees, utilities or cable companies for improper charges, cell phone companies for inadequate service, health care providers for improper practices, or computer enterprises for hardware and software failures. Unlike mass tort suits for personal injuries, consumer class actions often seek only economic damages in the form of refunds, payment for related losses, or statutory penalties.

Defendants in consumer cases have strenuously opposed class certification, even though it might avoid a multiplicity of suits, relying on the lack of interest or financial ability of most consumers to bring their own lawsuits. Realistically, if a class action can be avoided, a defendant is likely to be relieved of sizable liabilities for any particular consumer complaint. Nevertheless, a large percentage of consumer class actions are settled, with the defendant bargaining at that point for a broad definition of the class that will preclude similar suits in the future.<sup>22</sup>

Business and industry maintain that the economic risk of a class action can force them to settle weak or frivolous suits. Judge Richard Posner noted the intense pressure on class action defendants to settle, forcing them "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability" rather than risk a high jury award.<sup>23</sup> On the other hand, consumer organizations contend that frivolous suits can be removed by dismissal or summary judgment<sup>24</sup> and that the vast majority of consumer class actions are based on wrongful conduct by businesses.<sup>25</sup>

Perhaps the most complex issue surrounding consumer class actions is whether their social benefits outweigh their costs. According to a report by the Rand Institute for Civil Justice (Rand Report), the most comprehensive study of class actions conducted to date, this is "a deeply political question, implicating fundamental beliefs about the structure of the political system, the nature of society, and the roles of courts and law in society."<sup>26</sup> We have to recognize that there will often be a fundamental disagreement about the importance of the conflicting costs and benefits and whether those benefits could be achieved by other means. Thus, assessment of both cost-benefit factors and fundamental values is implicit in answering the question "Who are the real winners?"

### III. WHO ARE THE REAL WINNERS IN CONSUMER CLASS ACTIONS?

#### A. Class Members

Media reports of class action cases in which the lawyers received fees totaling millions of dollars while the class members received only small sums are troubling

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21. See HENSLER ET AL., *supra* note 2, at 54-57.

22. *Id.* at 126 n.52, 406-10.

23. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

24. See HENSLER ET AL., *supra* note 2, at 475; THOMAS E. WILLGING ET AL., *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 171* tbl.24 (Federal Judicial Center, 1996).

25. See HENSLER ET AL., *supra* note 2, at 50.

26. *Id.* at 472.

for many citizens.<sup>27</sup> A typical response is reflected in a *Washington Post* editorial that objected that class members may be “unaware” of the existence of a class or “dissatisfied” with it, and may only “get token payments while the lawyers receive enormous fees.”<sup>28</sup> This bears further scrutiny.

First, class members in a damage suit do have a right to notice of a class action and to “opt out” for any reason, such as antagonism towards the suit or a desire to pursue their own suit.<sup>29</sup> Notice has to be sent by a personal letter when the names and addresses of class members can be determined; however when, as in some consumer class actions, the names and addresses of purchasers or customers are not available, notice can be given through publication.<sup>30</sup> Since a high percentage of consumer class actions are settled, notice often comes when the parties have entered a settlement agreement and the court has approved it subject to notice, right to opt out, and opportunity to object by the class members.<sup>31</sup>

It is true that the percentage of opt outs is typically very small, an indication, say class action critics, of lack of interest by class members. Class action advocates, however, say that many class members lack the information and financial ability to file their own suit, but are happy to stay in a class action and let the class plaintiffs and attorneys bear the expenses of litigation that may result in some recovery to them. The Rand Report commented:

Most individuals are too preoccupied with daily life and too uninformed about the law to pay attention to whether they are being overcharged or otherwise inappropriately treated by those with whom they do business. Even if they believe that there is something inappropriate about a transaction, individuals are likely just to “lump it,” rather than expend the time and energy necessary to remedy a perceived wrong.<sup>32</sup>

Business groups, however, have long supported replacing the “opt out” with a requirement that a class member “opt in.”<sup>33</sup> Assuming that many class members

27. The Rand Report noted that:

to some observers, it seems inappropriate in most, if not all, circumstances for the plaintiff attorneys to pocket more in fees than the class members receive in the aggregate. Moreover, when—as in the case in small damage class actions—the attorneys pocket much more than any one individual class member receives as a result of the suit, many feel that it is a clear indication that something has gone awry in the process.

*Id.* at 83.

28. See *Making Justice Work*, WASH. POST, Nov. 25, 2002, at A14.

29. FED. R. CIV. P. 23(c)(2).

30. See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); HENSLER ET AL., *supra* note 2, at 74-75. In *Scott v. American Tobacco Co.*, 96-8461 (La. Civ. Dist. Ct. 4/16/97), a lengthy review of notice options and analysis resulted in the Court rejecting the need to mail notices to lists of class members, instead ordering a massive media program. Todd B. Hilsee, *Class Action Notice—How, Why, When and Where the Due Process Rubber Meets the Road* 6 n.14 (2002) (on file with The Maine Law Review).

31. See HENSLER ET AL., *supra* note 2, at 108-14.

32. *Id.* at 68.

33. See Testimony of Alfred W. Cortese, Jr., on Behalf of Lawyers for Civil Justice, to the Advisory Committee on Civil Rules (Feb. 13, 2002) (“Many significant problems of fundamental fairness, due process, justiciability, and the right to trial by jury are created because the default mechanism under Rule 23 is opt-out rather than opt-in.”). See also Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 94 (“By establishing membership in the class through the inherently passive procedure of opt-out, Rule 23 creates a framework for litigation that undermines the essential premises of the private compensatory model of adjudication.”) (internal footnote omitted).

will not take the trouble to "opt in" in consumer class actions for small amounts, defendants would be faced with much smaller classes and therefore much smaller damages.

Although the notice and opt-out procedures may not be given much attention by many class members, these procedures seek to insure due process by seeing that class members' claims are not settled without their consent. However, the form of notice has been heavily criticized as difficult for a layperson to understand. This has led to a recent amendment of the class action rule to require that "notice must concisely and clearly state in plain, easily understood language" the information concerning the class action and class members' rights.<sup>34</sup> Models for "plain language" notices have been promulgated by the Federal Judicial Center and others.<sup>35</sup>

Second, the *Washington Post* editorial's objection that class members only get "token payments" needs to be examined. There are certainly consumer class actions in which substantial sums are recovered for the class members, for example, the return of price-fixing profits or unauthorized overcharges by sellers, insurance companies, or banks to large customers. Sizable recoveries, sometimes in the hundreds of thousands of dollars, have also been made in class actions brought on behalf of employees or agents concerning pay, improper subtractions, pensions, and entitlements.

In many consumer class actions, however, the amount of individual damages may be quite small.<sup>36</sup> But it must be kept in mind that the objective of consumer class actions is not only compensation, but also deterrence and disgorgement of wrongful profits. The reporter to the advisory committee that drafted the 1966 class action rule noted that class actions were intended "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."<sup>37</sup> Most "negative value" cases, where the expected recovery is less than the cost of litigation, would not be litigated if there were no class actions, and thus wrongdoers might never have to answer for their conduct. A small recovery is arguably not the only benefit that a class member receives. He also receives the satisfaction of knowing that the defendant will have to pay all the class members for their losses and disgorge any unlawful profits, hopefully to deter such conduct in the future.

In some cases, each class member's compensatory damages are so small that it would cost more to administer a claims process and to issue and mail out checks than the value of the check. In such cases, courts may be willing to approve a "fluid recovery," applying part or all of the damages to some project that is related to the injury done, such as making a polluter plant trees and build a park in the affected area, or finance an antitrust center in a law school. Judge D. Brock Hornby,

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34. FED. R. CIV. P. 23(c)(2)(B).

35. See Todd B. Hilsee & Teresa LeClercq, *The Federal Judicial Center's Model Plain Language Class Action Notices: A New Tool for Practitioners and the Judiciary*, CLASS ACTION LITIG. REP. (BNA) (Mar. 14, 2003) at 182; Katherine Kinsella, *The Plain Language Tool Kit for Class Action Notice*, CLASS ACTION LITIG. REP. (BNA) (Oct. 25, 2002) at 157.

36. The Rand Report's study of six consumer class actions found that the average class member's recovery ranged from \$5.57 to \$1,478. The total recovery on behalf of the class ranged from a low of about \$270,000 to a high of over \$11 million. HENSLER ET AL., *supra* note 2, at 428.

37. Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497 (1969).

in the *In re Compact Disc Minimum Advertised Price Antitrust Litigation*,<sup>38</sup> noted the difficulty in trying to identify the purchasers of CDs who had paid inflated prices when people do not usually keep records of such purchases. He approved a settlement that would pay some \$13 to each claimant no matter how many CDs she had bought, but would also distribute 5.6 million CDs for public use in libraries and educational institutions on a pro rata basis to every state. In such cases, the class member is deemed to benefit from the support given to an activity related to his cause of action.

One of the most criticized aspects of consumer class actions has been the use of "coupon settlements."<sup>39</sup> There are cases where the recovery for each class member would be small and a discount or coupon for future purchases is worth more to the class member than it costs to the defendant. This can be fair where class members will have to continue buying the defendant's service—as in a suit for overcharges by a utility. However, a coupon discount to be applied to further purchases of a service or product that was alleged to be deficient is of more doubtful value. For example, class members in a suit claiming a product defect in certain Ford pickup trucks were given a nontransferable coupon for \$1000 off the purchase of a new Ford pickup, which could, alternatively, be exchanged for a \$500 coupon transferable to someone who wanted to buy a GM vehicle. The appellate court refused to approve the settlement, finding it "a sophisticated GM marketing program" that had little benefit for a class member.<sup>40</sup>

Since the public outcry over coupon settlements, courts have more carefully scrutinized the use of coupons, appreciating that "coupons that are not redeemed impose no real cost on the defendant, and a settlement composed wholly or largely of such coupons is not worth its face value."<sup>41</sup> Judge Hornby rejected part of the *CD Disc* settlement that gave coupon discounts to class members who had purchased CDs through clubs, finding no evidence that they were likely to be used or of benefit.<sup>42</sup> The amended Federal Rules of Civil Procedure that went into effect in December 2003, impose specific responsibilities on federal judges to approve settlements "only after a hearing and on finding that [it] is fair, reasonable, and adequate."<sup>43</sup>

38. *In re Compact Disc Minimum Adver. Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003).

39. They have been criticized by both plaintiff and defense organizations. See Richard H. Middleton, Jr., *Save Class Actions: Drop the Coupon Scams*, Association of Trial Lawyers of America, at <http://www.atla.org/homepage/classact.ht> (Dec. 5, 2001); HENSLER ET AL., *supra* note 2, at 90, 94-98 (discussing objections raised by Trial Lawyers for Public Justice and Public Citizen to various class settlements).

40. *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 807 (3d Cir. 1995). See also, *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996) (refusing to approve coupon settlement); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360 (E.D.La. 1997).

41. HENSLER ET AL., *supra* note 2, at 488.

42. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. at 220.

43. FED. R. CIV. P. 23(e). The Class Action Fairness Act of 2004, S. 2062, 108th Cong. § 1712(e), singles out coupon settlements, permitting court approval "only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members." A Texas statute passed in 2003 provides that "if any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney's fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class." TEX. CIV. PRAC. & REM. CODE ANN. § 26.003(b) (2003). It also provides that "the trial court shall use the Lodestar method to calculate the amount of attorney's fees to be awarded class counsel." *Id.* § 23.003(a).



The courts have reacted to settlement abuses, but some would say only belatedly. However, the Supreme Court did address "global settlements" that sought to settle, for little money, the future claims of class members who had been exposed to asbestos but who had not yet manifested any medical condition and may not have been aware of their exposure and risk.<sup>44</sup> Such settlements are attractive to both plaintiff and defendant attorneys as a means of resolving mass tort cases with finality. The Court has found that "future" class members can not be adequately represented by the same class counsel because of conflicts with other class members, thus limiting both the availability of global settlements and the use of the class action device in mass torts.

Meanwhile industry and business have sought more restrictive standards for class actions in the courts, the legislatures, and Congress. The Class Action Fairness Act,<sup>45</sup> which has been a principal lobbying effort of business and the Chamber of Commerce in the last five congresses, would transfer many class actions to federal courts. In recent years plaintiff lawyers have gravitated towards state courts in the belief that the federal courts are less sympathetic to class actions and are overly protective of business interests.<sup>46</sup> The Act particularly targets multistate class actions in which a state-court class action could determine the standards applicable to a defendant's operations throughout the nation. The intent of the Act is obviously more to shield defendants than to protect class members from abuses, but its advocates see any diminution in class actions as a check on the exploitation of class members by class attorneys. Opponents, not surprisingly, see the Act as forcing class actions into less receptive federal courts and making class certification more difficult, thus weakening the deterrent and regulatory impact of consumer class actions.

### B. Class Attorneys

There is no doubt that class actions have been fueled by entrepreneurial incentives for plaintiffs' lawyers.<sup>47</sup> Many class actions are primarily the creation of a law firm that recruits the representative plaintiffs and finances the expenses of the suit.<sup>48</sup> Securities fraud class actions were often cited as examples of unduly aggressive lawyer conduct in filing a class action when there was an appreciable downturn in a stock's market price, and of using the suit to force a settlement without regard to its merit.<sup>49</sup> Such "entrepreneurial litigation" led to the passage in 1995 of federal statutory limitations on securities fraud class actions. The Private Securities Litigation Reform Act permits a judge to reject the lawyers who filed the class action and to select other lawyers, and also limits individual shareholders' eligibility to serve as plaintiffs, with a preference for large institutional shareholders.<sup>50</sup> These strictures have not been applied to other class actions, al-

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44. See generally *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

45. Class Action Fairness Act of 2004, S. 2062, 108th Cong. (2004).

46. HENSLER ET AL., *supra* note 2, at 66.

47. See generally John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987).

48. HENSLER ET AL., *supra* note 2, at 403-07.

49. See James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497 (1997).

50. Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. § 78(a) (1995).

though the new amended Rules of Civil Procedure would give judges the power to appoint class counsel other than the one[s] who filed the suit and impose stricter standards and oversight for attorney's fees.<sup>51</sup>

It is hardly unfair that the lawyers who risk their time and finances in investigating and preparing a case (in class actions, often involving millions of dollars) should receive more money than any individual class member. However, the transaction costs to achieve this form of deterrence can sometimes be high,<sup>52</sup> and attorneys' fees in some class actions seem inordinately large. The public is especially aware of the fees paid to the "tobacco lawyers." After a global settlement in 1997 of suits by the states against the tobacco companies, groups of plaintiffs' firms were awarded fees of, for example, \$3.4 billion in Florida, \$3.3 billion in Texas, \$1.4 billion in Mississippi, and \$775,000 in Massachusetts.<sup>53</sup> They pointed, of course, to the \$368.5 billion settlement they had achieved after many years of work, expense, and risk.<sup>54</sup> Similarly, class actions for fraudulent marketing of insurance policies have resulted in settlements in the billions of dollars for the class members.<sup>55</sup> In the six major consumer class actions studied by the Rand Report, plaintiff attorneys' fees ranged from about half a million to eleven million dollars.<sup>56</sup> They "accounted for one-third or less—in several cases, substantially less—of the total paid in compensation and plaintiff fees, well in line with the norms in other civil litigation."<sup>57</sup>

Criticism of class action recoveries has to be tempered by a realization that class actions provide a check on powerful forces like businesses and government agencies. For good or for bad, Americans have rejected the kind of broad govern-

51. FED. R. CIV. P. 23(h) (effective Dec. 1, 2003).

52. As the Rand Report noted:

even a corporation that believed it had done *nothing* that could reasonably result in liability for class damages might decide it was cheaper to settle *all* class action lawsuits against it early in the litigation process, for negligible amounts, rather than incur the direct and indirect costs of litigation, including lost executive time and negative publicity. In all these instances, consumers ultimately lose, as the costs of litigation are passed on to them in the form of higher prices without commensurate benefits.

HENSLER ET AL., *supra* note 2, at 80-81.

53. CARRICK MOLLENKAMP ET AL., *THE PEOPLE VS. BIG TOBACCO* 31 (1998). This was not actually a class action, but rather a suit brought through the joinder as plaintiffs of a large number of state attorneys general. It did have some class-action type features, both in its size and scope, and due to the fact that the settlement eliminated class-action suits and the award of punitive damages based on past acts by the companies. *See id.* at 237.

54. *Id.* at 31.

55. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283 (3d Cir. 1998).

56. HENSLER ET AL., *supra* note 2, at 434.

57. *Id.* at 468. The Rand Report went on to inquire:

Did class action attorneys receive *too much* for their efforts? In the five cases for which enough information was presented to the court for us to perform the calculation, class action attorneys earned amounts ranging from \$320 to almost \$2000 per hour. Whether the high-end rates appropriately reflected the risks associated with bringing the litigation, the efforts required to settle these cases, and the outcomes class action attorneys achieved is another matter requiring judgment.

*Id.* A study by two law professors of court cases between 1993 and 2002 found that the average cost of settling a class action and average attorney fees have held steady for ten years. *See generally* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004), available at [www.blackwell-synergy.com/links/toc/jels/1/1](http://www.blackwell-synergy.com/links/toc/jels/1/1).

mental regulation of business that is often found in European countries. The American preference for market approaches results in an opportunity for litigation fueled by entrepreneurial lawyers to enforce laws, regulations, and standards.

"The key public policy question," as the Rand Report notes, "is whether the entrepreneurial behavior of private attorneys produces litigation that is, socially beneficial. Whereas *public* attorneys general may be reluctant to bring meritorious suits because of financial or political constraints, *private* attorneys general may be too willing to bring *nonmeritorious* suits if these suits produce generous financial rewards for them."<sup>58</sup>

### C. Defendants

Since a high percentage of consumer class actions are settled, most defendants make a choice to settle given their assessments of the risks and benefits. There are two very different ways in which a settlement may be beneficial to a defendant.

The first is most meritorious from a policy point of view—when a defendant makes genuine changes in its policies so that the complained-of-conduct will not occur in the future (assuming that the conduct was deficient). The Rand Report stated that:

corporate representatives . . . interviewed said that the burst of new class litigation had caused them to review financial and employment practices. Likewise, some manufacturers noted that heightened concerns about potential class action suits sometimes have a positive influence on product design decisions.<sup>59</sup>

This supports the view that class actions can actually affect business behavior and cause changes in policies, practices, or designs that could avoid this kind of suit in the future.

The second way that settlement can be of benefit to a defendant is just the opposite—that settlement is achieved at a smaller expense to the defendant without any significant change of policies. Settlements have sometimes been sweetheart deals between the defendant and plaintiffs' attorneys.<sup>60</sup> Defendants may work out a favorable settlement with one group of plaintiffs' attorneys who have filed a competing or overlapping class action and who are less hard nosed in their demands. The Rand Report states that "[t]he powerful financial incentives that drive plaintiff attorneys to assume the risk of litigation intersect with powerful interests on the defense side in settling litigation as early and as cheaply as possible, with the least publicity."<sup>61</sup>

These incentives can produce settlements that are reached without adequate investigation of facts and law and that create little value for class members or society. For class counsel, the rewards may be fees disproportionate to the effort they actually invested in the case. For defendants, the rewards are a less-expensive settlement than they may have anticipated given the merits of the case, and the ability to get back to business rather than engage in continued litigation.<sup>62</sup>

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58. HENSLER ET AL., *supra* note 2, at 72.

59. *Id.* at 119.

60. *Id.* at 79-85.

61. *Id.* at 119-20.

62. *See id.* at 79-85.

Defendants who “get off easy” through settlement are not always winners. Their transaction costs, including not only attorneys’ fees but also lost opportunities due to the drain on time and emotions, can cancel out the benefits of a settlement. However, a settlement can provide certainty and finality as to its practices or policies, permitting a company to move forward with the benefit of hindsight. Finally, since in many cases there is some deficient conduct, even if not sufficient to warrant turning down an attractive settlement, defendants can learn from a class action. Those that use it as a lesson for monitoring and amending their future conduct, or undertaking steps to mollify potential class members in the future, have made the best of a bad situation and come out winners in the end.

Defendants’ attorneys might also be nominated as winners of consumer class actions. In many ways, they are the purest of winners since their fees are paid win or lose, and entrepreneurial class actions bring them business. Of course, defendants’ attorneys often share the attitudes of their business clients and outdo their clients in their criticisms of class actions. But defendants’ attorneys play a key role in the class action enterprise, assuring them of considerable fee benefits for their efforts.

#### *D. Consumers at Large*

Consumer class actions seek not only compensation but also deterrence and disgorgement, and therefore a winning group may be consumers at large. In a day when corporate malfeasance has dominated the headlines, it is perhaps not surprising that business enterprises, with their focus on the bottom line of profit, sometimes engage in unauthorized, improper, or deceptive conduct towards consumers. The question is how important the class action is in deterring such conduct, and at what cost given that defendants may be unfairly pressured to settle unmeritorious class actions. The Rand Report examined this question from a number of different viewpoints and concluded that both statistical and descriptive evidence is not sufficient to give a definitive answer. Thus, as with many legal matters, we ultimately have to rely on anecdotal evidence to assess to what extent consumers as a class benefit from class action litigation.

There are sympathetic stories on both sides—we find cases in which a defendant company failed, apparently in good faith, to comply with some technical provision of law or followed a practice generally used in the industry, resulting in a small or indeterminate loss to consumers, and we also find cases in which a defendant company deliberately made unauthorized overcharges or decreased the value of the service provided, where, but for the class action, the company would probably have gotten away with it. However, in industries where customers often lack the information or ability to monitor charges and benefits—for example, banks, financial institutions, credit card companies, and insurers—class actions have often resulted in some genuine benefits to consumers through money damages and/or changes in services provided. The insurance industry, which has been one of the prime targets of class actions, provides some instructive examples.

##### *1. Credit Life Insurance Premium Overcharging Litigation*

The Rand Report studied two insurance class actions in depth. The first concerned the purchase of “credit life insurance” by persons who buy goods on credit

(such as autos, furniture, or appliances) to insure that the loan would be paid in the event of death.<sup>63</sup> This coverage is attractive to retailers because they are assured of being paid in case of the debtor's death, and they often receive a commission for its sale. This class action was brought in Alabama by a woman who had bought a car for \$15,000, and whose attorney had discovered that the premium for her credit life insurance policy was based on the total value of all monthly payments (in this case 60 months) plus interest. It resulted in more coverage than was needed because if she had died while still making payments, the insurer would have to pay the seller only the unpaid principal. The plaintiff would have paid \$281.65 less for the premium if the policy had covered only the unpaid principal.<sup>64</sup> The insurer claimed that the practice had been sanctioned by the Alabama Banking Department and Department of Insurance.<sup>65</sup> The class action was ultimately settled with the defendant insurance company, making an average cash payment to class members of \$45.79 and agreeing to charge premiums based only on the unpaid principal. The state law was also changed to prohibit the prior practice by any insurance company.<sup>66</sup> The total damage recovery to the class was estimated to range from \$540,000 to \$1.1 million, while class counsel was awarded attorney fees of \$580,000.<sup>67</sup>

## 2. Insurance Premium Double Rounding Litigation

The second class action studied by the Rand Report was the "insurance premium double rounding litigation," which challenged the practice of some insurance companies in Texas of rounding the amount of auto insurance policies up or down to the nearest dollar. This practice would have had no effect on overall revenues of the company (some insureds would pay slightly more and others slightly less), but two large insurance companies (Farmers and Allstate) also made a second rounding for computing premiums for coverage of six-months or shorter. This resulted in an additional annual premium of from half a dollar to two dollars on policies.<sup>68</sup> There was evidence that double-rounding had been approved by some officials of the Texas Department of Insurance, but there was disagreement over whether it violated state law.<sup>69</sup> The case was settled by creating a \$35.7 million fund to be divided up among three subclasses (class members receiving an average of \$5.75). Only a small percentage of the largest subclass filed claim forms, and what was left over in the fund was, depending on the subclass, paid to a charity or returned to the defendants.<sup>70</sup> The attorneys received \$11,288,000 in fees and expenses.<sup>71</sup> The defendants changed their premium calculations to eliminate double rounding, and a similar change was ordered by the Department of Insurance.<sup>72</sup>

These two insurance class actions display some common features. In both cases, the state regulatory bodies had failed to curb the challenged practices, and

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63. *See id.* at 225-53.

64. *Id.*

65. *Id.* at 227.

66. *Id.* at 428, 432.

67. *Id.* at 244, 434.

68. *Id.* at 255-91.

69. *Id.* at 268-69.

70. *Id.* at 282-83.

71. *Id.* at 434.

72. *Id.* at 431-32.

the companies ultimately settled, agreeing to change the practices. The dollar value of the damages awarded class members turned out to be lower than originally estimated, in part because of a low percentage of claims by class members. In the double-rounding case, this resulted in funds being returned to the defendants (which could have been avoided by different settlement terms). The attorneys' fees agreed upon in the settlement turned out to be a high percentage of the money actually received by the class members. The change in the companies' practices that was accomplished by the suits represented a significant form of deterrence with respect to the operation of insurance companies. The companies steadfastly maintained that the practices were lawful, indeed authorized by the regulatory agencies, but the fact that the law was also changed undercuts somewhat the argument that the companies were unfairly forced to settle meritless claims.

### 3. *Managed Health Care Litigation*

Another prominent insurance class action was brought against health insurers and HMOs. A class action on behalf of patients alleging wrongful denial of valid medical claims was brought, as described in a study of class actions by the *Chicago Tribune*, by "celebrity class-action lawyers David Boies of New York and Dickie Scruggs of Mississippi."<sup>73</sup> The filing prompted a fall in the companies' stock prices on Wall Street, but the judge refused to certify the class, and "Scruggs and Boies walked away with nothing after investing millions of dollars in legal time and expenses."<sup>74</sup>

However, another class action was filed by "Archie Lamb, Jr., a low-profile class action specialist from Alabama,"<sup>75</sup> on behalf of doctors who claimed the insurers had short-changed them in paying for legitimate medical services they had rendered.<sup>76</sup> They particularly focused on the companies' practice of "downcoding" (changing billing codes to credit doctors with lower-priced services than were provided) and "bundling" (combining codes for two services but paying the doctors only for one). "Aetna Insurance Company broke ranks with the other HMOs to craft a sweeping deal covering at least 800,000 practitioners nationally" and "agree[ing] to pay the doctors \$100 million—much less than they say they lost—and give another \$20 million to a new foundation for improving health care."<sup>77</sup> This came to about \$140 for each of the 700,000 doctors, and the company also agreed to establish a faster and more efficient claims process, quicker payments, clearer coding guidelines, agreement to be bound by external reviewers, and recognition of doctors' right to decide what services are medically necessary.<sup>78</sup> Similar class action suits have been filed on behalf of dentists.<sup>79</sup>

The managed health care litigation shows that consumer class actions may be effectively used on behalf of professional groups or even business interests. Indeed, the fact that a patient class action was denied (because of the lack of pre-

73. Greg Burns, *The Class Action Game*, CHI. TRIB., Mar. 7, 2004, § 1, at 19.

74. *Id.*

75. *Id.*

76. See *In re Managed Care Litigation*, 132 F. Supp. 2d 989 (S.D.Fla. 2000).

77. Burns, *supra* note 73, at 19.

78. Sara Hoffman Jurand, *Aetna Settles Suit Over Unfair Business Practices, Dentists File Similar Action*, TRIAL, Aug. 1, 2003, at 74.

79. *Id.* at 75.

dominance of common issues given the varied individual circumstances of each denial of benefits) suggests the stronger position of a more cohesive class of professionals for class certification. The monetary compensation received by the doctors was small, although those with larger claims could opt out and sue on their own. However, the change in the claims and reimbursement practice of the insurer was likely to be of great benefit to many doctors and to the profession at large. The difficulty of individual doctors taking on the insurer made this a "negative value" case for which the class action is especially well suited.

Common to most insurance class actions is the possible claim that a class action is not "superior to other available methods for the fair and efficient adjudication of the controversy."<sup>80</sup> The insurance industry is regulated in every state by administrative agencies that are charged with oversight of the industry and can impose administrative regulations and enforcement remedies. However, many state regulatory agencies are underfunded and understaffed, and, except in cases involving large and pervasive practices, are not able to follow up with enforcement actions. The two insurance class actions studied by the Rand Report demonstrate that regulatory agencies sometimes give mixed signals to insurers and, even when a particular practice is challenged, fail to take corrective action until a private law suit is filed.

The Rand Report commented that "[i]n theory, individual consumers and small businesses should be able to rely on public agencies charged with enforcing statutory law, such as the Securities and Exchange Commission (SEC), Federal Trade Commission (FTC), and state attorneys general, to take action against businesses that violate legal rules," but that "in practice, public agencies lack sufficient financial resources to monitor and detect all wrongdoing or to prosecute all legal violations."<sup>81</sup> Thus "[m]any believe that [class action] lawsuits serve important public purposes by supplementing the work of government regulators whose budgets are usually quite limited and who are subject to political constraints."<sup>82</sup> In addition, when governmental agencies do undertake enforcement actions, their powers may lead only to injunctive or restorative relief and not to the broad range of damages and remedies available in a class action. Thus it is in providing alternatives to government regulation through the role of private attorneys general that the consumer class action might make a winner out of consumers at large.

#### IV. CONCLUSION

That most American of judicial procedures—the class action—has been expanded beyond the original contemplation of the drafters. In the 1970s and 1980s, it was the workhorse of institutional reform in civil rights and statutory or constitutional remedy litigation. Since that time it has had a mixed record in providing an effective mechanism for handling mass tort litigation. Consumer class actions have now become a substantial part of the class action scene as entrepreneurial lawyers have pooled resources and aggressively shaped litigation across many enterprises and industries. This has led to an outcry from business and industry, and battles are on-going in Congress, legislatures, and courts over limiting the

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80. See FED. R. CIV. P. 23(b)(3).

81. HENSLER ET AL., *supra* note 2, at 69.

82. *Id.*

scope of class actions. Central to this debate is an assessment of the effect and utility of consumer class actions—put simply, who the real winners are in the tortured world of class action litigation. The benefits to class members, class attorneys, defendants, and consumers at large are explored in this Article. There has also been an examination of several insurance class actions, demonstrating the role of deterrence and disgorgement, often used to justify “negative value” cases. But in the end, the assessment of the merits of class actions is heavily bound up with social and political considerations that do not provide a definitive solution as to what should be done in the future.



