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AGGREGATION AS DISEMPOWERMENT: RED FLAGS IN CLASS ACTION SETTLEMENTS

Howard M. Erichson*

ABSTRACT

Class action critics and proponents cling to the conventional wisdom that class actions empower claimants. Critics complain that class actions over-empower claimants and put defendants at a disadvantage, while proponents defend class actions as essential to consumer protection and rights enforcement. This Article explores how class action settlements sometimes do the opposite. Aggregation empowers claimants' lawyers by consolidating power in the lawyers' hands. Consolidation of power allows defendants to strike deals that benefit themselves and claimants' lawyers while disadvantaging claimants. This Article considers the phenomenon of aggregation as disempowerment by looking at specific settlement features that benefit plaintiffs' counsel and defendants without benefiting class members. Recognizing that protection of disempowered class members lies with judges who review settlement agreements, the Article identifies red flags to alert judges to problematic settlement terms and fee requests. By showing how certain settlement features reflect improper cooption of the power of aggregation, the Article offers a framework for understanding class action power dynamics and a path for reclaiming class actions as an empowerment mechanism.

INTRODUCTION

Class actions empower plaintiffs; that is what we used to think. Aggregation levels the field, the theory goes, by creating economies of scale, by permitting investment based on aggregate stakes, and by offering leverage in settlement negotiations.¹ Class certification is supposed to turn David-versus-Goliath into Goliath-versus-Goliath. Much of the bench, bar, and public still

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1 See, e.g., AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 reporters' notes (2010); WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1.7, Westlaw (5th ed. database updated June 2016); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI.

seem to believe this gospel. Indeed, it is the one point on which class action critics and class action proponents agree. Critics complain that class actions *over-empower* plaintiffs and put defendants at a disadvantage,² while proponents defend class actions on grounds of consumer protection and enforcement of rights.³

Aggregation still holds out the promise of empowerment, but, in too many instances, collective litigation has become a tool for disempowering claimants. The very thing that makes aggregation empowering—the separation of ownership and control that consolidates power in claimants’ lawyers—allows defendants to strike deals that benefit themselves and benefit claimants’ counsel while disadvantaging claimants. The goal of this Article is to understand this type of disempowerment both as a theoretical matter and by examining specific features of class settlements. Too often, class settlements include terms that leave one scratching one’s head and wondering why a settlement would include such a term. And too often, the answer is not that the provision added value for the class, but rather that it served the aligned interests of the defendant and class counsel. By cataloguing features of class settlements that fit this description, this Article offers red flags that judges should look for when evaluating settlements, that objectors should

LEGAL F. 519, 543–50; David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 840–66 (2002).

2 See, e.g., Brief of The Chamber of Commerce of the United States of America et al. as Amici Curiae Supporting Petitioners at 20, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (No. 14-1146) (“Class actions are thus a ‘powerful tool [that] can give a class attorney unbounded leverage’” (quoting S. REP. NO. 109-14 at 20 (2005))); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014) (“Halliburton and its amici contend that . . . [class actions] allow plaintiffs to extort large settlements from defendants for meritless claims”); *AT&T Mobility LLC v. Concepción*, 563 U.S. 333, 350 (2011) (“Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”); *Class Action Litigation*, QUINN EMANUEL TRIAL LAW., <http://www.quinnemanuel.com/practice-areas/class-action-litigation.aspx> (last visited Oct. 6, 2016) (“We know a class action can quickly become a tool for litigation blackmail.”).

3 See, e.g., ELIZABETH J. CABRASER, 1 LITIGATING TORT CASES § 9:20 (2014) (“Aggregation is empowering. Class actions marshal scattered claimants with few resources and little bargaining power into a unified force that defendants must reckon with. Courts have seen such empowerment as a core purpose of class certification, which can transform economically infeasible claims into lawsuits whose market value matches their merits.”); see also *Lee v. Carter-Reed Co.*, 4 A.3d 561, 574 (N.J. 2010) (“A class action permits ‘claimants to band together’ and, in doing so, gives them a measure of equality against a corporate adversary In short, the class action is a device that allows ‘an otherwise vulnerable class’ of diverse individuals with small claims access to the courthouse.” (first quoting *In re Cadillac V8-6-4 Class Action*, 461 A.2d 736, 741 (N.J. 1983); then quoting *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710, 728 (N.J. 2007))); *Daniels v. Hollister Co.*, 113 A.3d 796, 802 (N.J. Super. Ct. App. Div. 2015) (“[T]he class-action device was intended to empower ‘the smaller guy’” (quoting *Iliadis*, 922 A.2d at 719); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 (describing class actions as “realistically the only tool citizens have to fight illegal or deceitful business practices”).

highlight when fighting settlements, that defendants should hesitate to offer, and that class counsel and class representatives should hesitate to demand or accept. And by showing how these settlement features reflect defendants' cooption of the power of aggregation, the Article aims to reframe how we think about power dynamics in class actions in the age of settlement.

Objectionable class settlements are nothing new. For a while, coupons were the remedy that everybody loved to hate.⁴ More recently, the popular target became cy pres remedies that allocated settlement funds to charitable organizations.⁵ But even as observers recognized particular instances of bad class settlements,⁶ and even as the academic literature has long recognized agency risks in class actions,⁷ many still perceive aggregation in general, and class certification in particular, as empowering to claimants. Perhaps this is because the most prominent class action disputes, unsurprisingly, involve disputed class actions.⁸ Thus, the class actions that get the most attention tend

4 See, e.g., Class Action Fairness Act of 2005, 28 U.S.C. § 1712 (adopting rules for coupon settlements); S. REP. NO. 109-14, at 30 (2005); Steven B. Handler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343 (2005); Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 GEO. J. LEGAL ETHICS 1395 (2005); Edward Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223 (2004); Editorial, *Class War*, WALL ST. J., Mar. 25, 2002, at A18. For a discussion of coupon settlements, see *infra* text accompanying notes 100–15.

5 See, e.g., ADVISORY COMM. ON CIVIL RULES, RULE 23 SUBCOMMITTEE REPORT at 22 (Apr. 9–10, 2015) (“Much concern has been expressed in several quarters about questionable use of cy pres provisions, and the courts’ role in approving those arrangements under Rule 23.”); Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010); Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97 (2014); James M. Beck & Rachel B. Weil, “Cy Pres” Awards: Is the End Near for a Legal Remedy with No Basis in Law? 3–4 (Wash. Legal Found. Critical Legal Issues Working Paper Series, Paper No. 188, 2014); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 12, 2013) [hereinafter Liptak, *When Lawyers*], <http://www.nytimes.com/2013/08/13/us/supreme-court-may-hear-novel-class-action-case.html>; Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007), <http://www.nytimes.com/2007/11/26/washington/26bar.html>. For a discussion of cy pres settlements, see *infra* text accompanying notes 117–65.

6 See, e.g., FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION § 21.61 (4th ed. 2004) (listing class action settlement abuses); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 732 (2013) (referring to “isolated—but highly publicized—instances of abuse in which class attorneys obtained handsome fees while class members received meager recoveries or worthless coupons”).

7 See, e.g., DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1367 (1995); Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2002–03 (1999); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337; see also AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05(a) reporters’ notes (2010).

8 The Supreme Court has been famously preoccupied with class actions in recent years, but even though settlement class actions are more common and more troubling, every one of the Supreme Court’s recent cases involved a disputed class action rather than a settlement class action. See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (involving standing for a class action plaintiff); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036

to be ones in which defendants resist rather than embrace class certification. But most class actions now are certified only for settlement, not for litigation. Particularly when these *undisputed* class actions show up on a judge's docket—with the supposed adversaries hand-in-hand asking the judge to bless their deal and thereby make it binding on the entire class—the judge needs a keen awareness of how defendants and class counsel design settlements to serve their own interests.

The irony is that the seeds of disempowerment are sown by the very mechanism that makes aggregation empowering for plaintiffs. Class certification and appointment of class counsel put power in the hands of class counsel over class members. Just as the separation of ownership and control creates both opportunity and risk in the corporate context,⁹ so it does in mass representation of plaintiffs.¹⁰ The plaintiffs own the claims but relinquish control to their lawyers, who represent a class of numerous similarly

(2016) (questioning whether plaintiffs may use statistical techniques to overcome individual issues and achieve class certification); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) (considering whether a defendant can moot litigation class action by offering class representative complete individual relief); *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (considering whether consumers may litigate as a class notwithstanding an arbitration clause class prohibition); *Halliburton Co. v. Erica P. John Fund*, 134 S. Ct. 2398 (2014) (involving fraud-on-the-market doctrine in securities class actions); *Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (questioning whether merchants could litigate antitrust claims as a class action notwithstanding arbitration clause class prohibition); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (involving proof requirements on motions to litigate antitrust claims as class actions); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (involving class certification for an employment discrimination class action); *AT&T Mobility LLC v. Concepción*, 563 U.S. 333 (2011) (considering whether consumers could litigate fraud claims as a class action notwithstanding an arbitration clause class prohibition). Settlement class actions and settled litigation class actions could reach the Supreme Court on objectors' appeals. The problem is not lack of appealability, but rather that the Supreme Court has shown little interest in controlling class actions as a tool for defendants' closure of liability, even as it has shown great interest in diminishing class actions as a tool for plaintiffs' empowerment.

9 See generally Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983).

10 See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05(a) reporters' notes (2010) ("A foundational insight of the economic literature on agency relationships is that ownership of assets and control of their disposition must often be separated to achieve economies of scale, to take advantage of the division and specialization of labor, to bear risks efficiently, and to realize other advantages. Equally basic, however, is the understanding that when ownership and control of assets are divided, managers predictably lack incentives to maximize asset values and may even gain by acting to owners' detriment."); see also Martin H. Redish, *Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process*, 64 EMORY L.J. 451, 453 (2014) (offering a "guardianship model" of the class action in which virtually all of the power is held by the class attorney, underscoring both the value of the device and the danger when attorneys' profit incentives are misaligned with class members' interests). Other scholars, by contrast, embrace control by class counsel. See, e.g., Sergio J. Campos, *Class Actions and Justiciability*, 66 FLA. L. REV. 553, 565–74 (2014) (largely embracing a "trustee" model of class actions); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L.

situated clients. Control of numerous claims not only permits lawyers to invest based on aggregate stakes, it also provides leverage at the negotiating table because the lawyers can threaten substantial liability and offer substantial peace. Consolidation of control empowers claimants through their lawyers.¹¹ But the consolidation of power in plaintiffs' lawyers creates opportunities for exploitation. Defendants negotiating multi-claimant settlements seek advantageous terms for themselves by offering attractive terms for the plaintiffs' lawyers.

Agency risks occur in every client-lawyer relationship, but they have proved particularly problematic in mass settlement negotiations. I have described elsewhere how some of these problems play out in non-class aggregate settlements, where leadership counsel in multidistrict litigation or lawyers engaged in mass collective representation sometimes use their power to negotiate settlements on terms that are more favorable for defendants and themselves than for their clients.¹² The present Article focuses on class action settlements both because they present the most extreme version of the problem and because they offer the strongest opportunity for judicial intervention.

The interests of defendants and of class action lawyers line up in important ways that do not match the interests of the class members. Both defendants and class counsel prefer to make settlements comprehensive—defendants in order to strengthen protection from liability, and class counsel in order to build fees. Class members, by contrast, might be better off retaining claims that are poorly compensated in the deal. Both defendants and class counsel prefer to settle promptly to reduce litigation costs. Fees may not fully reward class counsel for additional hours spent on litigation,¹³ and, more to the point, they do not sufficiently reward the risk plaintiffs' attorneys incur if they fail to take the bird in hand. Class members may benefit by holding out for a better deal, but the lawyers who control the negotiation do

REV. 2043, 2070 (2010) (arguing in favor of fee awards that fully incentivize class counsel to pursue wrongdoers).

11 The focus is on class counsel rather than on class representatives because the lawyer is where the power resides. See Issacharoff, *supra* note 7, at 354 ("To the extent that the Rules direct courts to focus on the named class parties, they provide what is at best a distraction from the real source of legitimacy in class actions: the incentives for faithful representation by class counsel.").

12 See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 268 (2011); Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1020–22 (2010) [hereinafter Erichson, *All-or-Nothing*]; Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005) [hereinafter Erichson, *Typology*].

13 Most courts award class counsel fees based on a percentage of the outcome, although often they use the lodestar method (reasonable hourly fees multiplied by reasonable hours worked) as a crosscheck. The interests of defendants and of defendants' outside litigation counsel diverge on the benefit of a prompt settlement, at least to the extent the lawyers work on an hourly fee basis as opposed to a flat fee or alternative structure, but class counsel's interests line up with the defendant itself.

not fully internalize that benefit. Both a defendant and class counsel share an interest in making a settlement appear larger to the judge than its true value to class members or its true cost to the defendant, in order to secure judicial approval of the settlement and fee. Finally, class counsel may trade larger attorneys' fees for smaller class recovery, permitting a defendant to lower its overall settlement cost. These aligned interests explain why some defendants negotiate fees with class counsel. They explain why some class settlements include stunningly broad releases even when large swaths of claimants get little or nothing of value. And they explain why some class settlements include otherwise inexplicable remedies—illusory injunctive relief, predictably unclaimed funds, non-transferable coupons, or off-point cy pres awards—to create the illusion of value for the class.

Defendants, in short, have coopted the power of plaintiff aggregation. They have learned how to buy *res judicata* on the cheap. Defendants and their lawyers understand that aggregation puts control in the hands of plaintiffs' lawyers rather than plaintiffs, and defendants and their lawyers know that they have something of value to offer these plaintiffs' lawyers in exchange for advantageous settlement terms. In settlement, aggregation disempowers claimants by empowering their lawyers.

My point is not to disparage aggregation in general or class actions in particular. Aggregate litigation remains as essential as ever for empowering plaintiffs to pursue claims in mass disputes. Rather, my point is to show that even as aggregation empowers claimants in litigation, it disempowers them in settlement when courts look the other way as lawyers pursue self-interest at the expense of client interests. When thinking about the resolution of mass disputes, one is drawn to a tempting but inadequate syllogism: Aggregation is good (and inevitable). Settlement is good (and inevitable). Therefore, aggregate settlement is good (and inevitable). Each of the steps of this syllogism makes sense as far as it goes, but it stops short of the key point. Yes, aggregation is essential for empowering claimants in mass disputes. Yes, negotiated resolutions often are superior to adjudicated resolutions. And yes, collective approaches to settlement in mass disputes make more sense than independent individual settlements. But what the syllogism misses is that there are many ways to resolve a mass dispute through collective litigation and negotiation, and some are better than others. Collective settlement may be both inevitable and desirable as the endgame of mass disputes, but it need not be so disempowering to claimants.

Part I of this Article traces the recent history of class actions and mass litigation as a story of empowerment and disempowerment. Part II, the heart of the Article, offers a catalogue of settlement features that harm class members while benefiting class counsel and defendants. First, it looks at five features that create an exaggerated appearance of value: spurious injunctive relief, non-transferable and non-stackable coupons, unwarranted cy pres remedies, unnecessary or burdensome claims procedures, and reversions. Second, it looks at two features that expand class counsels' franchise and defendants' protection: overbroad releases and expanded class definitions.

Third, it looks at three terms that discourage objections: class representative bonuses, revertible fee funds, and clear sailing agreements. Part III addresses two important counterarguments. Finally, Part IV considers the problem from both procedural and ethical perspectives and explains why the clearest path to a solution lies in judicial recognition of problematic terms and judicial control of class settlements and class counsel fees.

I. DEFENDANTS' COOPTION OF THE POWER OF AGGREGATION

A. *A Brief History of Empowerment in Class Actions*

To understand how defendants have coopted the power of aggregation—and how empowerment of claimants' lawyers is not the same as empowerment of claimants—it is helpful to place class action settlement practice in historical context. Proponents of class actions have long justified the procedure as empowering plaintiffs to pursue claims that could not be pursued individually. When the modern class action rule was born in 1966,¹⁴ the Advisory Committee on Civil Rules justified Federal Rule of Civil Procedure 23 largely in terms of efficiency and consistency, but the empowerment rationale came through in the superiority analysis where the Committee noted, "the amounts at stake for individuals may be so small that separate suits would be impracticable."¹⁵ The Supreme Court in 1974 recognized that for small claims, "[e]conomic reality dictates that petitioner's suit proceed as a class action or not at all."¹⁶ In 1980, Chief Justice Warren Burger observed that class actions fill the regulatory gap left open when government fails to enforce the law:

The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.¹⁷

14 Rule 23 dates back to 1938 when the Federal Rules of Civil Procedure took effect, and its roots can be traced much earlier. See 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE §§ 1751–53 (3d ed. 2016). The pre-1966 version, however, with its "true," "hybrid," and "spurious" categories, proved difficult to apply. *Id.* § 1753. "Modern Rule 23, which originated in 1966, was 'a bold and well-intentioned attempt to encourage more frequent use of class actions.'" Klonoff, *supra* note 6, at 736 (quoting Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 170 (1970)).

15 FED. R. CIV. P. 23 advisory committee's note (1966 amendment); see also David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 593 (2013).

16 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

17 *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); see also Phillips Petrol. v. Shutts, 472 U.S. 797, 809 (1985) (noting that class actions "permit the plaintiffs to pool claims which would be uneconomical to litigate individually"). Professor John Coffee credits Kalven and Rosenfield with first recognizing "that the class action could be the procedural mechanism by which to arm and finance the private attorney general." JOHN C. COFFEE,

Not only could class actions help plaintiffs overcome the problem of negative-value suits for money damages, they allowed plaintiffs to overcome mootness problems and expanded opportunities for remedial action.

The first decade of post-1966 class actions included major cases on school desegregation,¹⁸ voting rights,¹⁹ prison reform,²⁰ and discrimination.²¹ Linda Mullenix describes this as “a period characterized by the emergence and domination of a new paradigm of public law and institutional reform litigation,”²² alluding to Abram Chayes’s classic description of this paradigm shift in *The Role of the Judge in Public Law Litigation*.²³ Richard Marcus labels it the “heroic era” of litigation.²⁴

Mass tort litigation emerged in earnest in the 1980s and presented different challenges than civil rights controversies. But one thing that mass torts shared with civil rights was the use of class actions and other aggregative procedures to empower plaintiffs.²⁵ In the Agent Orange litigation—chronicled by Peter Schuck as a prototype of a new kind of litigation²⁶—Judge Jack Weinstein certified a class action and engineered a comprehensive resolution to a politically charged controversy over chemical exposure during the Vietnam War.²⁷ Some courts certified class actions in asbestos cases,²⁸ although for the most part asbestos litigation proceeded as masses of non-class lawsuits.

JR., *ENTREPRENEURIAL LITIGATION* 53–54 (2015) (citing Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Action Suit*, 8 U. CHI. L. REV. 684 (1941)).

18 See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); *Hart v. Cmty. Sch. Bd. of Educ.*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975); *Vaughns v. Bd. of Educ.*, 355 F. Supp. 1034 (D. Md. 1972); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (involving a class action challenge to school financing system).

19 See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Hadnott v. Amos*, 394 U.S. 358 (1969); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

20 See, e.g., *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Cruz v. Beto*, 405 U.S. 319 (1972); *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973); *Mead v. Parker*, 464 F.2d 1108 (9th Cir. 1972); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968); *United States v. Kahane*, 396 F. Supp. 687 (E.D.N.Y. 1975); *Wilson v. Beame*, 380 F. Supp. 1232 (E.D.N.Y. 1974).

21 See, e.g., *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Morton v. Mancari*, 417 U.S. 535 (1974); *O’Shea v. Littleton*, 414 U.S. 488 (1974); *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir. 1975).

22 Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 NEV. L.J. 1455, 1457 (2014).

23 89 HARV. L. REV. 1281 (1976).

24 Richard Marcus, “*Looking Backward*” to 1938, 162 U. PA. L. REV. 1691, 1698 (2014).

25 See Howard M. Erichson & Benjamin C. Zipursky, *Lawyering for Groups: Civil Rights, Mass Torts, and Everything in Between*, 81 FORDHAM L. REV. 3039 (2013); Judith Resnik, *From “Cases” to “Litigation”*, 54 L. & CONTEMP. PROBS. 5 (1991).

26 See PETER SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 6 (1986).

27 See *In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1267 (E.D.N.Y. 1985), *aff’d*, 818 F.2d 145 (2d Cir. 1987).

28 See, e.g., *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986); *In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986).

Academics weighed in to promote class certification as a means of empowering plaintiffs to match the power of defendants in mass disputes.²⁹

In the mid-1990s, however, appellate courts pushed back with a string of reversals of class certifications,³⁰ including the Fifth Circuit's decertification of a nationwide tobacco class action that presented the first serious litigation threat to the cigarette industry.³¹ Mass litigation, however, did not dry up. Judges and litigators found other mechanisms for aggregating mass litigation.³² Plaintiffs' lawyers developed networks for representing large numbers of similarly situated claimants. Mass collective representation of clients by a single lawyer or firm, as well as coordination among plaintiffs' law firms, allowed plaintiffs' lawyers to level the field against powerful defendants.³³

Defendants, for their part, fought plaintiff aggregation at every turn. They opposed class certification, opposed plaintiff party joinder, and opposed consolidated trials. They eventually embraced certain methods for aggregated *processing* such as federal Multidistrict Litigation (MDL), which permits centralized handling of pretrial matters in federal court cases.³⁴ MDL transfer made discovery less burdensome for defendants and tended to slow the march toward trial. Methods for aggregated *adjudication*, however, were anathema to defendants.³⁵

Even as they fought plaintiffs' efforts to litigate claims as class actions and plaintiffs' other attempts to try claims on a consolidated basis, defendants began looking for ways to resolve mass liability by negotiating global settlements. The settlement class action, in particular, emerged as defendants' preferred mechanism for resolving mass disputes.³⁶ In a settlement

29 See, e.g., David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984). Linda Mullenix calls the decade from 1986 to 1996 "the first great age of aggregationist fervor." Mullenix, *supra* note 22, at 1464.

30 See *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (tobacco litigation); *In re Am. Med. Syst., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (penile implant litigation); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (blood products litigation).

31 *Castano*, 84 F.3d at 734.

32 See Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775 (2010); see also Mullenix, *supra* note 22, at 1458 (noting that this era "marked the beginning of a long and gradual shift in collective redress mechanisms away from the class action to alternative forms of non-class aggregate litigation").

33 Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386-401 (2000).

34 See AM. COLL. OF TRIAL LAWYERS, MASS TORT LITIGATION MANUAL § 2.01 (2006).

35 See *id.* In the words of one general counsel, "The class action device provides disproportionate leverage in favor of the plaintiffs' attorney, which is why almost no class actions ever get tried." HENSLER ET AL., *supra* note 7, at 33 (quoting 2 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, at 558, 559 (Admin. Off. of U.S. Courts, May 1, 1997) (written statement of William A. Montgomery)).

36 See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618 (1997) ("Among current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device." (cit-

class action, before class certification, the defendant negotiates a settlement on a class-wide basis with putative class counsel. The defendant and putative class counsel then present their deal to the court and jointly move for class certification and for approval of the settlement.

The most prominent settlement class actions of the 1990s involved efforts to resolve mature asbestos litigation.³⁷ By then, asbestos litigation had dragged on for years. When the litigation showed no signs of abating, asbestos defendants turned to settlement class actions as a way out of the morass. The Supreme Court in 1997 rejected the attempt of a consortium of asbestos defendants to use a settlement class action to resolve the future stream of claims against them.³⁸ And in 1999, the Supreme Court rejected Fibreboard Corporation's even more aggressive attempt to resolve future asbestos claims through a limited fund settlement class action.³⁹ Despite the setbacks of *Amchem* and *Ortiz*, defendants did not give up on settlement class actions as a tool for achieving global resolutions of mass disputes.

The early 2010s saw increased judicial resistance to class actions, especially at the Supreme Court. A five-Justice majority jumped at opportunities to limit the class action as an empowerment tool for plaintiffs. The Court rejected a gender-discrimination class action against the nation's largest private employer, Wal-Mart,⁴⁰ and reached out in that case to tighten the commonality requirement for class certification.⁴¹ In the *Wal-Mart* case, as well as in an antitrust class action against Comcast Corporation, the Court raised the proof requirements for class certification.⁴² The Court upheld class action prohibitions in arbitration agreements, even if the prohibition would be unenforceable as an unconscionable contract term under state law,⁴³ and even if a class action is the only realistic way for claimants to vindicate federal statutory rights.⁴⁴ Lower federal courts have applied these Supreme Court

ing T. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 61–62 (1996))).

37 On the idea of mass tort maturity, see generally Francis McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

38 See *Amchem*, 521 U.S. at 591.

39 See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

40 See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

41 See *id.* at 347–51 (reaching a 5-4 decision on commonality despite the Court's unanimous view that the Rule 23(b)(2) class action could not proceed because it sought non-incident monetary relief).

42 See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (5-4 decision); *Wal-Mart*, 564 U.S. at 352–53 (reaching a 5-4 decision on class certification proof requirements despite unanimity that the class action could not proceed under Rule 23(b)(2)).

43 See *AT&T Mobility LLC v. Concepción*, 563 U.S. 333, 341 (2011) (5-4 decision).

44 *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–10 (2013) (5-3 decision with Justice Sotomayor not participating). The Court also has addressed attempts by defendants to sidestep class actions by picking off named plaintiffs. Compare *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013) (reaching a 5-4 decision dismissing a Fair Labor Standards Act collective action for mootness after defendant made an unaccepted offer of judgment for the full value of named plaintiff's claim), with *Campbell-*

pronouncements to restrict litigation class actions.⁴⁵ And federal courts have rigorously enforced the jurisdictional provisions of the Class Action Fairness Act of 2005,⁴⁶ a statute driven by distrust of class action lawyers and distrust of certain state courts,⁴⁷ making it difficult for plaintiffs to pursue sizable class actions in state courts.

But even as courts have tightened restrictions on class certification for litigation, they remain open to defendants' use of class actions to achieve binding resolutions through settlement. Looking at the Supreme Court's extraordinary run of anti-class-action decisions in recent years,⁴⁸ notably absent are any decisions imposing limits on settlement class actions.⁴⁹ Some courts have eased defendants' path to getting released through settlement class actions even where plaintiffs could not have gotten class actions certified for litigation.⁵⁰ And district judges, predisposed to favor settlement and unaccustomed to inquisitorial judging, have been too willing to approve problematic class settlements.⁵¹

Ewald Co. v. Gomez, 136 S. Ct. 663 (2016) (rejecting such a pick-off in a Rule 23 class action).

45 See Klonoff, *supra* note 6, at 823.

46 See, e.g., Pretka v. Koltter City Plaza II, Inc., 608 F.3d 744 (11th Cir. 2010); USW v. Shell Oil Co., 602 F.3d 1087 (9th Cir. 2010); Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005); see also Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013).

47 See Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PENN. L. REV. 1593, 1596–602 (2008).

48 See, e.g., Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013); *Am. Express Co.*, 133 S. Ct. 2304; *Symczyk*, 133 S. Ct. 1523; *Knowles*, 133 S. Ct. 1345; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 388 (2011); *AT&T Mobility*, 563 U.S. 333. But see *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184 (2013); *Smith v. Bayer Corp.*, 564 U.S. 299 (2011); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011).

49 The Supreme Court's last two decisions restricting settlement class actions were in the 1990s. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). In *Amchem*, the Court sent mixed signals about settlement class actions. On the one hand, the Court affirmed the Third Circuit's rejection of class certification in that case, and stated that most of the Rule 23 requirements "demand undiluted, even heightened, attention in the settlement context." *Amchem*, 521 U.S. at 620. On the other hand, the Court stated that in a settlement class action, "a district court need not inquire whether the case, if tried, would present intractable management problems." *Id.* Lawyers and judges have latched onto the latter dicta to promote settlement class actions.

50 See, e.g., *In re Am. Int'l Group, Inc. Sec. Litig.*, 689 F.3d 229 (2d Cir. 2012); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011) (en banc). See generally Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951 (2014).

51 See, e.g., *Eubank v. Pella*, 753 F.3d 718, 721 (7th Cir. 2014); *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351 (E.D. Pa. 2015); *Redman v. RadioShack Corp.*, No. 11 C 6741, 2014 WL 497438 (N.D. Ill. Feb. 7, 2014), *rev'd*, 768 F.3d 622 (7th Cir. 2014); *Pearson v. NBTY*, No. 11 CV 7972, 2014 WL 30676 (N.D. Ill. Jan. 3, 2014), *rev'd*, 772 F.3d 778 (7th Cir. 2014); *In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040 (S.D. Cal. 2013), *vacated and remanded*, 599 F. App'x 274 (9th Cir. 2015); *In re DryMax Pampers Litig.*, No. 1:10-cv-00301, 2011 WL 4502664 (S.D. Ohio Sept. 28, 2011), *rev'd*, 724 F.3d 713 (6th Cir. 2013); *McDonough v. Toys "R" Us, Inc.*, 834 F. Supp. 2d 329 (E.D. Pa. 2011), *rev'd*, 708 F.3d 163 (3d Cir. 2013); *Dennis v. Kellogg Co.*, No. 09-CV-1786, 2010 WL

If class actions are to empower claimants, a turnaround is needed on two fronts. On one side, empowerment demands that courts show less hostility to litigation class actions, and on the other side, empowerment demands that courts show more hostility to settlements that disserve class members.

B. *Recent Judicial Skepticism of Class Action Settlements*

While some judges approve self-serving deals struck by class counsel and defendants, a number of recent judicial decisions have looked at class settlements with a more jaundiced eye. They have struck down proposed settlements that provided little benefit to class members, advantageous terms for defendants, and lucrative fees for counsel. These courts have done so, moreover, with blunt commentary on the incentives of class counsel and the powerlessness of class members. It remains to be seen whether these recent cases foretell a broader shift in judicial attitudes about class settlements, but the time seems right. Alongside the disillusionment with aggregation that increasingly appears in the academic literature,⁵² perhaps these rejections of class settlements will influence others.

In *Pearson v. NBTY*,⁵³ for example, the Seventh Circuit reversed a district court's approval of a settlement of false-labeling claims against Rexall and other sellers of glucosamine pills. Judge Richard Posner's opinion explained the problems with the proposed labeling changes, the claims process, and other remedies, but the opinion did not merely point out the inadequacy of the settlement.⁵⁴ Rather, the opinion spoke directly to the motives of the defendant and of class counsel:

It's hard to resist the inference that Rexall was trying to minimize the number of claims that class members would file, in order to minimize the cost of the settlement to it. Class counsel also benefited from minimization of the

4285011 (S.D. Cal. Oct. 14, 2010), *rev'd*, 697 F.3d 858 (9th Cir. 2012); *Lane v. Facebook*, No. C 08-3845, 2010 WL 9013059 (N.D. Cal. Mar. 17, 2010), *aff'd*, 696 F.3d 811 (9th Cir. 2012), *reh'g en banc denied*, 709 F.3d 791 (9th Cir. 2013); *Nachshin v. AOL, LLC*, No. 2:09-cv-03568 (C.D. Cal. Dec. 31, 2009), *rev'd*, 663 F.3d 1034 (9th Cir. 2011); *Hayden v. Elf Atochem N. Am., Inc.*, No. 4:92-cv-01054 (S.D. Tex. Apr. 14, 2003), *rev'd sub nom. Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011).

52 See, e.g., Elizabeth Chamblee Burch, *Disaggregation*, 90 WASH. U. L. REV. 667 (2013); Jaime Dodge, *Disaggregative Mechanisms: Mass Claims Resolution Without Class Actions*, 63 EMORY L.J. 1253 (2014); Mullenix, *supra* note 22; see also MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009). From the comparative perspective, even as the world generally moves toward more liberal procedures for group litigation, it does not look kindly on U.S. class action settlements. See CHRISTOPHER HODGES & ASTRID STADLER, *RESOLVING MASS DISPUTES: ADR AND SETTLEMENT OF MASS CLAIMS* 8 (2013) ("The history of the US class action is full of examples of suspicious settlements with the group members left behind with dubious 'discount coupons' instead of money damage awards or cy-près solutions granting only indirect benefit to the class or consumers in general.").

53 772 F.3d 778 (7th Cir. 2014). For discussion of particular features of the glucosamine settlement, see *infra* text accompanying notes 76–87, 126, and 172–76.

54 See *Pearson*, 772 F.3d at 785–87.

claims, because the fewer the claims, the more money Rexall would be willing to give class counsel to induce settlement.⁵⁵

Importantly, the court did not use the language of *collusion*. Rather, it used the language of *self-interest*.⁵⁶ The fruitful question, Judge Posner understood, is not whether there was a nefarious conspiracy between the defendant and class counsel. Rather, looking at the actual terms of the settlement, the question is whether class counsel negotiated in the best interests of the class, as opposed to negotiating a deal that would appeal to the defendant, appear satisfactory to an uninquisitive judge, and serve class counsel's self-interest.⁵⁷

Similarly, in a settlement class action concerning Kellogg's marketing of Frosted Mini-Wheats, the Ninth Circuit spoke of the risk that "the incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of the negotiations."⁵⁸ After examining specific features such as the *cy pres* remedy and injunctive relief of questionable value to the class, Judge Stephen Trott's opinion asked whether there was any explanation, other than self-interest, for the "mysteries" in the settlement: "Neither class counsel nor Kellogg offers any credible reason for the mysteries in the current settlement. To approve this settlement despite its opacity would be to abdicate our responsibility to be 'particularly vigilant' of pre-certification class action settlements."⁵⁹

The court questioned not only the compensatory value of the settlement to the class of consumers, but also the settlement's cost to the defendant and thus its value in terms of disgorgement and deterrence:

Moreover, Plaintiffs' counsel tells us that settlements like this serve the purposes of "restitutionary disgorgement and deterrence." If the product *cy pres* distribution is form over substance and not worth nearly as much to Kellogg as the settlement claims, then these goals are not served. To the contrary, the settlement is a paper tiger.⁶⁰

The court's insistence on looking at the real value of the settlement to the class, its inquiry as to the cost of the settlement to the defendant, and its

55 *Id.* at 783; see also *In re Walgreen Co. Stockholder Litig.*, No. 15-3799, 2016 WL 4207962 at *3 (7th Cir. Aug. 10, 2016) (Posner, J.) ("The type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end. No class action settlement that yields zero benefits for the class should be approved, and a class action that seeks only worthless benefits for the class should be dismissed out of hand.").

56 See *Pearson*, 772 F.3d at 787.

57 See *Erichson*, *supra* note 50, at 962 (citing cases approving settlements because of the lack of evidence of "collusion" and arguing that this is the wrong question).

58 *Dennis v. Kellogg Corp.*, 697 F.3d 858, 867 (9th Cir. 2012) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003)). For discussion of the *cy pres* aspect of the *Kellogg* settlement, see *infra* text accompanying notes 142–50.

59 *Id.* (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011)).

60 *Id.* at 868.

related consideration of class counsel's self-interest should be a model for other courts.

The most noteworthy progress on this front has occurred in the courts of appeals. For its part, the twenty-first century Supreme Court⁶¹ has shown little interest in the dangers of class actions as a tool for defendants to escape liability through favorable settlements, even as it has gone out of its way to restrict class actions as a tool for plaintiffs to pursue their claims through litigation. The one notable exception is Chief Justice Roberts's statement respecting the denial of certiorari in *Marek v. Lane*,⁶² which involved a settlement that protected Facebook from liability for claims that its Beacon program violated members' privacy rights. The settlement survived review by the district judge and by the Ninth Circuit.⁶³ When the petition reached the Supreme Court, the Chief Justice criticized the deal despite his agreement with the Court's denial of certiorari. Running down the list of problems—spurious injunctive relief, inappropriate *cy pres* remedy, and self-serving expansion of the settlement class by the defendant and class counsel—he framed the deal as a low-cost strategy for Facebook to insulate itself from liability:

In the end, the vast majority of Beacon's victims got neither [money damages nor an injunction barring Facebook from continuing the program]. The named plaintiffs reached a settlement agreement with the defendants before class certification. Although Facebook promised to discontinue the "Beacon" program itself, plaintiffs' counsel conceded at the fairness hearing in the District Court that nothing in the settlement would preclude Facebook from reinstating the same program with a new name.

And while Facebook also agreed to pay \$9.5 million, the parties allocated that fund in an unusual way. Plaintiffs' counsel were awarded nearly a quarter of the fund in fees and costs, while the named plaintiffs received modest incentive payments. The unnamed class members, by contrast, received no damages from the remaining \$6.5 million. Instead, the parties earmarked that sum for a "*cy pres*" remedy—an "as near as" form of relief—because distributing the \$6.5 million among the large number of class members would result in too small an award per person to bother. The *cy pres* remedy agreed to by the parties entailed the establishment of a new charitable foundation that would help fund organizations dedicated to educating the public about online privacy. A Facebook representative would be one of the three members of the new foundation's board.

To top it off, the parties agreed to expand the settlement class barred from future litigation to include not just those individuals injured by Beacon during the brief period in which it was an opt-out program—the class pro-

61 The Supreme Court has not examined the problems of settlement class actions or inadequate class settlements since *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). See *supra* note 49.

62 134 S. Ct. 8 (2013) (Roberts, C.J., respecting denial of certiorari). For discussion of particular features of the *Facebook* settlement, see *infra* text accompanying notes 88–94, 151–65, and 196–200.

63 *Id.* at 9.

posed in the original complaint—but also those injured after Facebook had changed the program’s default setting to opt in. Facebook thus insulated itself from all class claims arising from the Beacon episode by paying plaintiffs’ counsel and the named plaintiffs some \$3 million and spending \$6.5 million to set up a foundation in which it would play a major role.⁶⁴

The statement ended with the reasons why he did not consider the Facebook case a suitable vehicle for addressing questions about cy pres remedies in class actions, as well as his view that “[i]n a suitable case, this Court may need to clarify the limits on the use of such remedies.”⁶⁵ One can hope that the Court will address not only the issue of cy pres remedies as the Chief Justice suggests, but also the broader problem of settlements that serve class counsel and defendants but not class members, and that the Court will do it with the sensitivity shown by the Ninth Circuit in *Dennis v. Kellogg* and the Seventh Circuit in *Pearson v. NBTY*.

II. RED FLAGS IN CLASS ACTION SETTLEMENTS

What features of class settlements benefit defendants and plaintiffs’ lawyers without providing value to class members? This Part looks at ten features of problematic class settlements: spurious injunctive relief, non-transferable or non-stackable coupons, unjustified cy pres remedies, burdensome or unnecessary claims procedures, reversions, excessively broad releases, expanded class definitions, class representative bonuses, revertible fee funds, and clear sailing agreements. The first five features involve efforts to make a settlement appear larger than it is. The next two features address breadth—breadth of claims and breadth of class definition—and have a common goal of expanding class counsel’s franchise and the defendant’s protection from liability. The final three features are terms that discourage objections to a settlement or to class counsel’s fee request.

The point of cataloguing these settlement features and reporting examples is twofold. The first purpose is explanatory and evidential. The clearest way to tell the story of aggregation as disempowerment is by showing what it looks like in actual settlement terms. The evidence of the phenomenon is the very existence of settlement features that serve defendants and class counsel without benefiting class members. This catalogue and these examples of course do not establish that *all* class settlements are problematic, but they suffice to show that the problem is real.

The second purpose is more action-oriented and is directed both at judges and at lawyers negotiating class settlements. By pointing out settlement features that fail to serve class members, the Article aims to help judges identify settlements that warrant closer scrutiny or outright rejection. And by encouraging judges to scrutinize settlements with these features, the Article aims to steer lawyers away from including such terms in class settlements.

64 *Id.* at 8–9 (citation omitted).

65 *Id.* at 9.

A. *Terms That Create an Exaggerated Appearance of Value*

Regardless of a settlement's true value to class members, and regardless of a settlement's true cost to a defendant, the defendant and class counsel share an interest in making the settlement *appear* as large as possible. The more valuable the settlement appears to the judge, the more likely the judge will find it "fair, reasonable, and adequate" for purposes of judicial approval.⁶⁶ And the bigger the settlement, the bigger the fee for class counsel. This Section considers five types of settlement terms that bulk up the apparent size of settlements at low cost to defendants and with little value for class members.

1. Spurious Injunctive Relief

Class actions can provide an effective means of obtaining injunctive remedies. Whether as primary relief in Rule 23(b)(2) class actions or as secondary relief in Rule 23(b)(3) class actions, class plaintiffs often seek structural reform or other changes in defendant conduct.⁶⁷ Discrimination plaintiffs want the defendant to stop discriminating. Consumer fraud plaintiffs want the defendant to stop defrauding. Prison reform plaintiffs want prison reform. Product liability plaintiffs want the defendant to stop producing a dangerous product or, in some cases, to provide better warnings. For a court to include injunctive remedies in such cases, whether by adjudication or by settlement approval, makes sense as long as the change in defendant's conduct accomplishes something to remedy the problems raised in the complaint. Class settlements can be a superb way to protect rights and effect institutional reform.

Some class settlements, however, incorporate meaningless changes in defendant's conduct. In such settlements, the defendant agrees to do something that costs the defendant little and does little for the class. By creating the illusion that the settlement accomplishes something, the defendant hopes for *res judicata* through judicial approval of the deal. Likewise, by creating the illusion of accomplishment, the class lawyer hopes to obtain judicial approval not only of the settlement but also of the lawyer's fee request.⁶⁸

66 FED. R. CIV. P. 23(e)(2).

67 See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003) (class action seeking changes to college admissions policy); *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014) (class action seeking changes to prison medical care system); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974 (9th Cir. 2007) (en banc) (class action seeking changes to employment policy for hearing-impaired drivers); see also Settlement Agreement, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Dec. 15, 2015) (proposed class settlement altering New York's policies concerning solitary confinement).

68 See Theodore H. Frank, Position Paper for Roundtable on Settlement Class Actions ¶ 1.5.3 (Apr. 8, 2015) (unpublished manuscript) (on file with author) ("When courts hold that class counsel is entitled to fees for creating prospective injunctive relief of uncertain benefit, the incentive of class counsel and defendants is not to optimize social good (much less the benefit to the class), but to reshuffle deck chairs to minimize pain to the defendant

Consider, for example, *Poertner v. Gillette Co.*,⁶⁹ a recently affirmed settlement class action involving Duracell batteries. Plaintiffs claimed that Gillette falsely marketed its Duracell Ultra Advanced and Ultra Power batteries as longer lasting than its standard Duracell CopperTop batteries.⁷⁰ As part of the settlement, “Gillette agreed to stop putting the allegedly misleading statements on the packaging of Ultra batteries.”⁷¹ But by the time Gillette agreed to the settlement, it had discontinued the Ultra line of batteries.⁷² Simply put, the company agreed to a labeling change on a product that it no longer manufactured, marketed, or sold. When the Eleventh Circuit affirmed the approval of the settlement, it did not find clearly erroneous the district judge’s finding that the class received a “substantial benefit” from the company’s agreement to refrain from labeling Ultra batteries as longer-lasting.⁷³ The Court of Appeals reasoned, “Gillette’s decision to stop selling and marketing Ultra batteries with the challenged statements on the packaging was motivated by the present litigation.”⁷⁴ But the fact that litigation motivated a company to alter its conduct does not make the change itself consideration for the class members’ release of their claims. The Duracell settlement also included a cy pres remedy (distribution of batteries to charitable organizations), a small cash component available on a claims-made basis (the total amount paid was \$344,850), and attorneys’ fees and costs of \$5.68 million.⁷⁵ Class counsel, incredibly, contended that a \$5-million fee was justified because it was only ten percent of the settlement’s stated \$50-million value.⁷⁶

*Pearson v. NBTY*⁷⁷ offers another example of a consumer class settlement with a meaningless labeling change. Plaintiffs sued Rexall and other sellers of glucosamine pills, alleging that the defendants falsely represented that their product protected cartilage.⁷⁸ The defendants negotiated a settlement class action that, appropriately for a false-labeling class action, included changes to the product’s labeling.⁷⁹ However, the label changes required by the settlement were temporary in duration and cosmetic in content.⁸⁰ The district court in *Pearson* approved the settlement but attributed zero value to

while justifying fees to class counsel, at the expense of the class’s original claims and often society at large.”).

69 618 F. App’x 624 (11th Cir. 2015). The case offered the Supreme Court an excellent opportunity to weigh in on class settlement remedies, but the Court denied certiorari. See *Frank v. Poertner*, 136 S. Ct. 1453 (2016) (mem.) (denying certiorari).

70 See *Poertner*, 618 F. App’x at 625.

71 *Id.* at 626.

72 *Id.* at 625.

73 *Id.* at 629.

74 *Id.*

75 *Id.* at 625–26.

76 See *id.* at 626.

77 772 F.3d 778 (7th Cir. 2014). For discussion of the Seventh Circuit’s decision in *Pearson*, see *supra* text accompanying notes 53–56.

78 See *Pearson*, 772 F.3d at 779.

79 *Id.* at 779, 784.

80 *Id.* at 784.

the label revisions.⁸¹ The Seventh Circuit went further, reversing the settlement approval as an abuse of discretion.⁸² The injunctive relief was one of many problems with the settlement, but the Court of Appeals took pains to describe its valuelessness.⁸³ First, the court highlighted the limited time frame of the relief. The packaging restrictions applied for only two years (although the settlement described a thirty-month restriction, it gave the defendants six months to effectuate the changes).⁸⁴ The Seventh Circuit wondered why a settlement of false-labeling claims would permit a defendant to restore the alleged misrepresentations:

The 30-month (actually 24-month) cutoff means that after 30 months Rexall can restore the product claims that form the foundation of this suit. It says it will be reluctant to do that because then fresh class actions will be brought against it. But if so, why would it prefer a 30-month injunction to a perpetual injunction?⁸⁵

The Seventh Circuit's bigger concern, however, was the injunction's substantive emptiness:

A larger objection to the injunction is that it's superfluous—or even adverse to consumers. Given the emphasis that class counsel place on the fraudulent character of Rexall's claims, Rexall might have an incentive even without an injunction to change them. The injunction actually gives it protection by allowing it, with a judicial imprimatur (because it's part of a settlement approved by the district court), to preserve the substance of the claims by making—as we're about to see—purely cosmetic changes in wording, which Rexall in effect is seeking judicial approval of. For the injunction seems substantively empty.⁸⁶

The court examined, one by one, the packaging changes required by the settlement. For each, the court said, "We see no substantive change."⁸⁷ And the court went on:

Equally dubious claims found on the original label, moreover, are left unchanged, such as "maintain healthy connective tissue," "lubricate joints," "maintain joint comfort," and "improvements to joint comfort in seven days." . . . And no medical basis is suggested for any of the changes, or for not making changes that would bite.⁸⁸

81 *Pearson v. NBTY, Inc.*, No. 11 CV 7972, 2014 WL 30676 (N.D. Ill. Jan. 3, 2014), *rev'd on other grounds*, 772 F.3d 778 (7th Cir. 2014).

82 *See Pearson*, 772 F.3d at 787.

83 *See id.*

84 *Id.*

85 *Id.* at 785.

86 *Id.*

87 *Id.*

88 *Id.* Similarly, in the antitrust setting, a judge recently rejected a major settlement class action while expressing concerns about the "questionable value" of the injunctive relief provided in the proposed settlement. *See In re Am. Express Anti-Steering Rules Antitrust Litig.*, Nos. 11-MD-2221, 13-CV-7355, 2015 WL 4645240, at *20 (E.D.N.Y. Aug. 4, 2015).

In *Lane v. Facebook*,⁸⁹ plaintiffs challenged Facebook's "Beacon" program under which information about members' non-Facebook Internet activities was broadcast without their affirmative consent. Plaintiffs contended that the program violated their privacy rights.⁹⁰ Facebook negotiated a settlement class action in which the company agreed to terminate Beacon, but could reinstate the same policies.⁹¹ The district judge approved the settlement, and the Ninth Circuit affirmed.⁹² The Supreme Court denied certiorari, but as discussed above,⁹³ Chief Justice Roberts wrote separately to comment on the problems with the settlement. He noted that although the "complaint sought damages and various forms of equitable relief, including an injunction barring the defendants from continuing the program," the victims did not get either of the forms of relief they sought.⁹⁴ As to injunctive relief, he pointed out the emptiness of the settlement: "Although Facebook promised to discontinue the 'Beacon' program itself, plaintiffs' counsel conceded at the fairness hearing in the District Court that nothing in the settlement would preclude Facebook from reinstating the same program with a new name."⁹⁵

Merger and acquisition litigation sometimes yields nuisance settlements in which corporations agree to meaningless supplemental disclosures in exchange for release from class claims.⁹⁶ The Delaware Chancery Court recently rejected such a disclosure-only settlement of claims involving a proposed merger of Trulia and Zillow.⁹⁷ The Chancellor wrote:

I conclude that the terms of this proposed settlement are not fair or reasonable because none of the supplemental disclosures were material or even helpful to Trulia's stockholders, and thus the proposed settlement does not afford them any meaningful consideration to warrant providing a release of claims to the defendants.⁹⁸

Similarly, the Seventh Circuit recently reversed a district court's approval of a disclosure-only settlement relating to a Walgreens acquisition and reor-

89 696 F.3d 811 (9th Cir. 2012).

90 *Id.* at 816.

91 *Id.* at 828. The settlement also included a cy pres component of dubious value, which will be discussed below, and several million dollars in fees for the class lawyers. *See infra* text accompanying notes 151–65.

92 *See Lane*, 696 F.3d at 826.

93 *See supra* text accompanying notes 62–64.

94 *Marek v. Lane*, 134 S. Ct. 8, 8 (2013) (Roberts, C.J., respecting denial of certiorari).

95 *Id.* The Chief Justice quoted the transcript from the fairness hearing: "At the end of the day, we could not reach agreement with defendants regarding limiting their future actions as a corporation." *Id.*

96 *See* Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557 (2015); Joel Edan Friedlander, *How Rural/Metro Exposed the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 877 (2016); Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1 (2015).

97 *See In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 908 (Del. Ch. 2016).

98 *Id.* at 887.

ganization.⁹⁹ Judge Posner's opinion examined, one by one, each of the disclosures that class counsel had obtained in exchange for a release of the class members' claims, and explained why not one of them contained any new information that a reasonable investor would have found significant.¹⁰⁰

The lesson from these examples is that courts must not assume all negotiated remedies have value. The fact that class counsel and the defendant struck a deal with an injunctive component does not necessarily indicate that the injunctive remedy accomplishes anything useful. When thinking about settlement approval or attorneys' fees, courts should ask whether non-monetary components of a class settlement—structural reforms, marketing revisions, added disclosures, promises regarding conduct, and so on—provide any value to the class members, or, for that matter, whether the reforms cost anything to the defendant. If the non-monetary remedies provide real value, then courts should take that value into account for settlement approval and fees. Rexall's label revisions in *Pearson*, Facebook's new institute in *Lane*, and Trulia's supplemental disclosures in its merger litigation provided nothing of value to class members. Moreover, the measures were virtually costless and arguably beneficial to the defendants.

2. Coupons

In class action settlements, defendants naturally prefer providing coupons or credits to paying cash. Not only do coupons cost less to the defendant, they may help the defendant to generate business. In theory, there is nothing wrong with coupon settlements.¹⁰¹ At their best, coupons or credits present opportunities for non-zero-sum gains in settlement by providing value to class members greater than the cost to defendants. The best coupons or credits are transferable, stackable, and unrestricted.¹⁰² In practice,

99 See *In re Walgreen Co. Stockholder Litig.*, No. 15-3799, 2016 WL 4207962 (7th Cir. Aug. 10, 2016).

100 See *id.* at *2-3.

101 For a defense of coupon settlements, see Michael W. Davis et al., *Coupon Settlements Play Continuing Role in Class Litigation After CAFA*, 13 CLASS ACTION LITIG. REP. (BNA) No. 14, at 811 (July 27, 2012).

102 See, e.g., *Young v. Polo Retail, LLC*, No. C-02-4546, 2007 WL 951821 (N.D. Cal. Mar. 28, 2007). In *Young*, the court approved a class action settlement that was part cash, part gift cards. Judge Vaughn Walker explained why he approved it despite misgivings, focusing on the gift cards' breadth and transferability:

The primary downside of the proposed settlement is the use of product vouchers in the settlement award. The federal rules instruct that “[s]ettlements involving nonmonetary provisions for class members . . . deserve careful scrutiny to ensure that these provisions have actual value to the class.” Advisory Committee note for FRCP 23(2)(C)(h). In its preliminary approval order, the court asked “why would former employees, who allegedly were forced to buy a great deal of unwanted Polo products, desire product vouchers so that they could purchase even more clothes?” In response, plaintiff notes that Polo sells a broad array of merchandise other than clothes, such as sheets, towels, perfume and paint. More compelling than the availability of alternative items like Polo brand

however, coupon settlements sometimes provide little benefit to class members.

Coupons or credits that are transferable, especially if they permit a secondary market in the coupons, have cash value. If coupons are not transferable, one has to ask, Why not? To whatever extent the purpose of the settlement is to compensate class members for their claims, why aren't they entitled to the value of the coupon? And to whatever extent the purpose of the settlement is disgorgement and deterrence, shouldn't the defendant absorb the cost of the coupon regardless of whether a class member personally redeems it? Non-transferability increases the likelihood that a coupon will neither provide any benefit to the class member nor impose any cost on the defendant. If a settlement includes non-transferable coupons or credits, it is hard to resist the conclusion that the defendant wanted to discourage class members from using them, and that class counsel acquiesced because the coupons or credits would give the settlement a large face value even if the remedy provided little value to class members.

Another red flag is non-stackability. The holder of the coupon or credit should be able to use it on top of other discounts or credits. If coupons are not stackable, again one has to ask, Why not? To whatever extent the purpose of the settlement is to compensate class members for their claims, shouldn't they be entitled to the value of the coupon on top of whatever other discounts or credits they might have? And to whatever extent the purpose of the settlement is disgorgement and deterrence, shouldn't the defendant absorb the cost of the coupon regardless of whether a class member has other credits to use? When businesses use coupons, credits, or discounts as marketing devices, they are free to impose whatever restrictions they think will maximize profits. But when class counsel negotiate with defendants for coupons or credits as an alternative to cash in the settlement of plaintiffs' claims, it is hard to see a justification for non-stackability. If the defendant's business strategy for some reason requires that settlement coupons or credits not be used on top of other coupons or credits, then the lawyers and judge should be clear about the fact that the coupons or credits are worth less than their face value.

A third red flag is undue restrictions on use. For example, if a coupon or credit has an expiration date, or may be used only on certain items or only during certain calendar windows, then one ought to ask why such a restriction makes sense as part of the settlement. Unlike non-transferability and

paint or perfume is the transferability of the gift cards; this enables class members to obtain cash—something all class members will find useful.

Id. at *4 (alterations in original) (citations omitted); *see also In re Auction Houses Antitrust Litig.*, 164 F. Supp. 2d 345 (S.D.N.Y. 2001), *aff'd*, 42 F. App'x 511 (2d Cir. 2002) (approving an antitrust class action settlement in which class counsel took fees in the same 80-20 proportion of cash and coupons as class members, coupons were redeemable for cash after five years, and the settlement provided for the development of a secondary market in the coupons). *See generally* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Actions*, 49 UCLA L. REV. 991 (2002).

non-stackability, which seem intended only to reduce the cost to the defendant while creating the illusion of value for the class, certain restrictions on use may help parties achieve non-zero-sum gains in settlement. If so, the parties ought to be able to explain why the restrictions were useful in achieving a positive result for the class, and ought to be clear about the extent to which the restrictions reduce the actual value of the coupons or credits. If the coupons are transferrable and give rise to a secondary market, then restrictions on use are less problematic because the actual value of the deal for purposes of awarding attorneys' fees may be determined by the amount others are willing to pay for the coupons notwithstanding the restrictions on use.

Problems of non-transferability, non-stackability, and restricted use often go hand in hand. For example, Hewlett Packard (HP) agreed to settle claims involving HP InkJet printers by providing up to \$5 million in "e-credits" redeemable for printers and printer supplies, making certain disclosures to consumers, and paying up to \$2.9 million in attorneys' fees and costs.¹⁰³ Class members would receive electronic credits for \$2, \$5, or \$6 for each affected HP printer. The coupons, which could be used only on HP's website and would expire in six months, were not transferable and could not be used with other discounts or coupons.¹⁰⁴ The district court approved the settlement and awarded attorneys' fees of \$1.5 million plus nearly \$600,000 in costs.¹⁰⁵ The Ninth Circuit did not reach the question of whether the district court abused its discretion in finding the settlement reasonable, but reversed on the grounds that the district court's fee award to class counsel violated the Class Action Fairness Act, which requires that fees for coupon settlements be based on the value of coupons actually redeemed.¹⁰⁶

In *In re EasySaver Rewards Litigation*,¹⁰⁷ the defendant settled claims by providing class members with \$20 credits for online purchases from ProFlowers and the defendant's other online gift-selling businesses. The credits could not be used during the Christmas, Valentine's Day, or Mother's Day seasons; they expired in one year; and they could not be used on top of the substantial discounts that the website regularly offered all its customers.¹⁰⁸ The parties audaciously asked the court to value these credits at their full face value, and the district judge complied.¹⁰⁹ The judge approved the settlement and awarded attorneys' fees based on the total face value of the

103 See *In re HP InkJet Printer Litig.*, 716 F.3d 1173, 1176 (9th Cir. 2013).

104 See *id.* at 1176 & n.2; see also *id.* at 1179 ("[A] coupon settlement is likely to provide less value to class members if, like here, the coupons are non-transferable, expire soon after their issuance, and cannot be aggregated.").

105 *Id.* at 1177.

106 *Id.* at 1181, 1187 (citing 28 U.S.C. § 1712 (2012)).

107 921 F. Supp. 2d 1040 (S.D. Cal. 2013), *vacated and remanded*, 599 F. App'x 274 (9th Cir. 2015).

108 See *id.* at 1045.

109 *Id.* at 1048-49 ("[T]he Court finds that the \$20 credits, regardless of their classification as coupons or credits, provide an actual value of \$20 to the class members despite the blackout dates and inability to combine the credits with coupons and promotions.").

deal, including both the coupon component and the cash component, despite overwhelming reasons why each of the components was actually worth far less than the face value. The court stated, “The total settlement will approximate \$38 million dollars if the entire class use the credits and make claims for reimbursement.”¹¹⁰ But predictably only a small fraction of the class members would use the credits and make claims for reimbursement, so it is hard to understand how class counsel could straight-facedly ask a judge to treat the remedy as being worth its face value, or how a district judge could agree to do so.

Section 1712 of the Class Action Fairness Act of 2005 (CAFA) took aim at coupon settlements.¹¹¹ The statute, best known for expanding federal court jurisdiction over class actions, allows federal courts to approve a coupon settlement only upon a hearing and a written finding that the settlement is reasonable for class members.¹¹² Moreover, in cases where a judge awards attorneys’ fees based on the size of the settlement, the statute instructs judges to consider the value to class members of coupons actually redeemed.¹¹³ Although CAFA too narrowly focused on “coupons” rather than the full panoply of class settlement issues, section 1712 is a useful tool for courts inclined to invoke it.¹¹⁴ The Senate Report captured the skepticism courts should bring to coupon settlements:

Such settlements may be appropriate where they provide real benefits to consumer class members (e.g., where coupons entitle class members to receive something of actual value free of charge) or where the claims being resolved appear to be of marginal merit. However, where such settlements are used, the fairness of the settlement should be seriously questioned by the reviewing court where the attorneys’ fees demand is disproportionate to the level of tangible, non-speculative benefit to the class members.¹¹⁵

110 *Id.* at 1046.

111 *See* 28 U.S.C. § 1712; S. REP. NO. 109-14, at 27 (2005).

112 28 U.S.C. § 1712(e) (“In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.”); *see also* S. REP. NO. 109-14, at 31 (“Section 1712(e) provides that a federal judge may not approve a coupon settlement without first conducting a hearing and determining that the settlement terms are fair, reasonable, and adequate for class members. In making that determination, the judge should consider, among other things, the real monetary value and likely utilization rate of the coupons provided by the settlement.”).

113 28 U.S.C. § 1712(a) (“If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney’s fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.”). The statute does not prohibit use of a lodestar method rather than a percent-of-recovery method, however. *See id.* § 1712(b).

114 *See, e.g.,* *Redman v. RadioShack Corp.*, 768 F.3d 622, 633–34 (7th Cir. 2014).

115 S. REP. NO. 109-14, at 31–32.

But questions persist about what counts as a “coupon” under the statute,¹¹⁶ and parties continue to negotiate settlements with significant components of coupons, vouchers, or credits.

Regardless of whether they use the word coupon, courts should be on the lookout for any settlement that offers a credit or discount for goods or services. When a class settlement includes such a provision, the judge should ask whether the credit or discount is transferrable, stackable, and unrestricted. Valuation of such settlement terms for purposes of approving the settlement or awarding attorneys’ fees should be based on the actual value to the class members of credits or discounts redeemed.¹¹⁷

3. Cy Pres

It has become common for class settlements to include payments to charitable organizations.¹¹⁸ The theory behind such “cy pres” settlement provisions is that even if a settlement cannot feasibly compensate class members directly, it can remedy the claims indirectly through an organization that serves similar interests.

Short for *cy près comme possible* (as close as possible), an equitable doctrine that permits the effectuation of a testator’s intent by finding the next best thing to satisfy the intent when the testator’s specific instructions cannot be followed, cy pres has proved useful in certain class actions where direct remedies are elusive.¹¹⁹ An early example is *Daar v. Yellow Cab Co.*,¹²⁰ a California class action in which plaintiffs claimed that a taxicab company had been overcharging its customers for four years. Well before the era of Uber accounts and credit card taxi payments, it was not feasible to identify and locate customers who had used the defendant’s cabs during the relevant time frame. The parties reached a \$1.4-million settlement in which \$950,000 would be funded by requiring the defendant to lower its fares for a period of time, thus spreading the remedy to future users of the company’s services.¹²¹ Although the remedy was overinclusive and underinclusive in terms of whom it compensated, it was the most sensible remedy for the class of taxicab customers under the circumstances. Presumably there would be overlap

116 See, e.g., *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914 (9th Cir. 2015). The district court in *EasySaver*, for example, concluded that the online credits in that class settlement were not “coupons” for purposes of CAFA. *In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040 (S.D. Cal. 2013), *vacated*, 599 F. App’x 274 (9th Cir. 2015).

117 To the extent class actions serve goals of deterrence and disgorgement rather than compensation, valuation may be based on cost to defendant rather than value to class members. Either way, non-transferability, non-stackability, and use restrictions reduce the value of credits or discounts as class action remedies. See *infra* text accompanying notes 120–26.

118 See Wasserman, *supra* note 5.

119 Beck & Weil, *supra* note 5, at 1–2.

120 *Daar v. Yellow Cab Co.*, 433 P.2d 732 (Cal. 1967).

121 See 4 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 11:20 n.13 (4th ed. 2002).

between the set of past customers who were overcharged and the set of future customers who would receive the lower fares, and even if not, at least the defendant would give up its ill-gotten gains.¹²²

Another early example is the Agent Orange class action settlement, in which three-fourths of the settlement fund was set aside for distribution on a claims-made basis to Vietnam veterans who were diagnosed with cancer during the designated time frame, and one-fourth was used to create a “Class Assistance Program” to serve the needs of Vietnam veterans and their families. Judge Jack Weinstein explained this portion of the settlement as a way to reach a broader portion of the class than would be eligible for cash payments.¹²³

But cy pres remedies have spread to a wider range of class settlements, and the distributions do not always make sense as remedies for the claims asserted by the class. Courts should be on the lookout for three types of red flags: cy pres remedies in settlements where class members could have been compensated directly, cy pres remedies that flow to organizations with which class counsel or the judge is affiliated, and cy pres remedies that fail to benefit class members or that serve the defendant’s self-interest.

Cy pres remedies in settlements make sense under some limited circumstances, particularly to distribute settlement funds that remain after fully compensating all class members who can be located. Reversion and escheat are worse options for remainders.¹²⁴ The American Law Institute, in the *Principles of the Law of Aggregate Litigation*, recommends distribution of remaining funds to identified class members instead of cy pres distribution.¹²⁵ Cy pres remedies should remain available as a tool in the class settle-

122 Some would refer to the remedy in *Daar* as “fluid recovery” rather than cy pres:

As the term has been most often used, cy pres refers to the designation of a portion of unclaimed damage or settlement funds to a charitable use that is in some way related to the subject of the suit. As employed here, fluid class recovery applies to an effort—either in a class settlement or as part of a class award—to approximate the injured class of consumers through the provision of relief to future consumers.

Redish et al., *supra* note 5, at 662. Both types of remedies are built on the idea that even if class members cannot be compensated directly, it may be possible to remedy their claims indirectly. The settlement provisions of this sort that raise red flags involve cy pres more than fluid recovery.

123 See *In re “Agent Orange” Prod. Liab. Litig.*, 689 F. Supp. 1250, 1259–60 (E.D.N.Y. 1988).

124 Reversion to the defendant undermines deterrence. See *infra* text accompanying notes 158–59. Escheat to the state takes class members’ claims and appropriates their value as public property. See *Highland Homes Ltd. v. Texas*, 448 S.W.3d 403 (Tex. 2013) (holding that unclaimed class action funds need not escheat to the state under the Texas Unclaimed Property Act, despite prior Texas decisions to the contrary).

125 See, e.g., AM. LAW INST., *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 3.07 (2010). In some cases a second distribution may create a windfall for a small minority of class members while leaving other class members’ claims completely unremedied, but in general section 3.07 represents a sensible approach to the problem of cy pres, and courts increasingly are moving to this position. See, e.g., *In re BankAmerica Corp. Secs. Litig.*, 775

ment toolbox,¹²⁶ but courts should be on the lookout for the red flags that suggest that the inclusion of a *cy pres* remedy worked to advantage class counsel and the defendant at the expense of class members.

a. Unnecessary *Cy Pres*

The most basic red flag is the unnecessary inclusion of a *cy pres* remedy. The very presence of *cy pres* relief in a settlement should make a judge ask whether compensating the class directly was truly infeasible.

In *Pearson v. NBTY, Inc.*, the case concerning false labeling of glucosamine, the district court approved a settlement class action that included a \$1.13-million *cy pres* award to an orthopedic foundation.¹²⁶ The Seventh Circuit held that *cy pres* was improper because the funds should have gone to class members:

[T]here is no validity to the \$1.13 million *cy pres* award in this case. A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries, here consisting of the class members The Orthopedic Research and Education Foundation seems perfectly reputable, but it is entitled to receive money intended to compensate victims of consumer fraud only if it's infeasible to provide that compensation to the victims—which has not been demonstrated.¹²⁷

The point is simple: unless it is infeasible to remedy claims directly, there is no cause to resort to an “as close as possible” solution.¹²⁸

In *In re BankAmerica Corp. Securities Litigation*,¹²⁹ shareholders filed class actions alleging securities law violations in connection with the merger of NationsBank and BankAmerica to form Bank of America Corporation. The court certified four classes and later approved a class settlement.¹³⁰ After two rounds of distributions to class members, \$2.4 million remained in a settlement fund for the NationsBank class.¹³¹ Granting class counsel's motion to distribute the “surplus settlement funds” to charity, the district court ordered “that the balance of the NationsBank Classes settlement fund shall be distributed *cy pres* to Legal Services of Eastern Missouri, Inc.”¹³² A class representa-

F.3d 1060 (8th Cir. 2015); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011); *Slipchenko v. Brunel Energy, Inc.*, No. H-11-1465, 2015 WL 5332219 (S.D. Tex. Sept. 14, 2015); *Better v. YRC Worldwide Inc.*, No. 11-2072, 2013 WL 4482922 (D. Kan. Aug. 19, 2013).

¹²⁶ *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780 (7th Cir. 2014).

¹²⁷ *Id.* at 784.

¹²⁸ See ADVISORY COMM. ON CIVIL RULES, *supra* note 5, at 27 (“The starting point is that the settlement funds belong to the class members and do not serve as a resource for general ‘public interest’ activities overseen or endorsed by the court.”).

¹²⁹ 775 F.3d 1060.

¹³⁰ *Id.* at 1062.

¹³¹ *Id.* at 1069.

¹³² *In re Bank of Am. Corp. Secs. Litig.*, No. 4:99-MD-1264, 2013 WL 3212514, at *7 (E.D. Mo. June 24, 2013), *rev'd sub nom. In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015).

tive argued on appeal that the district court abused its discretion in ordering the cy pres distribution, and the Eighth Circuit agreed.¹³³ The Court of Appeals did not accept class counsel's word that a cy pres distribution was warranted, since further distributions to the class were feasible. The court emphatically rejected class counsel's contention "that a further distribution to the class is inappropriate because it would primarily benefit large institutional investors, who are less worthy than charities such as [the proposed cy pres beneficiaries]." ¹³⁴ The Eighth Circuit "flatly reject[ed] this contention," calling the move an "impermissible misappropriation of monies gathered to settle complex disputes among private parties."¹³⁵

What the district courts in *Pearson* and *BankAmerica* failed to appreciate is that the claims belong to the class members. As the Eighth Circuit aptly put it in *BankAmerica*, giving settlement funds to charity, when the funds could be distributed to class members, amounts to misappropriation of other people's money.

b. Cy Pres Tainted by Conflict of Interest

The ugliest cy pres settlements are those that direct funds to organizations with which class counsel or the judge is affiliated. In a particularly egregious example, a settlement in the fen-phen mass tort litigation included a cy pres component in which the defendant paid \$20 million to establish the "Kentucky Fund for Healthy Living," and the proceeds were used in part to pay an annual salary to the judge and to the plaintiffs' lawyers as directors of the new organization.¹³⁶ The lawyers involved were disbarred,¹³⁷ two were convicted on criminal charges,¹³⁸ and the judge was removed from the bench.¹³⁹

Most examples are not so corrupt, but nonetheless may involve settlements that steer money in a direction that an attorney or judge favors. In selecting cy pres recipients, negotiators may seek to benefit their alma maters or their favorite charities.¹⁴⁰ By letting the judge select cy pres recipients, negotiators may seek to incline the judge toward approval without adding value for the class.¹⁴¹ A variation is allowing class representatives to select the charities, which is a way to incline the class representatives to go along with

133 *BankAmerica*, 775 F.3d at 1062–63.

134 *Id.* at 1065.

135 *Id.*

136 *Gallion v. Ky. Bar Ass'n*, 266 S.W.3d 802, 804 (Ky. 2008).

137 *Cunningham v. Ky. Bar Ass'n*, 266 S.W.3d 808, 813 (Ky. 2008); *Gallion*, 266 S.W.3d 802, 807.

138 *United States v. Cunningham*, 679 F.3d 355, 369 (6th Cir. 2012); *see also* Erichson, *All-or-Nothing*, *supra* note 12, at 986.

139 *Ky. Bar Ass'n v. Bamberger*, 354 S.W.3d 576, 580 (Ky. 2011).

140 *See, e.g., In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040, 1045 (S.D. Cal. 2013), *vacated*, 599 F. App'x 274 (9th Cir. 2015).

141 *See, e.g., In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013).

the proposed settlement regardless of what it accomplishes for the class.¹⁴² Courts should be skeptical about any settlement term that primarily appeals to the lawyers', class representatives', or judge's self-interests—including their altruistic interests.

c. *Cy Pres* of No Value to the Class

Finally, courts should be wary of *cy pres* settlement provisions that are worthless for class members, self-serving for defendants, or both. The point of a *cy pres* remedy is not to find a random organization that does worthwhile work; the point is to achieve the best remedy for claimants that can be achieved under circumstances where direct compensation is infeasible. If a judge and lawyers want to help a worthy organization, they are free to donate their own money; they are not free to donate other people's claims.

In *Dennis v. Kellogg Co.*,¹⁴³ the plaintiff filed a class action claiming that Kellogg engaged in a false marketing campaign asserting that its Frosted Mini-Wheats cereal was scientifically proven to improve children's cognitive functions for several hours after breakfast.¹⁴⁴ The class lawyers negotiated a deal with Kellogg to settle the claims on a nationwide basis through a settlement class action. The largest component of the settlement was Kellogg's agreement to distribute \$5.5 million of Kellogg food items to charities that feed the indigent.¹⁴⁵ In addition, \$2.75 million would be set aside for distribution to class members on a claims-made basis, and any remainder of this fund would be donated to "charities chosen by the parties and approved by the Court pursuant to the *cy pres* doctrine."¹⁴⁶

The district court approved the Kellogg settlement along with \$2 million in fees and costs for class counsel.¹⁴⁷ The Ninth Circuit, reversing, noted that the noble goal of feeding the needy has nothing to do with the class of plaintiffs or the purpose of the lawsuit, other than that they both involve food.¹⁴⁸ The court questioned the value of the settlement for the class mem-

142 See *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1037 (9th Cir. 2011) (involving a settlement where class representatives each chose a charity to receive \$8750; one chose the school where she worked).

143 *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012).

144 *Id.* at 861–62.

145 *Id.* at 863 ("Kellogg agreed to distribute, also pursuant to the *cy pres* doctrine, \$5.5 million 'worth' of specific Kellogg food items to charities that feed the indigent. The settlement does not specify the recipient charities, nor does it indicate how this \$5.5 million in food will be valued—at cost, wholesale, retail, or by some other measure.").

146 *Id.* at 862–63. The settlement also included a marketing restriction of dubious value. For three years, Kellogg would "refrain from using in its advertising and on its labeling for the Product any assertion to the effect that 'eating a bowl of Kellogg's® Frosted Mini-Wheats cereal for breakfast is clinically shown to improve attentiveness by nearly 20%,'" but the company "would still be allowed to claim that '[c]linical studies have shown that kids who eat a filling breakfast like Frosted Mini-Wheats have an 11% better attentiveness in school than kids who skip breakfast.'" *Id.* at 863 (alteration in original).

147 *Id.*

148 *Id.* at 866.

bers: “This record leaves open the distinct possibility that the asserted \$5.5 million value of the product *cy pres* award and the remaining cash *cy pres* award will only be of serendipitous value to the class purportedly protected by the settlement.”¹⁴⁹ Not only did the court suggest that the *cy pres* remedy was worthless to the class, the court went further, asking whether the remedy was designed to be costless to Kellogg:

[T]he settlement fails to include any restrictions on how Kellogg accounts for the *cy pres* distributions. Can Kellogg use the value of the distributions as tax deductions because they will go to charity? And given that Kellogg already donates both food and money to charities every year—which is unquestionably an admirable act—will the *cy pres* distributions be in addition to that which Kellogg has already obligated itself to donate, or can Kellogg use previously budgeted funds or surplus production to offset its settlement obligations?¹⁵⁰

The court also raised questions about the valuation of the *cy pres* remedy, appropriately worrying that the proposed food distribution was a ploy to make the settlement appear large for purposes of justifying the attorneys’ sizable fee request.¹⁵¹

149 *Id.* at 867. For another example of an off-point *cy pres* settlement remedy, see *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015), which involved alleged violations of securities laws in connection with the merger of NationsBank and BankAmerica to form Bank of America Corporation. After initial distribution to class members, \$2.4 million remained in a settlement fund for the NationsBank class. The district court, at class counsel’s suggestion, ordered “that the balance of the NationsBank Classes settlement fund shall be distributed *cy pres* to the Legal Services of Eastern Missouri, Inc.” *In re Bank of Am. Corp. Secs. Litig.*, No. 4:99-MD-1264, 2013 WL 3212514, at *7 (E.D. Mo. June 24, 2013), *rev’d sub nom. BankAmerica*, 775 F.3d 1060. Reversing, the Eighth Circuit stated that Legal Services of Eastern Missouri, “though unquestionably a worthy charity, is not the ‘next best’ recipient of unclaimed settlement funds in this nationwide class action seeking damages for violations of federal and state securities laws.” *BankAmerica*, 775 F.3d at 1067.

150 *Dennis*, 697 F.3d at 867–68. After the Ninth Circuit reversed the district court’s approval of the settlement, Kellogg negotiated a new settlement with class counsel. The revised deal increased the cash payment to class members. It still included a *cy pres* component, but rather than distribute food and funds to organizations that feed the indigent, the settlement designated specific consumer advocacy groups as the recipients of funds. *Dennis v. Kellogg Co.*, No. 09-CV-1786, 2013 WL 1883071, at *1 (S.D. Cal. May 3, 2013).

151 The court explained that the appropriateness of the requested fees for class counsel depended upon valuing the food distribution at the full stated amount of \$5.5 million, even though the parties did not specify whether the valuation was based on retail price, wholesale price, producer’s cost, or some other measure:

This deficiency raises in turn serious issues about the alleged dollar value of the product *cy pres* award, an important number used to measure the appropriateness of attorneys’ fees. For example, if the alleged \$5.5 million value of the product *cy pres* distribution turns out on close examination to be an illusion and is subtracted from the alleged \$10.64 million value of the common fund, the dollar value of the settlement fund plummets to \$5.14 million, and the \$2 million attorneys’ fees award becomes 38.9% of the total, which is clearly excessive under our guidelines. This possibility gives us an additional reason to be vigilant regarding the particulars of this class action settlement: is it all that it appears to be? Are the

In *Lane v. Facebook, Inc.*,¹⁵² discussed above in the context of spurious injunctive relief,¹⁵³ plaintiffs challenged Facebook's Beacon program as an invasion of privacy for broadcasting members' online activities without consent.¹⁵⁴ The named plaintiff, Sean Lane, had bought a ring from Overstock.com as a Christmas gift for his wife, and his wife learned of the purchase when Facebook revealed the information without Lane's consent.¹⁵⁵ Facebook and the class action lawyers struck a deal. Facebook agreed to terminate Beacon, but could reinstate the same program by a different name.¹⁵⁶ Facebook also agreed to pay \$9.5 million, but none of the money would go to class members.¹⁵⁷ Rather, about \$3 million would go to the class lawyers and class representatives and \$6.5 million would be used to create an organization called the Digital Trust Foundation (DTF),¹⁵⁸ whose purpose was to "fund and sponsor programs designed to educate users, regulators[,] and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats."¹⁵⁹ The foundation would have a three-member board of directors, one of whom would be a Facebook executive.¹⁶⁰ The district court approved the settlement,¹⁶¹ the Ninth Circuit affirmed¹⁶² and denied rehearing en banc,¹⁶³ and the Supreme Court denied certiorari.¹⁶⁴

The Facebook settlement traded away class members' claims for something of no value to the class. The class did not get protection from the alleged privacy violations because the settlement permitted Facebook to reinstate the same policies. The class did not receive any compensation. And as to the *cy pres* remedy, not only would Facebook partly control the new entity, but the entity was not even devoted to serving the interests at stake in the lawsuit. The DTF was established to enhance user control through educa-

assigned numbers real, or not? This issue is particularly critical with a *cy pres* product settlement that has a tenuous relationship to the class allegedly damaged by the conduct in question. The issue of the valuation of this aspect of a settlement must be examined with great care to eliminate the possibility that it serves only the "self-interests" of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious.

Dennis, 697 F.3d at 868.

152 *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012).

153 *See supra* text accompanying notes 75–78.

154 *Lane*, 696 F.3d at 817.

155 *Id.* at 827 (Kleinfeld, J., dissenting).

156 *Id.* at 828.

157 *Id.* at 817 (majority opinion).

158 *Id.*

159 *Id.* (alteration in original) (internal quotation marks omitted) (quoting DIGITAL TR. FOUND., <http://digitaltrustfoundation.org/purpose-history/> (last visited Sept. 30, 2016)).

160 *Id.*

161 *Id.* at 818; *see also* *Lane v. Facebook, Inc.*, No. C 08-3845, 2010 WL 9013059 (N.D. Cal. Mar. 17, 2010).

162 *Lane*, 696 F.3d at 826.

163 *Lane v. Facebook, Inc.*, 709 F.3d 791, 793 (9th Cir. 2013).

164 *Marek v. Lane*, 134 S. Ct. 8 (2013).

tion, but the lawsuit had nothing to do with protection from hackers or accidental disclosure of private information by users. Rather, the lawsuit accused Facebook of intentionally (and wrongfully) revealing user information. Judge Smith explained the disconnect in his dissent from the Ninth Circuit's denial of rehearing en banc:

[A]n organization that focuses on protecting privacy solely through "user control" can *never* prevent unauthorized access or disclosure of private information where the alleged wrongdoer *already has unfettered access* to a user's records. The DTF can teach Facebook users how to create strong passwords, tinker with their privacy settings, and generally be more cautious online, but it can't teach users how to protect themselves from Facebook's deliberate misconduct. Unless of course the DTF teaches Facebook users not to use Facebook. That seems unlikely.¹⁶⁵

The Facebook settlement was lambasted¹⁶⁶ but the deal survived.

4. Claims Procedures

To obtain money from a settlement fund, class members often must participate in a post-settlement claims process. The first question should be whether any claims process is necessary. Could the settlement compensate class members directly rather than on a claims-made basis? Defendants often possess information about their own consumers, members, investors, or employees. If class members can be identified using information in defendants' possession, and if settlement amounts need not vary individually based on information unavailable to defendants, then the settlement should set up a direct payment process rather than a claims-made process. In a settlement of price-fixing claims against electronic book publishers, for example, the defendant publishers funded automatic credits to class members' Amazon accounts.¹⁶⁷ In a recent study of consumer class action compensation rates, Brian Fitzpatrick and Robert Gilbert showed that settlements can be designed to increase the proportion of class members who actually receive compensation.¹⁶⁸ They found not only that the settlements with the highest compensation rates did not require class members to file claim forms, but also that where checks were automatically sent to class members, the check negotiation rate depended upon whether postcard-sized checks or standard-sized checks were used,¹⁶⁹ and they concluded that "courts and counsel inter-

165 *Lane*, 709 F.3d at 794–95 (Smith, J., dissenting from denial of rehearing en banc).

166 *See, e.g.*, Liptak, *When Lawyers*, *supra* note 5.

167 *In re Elec. Books Antitrust Litig.*, No. 12-cv-03394, 2013 WL 7045299 (S.D.N.Y. Dec. 9, 2013); *see also For Information About the 2016 Apple eBook Settlement*, AMAZON, <http://www.amazon.com/gp/feature.html?docId=1002402851> (last visited Dec. 15, 2016) ("Eligible customers do not need to do anything to receive these credits. If you are eligible, we have already calculated your credit and added it to your Amazon account.").

168 *See* Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J. L. & Bus. 767, 788 (2015).

169 *Id.* at 770.

ested in the compensatory side of class actions should make efforts to directly deposit settlement payments whenever possible.”¹⁷⁰

The second question, assuming a claims process is needed, is whether the process established by the settlement is more opaque or burdensome than necessary.¹⁷¹ Claims rates in class actions are often low, an unsurprising fact given the small amounts often involved. Compensation in small-claims class actions requires clear, concise notice and simple, efficient claiming. But defendants naturally prefer to pay less and class counsel have little incentive to push for a simpler claims process if they can persuade a court to award fees based on the total available fund. In this regard, claims-made cash settlements have much in common with the coupon settlements discussed above.¹⁷²

The glucosamine false labeling settlement in *Pearson v. NBTY*, for example, included monetary compensation to be provided on a claims-made basis, as well as a cy pres remedy. The Seventh Circuit, explaining its rejection of the cy pres component of the settlement, noted that rather than paying out claims only on a claims-made basis, the defendant could have sent checks to those customers whom it knew to have bought the pills:

The 4.72 million who received postcards were all those whom Rexall knew (through pharmacy loyalty programs and the like) to have bought its glucosamine pills . . . [K]nowing that 4.72 million people had bought at least one bottle of its pills, Rexall could have mailed \$3 checks to all 4.72 million postcard recipients.¹⁷³

As to the portion of the settlement that provided monetary compensation to class members, the Seventh Circuit described the discouraging claims process:

Another of the links is captioned “Claim Form,” and if you clicked on that you’d see a “Glucosamine Settlement Claim Form.” The form required the claimant to list cash register receipts or other documentation indicating the date and place at which he or she had bought the product. The form advised the claimant that “The Claims Administrator and the Parties have the right to audit all claims for completeness, waste, fraud, and abuse. Filing a false claim may violate certain criminal or civil laws.” Further, the claimant was—in boldface—required to “certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.”¹⁷⁴

170 *Id.* at 771.

171 See ADVISORY COMM. ON CIVIL RULES, *supra* note 5, at 26 (“In reviewing a proposed settlement, the court should focus on whether the claims process might be too demanding, deterring or leading to denial of valid claims.”).

172 See Frank, *supra* note 68, ¶ 1.5.2 (“Claims-made settlements . . . are economically indistinguishable from coupon settlements. In both types of settlements, the defendant ‘makes available’ a certain amount of relief, but can expect to pay only a fraction of that amount because of low redemption or claims rates.”). For a discussion of red flags in coupon settlements, see *supra* subsection II.A.2.

173 *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014).

174 *Id.* at 783.

The court suggested that a sworn statement should have sufficed for monetary compensation in light of the low ceiling on payouts and the fact that claimants were unlikely to have kept receipts.

The requirement of needlessly elaborate documentation, the threats of criminal prosecution, and the fact that a claimant might feel obliged to wade through the five other documents accessible from the opening screen of the website, help to explain why so few recipients of the postcard notice bothered to submit a claim.¹⁷⁵

What motivated the defendant to make the claims process complex and intimidating? The court found it “hard to resist the inference” that the goal was to minimize the number of claims.¹⁷⁶ And why would class counsel agree to such a claims process? The court explained it, correctly and troublingly, in terms of class counsel’s interest in reducing the payouts to class members: “Class counsel also benefited from minimization of the claims, because the fewer the claims, the more money Rexall would be willing to give class counsel to induce settlement.”¹⁷⁷ As long as they can make the settlement *appear* large for purposes of settlement approval and attorneys’ fees, the defendant and class counsel share an interest in creating a burdensome claims process that reduces the number of claims.

The *EasySaver Rewards Litigation* class settlement included not only restricted coupons,¹⁷⁸ but also a process for class members to obtain cash refunds of their monthly membership fees in the rewards program. To obtain refunds, class members were required to visit an online link and submit their contact information.¹⁷⁹ But the defendant already knew who had paid the membership fees and how much they had paid. Indeed, the settlement required that refund claims be evaluated based on the defendant’s own records: “The Claims Administrator will evaluate and calculate all claims for payment based upon Defendants’ records.”¹⁸⁰ Why would a refund process place the burden on each class member to reach out to the company? Class members were required to “verify that they did not intend to enroll and did not use the benefits of the program.”¹⁸¹ While verification processes can be useful to separate meritorious from non-meritorious claims, the step was problematic in this settlement given the nature of the claims in the *EasySaver* litigation. The plaintiffs’ lawsuit accused the defendant of fraudulently enticing consumers to click on a link to earn rewards from the defendant’s online businesses.¹⁸² One might expect this class of consumers, burned once, to

175 *Id.*

176 *Id.*

177 *Id.*

178 For a discussion of the *EasySaver* settlement as an example of an unduly restrictive coupon settlement, see *supra* text accompanying notes 107–10.

179 *In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040, 1045 (S.D. Cal. 2013), *vacated*, 599 F. App’x 274 (9th Cir. 2015).

180 *Id.*

181 *Id.*

182 *Id.* at 1043.

resist clicking on another link from the same company and to provide requested information. Given that the defendant could have sent each customer a refund check, one has to wonder whether the refund process was designed to maximize the margin between the stated value of the settlement (for purposes of settlement approval and attorneys' fees) and the actual cost of the settlement to the defendant.

5. Reversions and Claims-Made Settlements

Reversionary settlements seem to have become uncommon in the face of judicial disfavor.¹⁸³ When a class settlement provides for the reversion of unclaimed funds to the defendant, it encourages the defendant and class counsel to design a claims process that reduces the compensation actually paid to the class while leaving the defendant and class counsel a basis for overstating the value of the settlement for purposes of settlement approval and attorneys' fees. As mentioned above, there is no perfect answer to what should happen to money that remains in a fixed-amount settlement fund after class members' claims have been paid.¹⁸⁴ Reversion to the defendant reduces the impact of the class action both as a matter of compensation and as a matter of deterrence and disgorgement. *Cy pres* distribution carries its own problems. Escheat eliminates the under-enforcement problem of reversion but deprives class members of a portion of their compensation for the claims that they gave up. The American Law Institute recommends a second distribution to class members, when feasible, if funds remain after a first distribution,¹⁸⁵ but in some cases such a distribution would provide a windfall for a small number of class members while leaving others uncompensated.

The problems with reversion would disappear if attorneys' fees were awarded based on funds actually paid to class members, rather than based on the face value of the settlement as presented by its proponents. If fees are to be awarded based on the entire settlement fund, judges should be wary of approving any class settlement that allows funds to revert to the defendant.¹⁸⁶

183 See, e.g., *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) ("Reversion to the defendant risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement."); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 32–33 (1st Cir. 2012); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308–09 (9th Cir. 1990); *Diamond Chem. Co. v. Akzo Nobel Chems. B.V.*, 517 F. Supp. 2d 212 (D.D.C. 2007); *Cundiff v. Verizon Cal., Inc.*, 84 Cal. Rptr. 3d 377 (Ct. App. 2008).

184 See *supra* text accompanying notes 103–04.

185 AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(b) (2010).

186 See ADVISORY COMM. ON CIVIL RULES, *supra* note 5, at 26 n.37. The report suggests that it might be beneficial for the Committee to add language to the Rule 23 notes to express caution about settlements with reversionary provisions, for example by saying that "if there is a reverter clause the court should look at the claims process very carefully to make sure that it does not impose high barriers to claiming." *Id.*

In terms of discouraging the design of user-friendly claims processes, claims-made settlements are no different from reversionary settlements. A claims-made settlement is one in which the defendant pays claimants as they come rather than paying a set amount of money into a settlement fund.¹⁸⁷

B. Terms That Expand Class Counsels' Franchise and Defendants' Protection

Defendants' interests and plaintiffs' lawyers' interests align in settlement comprehensiveness. When a defendant pays to be released from claims, the defendant desires the broadest possible release, preferring to be thoroughly shielded from future litigation. Claimants who get little from the settlement might benefit from a narrower release that leaves their claims intact, but the negotiating lawyer has the opposite objective, as class action lawyers seek to expand the size of their franchise. The broader the class definition at settlement, the more claimants the attorney represents. And the broader the release, the more a defendant is willing to pay, even if the benefit is negligible for each added member of a more broadly defined class.

1. Excessively Broad Release

A settlement, by definition, means that a claimant releases claims in exchange for the remedy offered by the defendant. But the releases in some class settlements go further than one would expect, releasing defendants from liability for conduct that falls outside of the claims asserted in the complaint. It is easy to understand why a defendant would request an all-encompassing release, but it is harder to see why a loyal negotiator for the class would agree to it. One might expect that a lawyer negotiating on behalf of a plaintiff class would push back against a defendant's unduly broad proposed release.

The best deal for the class would be one that releases only those claims that are reasonably compensated in the settlement. For the class lawyer, however, it is hard to internalize the benefit to the class that flows from a narrower release. The lawyer stands to benefit only from the particular class settlement on the table, not from whatever judgment or settlement the class members might obtain in a subsequent action upon other claims. Thus, the class lawyer's self-interest points toward accepting whatever release the defendant demands. For the class lawyer, anything that expands the scope of the deal, and anything that gets the deal done, is advantageous. Releasing additional claims may be costly to class members, but it is costless to their lawyer.

In *Authors Guild v. Google Inc.*,¹⁸⁸ for example, Google and a group of class action lawyers proposed a settlement class action that not only would have released Google from liability to authors for past copyright infringe-

¹⁸⁷ See RUBENSTEIN, *supra* note 1, § 13:7 (defining claims-made settlement and describing it as "the functional equivalent of a common fund settlement where the unclaimed funds revert to the defendant").

¹⁸⁸ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011). Judge Denny Chin rejected the proposed class settlement and later granted summary judgment in favor

ment in connection with its controversial Google Books project, but also would have released Google from liability for future conduct in connection with the project. For Google, the benefit of such a release was obvious. By striking a deal with lawyers who purport to represent all book authors, Google sought to protect itself from copyright liability as it moved forward with its controversial project. For the lawyers who purported to represent the class, the benefit was equally obvious, as the settlement provided that Google would pay the lawyers \$30 million.¹⁸⁹ Judge Chin concluded that the future-conduct aspect of the settlement was an improper “attempt to use the class action mechanism to implement forward-looking business arrangements that go far beyond the dispute before the Court in this litigation.”¹⁹⁰ Class members, the court observed, “would be giving up certain property rights in their creative works, and . . . would be deemed—by their silence—to have granted to Google a license to future use of their copyrighted works.”¹⁹¹

In *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, which involved antitrust claims by merchants against Visa and MasterCard, Judge Pierre Leval eloquently captured the confiscatory aspect of certain class settlements. The Second Circuit had reversed the district court’s certification and approval of a pair of settlement class actions in which an opt-out settlement class would get monetary relief while a non-opt-out settlement class would get only injunctive relief.¹⁹² Judge Leval agreed with the majority that the class was inadequately represented, but he wrote separately to emphasize the mismatch between certain class members’ benefit and the release the defendants would have received:

What is particularly troublesome is that the broad release of the Defendants binds not only members of the Plaintiff class who receive compensation as part of the deal, but also binds in perpetuity, without opportunity to reject the settlement, all merchants who in the future will accept Visa and MasterCard, including those not yet in existence, who will never receive any part of the money. This is not a settlement; it is a confiscation. . . . One class of Plaintiffs receives money as compensation for the Defendants’ arguable past violations, and in return gives up the future rights of *others*.¹⁹³

of Google, which the Second Circuit affirmed. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *aff’d*, 804 F.3d 202 (2d Cir. 2015).

189 Amended Settlement Agreement at 80, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-cv-08136).

190 *Authors Guild*, 770 F. Supp. 2d at 677 (quoting Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement at 2, *Authors Guild*, 770 F. Supp. 2d 666).

191 *Id.* at 680; see also James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. REV. 387 (2013). For an analysis of similar problems with a large antitrust class action settlement, see Steven Semeraro, *Settlement Without Consent: Assessing the Credit Card Merchant Fee Class Action*, 2015 COLUM. BUS. L. REV. 186.

192 *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 240 (2d Cir. 2016).

193 *Id.* at 241 (Leval, J., concurring).

For class counsel, it is costless and potentially very profitable to trade away the future rights of those not at the table. A broadly defined class and a broadly framed release give the defendant maximal protection from liability; the question for the court must be whether all of the class members are adequately compensated for giving up their right to sue.

2. Expanded Class Definition

Class action requires class definition.¹⁹⁴ Binding nonparties—the very essence of a class action—demands some way to know who is bound.¹⁹⁵ Class definitions may be struck at varying levels of inclusiveness. Is it a class only of current employees or does it include former employees? What are the dates and other parameters for a class of investors? What products or services are included for a class of consumers? Is the class limited to those whose contract took a particular form? In a discrimination class action, what groups are included? In a class action for injuries attributed to product exposure, is the class limited to those whose injuries have manifested or does it include all who have been exposed? Is it a statewide, nationwide, or otherwise geographically defined class?

A defendant's preference for a narrow or broad class definition depends on whether the class action is being defined for purposes of litigation or settlement. When class actions are to be litigated, defendants generally prefer narrower class definitions. The bigger the class, the bigger the exposure. In settlement, however, defendants prefer the broadest class definition they can obtain for a reasonable price. The defendant, after all, is paying for *res judicata*. When a court enters judgment approving a class settlement, every class member is precluded from pursuing the claim against the defendant.¹⁹⁶ The more claim preclusion the defendant can get for its settlement dollars, the happier the defendant.

When it comes to defining a settlement class expansively, class counsel have no incentive to resist a defendant's preference. Class counsel prefer to define a class as broadly as possible within the constraints of class certification. The bigger the class, the bigger the franchise. Class action lawyers lose nothing by agreeing to "represent" a larger pool of claimants in the settlement. If the prospect of expansive preclusion lubricates the deal, then acceding to a broader class definition enriches class lawyers by hastening the settlement, sweetening the fees, or both. Thus, defendants and class counsel

194 FED. R. CIV. P. 23(c)(2)(B)(ii) (establishing that class notice in a Rule 23(b)(3) class action must clearly and concisely state "the definition of the class certified"); *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 659 (7th Cir. 2015) ("Rule 23 requires that a class be defined, and experience has led courts to require that classes be defined clearly and based on objective criteria." (citing RUBENSTEIN, *supra* note 1, § 3:3)).

195 See *Mullins*, 795 F.3d at 660 ("Vagueness is a problem because a court needs to be able to identify who will receive notice, who will share in any recovery, and who will be bound by a judgment." (citing *Kent v. SunAmerica Life Ins. Co.*, 190 F.R.D. 271, 278 (D. Mass. 2000))).

196 See *generally* *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

sometimes expand their class definitions when negotiating settlement class actions. The losers are the claimants swept in by the expanded class definition whose claims are thereby released, but who get little or nothing of value from the deal.

In the Facebook Beacon settlement class action, for example, Facebook and the class lawyers agreed to expand the class definition as part of their deal. The class action was originally brought by nineteen plaintiffs on behalf of a class of Facebook members whose private information had been disclosed by Beacon during the one month in which the program was opt-out rather than opt-in.¹⁹⁷ In the settlement, Facebook and class counsel expanded the class definition to include not only those whose information was obtained and disclosed when the program was opt-out, but also those whose information was obtained and disclosed after Facebook changed Beacon to an opt-in program.¹⁹⁸ For Facebook, expanding the class definition was both advantageous and costless. The company did not agree to pay any money damages to class members. Rather, the company agreed to spend \$6.5 million to create the Digital Trust Foundation (a cy pres remedy of dubious benefit to the class and arguably beneficial to Facebook),¹⁹⁹ to terminate the Beacon program by its current name (but without limiting the company's future conduct),²⁰⁰ and to pay about \$3 million to the class action lawyers and the named plaintiffs.²⁰¹ Expanding the class definition did nothing to expand the benefits obtained by the class. For Facebook, it was a costless way to protect itself from liability from a larger group of potential plaintiffs. Why would class counsel agree to such an expansion of the class definition? It was costless to them, as well. For class counsel, expanding the class definition was a way to please the defendant and secure generous fees. Expansion of the class definition was not costless for the newly included class members, however. Their claims were traded away by class counsel, but they got nothing of value in exchange for this imposed release of their claims.

In a settlement of state law antitrust claims against the DeBeers group of diamond companies, the defendants obtained a troublingly broad class definition for their settlement class action.²⁰² The settlement encompassed consumers in states where the claims were viable under state law (those in non-*Illinois Brick* states, meaning those states that allow indirect purchasers to pursue antitrust claims) as well as consumers in states where the claims were not viable under state law (those in *Illinois Brick* states, meaning those states that

197 *Marek v. Lane*, 134 S. Ct. 8, 8 (2013) (Roberts, C.J., respecting the denial of certiorari).

198 *Id.* at 9 (“To top it off, the parties agreed to expand the settlement class barred from future litigation to include not just those individuals injured by Beacon during the brief period in which it was an opt-out program—the class proposed in the original complaint—but also those injured after Facebook had changed the program’s default setting to opt in.”).

199 *Cf. supra* text accompanying notes 133–40.

200 *See supra* text accompanying notes 93–95.

201 *Marek*, 134 S. Ct. at 9 (Roberts, C.J., respecting the denial of certiorari).

202 *See generally* *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011) (en banc).

follow the federal precedent of *Illinois Brick Co. v. Illinois*²⁰³ barring indirect purchasers from pursuing antitrust claims). The district judge approved and certified the settlement class action, a Third Circuit panel reversed, and the Third Circuit, sitting en banc, vacated the reversal and affirmed the district court's approval of the deal.²⁰⁴ A dissenting judge explained the situation:

The problem, though, is that the defendants' singular conduct here gives rise to causes of action in some states while providing for no cause of action at all in others. Under these circumstances, there can be no grouping of claims into a single class action, because, by definition, some would-be class members have no claim.²⁰⁵

There are several different frames through which one might view the problem of including both types of claimants in the DeBeers settlement. It might be framed in terms of commonality,²⁰⁶ predominance,²⁰⁷ adequacy of representation,²⁰⁸ or other class certification requirements. Alternatively, it might be framed in terms of whether some claims should have been dismissed for failure to state a claim.²⁰⁹ For purposes of understanding aggregation as disempowerment, however, the DeBeers settlement may be seen as an expansive class definition that served the interests of the defendant and of class counsel but disserved the interests of class members with viable claims. By including additional class members whose claims were not viable under applicable state law, the settlement diluted the value of the claims for which the defendant was willing to pay valuable consideration. Had each group—the *Illinois-Brick*-state claimants and the non-*Illinois-Brick*-state claimants—been certified for litigation as a separate class action, their settlement leverage would have differed from each other, if indeed the first group could get any settlement at all.

C. Terms That Discourage Objections

Approval of a proposed class settlement may or may not be in the class members' interests; it depends upon the quality of the settlement. Both the defendant and class counsel, however, explicitly seek judicial approval when they put forward a class settlement proposal. We have already seen several features designed to encourage judicial approval by making settlements appear valuable.²¹⁰ Other features aim at the same outcome not by building up the apparent value of the deal, but rather by running interference.

203 *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

204 *Sullivan*, 667 F.3d at 333.

205 *Id.* at 341 (Jordan, J., dissenting).

206 FED. R. CIV. P. 23(a)(2).

207 FED. R. CIV. P. 23(b)(3).

208 FED. R. CIV. P. 23(a)(4).

209 *See Sullivan*, 667 F.3d at 308 (majority opinion).

210 *See supra* subsections II.A.1–3.

1. Class Representative Bonus

Class settlements or judgments often provide compensation to class representatives beyond their recovery as class members. Such “bonuses” are unnecessary in securities litigation, where class representatives are typically institutional investors with high-value claims due to the Private Securities Litigation Reform Act’s provision that the class representative presumptively should be the class member with the largest claim.²¹¹ However, in consumer class actions, employee class actions, or others involving relatively small claims, courts often approve bonus payments for class representatives to compensate them for their time and effort and to incentivize others to serve as class representatives.

When submitted as part of a class settlement, bonuses create agency risks.²¹² Some courts cite the support of class representatives as a factor in determining the fairness of a class settlement.²¹³ Class representative bonuses undermine whatever value the class representatives’ support may have had for evaluating a proposed settlement and attorneys’ fees.²¹⁴

In the proposed class settlement in the *EasySaver Rewards Litigation*, for example, class members were to receive \$20 coupons.²¹⁵ Two of the class representatives, meanwhile, would get \$15,000 cash, four other class representatives would get \$10,000, and two others would get \$5000.²¹⁶ Even if these bonuses were appropriate amounts to compensate the particular class representatives for their work, it is hard to see how any of these class representatives could offer useful views on whether the coupons adequately compensated the class members for their claims.

211 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb) (2012); see also RUBENSTEIN, *supra* note 1, § 17:19.

212 See, e.g., RUBENSTEIN, *supra* note 1, §§ 17:1, 17:3; Ann K. Wooster, Annotation, *Propriety of Incentive Awards or Incentive Agreements in Class Actions*, 60 A.L.R. 6th 295 (Westlaw) (2010).

213 See, e.g., *All Plaintiffs v. All Defendants*, 645 F.3d 329, 334 (5th Cir. 2011) (including, as factors for class settlement approval, “the opinions of class counsel, class representatives, and absent class members” (citing *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 194–95 (5th Cir. 2010))); *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007); *In re Prandin Direct Purchaser Antitrust Litig.*, No. 2:10-cv-12141, 2015 WL 1396473, at *2 (E.D. Mich. Jan. 20, 2015) (approving settlement class action based in part on the fact that the class representatives “evaluated the strength of the settlement, finding that it was fair and reasonable”).

214 See ADVISORY COMM. ON CIVIL RULES, *supra* note 5, at 8 n.6 (“When the individual recovery is small and the incentive bonus for the class representatives is large, that may, standing alone, raise questions about the settlement, given that the class representatives may have much to lose if the settlement is not approved but little to gain if the case goes to trial and the class recovers many times what the settlement provides.”).

215 Problems with the EasySaver coupons are discussed *supra* at text accompanying notes 107–10.

216 *In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040, 1046 (S.D. Cal. 2013).

In *Eubank v. Pella*,²¹⁷ the named plaintiffs were given payments of \$5000 or \$10,000. The settlement agreement, however, provided for payments only to representatives who supported the settlement, not to representatives who opposed it. The district judge awarded payments to all of the class representatives notwithstanding the language of the settlement agreement, but the Seventh Circuit noted the conflict of interest that the agreement created: “[A]ny class representative who opposed the settlement would expect to find himself without any compensation for his services as representative.”²¹⁸

There is nothing inherently problematic about modest payments to class representatives for their services. The problem comes from the inclusion of such payments as part of a settlement negotiated between a defendant and class counsel. Rather than negotiate class-representative bonuses as part of a settlement agreement, parties should leave it to the court. Alternatively, class counsel may suggest an amount to the court without having negotiated it with the defendant. The judge should determine, after approval of a class settlement, whether class representatives should be paid some amount for their services, and if so, how much should be taken from the settlement fund for this purpose.

2. Fee Fund

In a class action, the judge decides what fee to grant class counsel,²¹⁹ but this has not prevented lawyers from negotiating with defendants over attorneys’ fees in conjunction with class settlements. The terms of class settlements sometimes provide that defendants will pay class counsel’s fee on top of the settlement for the class.²²⁰ Two specific aspects of fee negotiations deserve mention as red flags. This subsection will address segregated revertible fee funds—the practice of setting aside a separate pool of money for the defendant to pay class counsel fees.²²¹ The next subsection will address clear sailing agreements—the practice of negotiating a fee amount up to which the defendant will pay class counsel without objection.²²²

217 *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014).

218 *Id.* at 723.

219 FED. R. CIV. P. 23(h).

220 Class settlements for pure injunctive relief under Rule 23(b)(2) raise distinct concerns regarding fees for class counsel, at least for claims that do not involve statutory fee-shifting. If the settlement neither creates a common fund from which fees can be awarded nor creates a legal basis for a fee award to the prevailing party, it makes sense for the defendant to reach some agreement with class counsel concerning fees. Class lawyers reasonably want some assurance of compensation in connection with a class settlement, and defendants reasonably want to know how much they are spending to secure a settlement of a Rule 23(b)(2) class action. Thus, the argument against fee negotiations in connection with class settlements does not apply in the same way to injunctive class settlements. Even so, the better practice is for parties to address the question of fees only after they have reached agreement on the terms of the settlement for the class.

221 *See, e.g., Pearson v. NBTY, Inc.*, 772 F.3d 778, 780 (7th Cir. 2014).

222 *Redman v. RadioShack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014).

From the defendant's perspective, payment of class settlements and class counsel fees is largely zero-sum; it makes little difference to the defendant whether the money goes to the lawyers or to the class members. To say it makes *no* difference to defendants, as some assert,²²³ is an oversimplification, as defendants' interests actually cut both ways. On the one hand, repeat-player defendants presumably do not love filling the coffers of plaintiff class action lawyers. And, one hopes, some defendants would prefer to see their funds go to their own consumers, investors, employees, and so on, especially if they believe the claims have some merit. Thus, one might think that defendants would prefer to allocate settlement funds to claimants rather than to claimants' lawyers. On the other hand, knowing that settlement power is held by class counsel rather than by class members, defendants may decide they can settle more cheaply overall by paying more to the lawyers rather than by paying more to the class. The economics of settlement makes this the dominant consideration. Thus, as a general matter, courts should view negotiated class counsel fees with skepticism.

Some class settlements provide that the defendant will pay class counsel's fees and expenses in an amount determined by the court and set aside a separate fund for this purpose, independent of the fund for the class.²²⁴ Any amount remaining in the fee fund, after the court's determination of a reasonable fee, reverts to the defendant.

On the surface, such a segregated fee fund may seem attractive. By treating lawyers' fees as an entirely separate item, a segregated fee fund gives the appearance of protecting the class members' ability to get their full settlement without "subtracting" attorneys' fees. But the idea that a segregated fee fund leaves the entire settlement to class members ignores the fact that defendants are not willing to pay an infinite amount to settle class members' claims. The more the defendant must set aside to pay counsel fees, the less the defendant is willing to pay to the class members.

Problem one goes to the value of the settlement. A segregated revertible fee fund takes money away from the class that a defendant was willing to pay in settlement of the class members' claims. It makes no sense to think that the class members are getting their "full" settlement, or to think that the segregated fund avoids "subtracting" from the settlement, if in fact the defendant was willing to pay a higher total amount in order to obtain a release of the class claims.

Problem two does not go to the value of the settlement, but rather to tactics in the battle between class counsel and prospective objectors. A segregated revertible fee fund is a strategy by class action lawyers to insulate their fees from attack, as class members have no incentive to attack the fee because a lower fee does not inure to class members' benefit. Without objectors,

²²³ See, e.g., *Pearson*, 772 F.3d at 783 ("Rexall has no reason to care about the allocation of its cost of settlement between class counsel and class members; all it cares about as a rational maximizer of its net worth is the bottom line—how much the settlement is likely to cost it.")

²²⁴ *Pearson*, 722 F.3d at 780.

courts lack the benefit of any adversarial presentation on the reasonableness of attorneys' fees.

3. Clear Sailing Agreement

In some class action settlements, defendants agree not to contest class counsel's request for attorneys' fees up to an agreed amount. For example, in a recent antitrust class settlement agreement, American Express agreed not to object to class counsel's request for fees and expenses up to \$75 million.²²⁵ The idea is that the judge has the power to award a fee to class counsel, but rather than leave the amount to the judge's discretion or to later litigation, the defendant and class counsel agree on what they consider a reasonable fee for the class to pay.

One way or another—by statutory fee-shifting, by dipping into a common fund created by the settlement, or by payment of attorneys' fees on top of non-monetary relief for the class—the money for class counsel's fees will be paid by the defendant. In another sense, however, the money comes from the class members. It is the class members' claims that are traded for whatever the defendant is willing to pay. Thus, when a defendant agrees that it will pay up to \$75 million in attorneys' fees for class counsel, the defendant is taking \$75 million of the total value that the class might receive and allocating that amount to class counsel rather than to class members.

Clear sailing provisions show up in class settlements even though courts express concern that negotiations between class counsel and defendants over fees may harm class members' interests. In *Allen v. Bedolla*,²²⁶ the Ninth Circuit listed several "subtle signs that class counsel have allowed pursuit of their own self-interests . . . to infect the negotiations," including "when the parties negotiate a 'clear sailing arrangement' (i.e., an arrangement where defendant will not object to a certain fee request by class counsel)."²²⁷ In *Allen*, a settlement class action involving claims that a temporary staffing agency had violated day laborers' rights under wage and hour laws, the defendant agreed not to dispute class counsel fees up to twenty-five percent of the settlement fund.²²⁸ Because the district court failed to take into account the clear sailing agreement and other signs of potential procedural unfairness, the Court of Appeals vacated the district court's approval of the settlement class action and remanded for more careful consideration.²²⁹

225 *In re Am. Express Anti Steering Rules Antitrust Litig.*, Nos. 11-MD-2221, 13-CV-7355, 2015 WL 4645240, at *5 n.12 (E.D.N.Y. Aug. 4, 2015) ("In the Class Settlement Agreement, American Express agrees not to object to Class Counsel's seeking attorneys' fees and costs and expenses not to exceed \$75 million in aggregate, and to pay up to \$75 million as awarded by the court." (citing Class Settlement Agreement ¶ 55, *Am. Express*, 2015 WL 4645240)).

226 787 F.3d 1218 (9th Cir. 2015).

227 *Id.* at 1224 (alteration in original) (internal quotation marks omitted) (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011)).

228 *Id.* at 1220–24.

229 *Id.* at 1224–26.

The problem with clear sailing agreements is that defendants may agree to a large fee to entice class counsel into agreeing to a weak recovery for the class. The Seventh Circuit, in *Redman v. RadioShack*, explained the concern this way:

Another questionable feature of the settlement is the inclusion of a “clear-sailing clause”—a clause in which the defendant agrees not to contest class counsel’s request for attorneys’ fees. Because it’s in the defendant’s interest to contest that request in order to reduce the overall cost of the settlement, the defendant won’t agree to a clear-sailing clause without compensation—namely a reduction in the part of the settlement that goes to the class members, as that is the only reduction class counsel are likely to consider. The existence of such clauses thus illustrates the danger of collusion in class actions between class counsel and the defendant, to the detriment of the class members.²³⁰

The defendant’s interest aligns with class counsel’s interest in a large fee. Or, to be precise, their interests align up to the point at which higher fees would increase the overall cost of the settlement to the defendant. For a defendant, money for the class’s lawyers is money well spent if it secures a speedy and inexpensive overall settlement.

The argument in favor of clear sailing agreements is that a settling defendant wants to know the *total* cost of the settlement. If a portion of the defendant’s payment obligation remains shrouded during negotiations, the defendant may be reluctant to pay full value for the plaintiffs’ claims. Two things should be noted about this argument.

First, this argument in favor of clear sailing agreements has no application to common fund settlements. If a settlement provides for the defendant to pay \$100 million into a settlement fund for distribution to class members, the court may simply award a fee to class counsel out of the \$100 million. The defendant knows exactly how much it will pay, and there is no reason for the defendant to be involved in negotiating class counsel’s fee.

Second, the very cases where the argument applies—that is, settlements for non-monetary remedies—are also the cases where clear sailing agreements cause the most trouble. The Seventh Circuit spoke to this problem in *Redman*:

230 *Redman v. RadioShack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014); *see also Bluetooth*, 654 F.3d at 947 (noting “the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class” (quoting *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000))); RUBENSTEIN, *supra* note 1, § 13:9 (“These agreements are troubling because they demonstrate that class counsel negotiated some aspect of their fee arrangement with the defendant, when counsel’s ethical obligation is to the class, not to its own fees. Courts worry that such agreements are indicia of collusion between class counsel and the defendant, signaling that perhaps class counsel agreed to a smaller class recovery in exchange for a heftier fee.”). These concerns are not new. More than a decade ago, William Henderson urged courts to adopt a per se rule rejecting all class settlements that include clear sailing agreements. William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 830 (2003).

[C]lear-sailing clauses are found mainly in cases such as the present one in which the value of the settlement to the class members is uncertain because it is not a cash settlement. This complicates the difficulty faced by the district court in determining an appropriate attorneys' fee, and a clear-sailing clause exacerbates the difficulty further by eliminating objections to an excessive fee by the defendant. Clear-sailing clauses have not been held to be unlawful per se, but at least in a case such as this, involving a non-cash settlement award to the class, such a clause should be subjected to intense critical scrutiny by the district court; in this case it was not.²³¹

The upshot is that defendants ought to stay out of the business of negotiating fees for class counsel.²³² The power to award a reasonable fee to class counsel belongs to the court,²³³ and it is a power better exercised independent of negotiations between class counsel and the defendant. Even if discussion of fees is postponed until after other settlement terms are reached, and even if a mediator oversees the discussion, there is much to be lost and nothing to be gained by allowing a defendant to participate in deciding how much class counsel ought to be paid for achieving a class action settlement.

III. ADDRESSING COUNTERARGUMENTS

Two potential counterarguments deserve attention. The first is that even a bad class settlement is better than nothing. The second is that class actions serve deterrence goals even if they fail to compensate class members. Each of these counterarguments goes to this Article's core argument that, in settlement, aggregation disempowers claimants by delivering control to lawyers. Each of these counterarguments, therefore, also presents a challenge to this Article's contention that judges should exercise more rigorous control over class settlements and class counsel fees.

A. *The Better-than-Nothing Argument*

This Article has dwelt almost entirely on the negative, griping about all that is wrong with class action settlements. It has attempted to gripe more precisely than others have done, or at least with more systematic attention to the connection between settlement features and the alignment of interests between defendants and class counsel. But still, the reader might wonder what all this negativity accomplishes. If judges throw out imperfect class settlements, and if class members are thereby left with nothing but rejected deals, how does this advance the cause of just and efficient mass dispute resolution? Isn't a weak class settlement better than nothing?

²³¹ 768 F.3d at 637.

²³² A defendant's participation in negotiating class counsel's fee makes sense in a case where an applicable fee-shifting statute imposes on the defendant the responsibility to pay plaintiffs' lawyers' fees. The defendant's participation in determining class counsel's fee is more difficult to justify, however, in a class action where the fee entitlement flows from creation of a common fund.

²³³ FED. R. CIV. P. 23(h).

The answer has three parts. The first part involves better class settlements in disputes that are appropriately resolved by class action. The second involves non-class aggregate settlements in disputes that are appropriately resolved on a non-class basis. The third involves claims of such dubious merit that they ought not be pursued at all. When we see a troubling class settlement, we ought to ask which of these categories best describes the problem, as each implies a different solution.

First, there is nothing inevitable about bad class settlements. None of the problematic features outlined in this Article is a necessary attribute of class action resolutions. Even though class lawyers' interests align in important ways with defendants' interests and against the interests of class members, and this alignment of interests exerts a tug in the direction of bad settlements, lawyers rise above self-interest every day in exercising duties of loyalty to clients. Moreover, judicial control over class settlements, appointment of class counsel, and class counsel fees gives judges power to steer negotiating parties toward appropriate settlements.²³⁴

For mass disputes that are sensibly resolved by class action—i.e., the claims are sufficiently cohesive for representative litigation, and the claims are sufficiently small that aggregation is needed for plaintiffs to litigate on a level field with defendants—a settlement ought to provide real value to the class members. For reasons I have addressed elsewhere, such settlements are more likely to occur in class actions that have been certified for litigation than in class actions that are certified solely for settlement.²³⁵ With certification to litigate on a class action basis, class counsel should have the leverage to negotiate a settlement with actual value for the class. However, this does not eliminate the risk that class counsel and defendants will negotiate a deal that serves their aligned interests and underserves the interests of the class members. Judges should make it clear that, in evaluating any proposed settlement, they will be sensitive to the risks of self-dealing and overvaluation.

If the plaintiffs' claims have merit and the defendant is unwilling to offer a meaningful remedy in exchange for release of the claims, then class counsel must be prepared to take the claims to trial. If, however, the defendant can be persuaded to offer a meaningful remedy in settlement, then the class should get the benefit of that remedy. Other than the fact that class counsel have grown accustomed to including self-serving terms in class settlements, and that defendants have grown accustomed to taking advantage of the self-interests of class counsel, there is no reason why parties cannot negotiate class settlements with remedies for class members proportionate to the value of their claims. If courts were to stop approving class settlements that fail to provide such remedies, then one can hope that counsel would stop proposing them.

Second, some mass disputes should be resolved by non-class litigation and settlements rather than by class action. Multidistrict litigation in federal

234 See *infra* text accompanying notes 221–37.

235 See Erichson, *supra* note 50.

court and consolidated statewide litigation in state court permit centralized handling of related claims even when those claims cannot meet the standard of cohesiveness required for class certification. Collective settlement negotiations in mass non-class litigation can present some of the same problems as class actions,²³⁶ but in the non-class setting, each claimant has the right to decide individually whether to accept the defendant's offer in exchange for a release of claims. Thus, while self-serving conduct by counsel can occur outside of class actions, at least there is the backstop of client consent.²³⁷

Finally, what if a settlement provides remedies of dubious value because that is what the plaintiffs' claims are actually worth? Perhaps empty injunctive relief and worthless coupons truly were the best that could be negotiated for the class because the defendant knew that the plaintiffs had little chance of prevailing on the merits of their claims. If the claims are so weak that the plaintiffs' lawyers are unwilling to take the claims to trial and unable to extract from the defendant anything of value for the claimants, then the "resolution" of the claims serves no function other than to trade nuisance value for attorneys' fees. Such claims are better left unasserted. By rejecting proposed class settlements with the problematic features catalogued in this Article, courts can encourage class action lawyers to abandon claims that have so little value that they cannot produce worthy settlements, and they can encourage defendants and class action lawyers to negotiate appropriate settlements for claims that have real value.

B. *The Private Attorney General Argument*

Class actions serve not only the goal of compensating class members, but also the goals of forcing defendants to disgorge wrongful gains and deterring others from engaging in illegal conduct. Class action lawyers thus serve as private attorneys general, and the settlements that they negotiate are public goods. By understanding the class action as a law-enforcement mechanism, we can see that the individual class member's check for \$3.19 pales in comparison to the value of the class action's deterrent and disgorgement functions. Therefore, one might argue, this Article's obsession with value for class members is misplaced, and any measure of claimant empowerment ought to take into account not only class member compensation, but also deterrence and disgorgement.

The answer is that the settlement features criticized in this Article do not merely reduce value for class members; they also reduce cost for defendants. The first five features discussed in this Article—spurious injunctive relief, non-transferable and non-stackable coupons, unwarranted *cy pres*, unnecessary or burdensome claims procedures, and reversion clauses—allow defendants to reduce settlement costs while inflating settlement valuations to secure judicial approval. When Gillette agrees to a labeling change on a discontin-

236 See Erichson, *All-or-Nothing*, *supra* note 12.

237 See Erichson & Zipursky, *supra* note 12.

ued line of Duracell batteries, it costs the defendant nothing.²³⁸ When ProFlowers offers restricted, non-stackable credits and asks the court to consider them at face value, the defendant saves money and perhaps even sees a net profit.²³⁹ When Kellogg donates food to charities, the donation costs the defendant less than the asserted valuation; indeed, it may cost the defendant nothing if the donation replaces otherwise-intended donations or uses product surplus, and it may serve the defendants' interests for taxes, public relations, or otherwise.²⁴⁰ When Rexall discourages claims by creating an onerous claims process, it reduces its payouts.²⁴¹ Reversion clauses, most explicitly of all, give money back to the defendant.²⁴²

The next two features—overbroad release and expanded class definition—allow defendants to expand their protection from liability at zero or low cost.²⁴³ The key to understanding aggregation as disempowerment is the alignment of interests between defendants and class counsel on particular settlement terms. Expansive claim preclusion, whether by inclusive release or by expanded class definition, gives a defendant broader protection from liability and gives a class action lawyer more business. These terms allow defendants to reduce their average cost per claim, and protect defendants from future liability, thus disserving the goals of deterrence and disgorgement.

The final three features—class representative bonuses, revertible fee funds, and clear sailing agreements—may appear to involve additional costs for defendants, but actually reduce defendants' overall settlement costs. By agreeing to pay bonuses to class representatives, and more importantly by agreeing to pay hefty fees to class counsel, defendants hope to secure agreement to favorable settlement terms. While the payment of large class counsel fees imposes a cost on defendants, a defendant's willingness to pay those fees presumably depends on a prediction that what it spends on fees is more than made up by what it saves on the overall settlement. Otherwise, the defendant could leave it to the court, rather than negotiate an amount that it is willing to pay without objection.²⁴⁴

The bottom line is that problematic class action settlements not only compensate class members too little; they also cost defendants too little. Aggregation as disempowerment thus presents a problem regardless of whether one focuses on the class action's compensation function or its law enforcement function.

238 See *supra* text accompanying notes 69–72.

239 See *supra* text accompanying notes 107–10.

240 See *supra* text accompanying notes 143–51.

241 See *supra* text accompanying notes 171–73.

242 See *supra* text accompanying notes 183–86.

243 See *supra* Section II.B.

244 See *supra* Section II.C.

IV. SOLVING THE PROBLEM

A. *The Judge's Role*

The problem of bad class settlements is solvable. Because class actions bind absentees, the law imposes procedural safeguards on class actions, giving judges the tools needed to address the problems identified in this Article. The settlement of any class action requires judicial approval based upon a finding that the settlement is "fair, reasonable, and adequate."²⁴⁵ As importantly, the judge may award "reasonable attorney's fees,"²⁴⁶ and the judge controls the appointment of class counsel.²⁴⁷

When considering proposed class settlements and requests for class counsel fees, judges not only should look generally at the value of the proposed settlement in light of the strength of the claims and the risks of litigation, but should look specifically for the types of settlement terms discussed above.²⁴⁸ To the extent a proposed settlement includes an injunctive component, the change in the defendant's conduct should address the problems complained of in the plaintiffs' pleading. If the settlement includes coupons, credits, or vouchers, they should be stackable and transferrable so that they are *valuable* in both senses of the word (provide value and permit valuation). To whatever extent the settlement includes a cy pres distribution—which should occur only where a direct remedy is not feasible—the recipient should serve the interests of class members to remedy the claims as nearly as possible. Monetary and other remedies should be provided directly to class members where feasible. If a settlement must employ a claims-made process because class members cannot adequately be identified or their claims adequately quantified, then the process should be no more burdensome than necessary. Funds remaining after a claims process should be distributed to the class rather than revert to the defendant. The class definition and the scope of the release should match the claims that class counsel was litigating on behalf of the class. And fees for class counsel, as well as any bonus payments for class representatives, should be left to the court rather than negotiated as part of a class settlement.

With procedural safeguards built into the class action rule, and with the well-established principle that judges must attend to the interests of absent class members, why do inadequate class settlements survive judicial review? One answer may be that U.S. judges, steeped in the adversary system, are ill-equipped for the inquisitorial judging required for careful review of class

245 FED. R. CIV. P. 23(e)(2).

246 FED. R. CIV. P. 23(h).

247 FED. R. CIV. P. 23(g). Because Rule 23 already gives judges power over settlement, fees, and appointment, solving the problems identified in this Article requires neither legislation nor rule amendment.

248 See *supra* Part II.

settlements.²⁴⁹ Another may be that judges themselves have an interest in bringing comprehensive settlements to fruition.²⁵⁰

Recent signals from the judiciary, however, give cause for optimism. As discussed in Section I.B, recent federal appellate decisions display a new level of savviness about the incentives of class counsel and defendants.²⁵¹ The Delaware Chancery Court recently has shown similar skepticism and care in the context of disclosure-only settlements in corporate merger litigation.²⁵²

District Judge William Alsup of the Northern District of California has a standard order that he issues when lawyers begin negotiating a class settlement in any action before him.²⁵³ Under the title “Notice Regarding Factors to be Evaluated for Any Proposed Class Settlement,” Judge Alsup spells out his expectations and concerns. He begins by stating, “[T]he Court prefers to litigate and vet a class certification motion *before* any settlement discussions take place. That way, the class certification is a done deal and cannot compromise class claims.”²⁵⁴ He explains that he will analyze the adequacy of the settlement in terms of its actual benefits to the class: “In the proposed settlement, what will absent class members give up versus what will they receive in exchange, *i.e.*, a cost-benefit analysis?”²⁵⁵ He says that “[t]he release should be limited only to the claims certified for class treatment,” and that class counsel must justify the scope of the release.²⁵⁶ He notes that expansions of the class definition “will be viewed with suspicion,” and that “settlement dollars must be sufficient to cover the old scope plus the new scope.”²⁵⁷ He calls reversion of settlement funds “a red flag, for it runs the risk of an illusory settlement, especially when combined with a requirement to submit claims that may lead to a shortfall in claim submissions.”²⁵⁸ As to the procedure for submitting claims, he notes the problems with some claim processes and sensibly points out that the best approach, when feasible, is “to calculate settlement checks from a defendant’s records (plus due diligence performed by counsel) and to send the checks to the class members along with a notice that cashing the checks will be deemed acceptance of the release and all other terms of the settlement.”²⁵⁹ On the question of fees for class counsel, Judge Alsup’s order states that he “prefers that all settlements avoid any

249 See Erichson, *supra* note 7, at 2010–15.

250 See Erichson & Zipurksy, *supra* note 12, at 291.

251 See *supra* text accompanying notes 53–62.

252 See *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 887 (Del. Ch. 2016) (“If approved, the settlement will not provide Trulia stockholders with any economic benefits. The only money that would change hands is the payment of a fee to plaintiffs’ counsel.”).

253 See, e.g., Notice Regarding Factors to Be Evaluated for Any Proposed Class Settlement, *Hee Nam You v. Hirohito*, No. C 15-03257, 2016 WL 3405444 (N.D. Cal. June 21, 2016).

254 *Id.* at 2 (emphasis in original).

255 *Id.* at 3.

256 *Id.*

257 *Id.* at 3–4.

258 *Id.* at 4.

259 *Id.*

agreement as to attorney's fees and leave that to the judge. If the defense insists on an overall cap, then the Court will decide how much will go to the class and how much will go to counsel."²⁶⁰ Finally, as to incentive payments for class representatives, he asks, "If the proposed settlement by itself is not good enough for the named plaintiff, why should it be good enough for absent class members similarly situated?"²⁶¹

Judge Alsup's standard order makes such good sense, one wonders why every district judge doesn't do the same. Old habits die hard. The American judicial mindset is geared toward adversarial expectations, promotion of settlement, and the presumption that a settlement negotiated by seemingly adversary counsel represents fair value. The fact that problematic class settlements continue to be negotiated and approved is worrisome. But the fact that at least some judges recognize the red flags, and that courts increasingly note the ways that class counsel and defendants take advantage of the powerlessness of class members, gives reason for hope in the future of class actions as a tool for empowerment rather than disempowerment.

B. *Lawyer Ethics*

What about legal ethics? If lawyers use the power of their role to enrich themselves at the expense of the class members they purport to represent, doesn't this violate the lawyers' ethical duties? The short answer is yes. Lawyers involved in class settlement negotiations should approach those negotiations with sensitivity to their obligations to their clients and to the profession. In terms of policing, however, except in egregious cases, agency problems in class actions are better addressed by procedural safeguards than by ethical safeguards.

For purposes of conflict of interest rules, the relationship between class counsel and class members differs from a standard lawyer-client relationship.²⁶² The class action lawyer nonetheless owes a duty to represent the interests of the class competently and loyally.²⁶³ A class action lawyer negoti-

²⁶⁰ *Id.*

²⁶¹ *Id.* at 6. Payments to class representatives, under some circumstances, may properly compensate and incentivize service. Generally there should be no need for such payments to be negotiated with a defendant. Thus, when negotiating parties include class representative bonuses as part of their proposed settlement, a judge may consider it a red flag even if the judge is open to awarding class representatives a modest payment out of the settlement fund. See *supra* text accompanying notes 189–95.

²⁶² See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 25 (2016) ("When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule.").

²⁶³ See FED. R. CIV. P. 23(g)(4) ("*Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class."); Ass'n of the Bar of the City of N.Y., Prof'l Ethics Comm., Formal Op. 2004-01: Lawyers in Class Actions (2004) [hereinafter Formal Opinion 2004-01] (explaining that a class action lawyer owes duties of competence, diligence, and confidentiality to the class). One district judge, rejecting a proposed settlement class action, asked:

ating a settlement must act in the best interests of the class,²⁶⁴ not in the lawyer's self-interest to maximize the fee.²⁶⁵ Defense lawyers, for their part, should remember that it is unethical to "knowingly assist or induce another" to violate rules of professional conduct,²⁶⁶ so to the extent class lawyers violate duties to class members by negotiating self-serving class settlement terms, defense lawyers likewise violate professional duties by knowingly offering or accepting such terms.

That said, one should not expect disciplinary proceedings to serve as the first line of defense against bad class settlements. Whereas ethical protections play more of a foreground role in non-class aggregate settlements,²⁶⁷ class actions rely on procedural safeguards and judicial supervision. For one thing, the burdens of proof differ between procedural safeguards and disciplinary proceedings.²⁶⁸ In the event of a bad class settlement, it is harder for a disciplinary committee to find by clear and convincing evidence that a lawyer violated ethical duties than for a judge to find that settlement proponents failed to meet their burden of establishing the settlement's fairness by a preponderance of the evidence. The class action rule explicitly incorporates protections for absent class members because of the nature of representative litigation, in contrast to non-class collective representation, which takes procedurally disparate forms, and where theoretically individual client-lawyer relationships and theoretically consensual settlements rely upon ethical rather than procedural constraints.²⁶⁹

CONCLUSION

Aggregate litigation, at its best, empowers claimants to pursue meritorious claims on a level field. At its worst, however, aggregation does little more than suck value out of claims. What makes aggregation empowering—law-

Have Class Counsel lost sight of the fact that they purport to represent [class members]? The court is concerned that *none* of the Co-Lead Class Counsel were, or are, acting in the class's best interests, as opposed to their own interests in effectuating this settlement agreement and collecting a fee.

In re Am. Express Anti Steering Rules Antitrust Litig., Nos. 11-MD-2221, 13-CV-7355, 2015 WL 4645240, at *20 (E.D.N.Y. Aug. 4, 2015).

264 See Formal Opinion 2004-01, *supra* note 263 ("A class lawyer's decision to support or oppose a settlement must be made in the best interests of the class.")

265 See *id.* ("A class lawyer's decision, likewise, may not be influenced by the lawyer's desire to increase the fees he or she will receive. Thus, the lawyer negotiating a class action settlement may not seek more favorable fee provisions in exchange for less favorable relief for the class.")

266 MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2016).

267 See Erichson, *Typology*, *supra* note 12.

268 Compare *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, 910 F. Supp. 2d 891, 912 (E.D. La. 2012) (requiring a preponderance of the evidence standard for the fairness of a class settlement), with MODEL RULES FOR LAWYER DISCIPLINARY ENF'T R. 18(c) (2002) (requiring a clear and convincing standard for ethical disciplinary proceedings).

269 See Erichson, *supra* note 1, at 530-43.

yers' control of numerous claims—creates the risk that settlement negotiations will leave the negotiation participants with much and the claimants themselves with little. Defendants suck value out of claims to gain protection from liability. Class action lawyers suck value out of claims to gain personal enrichment. What they have in common is an interest in taking value from the claims by negotiating mutually favorable settlement terms.

This Article has shown the disempowering effect of class actions in the settlement context, and has suggested that certain settlement features ought to lead judges to question proposed settlements and fee requests. Thinking critically about settlements always presents a challenge. Settlement evaluation requires knowledge of the value of the underlying claims, but claims vary enormously in their factual and legal merits and, by definition, claims released in settlement have not been litigated to completion. But even when one cannot confidently ascertain the value of unlitigated claims, one can look at specific terms of settlement deals and ask whether those terms deliver little or no value to class members while serving the aligned interests of class counsel and defendants. That is what this Article has done. It has told the story of aggregation as disempowerment by focusing on how the problem manifests in the terms of actual class settlements.

By training attention on problematic settlement features, this Article has sought not only to offer vivid illustrations of the problem, but also to provide a usable catalogue of red flags for judges reviewing class action settlement proposals and fee requests. It has examined terms that defendants and class action lawyers employ to create an exaggerated appearance of value, terms that expand defendants' protection and class counsels' franchise, and terms that discourage objections to the settlement and fees. With sharper awareness of the shape that disempowerment takes, judges and lawyers can work more effectively to preserve what is right about aggregate litigation.

