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Point / Counterpoint

Claims-Made Class-Action Settlements

MANY OF US HAVE RECEIVED NOTICE, by mail or by newspaper, of a class-action settlement on behalf of consumers who may unwittingly be claimants in a suit asserting that a manufacturer sold a defective toy or car part or a business offered a fraudulent service. But how many of us have followed the processes, filled out the forms, or cashed in the coupons for redress of the wrong? These so-called claims-made class-action settlements seem commonplace, but do they deliver meaningful benefits to consumers or serve any other useful societal purpose? Or do they primarily benefit the attorneys whose fees may far exceed the funds collected by claimants? Is there a better way?

Prominent attorneys in the class-action field, **ELIZABETH CABRASER** (partner, Lieff Cabraser Heimann & Bernstein in San Francisco) and **ANDREW PINCUS** (partner, Mayer Brown in Washington, D.C.) discuss how claims-made class-action settlements are handled by the courts and whether improvements to those processes are needed.

How often are claims-made settlements proposed in class actions? In what types of cases do they typically arise? Is there an upward trend in the number?

CABRASER: Claims-made settlements are typically utilized in retail consumer claims class actions when defendants do not have records of the identities of purchasers or the number or amount of their purchases. Hence, some affirmative action by class members is required to distribute settlement proceeds. By contrast, common-fund settlements are more typical of antitrust, securities, and mass-tort actions. In these, claiming class members typically receive pro rata shares of the common fund, such that the amount each claimant receives is a function of the number of claims, and the entire fund is distributed.

In a claims-made settlement, unclaimed funds (if a fixed amount has been negotiated) would go to court-approved cy pres recipients, or, in rare cases (this is disfavored) revert to the defendant. It is impossible to determine

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with precision the scale of the perceived upward trend in claims-made settlements, simply because no complete or reliable source exists that includes all class-action settlements in the federal and state courts, with descriptions of their claims mechanisms. Hence, arguments for and against claims-made settlements (and other class-action settlement styles) typically depend upon "anecdata" selected in a partisan manner to support the position taken.

In the future, it is hoped that more complete documentation of class-action settlements will enable more informed discussion and spur the spread of best practices in claims-made settlements. At this point, claims-made settlements are a matter of necessity: They are the only way to enable consumer claimants to recover some or all their economic losses arising from small retail purchases and other undocumented transactions.

PINCUS: Claims-made settlements are commonplace, particularly in the consumer context. Unfortunately, the lack of empirical data makes it impossible to identify the precise number of claims-made settlements that have been proposed or approved. And it is even harder to tell what these settlements actually deliver to consumers. As Alison Frankel recently noted in an article for Reuters, "[t]he biggest obstacle in evaluating class actions involving inexpensive consumer products is the frustrating lack of empirical data" because although it is possible to "compile statistics on case filings, dismissals, settlements and attorney's fees," "publicly available evidence about whether these cases actually benefit the people who bought the supposedly flawed product is scant indeed."[1]

In an effort to try to bring some empirical rigor to what is typically a battle of anecdotes, my law firm (Mayer Brown) recently studied 148 class actions that were filed in or removed to federal court in 2009.[2] Most of the consumer class-action settlements we identified took place on a claims-made basis.

That reality comports with common sense because both plaintiffs' counsel and defendants have economic interests that favor claims-made settlements. Plaintiffs' counsel are frequently attracted to them because, as Mayer Brown's study showed, the stated value of a claims-made settlement frequently exceeds by a significant amount the actual amount of money delivered to class members, in part because claims rates are relatively low — usually under 10 percent and frequently less than 1 percent. At the same time, because many courts award attorney's fees to plaintiffs' lawyers based on the stated value of the settlement, the amount of attorney's fees is more likely to be substantial under a claims-made settlement.

Defendants have an interest in using claims-made settlements as well. Most defendants believe that the claims asserted in the majority of class actions are meritless and that the cases are lawyer-driven. Requiring class members to submit a claim ensures that only those class members who are willing to stand up and say (in some small way) that they have been aggrieved by the conduct alleged in the lawsuit will be paid. In addition, as an economic matter, defendants are indifferent to how a settlement payment is divided among plaintiffs' counsel and class members, so if a claims-made settlement reduces the overall combined payout to class members and their counsel, defendants will perceive the result as beneficial.

There are reports that in most of these actions, the claimants rarely submit a claim for their share of the settlement? Has that been your experience?

CABRASER: There is no reliable, comprehensive data on claims rates and claims numbers in class-action settlements. The data exists, but it is submerged within the case files (or administrative files) of the actions themselves. Some data surfaces in published decisions on settlement approval or attorney's fees. This provides incomplete data at best. Some of the most successful claims-made settlements have been approved in state courts; at the trial court level, there is no reporting mechanism for these decisions. This data is simply unknown, except to those directly involved in the action.

A case in point: the pre-CAFA nationwide *Masonite* class-action settlement that generated over $1.2 billion in payments to repair defective exterior hardboard siding on the homes of class members. The parties negotiated an uncapped, claims-made settlement because the number of houses on which the defective siding had been installed was unknown. However, it was easy for homeowners to identify the siding, and a comprehensive notice and claims program, including claims adjusters who visited class members' homes to evaluate the damage, resulted in widespread participation, over a multiyear claims program. Because the *Masonite* settlement was approved by an Alabama state court judge, the settlement itself has gone largely unnoticed.

Another example is a similar settlement that paid to replace defective polybutylene pipe in the homes of class members nationwide. Again, *Polybutylene Pipe* was a state court settlement, approved by the Tennessee chancery court, that generated over $1 billion in payments during the life of the claims program. These two highly successful class-action settlements are proof that, where attention is paid to the realities of the class members' situations, the claims administrators are accountable to the court and to the parties on an ongoing basis, and class counsel are tenacious, participation can be high, and payouts can be substantial. *Masonite* and *Polybutylene Pipe* are illustrative anecdotes, but there is no way to place them within a comprehensive data set — yet.

It has been my experience that claims rates vary widely and are difficult to predict. Moreover, claims numbers can be reported and preserved, but it is sometimes impossible to generate a true claims rate (the percentage of class members who make claims) because the total number of class members is simply unknown.

A simple example illustrates this point: Acme Aspirin Co. has records of its wholesale sales. It knows how many bottles of aspirin it produces and ships each year. However, it has no way of knowing who or how many class members buy this output. There is no complete record of the number of purchases per person, or the identities of the purchasers. The class policies themselves must conform to provide this information, often by assertion or affidavit; they will not have records of these purchases. This is simply a function of the way retail sales work, not a weakness of class actions nor an argument against using class actions in consumer cases. After all, the state consumer protection statutes under which these cases are brought were designed with private rights of action, precisely to protect retail consumers and promote class-actions enforcement mechanisms.[3]

As advancing technology erodes privacy, it facilitates more effective claims programs. Retail-level identifying data is becoming more available, as large store chains track customer purchases, through loyalty programs, to design and direct marketing, to particular customers based upon prior purchases. This information may also provide a way to give direct notice and deliver claim forms, or even payments, to these retail customers. As technology advances, more direct notice (which has been demonstrated to improve claims rates), and perhaps even direct delivery of refunds, credits, or coupons, may develop.

PINCUS: Mayer Brown's study confirms what class-action practitioners on both sides have known for a long time: In most consumer class actions that are settled on a claims-made basis, relatively few class members actually file claims. As noted above, claims rates are routinely below 10 percent and often well under 1 percent. In fact, one claims administrator recently disclosed in a court filing that the median claims rate for class actions in which class members received notice via media advertisements (as opposed to direct notice) was 0.023 percent.[4] The claims administrator also testified that, for the "hundreds of consumer class actions" handled by the administrator "in which class members received notice indirectly rather than directly through the mail," the claims rate was almost always less than 1 percent.[5]

Many class members simply do not believe that it is worth their time or energy to file claims requesting the (usually very modest) awards to which they might be entitled. Often this is because the claim-filing process is burdensome by design, requiring plaintiffs to locate and produce years-old bills or other data to establish an entitlement to recovery. Judge Richard Posner recently discussed the problem of complicated claims forms that led to low participation rates in *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014), a decision reversing the approval of a class settlement under the Fair and Accurate Credit Transactions Act (FACTA). As Judge Posner explained, "[t]he fact that the vast majority of the recipients of notice did not submit claims hardly shows 'acceptance' of the proposed settlement: rather it shows oversight, indifference, rejection, or transaction costs."[6]

That case involved a technical error by a company that did not harm any one, but that was alleged to be a violation of FACTA (Radio Shack provided receipts on which credit or debit card expiration dates were recorded). The district-court-approved settlement provided that class members who were RadioShack consumers given such receipts could file a claim and obtain a $10 coupon for use at any RadioShack store.[7] As Judge Posner noted, however, "[t]he bother of submitting a claim, receiving and safeguarding the coupon and remembering to have it with you when shopping may exceed the value of a $10 coupon to many class members."[8]

A court may award attorney's fees based on the potential settlement

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amount or on the amount actually paid out to the class members. Do most courts choose one or another method?

CABRASER: Most courts award attorney's fees as a reasonable percentage of the economic value of the settlement that is made available to the class.[9] A settlement that generates a $50 million fund is thus typically valued at $50 million by the courts. In the case of "coupon" settlements, where the value is the aggregate face value of coupons or certificates, rather than cash, the Class Action Fairness Act enables courts to base attorney's fees on benefits actually claimed and paid or the time-based lodestar method.[10] Some courts have chosen hybrid methods.

The idea that pegging attorney's fees to the benefits actually delivered to class members incentivizes attorneys to maximize claims is a powerful one. In the *Masonite* settlement, a base fee was awarded, with additional fees paid by the defendant, on a periodic basis, at an equivalent of 15 percent of the claims paid to class members. Fees were not deducted from the class benefits, but were paid in addition to the claims. Thus, the attorney's fees were pegged directly to the success of the claims program. This was important in the *Masonite* case because ongoing efforts by class counsel were necessary to ensure the integrity of the claims process, and the claims program itself was a lengthy one (10-plus years), as exterior siding deteriorated on a gradual basis on class members' homes. This is an example of a settlement negotiated and designed to suit the circumstances of the case. Courts should be free to award attorney's fees based upon the total value of the settlement, as paid by the defendant (either to class members, or in the form of cy pres), to award fees based upon the amounts delivered to class members, to use tiered approaches, or to use different fee percentage levels to incentivize maximum performance. Judicial flexibility under Rule 23(h) is important here. Settlements are not easily typecast, settlement forms and features continue to evolve, and it would be a mistake to freeze settlements into rigid categories, corresponding with inflexible fee methodologies.

PINCUS: The courts are divided over how to award attorney's fees when a class action is settled. Most courts in practice base attorney's fees on the potential (stated) value of a class settlement rather than the actual value delivered to class members.

The most robust debate has taken place in the context of coupon settlements, because the Class Action Fairness Act — recognizing the historical abuses of coupon-based settlements — provides that "[i]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."[11] The next subsection of that provision, however, provides that "if a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel," then "any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action."[12]

The Ninth Circuit has held that "lodestar fees may only be awarded where class counsel obtains non-coupon relief," and that "[b]y tying attorney compensation to the actual value of the coupon relief, Congress aimed to prevent class counsel from walking away from a case with a windfall, while class members walk away with nothing."[13] The court held that the district court's lodestar award of $1.5 million in attorney's fees in that case constituted reversible error because the parties' settlement agreement had made it "impossible for the district court to calculate the redemption value of the coupons."[14]

In *Redman*, the Seventh Circuit did not find it necessary to resolve the question of whether lodestar fees are permissible under CAFA in the context of coupon settlements. Nonetheless, it examined not just the number of coupons actually claimed, but also the economic value of those coupons, recognizing that they were worth less than their face value. The court pointed out that the potential class size was as large as 16 million RadioShack customers, but that only about 83,000 class members submitted claims for the coupon — leading to a claims rate of "a little more than one half of one percent of the entire class."[15] And while the face value of the coupons was $10, because coupons are surely worth less than the face value, the court assumed that the coupons were worth no more than 60 percent of the face value.[16] When that more-realistic appraisal of the value of the settlement was taken into account, the approximately $1 million attorney's fee award that the parties had agreed to in the settlement was double the value delivered to the class, or, as Judge Posner put it, "the equivalent of a 67 percent contingency fee."[17] The order approving the settlement was reversed.

More recently, the Seventh Circuit disagreed with the Ninth Circuit on the question of whether fees may be calculated on a lodestar basis for a coupon-based settlement. In *In re Southwest Airlines Voucher Litigation*, two named plaintiffs sued Southwest Airlines for allegedly failing to "honor[] certain in-flight drink vouchers issued to customers who had bought 'Business Select' fares."[18] The class settlement "require[d] Southwest to issue replacement coupons to each class member who files a claim form"; the "coupons are transferable and good for one year" (and of course had to be used on a future Southwest flight).[19] The parties then agreed to attorney's fees of up to $3 million, and the district court awarded attorney's fees of nearly $1.65 million based on the lodestar method.[20] The Seventh Circuit held that Section 1712 of CAFA authorizes use of the lodestar method for a settlement involving coupon relief[21] — without regard to whether any coupons were redeemed. And indeed, one of the most telling aspects of the Southwest case is that we may never know how many class members claimed coupons at all — much less how many coupons were redeemed within the one-year window. The district court did not receive data from the parties about the claiming or redemption rates, but it found that "the actual value of what counsel obtained for the class . . . *is unquestionably* *far less* than the aggregate face value of the replacement vouchers" because "it is unlikely that a particularly high percentage of the vouchers actually will be used, or even claimed."[22]

Of course, many class actions settled on a claims-made basis do not involve coupons. But they still suffer from the problem that the district court does not know, or does not consider, the extent to which a class settlement delivers actual value to class members. Instead, attorney's fee awards are routinely based on the claimed potential value of the settlement — whether or not class members realize anything close to that potential value. That reality is extremely troubling because it indicates that courts may not be fulfilling their obligation to protect the interests of absent class members.

Courts should continue to reward excellent outcomes, and thus incentivize attorneys to continue to take the risk and incur the costs of prosecuting class actions in a tenacious and creative manner.

What are the reasons why a court should select one or another method of awarding attorney's fees?

CABRASER: The key is reasonableness. In some circumstances, given the difficulty of the case, the amount of time and work required to bring the settlement to fruition, the quality of the lawyering, and other familiar factors, higher or lower fees may be warranted. Courts should continue to reward excellent outcomes, and thus incentivize attorneys to continue to take the risk and incur the costs of prosecuting class actions in a tenacious and creative manner. Unlike incomplete data on claims methods or claims rates, there is robust data on court awards of attorney's fees in settlements of various types, of various magnitudes, and in various circumstances. The academic literature also continues to proliferate on this issue, and testifying experts are available. Thus, courts have information that enables them to award an appropriate fee under the circumstances of the case.

At this point, all of the federal circuits have recognized the percentage of the fund methodology for attorney's fee awards in class actions, pegging the fee to the result as is appropriate in recognition that class actions are contingent fee cases.[23] Economies of scale enable courts to award reasonable fees at percentages lower than the norm in private contingent-fee contracts. In most circuits, the courts may do a "lodestar cross-check" to assure that what seems a reasonable percentage of the fund or value of the settlement is not a windfall, but is also reflective of the amount of work performed in the case.

PINCUS: Courts should award attorney's fees in class actions by looking at what class members *actually* recover, not what they hypothetically might have recovered. Judges have a special responsibility to protect the interests of class members. As Judge Posner has put it: "The judge who presides over a class action and must approve any settlement is charged with responsibility for preventing the class lawyers from selling out the class, but it is a responsibility difficult to discharge when the judge confronts a phalanx of colluding counsel. 'The defendant wants to minimize outflow of expenditures and the class counsel wants to increase inflow of attorney's fees. Both can achieve their goals if they collude to sacrifice the interests of the class.'"[24] Given the obvious incentives for class counsel and defendant to collaborate, it should come as little surprise that claims-made settlements often benefit attorneys first and plaintiffs second.

These economic features of class actions underscore why judges should not simply rubber-stamp class settlements (and the attendant requests for attorney's fees) based on the parties' often-inflated characterization of the value of the settlement. In Judge Posner's words: "[t]he judge asked to approve the settlement of a class action is not to assume the passive role that is appropriate when there is genuine adverseness between the parties rather than the conflict of interest recognized and discussed in many previous class-action cases."[25]

Judges should ask themselves what the clients of class counsel (i.e., *all* absent class members, not just the named plaintiff) would reasonably agree to pay an attorney for the results sought and achieved. Or, as Judge Posner explained in *Redman*: "We have emphasized that in determining the reasonableness of the attorney's fee agreed to in a proposed settlement, the central consideration is *what class counsel achieved for the members of the class* rather than how much effort class counsel invested in the litigation."[26] Most individuals surely believe that achievement in a class action is measured largely by what they *actually receive*, not what they might have received if they had jumped through the various hoops created for them in a claims-made settlement.

Should there be a national uniform practice that bases the award of attorney's fees either on actual recovery or potential amount?

CABRASER: No. Uniformity could discourage the ongoing evolution and improvement of class-action settlements and freeze innovation where it is most needed at this point: in improving the content and modes of dissemination of class-action settlement notice, simplifying and expediting claims procedures, and exploring additional ways to provide settlement benefits directly to class members. In some cases, courts may want to make these incentives direct and explicit by pegging them primarily to the amount of money or value of benefits actually delivered to class members. This encourages attorneys to spend the extra time and effort to negotiate for direct payments to class members. There is widespread recognition and agreement that direct payment settlements are best.

However, it must be recognized that whether or not plaintiffs' counsel can achieve a direct pay settlement is a factor not only of the defendant's records but of the plaintiffs' leverage in the particular case. In a strong case, where the pretrial rulings have been going in plaintiffs' favor, plaintiffs may well have the leverage to insist that extraordinary efforts be made by defendants to reach class members directly and to make direct payments, and to dispense with the claims process altogether, in favor of delivering, via check or credit, the benefits to class members. In other cases, this may simply be impossible, and neither class members nor class counsel should be penalized due to circumstances beyond their control by denying settlements or withholding fees. Instead, the fee methodology and amount should incentivize them to maximize the claims by monitoring the process from beginning to end, to make running improvements in claim forms and procedures where possible, and to insure the best notice.

When class counsel achieve a settlement that makes a fixed amount available for claims, they are achieving vital consumer-protection objectives of disgorgement and deterrence, as well as an opportunity for claimants to achieve compensation. A fee award not limited to claims paid better reflects these goals.

PINCUS: I do think courts should adopt uniform national practices addressing how attorney's fees should be awarded in class settlements, and (as indicated above) courts should do so by assessing attorney's fees based on the *actual* benefit to class members, not hypothetical-but-unrealized benefits tied to the stated value of a settlement. If some jurisdictions are more generous in awarding attorney's fees, then plaintiffs' lawyers — who are the masters of their complaints and often can sue companies that operate nationally in a wide variety of jurisdictions — will have a strong incentive to pick the forum most likely to deliver the largest attorney's fee. That kind of forum shopping ought to be discouraged.

If so, should Rule 23 be amended to select one uniform method of awarding attorney's fees or should any such action be reserved for Congress by means of a statutory amendment?

CABRASER: In my view, it is not ultimately helpful to codify any aspect of Rule 23 to the extent that it freezes the ongoing development of class actions, or places class actions in a preexisting straightjacket that fails to recognize the application of Rule 23 to cases across a variety of substantive areas and involving a wide array of circumstances. Rule 23(e) must retain flexibility to enable courts to evaluate and approve, or disapprove, proposed class-action settlements that will arise in a wide array of circumstances, in many different kinds of cases. Similarly, Rule 23(h) needs corresponding flexibility. A fair fee is more likely to be achieved in every case if courts can assess the actual circumstances of each case and the actual merits of each settlement that is presented to them for approval. A schedule of fees, whether it is a set range of percentages, a set multiplier on lodestar, or keyed only to the amounts paid out to class members, would not serve what ought to be the animating purpose of best practices and principles in fee awards: to incentivize, in realistic ways, class-action settlements that provide the maximum benefit to each class that is practicable to achieve under the circumstances of each case.

One proposed Rule 23 amendment that holds promise is to "frontload" the information the court must be given at the beginning of the settlement approval process, before notice goes out, including detail on how the claims process will function and whether direct payments are feasible. This is where courts can insist on best practices, such as clear notice, simple claim forms and procedures, online claims, reminder notices as the claims deadline nears, and assistance from class counsel. Experience has shown these techniques increase claims. The Federal Judicial Center already recommends these in its "Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide" available online.

Of course, the foregoing discussion does not even begin to address the many important class actions that do not

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involve the payment of money to class members. These cases, which involve injunctive or equitable relief, which change company or industry practices for the better, and which protect the rights of class members in ways not reducible to cash, are also cases in which important principles of law have been articulated and confirmed. These actions should be encouraged. In these cases, statutory fees may be available, which may be lodestar/multiplier based. Again, the courts need flexibility in awarding fees that appropriately recognize and incentivize this important work. In such cases, defendants, who are paying these fees, have a more direct interest, and may be adversaries in the process.

The dynamics of fee awards in these circumstances thus differ from those of either common-fund or claims-made monetary class settlements. One size does not fit all with respect to fees methodologies: Class actions are alive only because fees are awarded when they succeed, and it would be counter-productive were Rule 23 either to be amended or statutes to be enacted that superimposed one or a few arbitrary or restrictive fees methodologies on the vast array of class actions that come before the courts for resolution.

PINCUS: The process for amending the Federal Rules of Civil Procedure is not the best way to address contested issues of class-action procedure. The Advisory Committee process works best when it targets straightforward and uncontroversial changes that address ambiguities, resolve confusion, or account for technological advances. The process works poorly when the issues are hotly disputed and competing interests are involved.

A better approach would be to allow these issues to work their way up to the Supreme Court so the Court can address these issues in the context of concrete, real-life facts. That is just what has happened with respect to multiple issues under Rule 23 and the Class Action Fairness Act. Indeed, the circuit conflict over how attorney's fees should be calculated in light of CAFA's provisions governing coupon settlements is a good example of the kind of issue that the Supreme Court may well be poised to — and is best suited to — resolve. So too with cy pres; the Chief Justice has indicated that "[c]y pres remedies are a growing feature of class-action settlements," and that "[i]n a suitable case, this Court may need to clarify the limits on the use of such remedies."[27]

Moreover, to the extent that questions regarding calculation of attorney's fees in connection with class settlements involve issues of policy, those questions (of course) should be resolved by the political branches of government, and are best addressed to Congress rather than the Advisory Committee.

Final Thoughts

CABRASER: Reducing claims barriers can change indifference to action. Direct notice may convert claims-made to claims-paid settlements. In Pearson, Judge Posner noted that the defendant could have simply mailed $3 checks to 4.72 million class members (generating a spectacular take-up rate) instead of postcard notices describing an "elaborate" and burdensome claims process.[28] The Seventh Circuit, a contemporary champion of the importance of small-damages class actions as essential mechanisms of access and deterrence,[29] condemns both defendants' efforts "to minimize the number of claims" by requiring elaborate documentation and plaintiffs' counsels' failures to push back.[30] The combined message of *Redman*, *Pearson*, and *Southwest* is this: The facts that per-claimant recoveries are small and that many won't make the effort are not reasons to abandon the enterprise; rather, the class deserves the best management efforts of the court, undivided loyalty of class counsel, and good faith of the settling defendant.

The *Redman* and *Southwest Airlines* analyses emphasize "flexibility." *Redman* reminds us that counsel should also be incentivized to obtain equitable relief, even where "much of the value of the equitable relief may be nonmonetizeable."[31] *Southwest Airlines* involved an unusual settlement in which coupons actually made the class "whole": the settlement replaced all of the canceled free-drink vouchers; class members fully recovered the choice to redeem these coupons for drinks if and as they wished. *Southwest* is a mundane example of a more profound point: Claims-made consumer class settlements offer class members a choice they could not have absent the class, precisely because individual litigation is economically infeasible.[32]

Courts should look to the overall benefits that a settlement achieves: (1) providing compensation to the class and delivering it with the practical minimum of burden to class members; (2) providing noncash benefits, like the correction of safety defects in the *Toyota Unintended Acceleration* settlement;[33] and (3) correcting defects or practices. In *Pearson* and *Redman*, Judge Posner focused on compensation while acknowledging the value of effective injunctive relief and appropriate cy pres.[34] In *Kore*, he found an all-cy pres remedy coupled with attorney's fees to be potentially superior in furthering statutory objectives.[35] The lesson is that the fee awards must be as carefully tethered to the circumstances of the particular case as are the terms of the settlement itself.

Redman, *Pearson*, and *Southwest* have sent a strong message to counsel (on both sides) to desist and resist tactics that reduce claims. But tying fees solely to claims rates, which no court requires, would have the perverse consequence of disincentivizing recovery of other important class benefits, or, as Judge Posner noted in *Kore*, discourage "small" class actions with strong liability and thus frustrating deterrence.[36]

PINCUS: Class actions in their modern form represent a relatively recent experiment in our legal system; it is not yet 50 years since the adoption of the 1966 amendments to Rule 23. That experiment did not fully anticipate the ways in which the interests of class counsel and class members could and often do diverge. It also failed to appreciate how difficult it is for judges to protect the interests of class members in the absence of an adversary presentation — which is what occurs in the all-too-frequent situations in which the economic interests of defendants and class counsel align. For these reasons, the history of class actions is fraught with abuses, some of which are the fault of practitioners and some of which are inherent in the structure of the class-action device.

But claims-made settlements remain a useful tool in appropriate circumstances. It is often impractical for defendants to identify all class members or to deliver benefits to them directly in the absence of a claims process (although courts probably should declare many such class actions unmanageable).

The fact that claims-made settlements may make sense does not mean that class counsel should receive outsized attorney's fee awards for bringing such cases. Few observers of the class-action system would dispute that the vast majority of class actions are "lawyer-driven"; that is, plaintiffs' lawyers find and develop the claims, identify class representatives to serve as "figurehead" plaintiffs, and for all intents and purposes control the litigation. Especially given that dynamic, it is important to the integrity of our judicial system that class counsel be compensated only for the benefits that they deliver to their clients, not merely for delivering the possibility of benefits that class members do not realize (in many cases because they do not want them).

In response to criticisms that claims rates in consumer class actions are low — ordinarily below 10 percent and frequently less than 1 percent — plaintiffs' lawyers sometimes complain that class notice can be difficult, and that it is hard to motivate class members to collect relatively small sums. But that complaint simply serves to highlight two questions that every judge should ask in considering class settlements: (1) if class members are not motivated to participate in the class action, was the case worth bringing in the first place; and (2) should the lawyers who pressed the lawsuit receive substantial compensation when as many as 90 — and sometimes greater than 99 — percent of class members received nothing?

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1 Alison Frankel, *A Smoking Gun in Debate Over Consumer Class Actions?*, Reuters (May 9, 2104), http://blogs.reuters.com/alison-frankel/2014/05/09/a-smoking-gun-in-debate-over-consumer-class-actions/.

2 *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, Mayer Brown LLP (Dec. 2013), https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

3 *See, e.g.*, *Vasquez v. Superior Court*, 484 P.2d 964 (Cal. 1971); Cal. Civil Code § 1781.

4 Frankel, *supra* note 1.

5 *Id.*

6 *Redmond v. RadioShack, Corp.*, 768 F.3d 622, 628 (7th Cir. 2014).

7 *Id.*

8 *Id.*

9 *See Williams v. MGM Pathe Commc'n. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (pre-CAFA case holding that it is an abuse of discretion for the district court to base fees on claims made rather than on the entire fund or on a lodestar basis).

10 *See* 28 U.S.C. § 1712(a). For a recent and thorough analysis of § 1712 and its application to attorney's fees, see *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701 (7th Cir. 2015) (finding that under CAFA, the district court has discretion to use lodestar rather than value of coupons to calculate fees).

11 28 U.S.C. § 1712(a).

12 *Id.* § 1712(b) (the lodestar method of calculating attorney's fees).

13 *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1185 (9th Cir. 2013).

14 *Id.* at 1186.

15 *Redman*, 768 F.3d 622, 628.

16 *Id*. at 632.

17 *Id.*

18 *In re Southwest Airlines Voucher Litig.*, 799 F.3rd 701 (7th Cir. 2015).

19 *Id.* at 705.

20 *Id.*

21 *Id.* at 710 & n.3.

22 *In re Southwest Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 5497275, at *11 (N.D. Ill. Oct. 3, 2013) (emphasis added).

23 *See Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 643 (5th Cir. 2012); Manual for Complex Litigation § 14.121 (4th ed. 2014).

24 *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 848–49 (7th Cir. 2010) (citation omitted), vacated on other grounds, 131 S.Ct. 3060 (2011).

25 *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014) (citing, *inter alia*, *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014); I*n re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801, 819–20 (3d Cir. 1995)).

26 *Redman*, 768 F.3d at 633 (emphasis added).

27 *Marek v. Lane*, 134 S.Ct. 8, 9 (2013) (statement of Roberts, C.J., respecting the denial of certiorari).

28 *Pearson v. NBTY, Inc.*, 772 F.3d 778, 783 (7th Cir. 2014).

29 *See Mullins v. Direct Digital, LLC,* 795 F.3d 654, 658 (7th Cir. 2015); *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701 (7th Cir. 2015); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 760 (7th Cir. 2014); *Pearson*, 772 F.3d at 787; *Redman*, 768 F.3d at 629; *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013); *Butler v. Sears Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013), *cert. denied*, 134 S.Ct. 1277 (2014); *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997) (cited approvingly in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)).

30 *See Pearson*, 722 F.3d at 783.

31 *Redman*, 768 F.3d at 635.

32 *See* Suchanek, 764 F.3d at 760; *Butler*, 727 F.3d at 798.

33 *See* Toyota Economic Loss Settlement, https://www.toyotaelsettlement.com (last visited Sept. 14, 2015).

34 *Pearson*, 772 F.3d at 784.

35 *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 675–78 (7th Cir. 2013) (emphasizing that even class actions that cannot deliver substantial compensation accomplish deterrence by providing sufficient fees "to interest a competent lawyer").

36 *Id.* at 676–78.