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IN DEFENSE OF THE CLASS ACTION LAWSUIT: AN EXAMINATION OF THE IMPLICIT ADVANTAGES AND A RESPONSE TO COMMON CRITICISMS

KATIE MELNICK*

INTRODUCTION

Historically, the role of the attorney in the American justice system has been that of an advocate, zealously arguing in court to protect his injured client's rights.¹ While there are still attorneys who fit this ideal, a shedding of the proverbial innocent skin began to take place in the 1960's.² At that time, the traditional class action lawsuit became available to the masses.³ Traditionally rooted in equity, the class action was not a pre-eminent force until the 1966 amendments to the Federal Rules of Civil Proce-

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¹ See M. Neil Browne et al., *The Purported Rigidity of an Attorney's Personality: Can Legal Ethics Be Acquired?*, 30 J. LEGAL PROF. 55, 69 (2005) (noting that attorney's traditional role is that of zealous advocate); see also Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3 (1991) (stating that traditional role of attorney is a professional who provides advice on behalf of his client).

² See Natalie C. Scott, *Don't Forget Me! The Client in a Class Action Lawsuit*, 15 GEO. J. LEGAL ETHICS 561, 562 (2002) (stating that while attorneys are traditionally considered "officer[s] of the court" and "staunch advocate[s]," Rule 23 class action lawsuits have given rise to ethical concerns that stem from fact that attorneys in class action lawsuits represent numerous clients whom they never meet and have little connection with); see also Joel Seligman & Lindsey Hunter, *Rule 23: Class Actions at the Crossroads*, 39 ARIZ. L. REV. 407, 408-09 (1997) (explaining how Rule 23 was amended in 1966).

³ See Seligman & Hunter, *supra* note 2, at 408-09 (stating that drafters of 1966 amendments agreed that class action lawsuits should be available to classes of people sharing common issues of law or fact, and purpose of amendments was to "enable litigation")(internal quotations omitted); see also Edward F. Sherman, *Complex Litigation: Plagued By Concerns Over Federalism, Jurisdiction and Fairness*, 37 AKRON L. REV. 589, 590-91 (2004) (describing amendments to Rule 23 as expanding scope of class action litigation to include actions for injunctive relief and monetary damages).

ture.⁴ It was at that time that Rule 23(b)(3), the damage class action lawsuit, was amended to allow class actions in situations where there were common questions of law or fact, and these questions predominated.⁵ This shift from the functional to the practical had the effect of allowing class actions even when there were no joint rights.⁶ As a result, individual plaintiffs were given the ability to raise actionable claims despite the fact that damages suffered by the individuals themselves were “relatively small and outweighed by the hefty expense and burden of individual litigation.”⁷ An increase in the popularity of the class action lawsuit followed as the new suits “level[ed] the playing field” and made it “possible for . . . individual investors to seek redress for wrongful corporate conduct.”⁸ As the class action became a tool more available to the masses, legal scholars began to dismiss such suits as nothing more than legalized black mail.⁹ In fact, when one takes into account the cost of litigating combined with notice pleadings and broad discovery rules, the deck does in fact appear stacked in favor of the plaintiffs.¹⁰

⁴ See Sherman, *supra* note 3, at 590-91 (noting that historically class actions in America were actions in equity, and were allowed only in limited situations where joint rights or rights against specific property were asserted, and that the 1966 amendments to Rule 23 expanded class actions to include suits for injunctive or monetary relief); see also Susan T. Spence, *Looking Back . . . In a Collective Way: A Short History of Class Action Law*, 11 A.B.A. BUS. LAW TODAY No. 6 (2002), available at <http://www.abanet.org/buslaw/blt/2002-07-08/spence.html> (stating “the modern American class action evolved on the equity side of the courthouse” and that American class actions changed dramatically with the 1966 amendments to Rule 23).

⁵ See Fed. R. Civ. P. 23(b)(3); see also Sherman, *supra* note 3, at 591 (describing Rule 23(b)(3) as significant development insofar as it permitted class actions for damages where questions of law or fact are common to members of the class).

⁶ See Fed. R. Civ. P. 23(b)(3); see also Sherman, *supra* note 3, at 590 (noting that 1966 amendments to Rule 23 expanded class actions to include suits for injunctive or monetary relief).

⁷ Sanford P. Dumain, *Class Action Suits, Auditor Liability, and the Effect of the Private Securities Litigation Reform Act of 1995*, in ACCOUNTANT'S LIABILITY, ALI-ABA COURSE OF STUDY MATERIALS 501 (2005).

⁸ *Id.*

⁹ See *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (noting that one of main problems with class action lawsuit is that some attorneys are “happy to sell out a class they anyway can't do much for in exchange for generous attorneys' fees”); see also Scott, *supra* note 2, at 561 (describing numerous criticisms “levied against the class action,” including allegations that plaintiffs' attorneys tend to settle cases prematurely in order to collect large sums in attorneys fees).

¹⁰ See Denis T. Rice, *A Practitioner's View of the Private Securities Litigation Reform Act of 1995*, 31 U.S.F. L. REV. 283, 328 (1997) (stating historically the costs of class action litigation are high); see also Scott, *supra* note 2, at 576 (noting that cost of providing notice of class action lawsuit can be astronomical).

This note will examine some of the common negative reactions to the class action lawsuit and will argue that such lawsuits actually do serve an important function within the legal world; and that perhaps the main problem lies not with the class action itself but with the overarching view that the class action can be molded to resemble other forms of litigation. When seen in light of the implicit advantages that such lawsuits bring to the forefront, it seems that the class action is much more than “legalized extortion.”¹¹

I. “CLASSLESS ACTIONS”: A RESPONSE TO COMMON CRITICISMS OF THE CLASS ACTION

A. *Solicitation of Clients*

In the most traditional sense, litigation begins when an injured client seeks legal representation. The attorney then pursues the claims on behalf of the client, with the client’s interests as the focal point of the litigation.¹² According to Model Rule 1.2(a), the client determines the objectives of the representation and the attorney is duty bound to comply with such objectives.¹³ This traditional view of the attorney is largely perverted in the forum of class action litigation,¹⁴ where it is often the attorney himself who solicits the client, turning himself into more of a “calculating

¹¹ See Gregg H. Curry, *Conflicts of Interest Problems for Lawyers Representing a Class in a Class Action Lawsuit*, 24 J. LEGAL PROF. 397, 398 (2000) (maintaining that “the class action is a mechanism created to serve unique purposes and to protect unique interests”); see, e.g., Suzette M. Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive: How Allison v. Citgo’s Predomination Requirement Threatens to Undermine Title VII Enforcement*, 26 BERKELEY J. EMP. & LAB. L. 405, 408 (2005) (pointing out importance of class action litigation in civil rights law). See generally Bhavik R. Patel, *Securities Regulation--Fraud--Rule 10b-5 No Longer Scares the Judiciary, but May Scare Corporate Defendants: The United States Supreme Court Switches Directions. Wharf (Holdings) Ltd. v. United International Holdings, Inc.*, 532 U.S. 588 (2001), 25 U. ARK. LITTLE ROCK L. REV. 191, 207 (2002) (acknowledging importance of class action litigation to securities field).

¹² MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2002).

¹³ MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2002).

¹⁴ See Samuel Issacharoff, *Program: AALS Section on Civil Procedures: Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 805 (1997) (suggesting “[c]lass actions occupy an uncertain position in Anglo-American law[.]” departing significantly from traditional legal model). See generally Macey & Miller, *supra* note 1, at 3 (positing that attorneys in class action litigation do not fit into traditional mold of the attorney).

entrepreneur” than the quintessential advocate.¹⁵ This scenario is perhaps most obvious in large-scale, small-claim litigation, where the overall liability is large but the individual interests of the class members are small.¹⁶ In such litigation, the attorneys stand to gain more from the potential settlement than any one individual.¹⁷ This reversal of traditional roles has caused many in the legal community to dismiss the class action as a means by which class action attorneys set themselves up to receive wind-falls from eventual settlements, using clients as mere pawns in their (the attorneys’) eventual recovery.¹⁸

A prime example of the large scale small claim litigation can be seen in *Kline v. Coldwell, Banker & Co.*¹⁹ In that case, plaintiffs (solicited by an attorney) commenced an action on behalf of themselves and other similarly situated residential home sellers claiming that defendants fixed brokerage commissions in realty

¹⁵ See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677–79 (1986) [hereinafter Coffee, *Understanding*] (explaining in context of class action the client often only has nominal stake in outcome of litigation and is therefore attorney who has more of vested interest in litigation); see also Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 405–06 (2003) (explaining most criticisms of class action suits are because “customary principal-agent relationship between attorney . . . and the client . . . fails to exist in the typical class action [and t]he entrepreneurial incentives of attorneys who specialize in class actions transform this relationship into the converse connection in which the attorney becomes the principal and the unsophisticated client becomes the agent, with minimal ability to monitor the behavior of the class action counsel.”).

¹⁶ See Brunet, *supra* note 15, at 406–07 (discussing “sweetheart deal” scenario in which attorney for plaintiffs will make favorable deals with defense attorneys to primary benefit of attorneys, not the client); see also Coffee, *Understanding*, *supra* note 15, at 678 (describing that in the context of class actions the actual client only has a nominal stake in the outcome of the litigation).

¹⁷ See Coffee, *Understanding*, *supra* note 15, at 678 (explaining how our legal system has accepted the concept of the plaintiff's attorney as an entrepreneur in many ways, including allowing attorney to settle over objections of actual client); see also Fact Sheet: Securing Our Economic Future (Dec. 15, 2004), available at <http://www.whitehouse.gov/news/releases/2004/12/20041215-3.html> (discussing how many class action suits are “heavily abused” and “injured parties often receive awards of little or no value while lawyers receive large fees”).

¹⁸ John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 218–19 (1983) [hereinafter Coffee, *Rescuing*] (stating that “[l]ower federal judges have been even more explicit in their view that the legal system is being exploited, rather than aided, by such attorneys”); see Brunet, *supra* note 15, at 406–07 (suggesting that lack of sufficient oversight to monitor the class action attorney may lead to self-interested collusion with the defense).

¹⁹ 508 F.2d 226 (9th Cir. 1974).

sales.²⁰ Though facially the plaintiffs alleged that defendants had violated section one of the Sherman Act,²¹ what is particularly striking about this case is that the named plaintiff had in fact only suffered minor pecuniary damages as a result of the purported fixed commissions.²² Additionally, the court noted that out of the 400,000 sellers the plaintiffs claimed they were to represent, only one other plaintiff had come forward or expressed any interest in the litigation.²³ Given the small amount the plaintiffs stood to gain, and the extraordinary lack of interest on behalf of the “class,” it was posited that the case was nothing more than the brainchild of attorneys.²⁴ While the class was never certified because it was held to be unsuitable for class action treatment, it is important to note the court’s focus on the perversion of the attorney client relationship and the visceral reaction that the judges had when confronted with the notion that “the real bonanza in a case like this, if it is won, will go to counsel.”²⁵

Attorney-solicitation of clients is also apparent in the intersection of the medical and legal worlds, more specifically within the realm of prescription drugs.²⁶ In this scenario, a plaintiff’s attor-

²⁰ *Id.* at 228.

²¹ *Id.*

²² *Id.* at 236-37 (Duniway, J., concurring) (explaining that Kline had sold single property and paid single commission, and therefore the maximum damages would be \$2500 or \$7650 trebled).

²³ *Id.* at 237.

²⁴ *Id.* at 238 (quoting Judge Duniway’s opinion that “none of the class actions features of this case was dreamed up by the named plaintiffs, but that all of them are the brain children of their attorneys”).

²⁵ *Id.* at 237. Perhaps the most egregious example of client solicitation comes on the heels of a mass disaster, where the attorney attempts to gain access to the suffering families in their time of need and, under the guise of consoling the grief stricken family, encourages them to file suit. The behavior of the attorneys following the Pan Am crash over Lockerbie, Scotland truly illustrated how aggressive and unfeeling attorneys can be in their pursuit of clientele. While it is important to note that in situations of mass disasters, a lawsuit will inevitably follow because wherever death is involved, the potential for recovery is quite high. That being said, it is the behavior of the attorneys in the face of disasters that many find offensive. See Grace Najarian, *Balancing Act: New Jersey Walks a Line Between the Pros and Cons of Attorney Solicitation of Clients*, 29 SETON HALL L. REV. 1543, 1558-59 (1999).

²⁶ See *In re Tetracycline Cases*, 107 F.R.D. 719, 721 (W.D. Mo. 1985) (representing plaintiffs’ attempt to certify a class whose members comprise “all persons who ingested, in Missouri before their eighth birthday, or whose mothers ingested, in Missouri during pregnancy with such persons, a drug of the tetracycline class agent”); see also *Ratliff v. Merck & Co.*, 359 F. Supp. 2d 571, 576 (E.D. Ky. 2005) (representing lawsuit against Merck alleging that “ingestion of [VIOXX(R)] exposes individuals to an increased risk of

ney gets word that a drug has been taken off the market or that complications have been reported in those who have ingested the drug.²⁷ He subsequently begins to advertise, encouraging people to contact him if they have (or anyone in their family has) ever taken the medicine.²⁸ In such situations, even if the individual does not feel particularly injured, he is painted a picture of a no-risk, high-reward scenario.²⁹ These advertising campaigns in fact serve the dual purpose of not only alerting people that they may have been injured in the first place, but also of providing them a means through which they can rectify their injuries.³⁰

In the 1980s, tetracycline became the focal point of significant legal attention when individuals, inspired by attorneys, began to sue on behalf of themselves and others who had ingested the

cardiovascular events' and that individuals who used VIOXX(R) 'now need to see their physician for consultation regarding their use of the drug").

²⁷ See Michael Isikoff, *Defective-Products Claims Cause Legal Morass; Lawyers, Not Victims, Are Source of Most Problems When Punitive Damages Are Sought, Critics Claim*, WASH. POST, Sept. 1, 1985, at M2 (criticizing legal system as being driven by plaintiffs' attorneys seeking enormous punitive damage awards that result in larger contingency fees for attorneys in products liability cases); see also Sebastian Mallaby, *No Defense For This Insanity*, WASH. POST, May 1, 2006, at A19 (suggesting reform in legal system in light of Vioxx lawsuits which "sink a flagship scientific company in order to line the pockets of unscrupulous lawyers").

²⁸ See, e.g., The Kahn Law Firm, <http://thekahnlawfirm.com/personal/drug/> (last visited Oct. 15, 2007) ("If you or someone you love has been injured as a result of VIOXX, contact our lawyers. We have the experience needed to help you file a successful VIOXX lawsuit. Depending on your jurisdiction, time limitations may apply to the filing of your VIOXX lawsuit claim. It is important to know your legal rights."); see also Tequin Lawsuit, <http://tequinlawsuit.lawinfo.com/index.html> (last visited Oct. 15, 2007) (encouraging individuals or their loved ones who had suffered blood sugar problems after taking a particular drug to "Take Action NOW to Protect Your Legal Rights!").

²⁹ See, e.g., The Kahn Law Firm, <http://thekahnlawfirm.com/personal/drug/> (last visited Oct. 15, 2007) (advertising that contacting the firm "is free and there is no commitment").

³⁰ See, e.g., The Montgomery Law Firm, LLC, http://www.montgomerylaw.org/vioxx_legal_options.php (last visited Oct. 15, 2007) ("There are a number of Vioxx legal options open to those affected by Vioxx. It is anticipated that many affected patients will file a compensation claim or lawsuit against Merck, and this can be done in one of two ways. You can file an individual lawsuit for compensation from Merck, and for this you should employ the services of an experienced and skilled Vioxx lawyer."); Tequin Lawsuit, <http://tequinlawsuit.lawinfo.com/index.html> (last visited Oct. 15, 2007) ("If you or someone close to you has used Tequin, a medical examination should be scheduled immediately . . . If you are diagnosed with diabetes or other diseases and conditions associated with the use of Tequin, you may be entitled to recover substantial financial compensation . . . Your physician can attend to your medical requirements, and an experienced and qualified Tequin litigation attorney can help protect your legal rights.").

drug, or whose mothers had ingested the drug.³¹ Plaintiffs claiming that the drug caused tooth damage and discoloration sued the pharmaceutical manufacturers.³² As word spread, cases emerged across the country, all seeking damages on behalf of others similarly situated.³³ Today there is conclusive evidence that giving tetracycline to children whose teeth are developing, or to mothers who are pregnant or lactating, can cause tooth discoloration.³⁴ Even at the time the litigation began, there was strong evidence indicating a correlation between ingesting the drug and eventual tooth damage and discoloration.³⁵ This aside, when one looks at the cases from that era, a significant trend begins to emerge. As the cases progressed, the injuries that were the inspiration for the litigation fell to the side, as attorneys pushed for the certification of larger classes and larger recoveries for themselves.³⁶

³¹ See *Albright v. Upjohn Co.*, 788 F.2d 1217, 1218 (6th Cir. 1986) (noting plaintiffs' attorneys filed eight tetracycline products liability actions against nine pharmaceutical manufacturers on the same day).

³² See *Albright*, 788 F.2d at 1218 (alleging that defendants involved in the manufacture and sale of tetracycline-based drugs were responsible for plaintiffs' permanent tooth stain and discoloration); see also *In re Tetracycline Cases*, 107 F.R.D. at 722 (naming manufacturers of drug tetracycline as defendants in claim for damages to those who ingested the drug prior to tooth development).

³³ See *In re Tetracycline Cases*, 107 F.R.D. at 725-26 (identifying common questions of fact and law for which tetracycline plaintiffs sought class certification); see also Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 736 (2003) (noting that plaintiffs received partial class certification to proceed in their mass tort claim).

³⁴ See PDR Health, Tetracycline, http://www.pdrhealth.com/drug_info/rxdrugprofiles/drugs/tet1439.html ("Tetracycline should not be used during the last half of pregnancy or in children under the age of 8. It may damage developing teeth and cause permanent discoloration."); see also Jonathan A. Ship, Tooth Discoloration, eMedicine.com, <http://www.emedicine.com/derm/topic646.htm> (Oct. 27, 2005) ("Since the 1950s, drugs from the tetracycline family have been associated with intrinsic tooth discoloration. Once in the bloodstream, tetracycline can be incorporated into the calcification process of developing teeth, in which it affects either primary or secondary dentition after maternal or childhood ingestion . . .").

³⁵ See Morton Mintz, *Tetracycline Rx Deemed Still a Peril to Children*, WASH. POST, Sept. 24, 1977, at A4 (stating that since 1970 FDA required drug suppliers to warn of dangers of tooth discoloration in children who take tetracycline); see also C.J. Tredwin et al., *Drug-induced Disorders of Teeth*, J. DENT. RES. 84(7): 596, 597 (2005) ("In the early 1960's, clinical evidence began to appear suggesting that tetracycline could cause tooth discoloration.").

³⁶ See *In re Tetracycline Cases*, 107 F.R.D. at 721-22 (indicating that two tetracycline cases had turned into a battle of whether to allow additions to the class of plaintiffs in amended complaints and motions to expand the class); but see *Ratliff v. Merck & Co.*, 359 F. Supp. 2d 571 (E.D. Ky. 2005) (adjudicating dispute in which plaintiff argues damages are no more than \$75,000 threshold for diversity jurisdiction while defendant argues they are).

Most recently, the drug Vioxx has garnered attention as the center of the class action world. Merck, a drug company, originally marketed the drug as treatment for arthritis pain.³⁷ On September 30, 2004, Merck voluntarily withdrew the drug from the market after studies indicated that taking the drug could potentially increase a patient's risk of heart attack and stroke.³⁸ Following the withdrawal, the solicitation began. Plaintiffs' attorneys began to run advertising campaigns on the Internet, the subway, the television, and on city buses encouraging people to join in a class action lawsuit if they had ever taken Vioxx.³⁹ Advertisements demanded that people stand up for their rights and demand retribution for the wrong that had been perpetrated.⁴⁰ The problem that many see with the behavior that seems to follow prescription drug disasters is not that these cases are being litigated or that the drug companies are being forced to answer for their behavior.⁴¹ In fact, providing a forum for the litigation of these cases is something that many would argue is an important and necessary function of the American legal system.⁴² The is-

³⁷ See CBS News, Healthwatch, *Merck Yanks Vioxx From Shelves*, <http://www.cbsnews.com/stories/2004/10/06/health/main647872.shtml> (2004) (last visited Oct. 15, 2007) (stating that Vioxx was the "blockbuster" arthritis drug and was heavily marketed and promoted); see also Merck & Co., Vioxx, <http://www.vioxx.com/rofecoxib/vioxx/consumer/index.jsp> (last visited Oct. 15, 2007) (explaining that Merck is a drug company, and VIOXX is a Merck product).

³⁸ Merck & Co., Vioxx, <http://www.vioxx.com/rofecoxib/vioxx/consumer/index.jsp> (last visited Oct. 15, 2007) (offering company's explanation of the withdrawal); see *Merck Withdraws Vioxx; FDA Issues Public Health Advisory*, FDA CONSUMER MAGAZINE (2004), available at http://www.fda.gov/fdac/features/2004/604_vioxx.html (supporting Merck's decision to withdraw Vioxx) (last visited Oct. 15, 2007).

³⁹ See, e.g., The Kahn Law Firm, <http://thekahnlawfirm.com/personal/drug/> (last visited Oct. 15, 2007) (serving as an example of an online advertisement from a law firm seeking clients who have suffered a Vioxx related injury); Tequin Lawsuit, <http://tequinlawsuit.lawinfo.com/index.html> (Oct. 15, 2007) (providing encouragement and information about contacting an attorney if one has suffered a Tequin side effect).

⁴⁰ See, e.g., The Kahn Law Firm, <http://thekahnlawfirm.com/personal/drug/> (last visited Oct. 15, 2007) (providing facts which tend to increase Merck's culpability); The Montgomery Law Firm, LLC, http://www.montgomerylaw.org/vioxx_legal_options.php (last visited Oct. 15, 2007) (insisting people with certain symptoms call an attorney in order to protect their rights).

⁴¹ See Macey & Miller, *supra* note 1, at 3 (lamenting the lack of oversight of class action attorneys by their clients and likening them to "entrepreneurs," but not arguing that there should be no mechanism for recovery in these situations); see also Eric S. Roth, *Confronting Solicitation of Mass Disaster Victims*, 2 GEO. J. LEGAL ETHICS 967, 969 (1989) (criticizing the suits on the potential for abuse and not for the possibilities of redress).

⁴² When the injuries are small to each member of a class but large overall, it is cost prohibitive to bring the actions individually and so the class action is necessary in order for litigation to proceed. See Macey & Miller, *supra* note 1, at 8-9. Utilization of the term

sues instead arise with the behavior of the attorneys, who seem to forget that they are in fact representing injured individuals and appear to be arguing for nothing more than their own monetary gain.⁴³

Within the class action context, this scenario of attorneys publicly soliciting for clients is particularly apparent because often the incidents that attract the so-called “ambulance chasers” are widespread in scale and similarly attract much media attention.⁴⁴ As both media and attorneys descend on this now truly public event, the attorneys' behavior and questionable conduct is simultaneously thrust into the public eye.⁴⁵

This appearance of attorneys in search of a windfall following a disaster or other widely publicized event is undeniably disturbing.⁴⁶ It is specifically this farce of attorneys turning themselves into businessmen and representing plaintiffs in name only, while essentially advocating for their (the attorneys') own pecuniary gain that is unsettling, both to the public and the legal community.⁴⁷ It is this same client solicitation that is a major impetus

“private attorney general” instead of “bounty hunter” lends credence to the idea that the fact that a liable corporation has to pay, regardless of whether or not this payment in the end produces just compensation for the wrong, has become part of the way the modern legal system deters such behavior. See Coffee, *Rescuing*, *supra* note 18, at 218.

⁴³ See Roth, *supra* note 41, at 968 (stating that some attorneys are solely interested in their own pecuniary gain); see generally MODEL RULES OF PROF'L CONDUCT R. 7.3 (2002) (admonishing attorneys from entering into relationships with clients for their own pecuniary gain).

⁴⁴ See Roth, *supra* note 41, at 967-68 (explaining that motivation behind client solicitation following a mass disaster, and using Pan Am disaster as an example, is the money that is at stake and further maintaining that the larger the disaster the more money at stake and therefore the bigger impetus to begin soliciting); see also Craig R. Whitney, *Jetliner Carrying 258 to U.S. Crashes in Scottish Town*, N.Y. TIMES, Dec. 22, 1988, at A1 (demonstrating general newsworthiness of the Pan Am disaster).

⁴⁵ See Najarian, *supra* note 25, at 1544-45 (claiming that solicitations have undeniably “caused irreparable harm to the public's perception of the legal profession”); see also Roth, *supra* note 41, at 967 (discussing how individuals involved in mass disasters are often contacted by attorneys at a time when they least want to be bothered).

⁴⁶ See Roth, *supra* note 41, at 969 (articulating theory that what makes people so uncomfortable about the appearance of attorneys following a mass disaster is the “potential for abuse” because the victims are too shocked to fully reason and understand the decisions with which they are faced); see also MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 1 (2002) (noting concern arising from practices that “subject the layperson to the private importuning of the trained advocate,” though here referring explicitly to face to face encounters).

⁴⁷ See Roth, *supra* note 41, at 968-69 (explaining that when attorneys are driven solely by the opportunity to make money it flies in the face of the traditional view of attorney as advocate). See generally MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2002) (prohibiting approaching a potential client for pecuniary gain).

towards perpetuating the negative view of class actions.⁴⁸ However, those that dismiss class actions as a perversion of the normal or standard attorney client relationship fail to recognize that these attorneys are in fact serving an important function.⁴⁹ The victims of a disaster or for that matter any illegal activity, do in fact need legal representation and the presence of attorneys serves the function of providing the victims with both access to an attorney and immediate legal advice.⁵⁰ While this may provoke visceral reactions because attorneys do stand to gain from the potential representation they are soliciting, without their presence the victims would be left to fend for themselves.⁵¹ This scenario becomes particularly important when one examines the fact that following many legal infractions, the defendants' insurance companies will certainly attempt to convince victims not to acquire legal representation by maintaining that the insurance company is prepared to offer a "generous settlement."⁵² Consequently, while the idea of attorneys soliciting clients is perhaps offensive, there is no more assured way of protecting an injured

⁴⁸ See Robert Anthony, Note, *Protection for Attorney Solicitation Slow In Coming*, 33 U. FLA. L. REV. 698, 709-10 (1981) (stating that in-person solicitation have inherent risks of "fraud, deception, coercion, harassment, misrepresentation, and overreaching"); see also Roth, *supra* note 41, at 968 (positing that while it is a minority of attorneys that act in such an egregious manner, "this minority of attorneys casts a blemish on the legal profession," and holding that such conduct is detrimental to both the injured plaintiffs and the legal profession alike).

⁴⁹ See Vincent R. Johnson, *The Ethics of Communicating with Putative Class Members*, 17 REV. LITIG. 497, 513 (1998) (discussing risks of insurance companies seeking quick settlements that may overreach tort victims); see also Roth, *supra* note 41, at 975-76 (explaining how insurance companies often arrive on scene of accidents in same manner as attorneys, attempting to convince victims not to accept legal representation by assuring them that insurance company has best interest of injured party in mind).

⁵⁰ See Evan R. Levy, *Edenfield v. Fane: In-Person Solicitation by Professionals Revisited - What Makes Lawyers Different?*, 58 ALB. L. REV. 261, 280-81(1994) (describing how some believe in-person solicitation provides an opportunity for attorneys to tailor to the specific needs of the individual which may offer more benefits than other forms of advertising); see also Roth, *supra* note 41, at 968 (stating that it is not the presence of the attorneys that is necessarily troubling, as they can protect the victims and their families from the insurance companies).

⁵¹ See MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. (2002) (discussing the potentials for abuse inherent in in-person contact because they subject the layperson to the private importuning of a trained advocate); but see Roth, *supra* note 41, at 967 (discussing how insurance company representatives are on the scene of a mass accident as soon as possible, "offer[ing] assurances that the company will take care of the victims and their relatives").

⁵² Roth, *supra* note 41, at 967-68 (describing the ordinary practices of insurance companies).

party's rights. Were attorneys to refrain from solicitation, those who had been injured would still be faced with an onslaught of insurance representatives, cajoling and pressuring them to settle for a pittance.⁵³ With this as the backdrop, it becomes apparent that legal presence can be much more than a perversion of the normal attorney-client relationship. Despite the fact that these attorneys are soliciting clients and do stand to gain from the retention of the victims, they are ultimately serving the important legal goals of assuring that each person has adequate legal representation to guide his decisions and no person is forced to face opposing counsel (i.e. attorneys for the insurance companies) unrepresented.⁵⁴

B. Settlement/Contingency Fees

Class actions have also been criticized for the way in which their fee arrangements misalign the interests of the attorney with the interests of the client, pitting the attorney's interests against those of his client in the case.⁵⁵ The idea of the contingency fee exemplifies such concerns.⁵⁶ A contingency fee arrangement is one in which the attorney agrees to represent his client for no fee unless the lawsuit is successful or is settled out of court.⁵⁷ In such arrangements, the attorney receives no com-

⁵³ See Roth, *supra* note 41, at 968-69 (stating that "[t]here is a conflict of interest because the insurance company is more interested in protecting its own financial interest than in adequately compensating victims"); see also Steven Smucker, *Low Insurance-Company Settlements Prompt Personal-Injury Lawsuits*, THE SUN. OREGONIAN, Mar. 5, 1995, at E02 ("If insurance companies offered fair settlements on injury claims in the first place, most people would not call lawyers.").

⁵⁴ See Roth, *supra* note 41, at 969 (concluding that "[a] valuable service may be rendered to the victims and their families when they are informed of their legal rights and of their legal options"); see also MODEL CODE OF PROF'L RESPONSIBILITY EC 2-3 (1983) (stating that "[t]he giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems").

⁵⁵ See Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 535 (1978) (concluding that "an important goal in structuring legal fees should be the elimination, or at least the minimization, of economic conflict of interest between lawyer and client"); see also Macey & Miller, *supra* note 1, at 23 ("[T]here is a substantial deviation of interests between attorney and client.").

⁵⁶ See Clermont & Currivan, *supra* note 55, at 534 (stating that "[n]umerous conflicts of interest exist between lawyer and client, many of them economic in nature"); Macey & Miller, *supra* note 1, at 17-18 (describing how contingency fees may cause situations where attorneys neglect their client's interests).

⁵⁷ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 (2000) (defining contingency fee).

compensation until the suit is finished, and at that time, both the attorney and client receive their compensation simultaneously.⁵⁸ Within the class action context, however, the contingency fee works differently. While again the attorney will not recover until his client (the class) recovers, the person that truly stands to gain the greatest piece of the recovery is the attorney himself and not any individual client.⁵⁹ This can lead to tensions between the attorney and the class members as the attorney has an incentive to settle early and therefore maximize his possible payout.⁶⁰ The sooner the attorney settles the case, the sooner he receives his paycheck.⁶¹ Extending the case, and thereby increasing the amount each individual class member could recover, may actually be detrimental to the attorney's interests as it will involve more work and more time on his part for only a small increase in the amount he will eventually receive.⁶² The perversion of the contingency fee within the class action context lies within these dueling interests. The attorney wants to maximize the plaintiff's recovery because in doing so he is simultaneously maximizing his

⁵⁸ *Id.* (noting that a contingent fee usually calls for larger compensation to be paid than the attorney would normally charge)

⁵⁹ See Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1015 (2005) ("A standard critique of class actions is that lawyers who act as agents for the class have financial incentives to negotiate settlements that prioritize their own interests at the expense of class members' interests."); see also Macey & Miller, *supra* note 1, at 17-18 (explaining that contingency fees give attorneys too much of a vested interest in the ongoing litigation).

⁶⁰ See *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) ("[A] juicy bird in the hand is worth more than the vision of a much larger one in the bush."); see also Macey & Miller, *supra* note 1, at 18 ("[The attorney has an incentive] to settle early for a lower amount than the attorney could obtain for the client by putting more time and effort into the case.").

⁶¹ See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 390-91 (2000) [hereinafter Coffee, *Class Action*] ("Given this financial outlay and the significant opportunity cost that the litigation represents to them, plaintiffs' attorneys are unlikely to be as risk neutral in their approach to the litigation as the average class member can be."); see also Macey & Miller, *supra* note 1, at 25 ("Attorneys compensated on a percentage method have an incentive to settle early for an amount lower than what might be obtained by further efforts.").

⁶² See Erbsen, *supra* note 59, at 1015n.34 (stating that class counsel may "conclude that the risk of holding out for a better deal for their clients is not worth putting the certainty of their own fee in jeopardy"); see also Macey & Miller, *supra* note 1, at 17 (explaining that "the contingent fee also gives the attorney an incentive to pay insufficient attention to cases where the marginal return to the attorney's time is low relative to other cases in the attorney's profile").

own recovery; however, he also wants to get in and out, settling quickly and receiving an early payday.⁶³

These fee arrangements have faced harsh criticism because they give the attorney an economic interest in the case often adverse to the interests of his client.⁶⁴ Additionally, contingency fee agreements also have negative consequences in that they can create an incentive for an attorney to pay insufficient attention to other cases.⁶⁵ For example, if an attorney is handling multiple cases, all with contingency fee agreements, he will have more of a motivation to aggressively handle cases from which he stands to gain the most, letting those cases that promise smaller payouts to fall by the wayside.⁶⁶ Finally, by intrinsically tying the attorney's paycheck to the outcome of the case, there is a blurring of the ethical lines, once again forcing the attorney in the shoes of a businessman and not an advocate, weighing in his own mind when to settle to maximize his possible investment.⁶⁷ This clash of the attorney and client interests raises questions as to who is truly the adversary in such cases.⁶⁸ The plaintiff in the class ac-

⁶³ See Coffee, *Class Action*, *supra* note 61, at 391 (noting that "because the fee award does not increase proportionately with the recovery . . . [i]t is simply unrealistic to expect the attorney to accept additional risk without the prospect of commensurate return"); see also Macey & Miller, *supra* note 1, at 17-18 (summarizing the attorney's rationale for contingency fee standards in class actions).

⁶⁴ See Coffee, *Class Action*, *supra* note 61, at 371-72 ("[T]he more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest."); see generally Macey & Miller, *supra* note 1, at 17-18 (discussing the attorney fee structures).

⁶⁵ See Macey & Miller, *supra* note 1, at 20 ("These collective action and free-rider effects [of class action suits] allow the plaintiff's attorney in class and derivative cases to operate with nearly total freedom from traditional forms of client monitoring."); see generally Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without The Prince Of Denmark?*, 37 UCLA L. REV. 29 (1989) (discussing the attorney practice of implementing contingency fee basis and the problems associated with it).

⁶⁶ See *Chesny v. Marek*, 720 F.2d 474, 477 (7th Cir. 1983) (noting the apparent conflict of interest between attorneys and clients for attorneys fees in class action suits); see also Macey & Miller, *supra* note 1, at 23 (discussing that "[t]he principal losers are members of the plaintiff class who must pay over part of their recovery to counsel for work that serves no purpose other than to justify an enhanced attorney's fee").

⁶⁷ See Elihu Inselsbuch, *Complex Litigation at the Millennium: Contingent Fees and Tort Reform: A Reassessment and Reality Check*, 64 LAW & CONTEMP. PROB. 175, 175 (1978) (discussing the conflicting views about contingent fees); see also Macey & Miller, *supra* note 1, at 25-26 (chronicling the problems of attorney's interest to reach settlement); see generally Coffee, *Understanding*, *supra* note 15 (analyzing the difference between the private and social incentives to litigate in light of the fact that the attorney's interests typically control class action suits).

⁶⁸ See Macey & Miller, *supra* note 1, at 8 ("[A]ttorneys are not subject to monitoring by their putative clients, they operate largely according to their own self-interest, subject

tion can actually be said to be fighting two battles in the courtroom. The external one against the defendant who has wronged him, and a silent, less obvious battle against his own attorney, who wants nothing more than to settle early, receive his paycheck, and avoid litigation.

The most obvious answer to such criticisms can be found in the rules of ethics. According to Model Rule 1.8, an attorney is prohibited from representing a client if his own interests will impair his ability to advocate zealously on behalf of his own client.⁶⁹ This would seem to disqualify a attorney from going forward with legal representation if he did not feel able to detach himself from his vested interest in the case and continue to advocate zealously on behalf of his client.⁷⁰ That being said, this is not an ideal world and an attorney who seeks to represent clients solely for his own financial gain will likely not be deterred by ethical rules barring him from such representation. Thus, it becomes necessary to determine if there are any implicit advantages to the contingency fee arrangement that override the potential drawbacks.⁷¹

While it may be easy to characterize contingency fees as immoral, such arrangements allow litigants into court even when they cannot afford to hire an attorney.⁷² This becomes increasingly relevant in the context of the class action lawsuit, where an individual plaintiff rarely has the money to fund the entirety of

only to whatever constraints might be imposed by bar discipline, judicial oversight, and their own sense of ethics and fiduciary responsibilities." See generally Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *The Institute Of Judicial Administration Research Conference On Class Actions: Aggregation And Individual Justice: Individuals Within The Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996) (noting attorney's role in class action suits regarding fees and settlements).

⁶⁹ See MODEL RULES OF PROF'L CONDUCT R. 1.8 (2002) (promulgating attorney's professional responsibilities).

⁷⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt (2003) (noting in relevant part "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); see also Macey & Miller, *supra* note 1, at 18 (stating that the attorney is ethically obligated to zealously advocate client's interest).

⁷¹ See Peter Karsten, *Enabling the Poor to Have their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 253 (1998) (noting that some view contingent fee arrangements to be contrary to public good); see also Macey & Miller, *supra* note 1, at 17 (pointing out pros and cons of contingent fee arrangements).

⁷² See *Major's Ex'r v. Gibson*, 1855 Va. LEXIS 70, at *61 (Va. 1855) (holding that contingent fee arrangements "constituted a better guaranty of fidelity" than fee certain arrangements); see also Karsten, *supra* note 71, at 242 (stating that contingent fee arrangements allow many poor people to bring their claims to court).

the suit.⁷³ Perhaps even more importantly within the class action context is the notion that often any individual plaintiff stands to gain only a nominal amount from the outcome of the suit and therefore has no economic incentive to fund the suit himself.⁷⁴ Contingency fees therefore serve the dual purpose of allowing both the individual who cannot afford to litigate and the individual who would not have an economic incentive to litigate, into the courtroom. Given that our judicial system is based on the notion that every person deserves his day in court, one could classify contingency fees as the ultimate proponent of this system.⁷⁵ Not only do such arrangements allow litigants into the courtroom regardless of their income, but they also serve to ensure that more suits are brought to the courtroom.⁷⁶ Though crowded dockets and overworked judges are certainly not a fortunate consequence of increased litigation, they are illustrative of the fact people are being given access to the courtroom and those that caused the injuries are not walking away unscathed.⁷⁷

⁷³ See JoEllen Lind, "Procedural Swift": *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 758 (2004) (stating that class actions allow for small claims to be litigated); see also Macey & Miller, *supra* note 1, at 8 (pointing out benefits of class action suits when there are many injured persons but injury to any particular individual is small).

⁷⁴ See Lind, *supra* note 73, at 758 (pointing out that consolidating claim into class action suit allows plaintiffs to attract attorneys to represent plaintiffs' claim); see also Macey & Miller, *supra* note 1, at 3 (indicating that while overall claims may be large, individual awards are small).

⁷⁵ See U.S. CONST. art. III, § 2, cl. 1 (enumerating powers of judicial branch); see also Rima N. Daniels, *Monetary Damages in Mandatory Classes: When Should Opt-Out Rights Be Allowed?*, 57 ALA. L. REV. 499, 516 (2005) (recognizing utility of class action suits in providing individuals ability to bring claims). See generally Karsten, *supra* note 71, at 241 (indicating that contingent fee arrangements are sole means for a poor person's rights to be enforced).

⁷⁶ See Karsten, *supra* note 71, at 239-40 (pointing out that fear of increasing number of lawsuits resulting from contingent fee arrangements has come to fruition and has actually become acceptable); see also Mark Klock, *Financial Options, Real Options, and Legal Options: Opting to Exploit Ourselves and What We Can Do About It*, 55 ALA. L. REV. 63, 103 (2003) (implying that contingent fee arrangements lead to more suits since such arrangements provide avenue for poor to attain counsel).

⁷⁷ The idea of the class action as a tacit check on businesses and as a means to ensure that a guilty party does not go unpunished simply because he has not injured someone in a truly egregious manner is addressed in section IV of this note.

C. Agency Theory

Another major criticism of the class action is that class action attorneys lack an actual client to constrain them.⁷⁸ In traditional forms of litigation, the attorney advocates on behalf of the client, but it is the client who makes the ultimate decisions regarding the representation.⁷⁹ In such a scenario, the client can be seen as a monitor, ensuring the attorney engages in his legal duties to the best of his abilities and is not sidetracked by any personal interest he has riding on the litigation.⁸⁰ Even in a contingency fee representation, the client can tell the attorney to reject settlement offers in favor of waiting out a higher offer or continuing on to litigation.⁸¹ Such a relationship does not exist within the class action context.⁸² In such litigation, attorneys do not have a single client to whom they must answer.⁸³ In fact, the client in class action litigation is an amorphous group and the attorney is ultimately responsible to the group as a whole, not to any individual member.⁸⁴ Without a specific client to keep him in check, the ex-

⁷⁸ See Joseph A. Grundfest and Michael A. Perino, *Securities Litigation: The Fundamental Issues: Participants: The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 ARIZ. L. REV. 559, 562-63 (1996) (suggesting that only individuals with rather large claims in class actions have incentive to monitor attorney activity); see also Macey & Miller, *supra* note 1, at 3 (describing role of attorney in class action suits as opposed to role of attorney in other forms of litigation).

⁷⁹ See Macey & Miller, *supra* note 1, at 3 (explaining how plaintiff's attorney functions in traditional forms of litigation); see also Elliott J. Weiss, *The Impact to Date of the Lead Plaintiff Provisions of the Private Securities Litigation Reform Act*, 39 ARIZ. L. REV. 561, 561 (1997) (discussing legislation that has been passed for purpose of giving more control of class action litigation to clients).

⁸⁰ See Macey & Miller, *supra* note 1, at 3 (indicating that client monitoring serves as check to attorney's actions); see also Weiss, *supra* note 79, at 563 (pointing out that even in class action suits there are processes to monitor attorney activity).

⁸¹ See *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 831 (3d Cir. 1973) (announcing that "parties normally have a real voice in the strategy and management of the litigation"); see also Macey & Miller, *supra* note 1, at 3 (stating that the attorney "is an agent of the client and subject to the client's control in all important matters").

⁸² See *Greenfield*, 483 F.2d at 832n.9 (stating that in class actions the counsel directs and manages the actions not the named parties); see also Macey & Miller, *supra* note 1, at 3 (positing that the class action attorney does not "fit this mold," and is "subject to only minimal monitoring by their ostensible 'clients,' who are . . . dispersed and disorganized").

⁸³ See *Greenfield*, 483 F.2d at 832 (illustrating the responsibility of class action counsel to multiple persons); see also Macey & Miller, *supra* note 1, at 3 (maintaining that client in the class action suit is not an individual but a named group).

⁸⁴ See *Greenfield*, 483 F.2d at 832 (explaining that the counsel for the class has fiduciary obligations to many parties not before the court); see also Macey & Miller, *supra* note 1, at 3 (arguing that the lack of a definitive client gives the attorney the ability to exercise extensive control over decisions that arise within the litigation context).

istence of the entrepreneurial attorney has emerged.⁸⁵ Such an attorney exists to further his own self-interests as opposed to furthering the interests of his client.⁸⁶

Traditional agency theory describes the agency relationship as “a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf, which involves delegating some decision making authority to the agent.”⁸⁷ Under such circumstances, if per chance the interests of the two parties diverge, the monitoring by the principal serves to keep the agent on track.⁸⁸ The effectiveness of this monitoring relationship ultimately depends on “the observability of the agent’s performance.”⁸⁹ In the traditional attorney client relationship, monitoring can be difficult because the client (the principal) is often ignorant of litigable claims and defenses, and therefore not always able to perform the necessary supervisory functions.⁹⁰ Regardless of the difficult nature of the task, the client is at least given the opportunity to observe his agent at work and to assert his own opinions when he desires.⁹¹

⁸⁵ See Coffee, *Rescuing*, *supra* note 18, at 235-36 (stating that “entrepreneurial” private attorneys predominate in class actions); see also Macey & Miller, *supra* note 1, at 7-8 (explaining that “[b]ecause these attorneys are not subject to monitoring by their putative clients, they operate largely according to their own self-interest, subject only to whatever constraints might be imposed by bar discipline, judicial oversight, and their own sense of ethics and fiduciary responsibilities”).

⁸⁶ See Coffee, *Rescuing*, *supra* note 18, at 235-36 (claiming that entrepreneurial attorneys are all “engaged in a race to claim the prize”); see also Macey & Miller, *supra* note 1, at 7-8 (stating that because of lack of monitoring, attorneys operate “according to their own self interest”).

⁸⁷ Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (defining an agency relationship).

⁸⁸ See Jensen & Meckling, *supra* note 87, at 308 (indicating that monitoring limits the “aberrant activities of the agent”); see also Macey & Miller, *supra* note 1, at 13 (stating that “the interests of the agent are likely to deviate from those of the principal”).

⁸⁹ Macey & Miller, *supra* note 1, at 13-14 (asserting this in an analysis of the monitoring of agents).

⁹⁰ See Brunet, *supra* note 15, at 405-06 (explaining the entrepreneurial incentives of attorneys who specialize in class actions transform attorney-client relationship into converse connection in which attorney becomes principal and the unsophisticated client becomes the agent, with minimal ability to monitor the behavior of the class action counsel); see also Macey & Miller, *supra* note 1, at 14 (noting that much of the attorneys’ activities are outside the purview of the client).

⁹¹ See Edward R. Becker, *Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 689, 705 (2001) (finding that an individual client’s stake in the outcome of the lawsuit motivates him to “choose counsel, agree to compensation, and monitor counsel’s conduct”); see also Macey & Miller, *supra* note 1, at 14 (explaining that the client can do a variety of things to assess his attorney).

Within the class action context, the ideal of agency theory becomes even more strained.⁹²

In large-scale small-claim litigation, the lack of a substantial stake in the litigation serves to deter many from wanting to take on the extra responsibility of serving as a litigation monitor.⁹³ Even when someone has agreed to be the named plaintiff, he often wants to lend no more than his name to a case in which he stands to recover only a nominal amount.⁹⁴ This creates a situation where someone who has been tasked with representing the voice of the class fails to follow through with the responsibility, again leaving the class attorney as the one driving the lawsuit.⁹⁵ Additionally, within the class action context, members of the class are often unaware that they have a stake in the litigation until the settlement has been reached and therefore never have a chance to weigh in on the litigation strategy.⁹⁶ Perhaps most disturbing to an outsider is the fact that, even if someone (besides the named plaintiff) wanted to assume a stronger role within a class action litigation, it is the attorney's responsibility to advocate for the best interests of the class as a whole, and not any one

⁹² See *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973) (describing the difficulties of attorney-monitoring in the class action situation); see also Macey & Miller, *supra* note 1, at 19 (stating the difficulty of maintaining a regulatory system for class actions because plaintiffs cannot monitor the attorneys).

⁹³ See *Zimmer Paper Prod., Inc. v. Berger*, 758 F.2d 86, 89 (3d Cir 1985) (indicating that although all plaintiffs may have to do is merely fill out a form upon winning a lawsuit in order to get the funds they deserve, only approximately twelve percent of plaintiffs ever fill out this form, suggesting that the minimal stake serves as a disincentive for much of the class); see also Macey & Miller, *supra* note 1, at 19-20 (explaining how the small investment in the litigation creates a "free-rider" effect where people are deterred from serving as a litigation monitor because they would be forced to take a larger role in the litigation as opposed to sitting back and waiting for a settlement windfall).

⁹⁴ See Macey & Miller, *supra* note 1, at 6 (stating that costs of having named plaintiff outweigh its benefits). See generally FED. R. CIV. P. 23(a) (stating that claims or defenses by the named plaintiff must be the same or similar to the class).

⁹⁵ See Macey & Miller, *supra* note 1, at 3 (stating that "[t]he absence of client monitoring raises the specter that the entrepreneurial attorney will serve her own interest at the expense of the client."); but see N.Y. CODE OF PROF'L RESPONSIBILITY DR 5-103 (1998) (discussing that once an attorney is interested in the litigation he should terminate representing the class).

⁹⁶ See FED. R. CIV. P. 23(c)(3) (mandating that in order to be excluded from a class action the plaintiff must opt out, and if the putative class members fails to opt out, he is included in the class and bound by the eventual settlement); see also Macey & Miller, *supra* note 1, at 20 (discussing that plaintiffs are generally unaware of their stake in the suit until a settlement has been reached).

individual.⁹⁷ Resultantly, the attorney could potentially refuse to listen to a class member at will, if he feels the class member's wishes conflict with the interests of the class as a whole.

Other problems can arise even when someone within the class does attempt to embrace the role of litigation monitor. Often the class representative becomes a sort of stand-in because there is no way for an attorney to be answerable to an entire class.⁹⁸ He is supposed to take on the responsibility of overseeing class counsel and ensuring that all decisions made are in the best interests of the class as a whole.⁹⁹ As discussed earlier, oftentimes this representative wishes to lend nothing more than his name to the litigation, but sometimes the class representative does embrace his role and does try to weigh in on important decisions made within the litigation context.¹⁰⁰ This however can create friction within the remainder of the class.¹⁰¹ If other class members do not agree

⁹⁷ See Macey & Miller, *supra* note 1, at 20 (explaining that "even where an individual class member is aware of pending litigation, it is far from clear that she could have much influence on the class attorney because the attorney must act for the benefit of the class as a whole and therefore is not obliged to follow the unilateral wishes of any individual class member when those wishes deviate from the attorney's sense of optimal litigation strategy"); see generally FED. R. CIV. P. 23(g) (discussing the role class counsel plays in the class action context, and that the class attorney "must fairly and adequately represent the interests of the class").

⁹⁸ See *Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972) (discussing the importance of conferring with the named plaintiff over litigation decisions); see also Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 388 (1988) (discussing that notice is not required for some class actions, but a court may order notice if they deem it to be necessary).

⁹⁹ See *Saylor*, 456 F.2d at 900 (discussing the importance of conferring with the named plaintiff over litigation decisions); see also Macey & Miller, *supra* note 1, at 20 (stating that "[e]ven where an individual class member is aware of pending litigation, it is far from clear that she could have much influence on the class attorney because the attorney must act for the benefit of the class as a whole and therefore is not obliged to follow the unilateral wishes of any individual class member when those wishes deviate from the attorney's sense of optimal litigation strategy").

¹⁰⁰ See Debra Lyn Bassett, *When Reform is Not Enough: Assuring More Than Merely "Adequate" Representation in Class Actions*, 38 GA. L. REV. 927, 985 (2004) (discussing that a court will ask class representative questions to try to decrease the chances of him not taking responsibility); see also Macey & Miller, *supra* note 1, at 70-71 (highlighting that "[a] representative plaintiff who is closely connected to the plaintiffs' attorney may exercise undue influence on the attorney to induce her to settle for an inappropriately low figure").

¹⁰¹ See *Eisen v. Carlisle*, 417 U.S. 156, 178-79 (1974) (explicating that "[t]he usual rule is that a plaintiff must initially bear the cost of notice to the class[,] . . . the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit"); see also Macey & Miller, *supra* note 1, at 70 (suggesting that representative plaintiff is likely to be more risk averse because he will have to pay the cost of litigation should the class lose).

with the decisions that the class representative is making and feel that he is not serving his role effectively, they can be left with little recourse, especially when other members of the class do not feel the same way. While class members could potentially opt out of a settlement with which they do not agree, this second chance at opting out of the litigation is not a guarantee and in fact can be granted only with judicial approval.¹⁰² Additionally, the unhappy class members could potentially move to remove the class representative, but that again requires judicial intervention and is not a guarantee, especially if other members of the class do not feel that the representative is performing his duties poorly.¹⁰³ As a result, class members who are unhappy with the class representative could potentially become bound by a litigation with which they do not agree and in which they feel their rights are not being adequately represented.¹⁰⁴

If the class representative decides not to wield control in the action, it is undeniable that a lack of monitoring will result and this will give the attorney a certain amount of leeway to litigate the ongoing case in any way he sees fit.¹⁰⁵ The question then arises as to who is most fit to run a class action lawsuit. In an individual litigation, it is the client who drives the suit, as he is the only one who has been injured and therefore the only one (besides the attorney) that stands to gain from an eventual recov-

¹⁰² FED. R. CIV. P. 23(b)(3) (mandating that in order to be excluded from a class action the plaintiff must opt out, and if the putative class members fails to opt out, he is included in the class and bound by the eventual settlement); *see also* FED. R. CIV. P. 23(e)(3) (explaining that under a Rule 23(b)(3) action, "the court may refuse to approve settlement unless it affords new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so").

¹⁰³ FED. R. CIV. P. 23(g) noting that class representative will be continually scrutinized by court).

¹⁰⁴ *See* FED. R. CIV. P. 23(b)(3) (mandating that in order to be excluded from a class action the plaintiff must opt out, and if the putative class members fails to opt out, he is included in the class and bound by the eventual settlement); *see also* Macey & Miller, *supra* note 1, at 62-63 (stating that a class representative will often not adequately represent absent parties, and even when they can perverse outcomes are still frequent).

¹⁰⁵ *See* Zimmer Paper Prod., Inc. v. Berger, 758 F.2d 86, 92-93 (3d Cir. 1985) (showing that lack of client involvement can be seen in the response rate to class action notices and that even following notices of settlement, there is only a twelve percent response rate); *see also* Macey & Miller, *supra* note 1, at 70-71 (noting that when plaintiff's representative does not monitor counsel, counsel is free to act in his own favor and in either event, "the notion that the representative plaintiff exercises any significant leverage over the plaintiffs' attorney is dubious at best").

ery.¹⁰⁶ In class action litigation, it is a group whose interests are at stake, and the group as a whole will be affected by the eventual settlement.¹⁰⁷ Even in large-scale, small-claim litigation, each class member has the potential to suffer a reduced settlement fee if rash and uninformed decisions are made.¹⁰⁸ With this in mind, it seems nonsensical to allow an individual member to inform the decisions of the class as a whole. In fact, with the attorney as the guide, the fact that he has a vested interest in the outcome could even serve to increase the eventual settlement.¹⁰⁹ After all, he too will be paid out of the eventual recovery.¹¹⁰ Although the attorney may have an incentive to settle earlier to maximize his own recovery, he too is looking for a positive outcome. Arguably, in some perverse way, this aligning the attorneys' interests with the interests of the class (in terms of wanting a recovery) actually forces the attorney himself to serve the protective function that a monitor plays in other forms of litigation.¹¹¹ The idea that there is no monitor in a class action suit is

¹⁰⁶ See Coffee, *Understanding*, *supra* note 15, at 677 (1986) (noting in relevant part that "a fundamental premise of American legal ethics is that clients, not their attorneys, should define litigation objectives."); see also MODEL RULES OF PROF'L CONDUCT, R. 1.2(a) (2004) (discussing how control is generally allocated between client and attorney).

¹⁰⁷ See *Amchem Products v. Windsor*, 521 U.S. 591, 626-27 (1997) (describing how conflicts of interest can affect settlement goals); see also Curry, *supra* note 11, at 398-99 (noting that plaintiff's attorney must "seek to protect the best interests of the class as a whole").

¹⁰⁸ See Curry, *supra* note 11, at 397 (describing one potential source of conflict as an attorney's desire to settle and receive his fees rather than finish litigation, which might be in plaintiffs' best interests); but see James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 933-34 (1996) (noting that there is speculation that Plaintiffs in Jiffy Lube class action received much larger settlement by settling quickly).

¹⁰⁹ See Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69, 69 (2004) (discussing one benefit to having attorneys auction for each class action suit as aligning their interests to that of clients because they are awarded on a contingent-fee basis); but see Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1042 (2002) (noting that attorneys generally have "high incentive[s] to settle" because it maximizes any return based on amount of time spent and because without settling, attorney may not get paid at all).

¹¹⁰ See *Parker v. Anderson*, 667 F.2d 1204, 1213 (5th Cir. 1982) (explaining that attorneys fees were fair and reasonable even though awarded out of settlement); see also Craig Salner, *The Basics of Attorneys' Fees in Class Action Cases*, 25 NO. 4 TRIAL ADVOC. Q. 25, 25 (2006) (noting one common method of paying class action attorney fees is from settlement award).

¹¹¹ See Andrew K. Niebler, *In Search of Bargained-For Fees For Class Action Plaintiffs' Lawyers: The Promise and Pitfalls of Auctioning the Position of Lead Counsel*, 54 BUS. LAW. 763, 771 (1999) (noting that contingency fees are often the better method of compen-

thus shortsighted. While the attorney may not be the agent for a specific individual, he plays the agent for the entire group. Given that a large settlement is both in his interest and in the interests of the class as a whole, a system of self-monitoring comes into being. Therefore, the monitor within the class action suit is not an individual, nor is it the class as a whole.¹¹² Such an arrangement would be futile as class action suits are often anonymous and involve individual plaintiffs with a small stake in the outcome.¹¹³ The attorney is the one with the greatest stake in the litigation, and is therefore the one who is best suited to serve as his own monitor, keeping himself in check.¹¹⁴

Additionally, the court itself serves as a check on the adequacy and fairness of any outcome in a class action case.¹¹⁵ Of course, as with all types of litigation, if the case goes to trial it is the judge's or jury's duty to render an impartial verdict and award damages as seen fit.¹¹⁶ Most cases, however, do settle—both within the

sating attorneys when client is not available to monitor attorney's activities because it best aligns attorney's interest with that of clients); see also Robert E. Litan & Steven C. Salop, *Reforming the Lawyer-Client Relationship Through Alternative Billing Methods*, 77 JUDICATURE 191, 194 (1994) (stating that one method of compensating attorneys is through a contingency fee, which "makes the attorney the economic equivalent of a partner with his or her client in litigation").

¹¹² See Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 173-74 (1997) (noting that plaintiffs lack both ability and desire to monitor an attorney due to expense involved and lack of having to pay attorneys regardless win or lose); see also Macey & Miller, *supra* note 1, at 19-20 (describing the lack of an appropriate monitor within class action context).

¹¹³ See Macey & Miller, *supra* note 1, at 19-20 (stating "[m]embers of the plaintiff class in a large class action or shareholder's derivative suit often have claims so small that the litigation is a matter of relative unimportance to them . . . no rational plaintiff would take on the role of litigation monitor"); see e.g., *Zimmer Paper Prod., Inc. v. Berger*, 758 F.2d 86, 89 (3d Cir. 1985) (noting that only twelve percent response rate of the plaintiff class after notice of settlement was given).

¹¹⁴ See Roth, *supra* note 41, at 967 (explaining that lawyers often stand to gain more from class action suits than the individual victims and that accounts for their presence following mass disasters); see also Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 470 (2000) (discussing the fact that "in virtually every class action seeking money damages, the person with the most at stake financially is the attorney representing the class").

¹¹⁵ FED. R. CIV. P. 23(e)(1)(C) (explaining the court may approve final resolution of a class action only after a hearing and finding that the final resolution of the case was fair, reasonable, and adequate).

¹¹⁶ See generally FED. R. CIV. P. 23; see also Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1, 13 (2001) (noting that "[a]lthough jurors may harbor unconscious bias . . . they may be more cognizant of their duty to render an impartial verdict after affirming to the court their professed ability to do so").

class action context and within the context of litigation in general.¹¹⁷ Within the class action context there is the strange anomaly of the contingency fee actually pitting the interests of the client against those of the attorney.¹¹⁸ And while both attorney and client want to maximize their individual recoveries, sometimes ending the litigation earlier maximizes the recovery for the attorney without having the same effect for the class.¹¹⁹ The Federal Rules provide a check on this potential problem, by creating an agent for the class action to keep the attorney in check.¹²⁰ Additionally, before a settlement in a class action can be approved there must be a fairness hearing before the court.¹²¹ Such a hearing ensures that the settlement is truly in the best interest of the class, and not just in the best interest of the class' attorney.¹²² Through the fairness hearing, the court itself has the responsibil-

¹¹⁷ See Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994) ("The fact that litigation ends in settlement in the vast majority of cases may lead one to conclude that settlement is the "preferred" alternative to going to trial."); see also Irvin W. Sandman et al., *Should Bankruptcy Lawyers Resist Mediation?*, 14-5 A.B.I. J. 26 (1995) ("Most cases settle. Settlement, not a court decision, is usually the final product in our adversary system. Traditionally, settlement has been the by-product of litigation.").

¹¹⁸ See Clermont & Currihan, *supra* note 55, at 534 (stating that "[n]umerous conflicts of interest exist between lawyer and client, many of them economic in nature"); see also Macey & Miller, *supra* note 1, at 17-18 (stating "the contingent fee also gives the attorney an incentive to pay insufficient attention to cases where the marginal return to the attorney's time is low relative to other cases in the attorney's portfolio").

¹¹⁹ See Coffee, *Class Action*, *supra* note 61, at 390-91 (illustrating that "[g]iven this financial outlay and the significant opportunity cost that the litigation represents to them, plaintiffs' attorneys are unlikely to be as risk neutral in their approach to the litigation as the average class member can be"); see also Macey & Miller, *supra* note 1, at 17-18 (stating "the contingent fee also gives the attorney an incentive . . . to settle early for a lower amount than the attorney could obtain for the client by putting more time and effort into the case").

¹²⁰ See FED R. CIV. P. 23(a)(4) (requiring class representative fairly and adequately protect the interests of the class).

¹²¹ FED R. CIV. P. 23(e)(1)(C) (stating the court may approve a settlement only after a hearing).

¹²² See FED R. CIV. P. 23(e)(1)(C) (requiring finding that resolution of class action was fair, reasonable, and adequate at the fairness hearing); see also Peter-Christian Olivo, *No More Times Tables: Risk Multipliers in Attorneys' Fee Awards After In Re Bolar Pharmaceutical Co.*, 77 MINN. L. REV. 893, 922n.138 (1993) (explaining that "[o]ften, the class would be better served by an equitable remedy rather than a damage remedy[;] . . . [i]n these cases, the class attorney should forgo the lure of the settlement enhancement and concentrate on the interests of her clients").

ity of ensuring honesty in the action and fairness in the overall settlement.¹²³

II. SAFEGUARDS

The previous section responded to the most common criticisms of the class action and described the ways in which such negative perspectives may in fact be advantageous within the greater scheme of the legal system. This section shifts the focus and responds to criticisms of the class action by exploring a few of the safeguards built into the system which prevent truly extortionate law suits from making their way into the courtroom.¹²⁴ Perhaps the best response to criticisms of the class action lawsuit lies within the Federal Rules of Civil Procedure themselves.¹²⁵

These rules were developed and amended over time to specifically combat the problem of allowing frivolous litigation into the court system.¹²⁶

¹²³ See FED R. CIV. P. 23(e)(1)(C) (requiring finding that resolution of class action was fair, reasonable, and adequate); see also Ryan Kathleen Roth, *Mass Tort Malignancy: In the Search for a Cure, Courts Should Continue to Certify Mandatory, Settlement Only Class Actions*, 79 B.U. L. REV. 577, 584 (1999) (noting that "[m]inimum procedural due process requires that class members not only receive adequate notice, but also have an opportunity to participate in a fairness hearing, which results in a substantially higher likelihood of an accurate result").

¹²⁴ Note that many other safeguards exist both within the rules and elsewhere for preventing extortionate claims from making it to the courtroom. For example, other safeguards exist within the notice requirements of Rule 23(b)(3) which demand that "the court must direct to class members the best notice practicable under the circumstances," and in Rule 23(e)(1)(A) which mandates that court approval is mandatory for the "settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." See FED R. CIV. P. 23. An examination of all of these safeguards is beyond the scope of this note.

¹²⁵ See e.g., FED. R. CIV. P. 23 (describing necessary elements of a class action lawsuit, including those necessary for class certification); see also FED. R. CIV. P. 11 (imposing sanctions for baseless lawsuits).

¹²⁶ See Richard L. Marcus, *Symposium of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 761, 787 (1993) (describing the constant progression of the federal rules as compelled by the standing committee on the civil rules as well as courts); see also Douglas J. McNamara, *Buckley, Imbler and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 ALB. L. REV. 1135, 1179 (1996) (providing the example of increased likelihood of sanctions as one way the rules were amended to decrease frivolous litigation).

A. Rule 23(a): Class Certification

The first threshold that class actions must cross is Rule 23 itself and this rule serves as a means to separate baseless claims from those that deserve to be litigated in a court of law.¹²⁷ Under Rule 23, a class action cannot be certified as such, unless the class meets all four of the 23(a) prerequisites and one of the 23(b) requirements.¹²⁸ This rule ensures that a class will not be certified and the litigation not allowed to continue unless: under 23(a)(1) “the class is so numerous that joinder of all the parties is impracticable”¹²⁹ under 23(a)(2) “there are questions of law or fact common to the class”¹³⁰ under 23(a)(3) “the claims or defenses of the representative parties are typical of the claims or defenses of the class”¹³¹ and under 23(a)(4) “the representative parties will fairly and adequately protect the interests of the class.”¹³²

The certification process itself is both trying and time consuming specifically because it has such a significant impact on the overall outcome of the litigation.¹³³ At this stage, the court has the ability to decide not only if the named plaintiff can adequately represent the class, but also whether the case can proceed as a class action at all.¹³⁴ By refusing to certify the class, the judge may cause both the class action to be dropped and plain-

¹²⁷ FED. R. CIV. P. 23(a) (allowing for class certification only if the class meets the four prerequisites under 23(a): numerosness, commonality, typicality and representativeness and one of the 23(b) categorizations).

¹²⁸ FED. R. CIV. P. 23(a); FED. R. CIV. P. 23(b).

¹²⁹ FED. R. CIV. P. 23(a)(1).

¹³⁰ FED. R. CIV. P. 23(a)(2).

¹³¹ FED. R. CIV. P. 23(a)(3).

¹³² FED. R. CIV. P. 23(a)(4).

¹³³ *Recent Case, Seventh Circuit Holds that Denial of Class Certification Can Have Preclusive Effect in State and Federal Courts, In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003), 117 HARV. L. REV. 2031, 2031 (2004) (explaining that “the modern class action is frequently won or lost at certification”); Carey M. Erhard, *A Discussion of the Interlocutory Review of Class Certification Orders under Federal Rule of Civil Procedure 23(f)*, 51 DRAKE L. REV. 151, 151-52 (2002) (positing that “the grant or denial of a motion for class certification is undoubtedly a defining moment in any class action litigation” as it “marks the first pivotal point in litigation, and often can be dispositive of its outcome”).

¹³⁴ *Recent Case, supra* note 133, at 2031 (noting judge’s power to decide whether the litigation can proceed as a class action and whether the named plaintiff can serve as the class representative); Erhard, *supra* note 133, at 153 (stating that the final judgment rule makes it very difficult for a party to obtain interlocutory relief for a class certification order).

tiffs to abandon their individual claims.¹³⁵ This is even more apparent in cases where the individual claims are quite small and it is only in the aggregate that the matter becomes worth litigating.¹³⁶ Additionally, many defendants view the certification stage as the penultimate stage in the litigation because as soon as the class is certified they must begin paying—either in the form of litigation fees or in the form of settlement offers.¹³⁷ Given the enormous costs of litigation itself, it may often be in the defendants' best interest to settle the case, regardless of the merits of the underlying claim.¹³⁸

"The importance of the class certification determination was recognized in the promulgation" of Rule 23(f) in 1998.¹³⁹ This rule permits parties to appeal a certification decision, at the discretion of the court, prior to a final ruling on the merits of the case.¹⁴⁰ Categories deemed appropriate for Rule 23(f) are those in which the denial of certification "sounds the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation."¹⁴¹ Also included in this cate-

¹³⁵ *Recent Case*, *supra* note 133, at 2031 (commenting that "the court's decision to grant or deny certification may determine not just how the litigation proceeds, but whether it proceeds at all"); *see* *Coopers v. Livesay*, 437 U.S. 463, 470 (1978) (stating that denial of class certification "may induce a plaintiff to abandon his individual claim").

¹³⁶ *See* Erhard, *supra* note 133, at 158 (explaining that one of the concerns with the class certification is the "death knell" situation and explaining that this is where the "denial of class certification effectively ends the litigation because the individual plaintiffs do not possess a large enough stake to litigate the claims individually"); *see also* John K. Rabiej, *The Making of Class Action Rule 23 - What Were We Thinking?*, 24 MISS. C. L. REV. 323, 365 (2005) (noting that a decision to deny certification is the "death knell" for actions involving a large number of small claims).

¹³⁷ *See* Erhard, *supra* note 133, at 158 (describing the situation of the "reverse death knell" in which "an order granting class certification may force the defendant to settle rather than defend the suit and risk potentially ruinous liability"); *see also* Amy Schmidt Jones, *The Use of Mandamus to Vacate Mass Exposure Tort Class Certification Orders*, 72 N.Y.U.L. REV. 232, 260 (1997) (stating even when a defendant is faced with claims of dubious merit, the cost and compulsion to settle arises because of the desire to avoid liability to a massive class).

¹³⁸ Erhard, *supra* note 133, at 158 (citing the concerns founded on the "reverse death knell"); *see also* *Herbst v. Int'l Tel. & Tel. Corp.*, 495 F.2d 1308, 1312 (2d Cir. 1974) (stating that "defendants in litigating class actions are likely to expend much money and time in defending such actions because of the enormous damages sought by the representatives of the class").

¹³⁹ Erhard, *supra* note 133, at 152. *See generally* FED. R. CIV. P. 23(f).

¹⁴⁰ FED. R. CIV. P. 23(f); *see* Erhard, *supra* note 133, at 152 ("[P]arties aggrieved by a district court's class certification determination [can be granted] an interlocutory appeal at the absolute discretion of the circuit court.").

¹⁴¹ *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999).

gory are those cases in which granting certification can “put considerable pressure on the defendant to settle, even when the plaintiff’s probability of success on the merits is slight”¹⁴² thereby causing a “mirror image of the death knell situation.”¹⁴³ In *Blair v. Equifax Check Services, Inc.*,¹⁴⁴ the court acknowledged the importance of the certification decision and endorsed the 23(f) ability to appeal that decision when certification or lack thereof had systemic side effects that threatened to overwhelm the ability to litigate the merits of an underlying claim.¹⁴⁵

The weight ascribed to the class certification decision can also be seen in the court’s allowance of expert testimony to help inform that decision as exemplified by *In re Visa Check/Mastermoney Antitrust Litigation*.¹⁴⁶ In that case, plaintiffs alleged that defendants had violated the Sherman Act and in response, sought to certify a class consisting of “all persons and business entities who [had] accepted Visa and/or MasterCard credit cards and therefore are required to accept Visa Check and/or MasterMoney debit cards under the challenged tying arrangements.”¹⁴⁷ Both sides submitted expert reports in support of their arguments concerning certification.¹⁴⁸ The class was certified and subsequently defendants appealed, maintaining that the district court abused its discretion by finding that plaintiffs’ expert report was sufficient to support class certification.¹⁴⁹ In affirming the district courts grant of certification, the court held that expert opinions can be persuasive in the determination of class certification.¹⁵⁰ This determination that expert opinions can be per-

¹⁴² *Id.*

¹⁴³ *Id.* at 835.

¹⁴⁴ 181 F.3d 832 (7th Cir. 1999).

¹⁴⁵ *See id.* at 835 (finding that “when the stakes are large and the risk of settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under Rule 23(f) is in order”).

¹⁴⁶ 280 F.3d 124, 131 (2d Cir. 2001) (highlighting plaintiffs’ submission of the report of an expert witness with a Ph.D. in economics “in support of their motion for class certification”).

¹⁴⁷ *Id.* at 131.

¹⁴⁸ *Id.* (stating that defendants also offered a report of an expert witness with a Ph.D. in economics).

¹⁴⁹ *Id.* at 131-32.

¹⁵⁰ *See id.* at 134-35 (explaining that “[a]s for the defendants’ claim that plaintiffs’ expert evidence failed to provide a reliable basis for class certification, the district court’s finding that [plaintiff’s expert witness’] methodology was not fatally flawed, and therefore, was sufficiently reliable for class certification purposes, does not constitute an abuse of its discretion”).

suasive in informing the class certification decision demonstrates the weight that courts ascribe to that decision.¹⁵¹ Certification is in fact given such weight that the court is willing to go outside the facts of the case itself and review the opinions of experts in the field to ensure that the decision is informed and is not made under false auspices.¹⁵²

The importance of the certification decision both in the minds of the parties involved in a class action and in the eyes of the court itself has been reiterated time and again.¹⁵³ As a result, the certification decision is often the most hotly litigated stage in the class action process.¹⁵⁴ Such contention stems from judicial recognition that although the certification decision is made at the outset of the litigation, the consequences which can flow from the decision can affect the overall disposition of the case.¹⁵⁵ The result is that certification decisions are carefully examined and litigated before being approved.¹⁵⁶ When the qualifications necessary to certify a class are combined with the judicial recognition that the certification decision has such a substantial impact on the outcome of the case, the risk of a truly baseless lawsuit making it through the certification process becomes minimal.¹⁵⁷

¹⁵¹ See *id.* at 131 (demonstrating how the court itself views certification as one of the most important stages in the class action process); see also Erhard, *supra* note 133, at 151 (suggesting the "grant or denial of a motion for class certification" to be "undoubtedly a defining moment in any class action litigation").

¹⁵² See *In Re Visa*, 280 F.3d at 131. The plaintiffs submitted an expert report in order to support their motion for class certification. The district court denied the defendants' motion to strike the report. *Id.* A motion for class certification can be supported by expert opinions. See *DeMarco v. Robertson Stephens Inc.*, 228 F.R.D. 468, 470 (S.D.N.Y. 2005).

¹⁵³ See *Recent Case*, *supra* note 133, at 2031 (stating that the modern class action is frequently won or lost at certification); see also Erhard, *supra* note 133, at 151-52 (noting that the grant or denial of a motion for class certification is a defining moment in any class action litigation).

¹⁵⁴ FED. R. CIV. P. 23(f) (stating that a court of appeals may permit an appeal from an order of a district court granting or denying class action certification); see Erhard, *supra* note 133, at 151-52 (pointing out that the importance of the class certification determination was recognized in the promulgation of Federal Rule of Civil Procedure 23 (f)).

¹⁵⁵ See *Coopers v. Livesay*, 437 U.S. 463, 470 (1978) (holding that denial of certification can have far-reaching side effects); see also *Recent Case*, *supra* note 133, at 2031 (explaining the overwhelming significance of the certification decisions).

¹⁵⁶ *Coopers*, 437 U.S. at 469n.12; *Recent Case*, *supra* note 131, at 2031.

¹⁵⁷ *Coopers*, 437 U.S. at 469n.12; *Recent Case*, *supra* note 131, at 2031.

B. Rule 11: Sanctions

If, however, a class did manage to be certified despite its baseless nature, then the Federal Rules have another safety catch to stop baseless claims from reaching the courtroom.¹⁵⁸ Rule 11 of the Federal Rules of Civil Procedure provides for the imposition of sanctions if a party brings a baseless lawsuit.¹⁵⁹ With the dawning of the big case era in the 1960's, Rule 11 was strengthened through the imposition of mandatory, not discretionary sanctions, as in the past.¹⁶⁰ This change was meant as a way in which to ensure the integrity of the pleadings and thereby guarantee that only meaningful lawsuits would pass into the federal court system.¹⁶¹ Though the amendments sought sanction as a panacea for what many perceived to be problems in federal litigation, specifically the disuse of Rule 11, it simultaneously caused an "explosion of satellite litigation" as parties began to litigate their Rule 11 claims postponing an examination of the actual merits behind a case.¹⁶² Thus, in 1993, the Rule was again amended, and mandatory sanctions were replaced with discretionary sanctions.¹⁶³ Additionally the parties were given a 21 day

¹⁵⁸ FED. R. CIV. P. 11 (b) (providing that representations made to the court must be warranted by existing law).

¹⁵⁹ FED. R. CIV. P. 11 (b) (explaining that "[b]y presenting to the court . . . a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after a reasonable inquiry under the circumstances--(1) it is not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation" and allowing for sanctions if 11(b) is violated); see Barbara Comminos Kruzansky, *Sanctions for Non-Frivolous Complaints? Sussman v. Bank of Israel and Implications for the Improper Purpose Prong of Rule 11*, 61 ALB. L. REV. 1359, 1361 (1998) (providing a detailed analysis of Rule 11).

¹⁶⁰ See Kruzansky, *supra* note 159, at 1363-66 (tracing the history and evolution of Rule 11); see also Stephen R. Ripps & John N. Drowatzky, *Article: Federal Rule 11: Are the Federal District Courts Usurping the Disciplinary Function of the Bar?*, 32 VAL. U. L. REV. 67, 73 (1997) (noting that "the 1983 amendments were intended to make the certification requirement 'more stringent'").

¹⁶¹ See Kruzansky, *supra* note 159, at 1366 (explaining how the new version of Rule 11 helped to guarantee the integrity of court filings); see also Ripps & Drowatzky, *supra* note 160, at 73.

¹⁶² See Kruzansky, *supra* note 159, at 1366-67 (discussing the problems that mandatory sanctions under Rule 11 introduced in the federal court system); see also Ripps & Drowatzky, *supra* note 160, at 78.

¹⁶³ FED. R. CIV. P. 11 (c) (stating that the court *may* impose sanctions if violations of Fed. R. Civ. P. 11 (b) have been committed); see Kruzansky, *supra* note 159, at 1369 (stating that the transition from mandatory to wholly discretionary standards have, in some cases, led to courts choosing to forego sanctions even if Rule 11 has clearly been violated).

safe harbor during which they could withdraw the offending pleading and escape repercussions.¹⁶⁴ Despite its many incarnations, the main thrust behind Rule 11 has not changed.¹⁶⁵ It currently, and has always existed for the purpose of policing lawsuits introduced into the system and ensuring that meritless claims do not reach the court room.¹⁶⁶

Given the purpose behind Rule 11, it seems unlikely that a truly extortionate class action lawsuit would survive the Rule 11 test.¹⁶⁷ Under Rule 11, an attorney is required to do competent research before making the decision to litigate a case.¹⁶⁸ If he fails to perform his duties adequately, and therefore continues to advocate on behalf of a meritless claim, he is exposing himself, his firm and his client to potential sanctions.¹⁶⁹ It follows therefore, that before a lawyer makes the decision to bring a class action to the court room he will research the underlying claims to ensure their validity.¹⁷⁰ This duty is magnified in the class action context because in such actions the defendant often stands to lose a huge amount of money and will therefore be closely examining

¹⁶⁴ FED. R. CIV. P. 11(c)(1)(A); see Kruzansky, *supra* note 159, at 1369 (explaining the safe harbor provision).

¹⁶⁵ FED. R. CIV. P. 11 (showing Rule 11 in its entirety); Kruzansky, *supra* note 159, at 1368-69 (quoting that “[t]hrough the 1993 version of Rule 11 is worded some what differently than its predecessor, the Rule retains the two essential requirements . . . (1) a filing may not be presented for an improper purpose, and (2) all claims or defenses raised must be warranted by existing law or a nonfrivolous argument for change”).

¹⁶⁶ FED. R. CIV. P. 11 (showing how meritless claims do not get to be litigated); Kruzansky, *supra* note 159, at 1369 (stating its two essential requirements that “(1) a filing may not be presented for an improper purpose, and (2) all claims or defenses raised must be warranted by existing law or a nonfrivolous argument for change”).

¹⁶⁷ FED. R. CIV. P. 11(b); see Marguerite L. Butler, *Rule 11-Sanctions and a Lawyer's Failure To Conduct Competent Legal Research*, 29 CAP. U. L. REV. 681, 681-82 (2002) (explaining responsibility of courts to impose sanctions when lawyers offend Rule 11).

¹⁶⁸ FED. R. CIV. P. 11(a) (positing that representations made to court have to be formed after reasonable inquiry); see Butler, *supra* note 167, at 690 (emphasizing that it is “the attorney’s obligation to conduct competent legal research”).

¹⁶⁹ FED. R. CIV. P. 11(c) (stating some possible sanctions if lawyer fails to perform his duties properly); Butler, *supra* note 167, at 692 (discussing sanctions imposed on lawyers for failing to research law competently).

¹⁷⁰ See Butler, *supra* note 167, at 690-92 (stating that before a lawyer brings claims they have to conduct competent legal research in order to avoid sanctions for failing to do so); see also Danielle Kie Hart, *And The Chill Goes On--Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-À-Vis 28 U.S.C. § 1927 and The Court's Inherent Power*, 37 LOY. L.A. L. REV. 645, 672 (2004) (talking about how sanctions pose serious threats to attorneys and guide their behavior).

the merits of the claim himself.¹⁷¹ This is because if the defendant is able to convince the court that the litigation is baseless, then he can use the claim of sanctions to extricate himself from potential liability.¹⁷² With this as the backdrop, in order for a truly extortionate class action to make it into the court room (and slip pass the Rule 11 sanctions test), the lawyer representing the class would have to dupe not only the judge, but also opposing counsel.¹⁷³ Since both judges and lawyers have a vested interest in maintaining the integrity of the legal system and because lawyers have a vested interest in winning their cases, it seems highly unlikely that truly extortionate claims will be allowed to slip by unnoticed into the courtroom.¹⁷⁴

C. Private Securities Litigation Reform Act of 1995

In 1995, “the 104th Congress enacted the Private Securities Litigation Reform Act of 1995” (PSLRA).¹⁷⁵ The Act “changed

¹⁷¹ See FED. R. CIV. P. 11 (setting the standards for merits of a claim); see also Macey & Miller, *supra* note 1, at 3 (describing how overall liability can be large in class action litigation); see also Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1373 (2003) (talking about how in class action litigation defendants will often settle for substantial amounts because class action suits create remote risks of financial ruin).

¹⁷² See FED. R. CIV. P. 11 (maintaining that if claim is found to be baseless than it will not be allowed to continue); see also Adam H. Bloomenstein, *Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure*, 21 AKRON L. REV. 289, 321 (1988) (quoting that when plaintiffs cannot plead their claims with requisite particularity, in addition to dismissing these claims, “sanctions should be imposed, unless the pleader can present the court with some reasonable justification for his filing the claim”).

¹⁷³ See Beverly Dyer, *A Genuine Ground In Summary Judgment for Rule 11*, 99 YALE L.J. 411, 428 (1989) (stating that it is difficult to determine whether meritless cases are unreasonable); see also Bruce L. Hay, *Allocating the Burden of Proof*, 72 IND. L.J. 651, 659 (1997) (stating that it is possible that some defendant might not know that claim against them is meritless).

¹⁷⁴ See Jeff Goland, *In Re Penne & Edmonds: The Second Circuit Returns to a Subjective Standard of Bad Faith for Imposing Post-Trial Sua Sponte Rule 11 Sanctions*, 78 ST. JOHN’S L. REV. 449, 487 (2004) (quoting that “[a]ttorneys’ primary interest in litigation is advancing the position of their clients [and t]he interest protected by Rule 11 is the integrity of the legal process[.] . . . judges generally are in a better position to assess the impact of questionable litigation conduct and have the responsibility to maintain the integrity of the legal process”); see also Joseph C. Kopec, *The Use of Rule 11 Sanctions and Prevailing Party Fee-Shifting Statutes After Rule 41(a)(1)(i) Notice Dismissal*, 88 COLUM. L. REV. 1512, 1524 (1988) (stating that Rule 11 sanctions are helpful in deterring bad-faith litigation and in encouraging integrity).

¹⁷⁵ Richard H. Walker & J. Gordon Seymour, *Recent Judicial and Legislative Developments Affecting the Private Securities Fraud Class Action*, 40 ARIZ. L. REV. 1003, 1023 (1998).

both substantive and procedural practice in class actions brought under the federal securities laws¹⁷⁶ and was "designed to prevent abuses of federal securities class action lawsuits."¹⁷⁷ According to Walker and Seymour, the principal features of the act include heightened pleading standards for the state of mind requirements, a safe harbor for certain forward-looking statements, a discovery stay while motions to dismiss are pending, substantive and procedural requirements for securities class action settlements, and lead plaintiff and notice provisions including requirements that those seeking to be a lead plaintiff must submit certification swearing that they did not purchase the security that is the subject of the complaint at the direction of counsel or in order to participate in the action and that they will not accept any payment for serving as a representative party on behalf of the class.¹⁷⁸

By tightening the rules surrounding the certification of federal securities class actions, the PSLRA is another device which ensures that only truly worthy claims make it past the initial stages and develop into full fledged lawsuits.¹⁷⁹ The new requirements which mandate that a plaintiff seeking to serve as a class representative must essentially apply for the position create a scenario where only someone who has truly been injured can serve as the front man for the lawsuit. This has the effect of ensuring that the rights of the class are adequately represented as the lead plaintiff is someone who has truly been injured and not simply someone glomming onto the suit in search of a potential recovery.¹⁸⁰

¹⁷⁶ Dumain, *supra* note 7, at 506.

¹⁷⁷ Walker & Seymour, *supra* note 175, at 1023.

¹⁷⁸ See Walker & Seymour, *supra* note 175, at 1023 (listing principle features of "the most ambitious overhaul of the private securities litigation system ever undertaken"). See generally Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, §§§ 101(a)2, 101(b), 102, 109 Stat. 737, 737-63 (1995).

¹⁷⁹ See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995). But see Carl Tobias, *Reforming Common Sense Legal Reforms*, 30 CONN. L. REV. 537 (1998) for the argument that these strictures "could dissuade many potential plaintiffs and their council from pursuing actions and undermine the securities legislation's objectives." *Id.* at 552.

¹⁸⁰ See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995); see also Eugene P. Caiola, *Retroactive Legislative History: Scierter Under the Uniform Security Litigation Standards Act of 1998*, 64 ALB. L. REV. 309, 315 (2000) (finding that professional plaintiffs contributed to filings of frivolous lawsuits and failed to adequately represent the class).

While questions have been raised as to the effectiveness of the PSLRA there are indications that the Act is in fact serving its purpose of ridding the federal system of baseless class action claims.¹⁸¹ Within the first seven months of the PSLRA's effectuation, only forty class action lawsuits were initiated in federal courts, whereas in previous years about 150 class actions were filed within the first seven months of the year.¹⁸² Upon the first anniversary of the PSLRA, data indicated that there was a decline in the number of securities class actions filed in federal courts from 1996 to 1995.¹⁸³ The PSLRA is a finite example that the federal rules do in fact serve their purpose of keeping frivolous litigation out of the courtroom while still allowing for the litigation of legitimate claims.

III. "CLASSY ACTIONS": THE OFT OVERLOOKED ADVANTAGES OF THE CLASS ACTION

It is one thing to determine that the federal rules provide protection against the dissemination of truly extortionate lawsuits and, argue that therefore, the class action should not be dismissed as legalized blackmail. These implicit protections aside, however, the class action lawsuits themselves actually provide an important service within the legal community.

*A. Benefits to the Plaintiffs: Access to the Courts and Deterrence*¹⁸⁴

Historically it has been the plaintiffs who have supported and utilized the class action.¹⁸⁵ The device is popular among injured

¹⁸¹ See Fed. Sec. L. Rep. (CCH) No. 1725, July 31, 1996, at 9-10; see also Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 976 (2003) (stating the act significantly improved the quality of cases).

¹⁸² See Fed. Sec. L. Rep. (CCH) No. 1725, July 31, 1996, at 9-10; but see Perino, *supra* note 181, at 929 (indicating that the empirical evidence is mixed with some finding that the class action filings have increased).

¹⁸³ See John C. Coffee, Jr., *First Anniversary: PSLRA of 1995*, N.Y.L.J., Jan 30, 1997, at 5; see also Mukesh Bajaj, Sumon C. Mazumdar & Atulya Sarin, *Empirical Analysis: Securities Class Action Settlements*, 43 SANTA CLARA L. REV. 1001, 1004 (2003) (finding that between 1995 and 1996 the number of class action suits filed in federal court dropped from 191 to 119).

¹⁸⁴ This section will address the advantages of the plaintiff class action lawsuit only.

¹⁸⁵ See *Deposit Guaranty Nat'l. Bank v. Roper*, 445 US 326, 338 (1980) (explaining that "[t]he use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for

plaintiffs because it allows them to pool their claims and bring an action even when a single plaintiff alone has not sustained a substantial enough injury to warrant the underlying action.¹⁸⁶ Similarly the class action device gives plaintiffs a sort of strength in numbers mentality.¹⁸⁷ Alone, facing the big businesses of the world can be daunting; and yet, as one in a group of injured plaintiffs, this daunting task becomes more feasible.¹⁸⁸

In discussing the advantages of the class action for plaintiffs, the easiest place to start is the notion within the American justice system of ensuring equal access to justice.¹⁸⁹ The American legal system is heavily based on the philosophy that every injured party deserves his day in court.¹⁹⁰ It is with this objective in mind that the class action becomes integral.¹⁹¹ Often in the class

economic reasons might not be brought otherwise"); see also Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 102 (1985) (finding that the class action benefits plaintiffs in several ways, including access to damages and better lawyers).

¹⁸⁶ See *Deposit Guaranty Natl. Bank*, 445 US at 339 (enumerating advantages implicit in class action lawsuits); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (noting that class action suits allow plaintiffs to pursue causes of action that otherwise would not be economical).

¹⁸⁷ See Deborah R. Hensler & Thomas D. Rowe, Jr., *Complex Litigation at the Millennium: Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROB. 137, 137 (2001) (holding that the class action can yield significant social benefits like "providing compensation for modest but non-trivial losses . . . [and] allowing recovery for losses that cannot practically be achieved through individual litigation"); see also Ausness, *supra* note 185, at 193 (stating that class action plaintiffs can join their resources and spread the cost of litigation).

¹⁸⁸ See Hensler & Rowe, *supra* note 187, at 137 (maintaining that the class action is a useful device for plaintiffs to pool their claims and litigate together as a common entity); see also Ausness, *supra* note 185, at 193 (stating that plaintiffs are able to afford better lawyers when they combine their resources).

¹⁸⁹ See Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 683 (1997) (describing "ensuring access to justice" as one of the tenets of the American legal system); see also N. Lee Cooper, *Sharpening Our Focus: The Association Proves Itself by Serving Members, Protecting the Constitution*, 82 A.B.A. J. 6 (1996) (listing "equal access to the courts" as one of the central issues for the American Bar Association).

¹⁹⁰ See Laura A Miles, *Absolute Mediation Privilege: Promoting or Destroying Mediation by Rewarding Sharp Practice and Driving Away Smart Lawyers?*, 25 WHITTIER L. REV. 617, 641-42 (2004) (commenting that "[t]ort doctrine has evolved in recognition that an injured party deserves to be made whole and the responsible party should bear the burden"); see also Lee W. Rawles, *The California Vexatious Litigant Statute: A Viable Judicial Tool To Deny the Clever Obstructionists Access?*, 72 S. CAL. L. REV. 275, 275 (1998) (noting that it is "axiomatic in our system of justice that every person is entitled to his day in court").

¹⁹¹ See Hensler & Rowe, *supra* note 187, at 137 (stating that class action claims provide remedies for "modest, but non-trivial losses"); see also Owen M. Fiss, *The Allure of Indi-*

action scenario, a business or corporation has injured a large number of people in such a way that the “overall liability is large but the individual interests of the class members or corporate shareholders are small.”¹⁹² In such cases, it is only when the injury is taken in the aggregate that it becomes worth litigating.¹⁹³ The class action provides the mechanism by which the injured plaintiffs can pool their claims, and in doing so create an action that is worth pursuing.¹⁹⁴

Additionally, the class action can be used as a means through which to enforce the rights of the poor.¹⁹⁵ “When the plaintiff is poor, marginalized, legally incompetent, ignorant of legal rights, or unable to assert rights for fear of sanctions or otherwise, and these disabilities are shared by others similarly situated, the class action may be the only effective means to obtain judicial relief.”¹⁹⁶ This ability to represent the poor becomes apparent in the willingness of class action lawyers to represent classes on a contingency fee basis.¹⁹⁷ Such a fee arrangement allows even indigent parties to obtain a lawyer to vindicate their rights because

vidualism, 78 IOWA L. REV. 965, 977 (1993) (writing that class action claims allow individual interests to be represented in court).

¹⁹² Macey & Miller, *supra* note 1, at 3.

¹⁹³ See *id.* at 3 (explaining how in “large-scale/small-claim” litigation the overall liability is large, but individually the plaintiffs have not sustained significant damages); see also Kerry Barnett, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591, 1593 (1987) (stating that the class action was supposed to be the vehicle to adjudicate individual claims).

¹⁹⁴ See Hensler & Rowe, *supra* note 187, at 137 (describing the social benefits of class actions in that they allow pooling of claims and therefore make litigation possible); see also Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 PENN. ST. L. REV. 1, 10 (2005) (positing that class actions create better access to the courts).

¹⁹⁵ See Blank & Zacks, *supra* note 194, at 10-11 (advocating the class action as the best method to adjudicate individual claims of the poor); see also Marie A. Failing & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1, 15-17 (1984) (arguing that poor individuals’ interest are best served by class action claims and shared strategies).

¹⁹⁶ Blank & Zacks, *supra* note 194, at 10-11 (quoting Lynn Pierce, *Trend and Development: Raising the Roof on Community Housing for People with Disabilities*, 6 APPEAL 22 (2000)).

¹⁹⁷ Murray L. Schwartz & Daniel J. B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1152 (1970) (reasoning that a contingent fee provides an incentive for attorneys and allows individuals to file claims based on potential recovery); Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DEPAUL L. REV. 347, 348-49 (1998) (writing that class action contingent fees are characterized by attorneys recovering fees when the class prevails and are proportional to the recovery).

they do not have to pay the attorney until they themselves recover.¹⁹⁸

While access to the courts is undeniably important, some argue that class action litigation is a waste of judicial time especially when the parties have not sustained serious enough injuries to bring individual actions.¹⁹⁹ These arguments fail to recognize the benefits such litigation provides to the community as a whole and not simply the benefits it provides to individual plaintiffs.²⁰⁰ In many ways the class action can eliminate power imbalances that would otherwise exist in the face of such claims.²⁰¹ Through the class action, plaintiffs are able to pool their claims and thereby increase the defendant's potential liability.²⁰² Additionally, the pooling of claims ensures that even small claims get litigated—claims that would go un-litigated were it not for the class action.²⁰³ In fact, one of the reasons many big businesses and corporations oppose the class action so vehemently is because they are aware that it would not be cost effective for many of the class action claimants to pursue their claims without the benefit of the

¹⁹⁸ Schwartz & Mitchell, *supra* note 197, at 1152 (noting that clients are sometimes better off under a contingency fee); see Alexander, *supra* note 197, at 352 (predicting that class actions would not survive without contingency fees as plaintiffs may not have sufficient funds during the litigation).

¹⁹⁹ See Barnett, *supra* note 193, at 1591-92 (describing how courts have been reluctant to certify classes, often leaving individual claims unresolved); see also Failing & May, *supra* note 195, at 17 (offering an example showing how poor plaintiffs may not recover damages because their individual claims are minor).

²⁰⁰ See Hensler & Rowe, *supra* note 187, at 137-38 (maintaining that class actions can deter injurious behavior); see also Coffee, *supra* note 18, at 218 (writing the point behind class action litigation is not simply to provide compensation for injured victims, but is also "to generate deterrence, principally by multiplying the total resources committed to the detection and prosecution of the prohibited behavior").

²⁰¹ See Blank & Zacks, *supra* note 194, at 12-13 (reasoning that a class is more effective at gaining the attention of a large, powerful defendant); see also Failing & May, *supra* note 195, at 17-18 (arguing that poor plaintiffs have increased clout when joined in a class).

²⁰² See Blank & Zacks, *supra* note 194, at 12-13 (explaining that a large class can hold a defendant responsible for its actions through large judgments); see also Failing & May, *supra* note 195, at 17-18 (showing through an example that a class can provide effective deterrence in addition to financial judgments).

²⁰³ See Blank & Zacks, *supra* note 194, at 11-12 (stating "[c]lass actions also enable claims that may be economically and socially insignificant as individuals claims, but that are far more significant as a whole, to be heard."); see also Failing & May, *supra* note 195, at 17-18 (arguing that a class action is the best way to litigate a poor plaintiff's individual claims).

other members of the class.²⁰⁴ Therefore, without the class action device, many businesses would arguably be able to escape answering for their wrong-doings until they injured someone so substantially that it became cost effective for the injured victim to pursue the claim individually.²⁰⁵

The use of the class action as a means to regulate businesses and to force them to answer for their wrong-doings, no matter how small, has given birth to the private attorney general.²⁰⁶ The private attorney general is someone who sues “to vindicate the public interest.”²⁰⁷ Lawyers who have deputized themselves as private attorney generals serve a very important purpose within the legal system.²⁰⁸ Such lawyers represent classes not only to ensure that the victims are duly compensated, but also to deter certain behavior within society at large.²⁰⁹ By soliciting and rep-

²⁰⁴ See Macey & Miller, *supra* note 1, at 3 (stating that in the absence of a class action device, many injuries would go unremedied because individual plaintiffs would not themselves have a sufficient economic stake in the litigation to incur the litigation costs); see also Allison Torres Burtka, *Illinois High Court Strikes Down Class Arbitration Ban*, TRIAL, January 1, 2007, at 68 (reporting that the Illinois Supreme Court held class action bans in arbitration clauses of cellular phone contracts to be unconscionable because they prevent a cost-effective mechanism for individual customers to obtain a remedy).

²⁰⁵ See Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 74-75 (2007) (suggesting that businesses, knowing that individuals are unlikely to mobilize, “may knowingly engage in illegal conduct that causes dispersed injury, confident that it will not be held accountable”); see also Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”*: An Introduction, 80 CORNELL L. REV. 811, 824 (1995) (stating that “[w]hen a million consumers have a ten dollar claim against a common defendant for an illegal business practice, no single claimant has a legal right that is worth individual pursuit”).

²⁰⁶ See Coffee, *supra* note 18, at 217-18 (stating that the role of private litigation in the enforcement of law, together with the key institutions of the class action and the contingent fee, gave rise to the modern private attorney general); see also Eric Helland, *Reputational Penalties and the Merits of Class-Action Securities Litigation*, 49 J. L. & ECON. 365, 365 (2006) (stating that “[t]he enforcement of the antifraud provisions of U.S. securities law creates private attorneys general who enforce public law for private gain”).

²⁰⁷ Coffee, *supra* note 18, at 216; see *Assoc. Indus. of N.Y. State, Inc., v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) (stating that Congress may, by statute, confer authority on non-official persons to bring legal action to “vindicate the public interest”).

²⁰⁸ See Coffee, *supra* note 18, at 216 (commenting that “our society places extensive reliance upon such private attorney generals to enforce the federal antitrust and securities laws, to challenge corporate self-dealing in derivative actions, and to protect a host of other statutory policies”); see also Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 830 (2006) (stating that consumer protection statutes encourage “private attorneys general to advance the public interest in a transparent, efficient consumer marketplace”).

²⁰⁹ See Coffee, *supra* note 18, at 218 (explaining that private attorney generals pursue litigation as much to compensate victims as to serve as general deterrents); see also

resenting injured claimants against larger businesses, these attorneys are increasing the resources allocated to the "detection and prosecution of prohibited behaviors."²¹⁰ This increase in resources simultaneously increases the likelihood that a business will be closely regulated and subsequently held accountable for any illicit behavior.²¹¹

The benefits of the class action device to individual plaintiffs are multi-faceted. First, the device allows plaintiffs to make their way into the court-room even when they have been injured only minimally.²¹² This access to the courts not only allows more claims to be litigated, but also causes businesses to be more aware of their behavior.²¹³ As more claims are filtered into the courtroom, it becomes more likely that a business will be forced to answer for any injures it has caused.²¹⁴ As plaintiffs' attorneys deputize themselves as private attorney generals, they serve the important purpose of supplementing the governmental regulation of business, again deterring illicit behavior on the part of big

Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 590 (2005) (stating that private attorneys general often request injunctive or other equitable relief aimed at altering the practices of large institutions and that the impact of such private attorney general litigation is rarely confined to the parties in a given case).

²¹⁰ Coffee, *supra* note 18, at 218; see Hensler & Rowe, *supra* note 187, at 137-38 (stating that class actions can deter injurious behavior and supplement regulatory enforcement by administrative agencies).

²¹¹ See Coffee, *supra* note 18, at 224-25 (stating that private attorneys general allow public agencies to concentrate their resources on detection); see also Hensler & Rowe, *supra* note 187, at 137 (stating that private attorneys general supplement the regulation and enforcement by administrative agencies which may be under-funded, politically constrained, or influenced by the very entities they regulate).

²¹² See Leslie, *supra* note 205, at 75-76 (observing that the class action device allows litigants to aggregate small claims and bring them on behalf of the class when the amount at stake for an individual would not warrant filing suit); see also Hensler & Rowe, *supra* note 187, at 137 (stating that damage class actions allow recovery for losses that cannot practically be achieved through individual litigation, and thus supplement regulation and enforcement by administrative agencies).

²¹³ See Coffee, *supra* note 18, at 218 (suggesting that the role of the private attorney general is not simply to secure compensation for victims but also to generate deterrence); see also Morrison, *supra* note 209, at 590 (commenting that private attorneys general aim is altering the practices of large institutions).

²¹⁴ See Coffee, *supra* note 18, at 218 (suggesting that the increase in resources committed to detection and prosecution added by the efforts of private attorneys general increase deterrence and enforcement); see also Hensler & Rowe, *supra* note 187, at 137 (stating that damage class actions deter injurious behavior and supplement regulatory enforcement).

business.²¹⁵ This circle of regulation works to compensate and deter, proving advantageous not only to the plaintiffs themselves, but also to society as a whole, which benefits from the increased regulation of the businesses world.²¹⁶

B. Defendants and the Class Action

While historically, it was the plaintiffs that supported the class action, recently there has been movement among defendants in support of the device.²¹⁷ This change is largely due to the growing notion that the class action device can provide defendants with some implicit protections as well.²¹⁸ When a corporation or business is named as a defendant in a class action, it means that it has allegedly injured a large number of people in the same manner.²¹⁹ Without the class action device, the defendant could potentially face an individual lawsuit from each member of the class.²²⁰ Defendants have begun to support the class action be-

²¹⁵ Hensler & Rowe, *supra* note 187, at 137-38 (stating that damage class actions deter injurious behavior and supplement regulatory enforcement); Helland, *supra* note 206, at 367 (outlining how one major enforcement methods of federal securities laws are private attorneys filing civil actions, which have the social utility of compensating victims and deterring future violations).

²¹⁶ See Blank & Zacks, *supra* note 194 at 13-14 (positing that "the mere possibility of a class action lawsuit may encourage a government or private agency to change its behavior without engaging in litigation"); see also Morrison, *supra* note 209, at 590 (suggesting that "[f]rom school desegregation to fair housing, environmental management to consumer protection, the impact of the private attorney general litigation is rarely confined to the parties in a given case").

²¹⁷ See Anne Bloom, *Access to Justice: The Economics of Civil Justice: From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719, 747 (2006) (explaining Agent Orange litigation brought about shift to "place greater emphasis on the economic need of class action defendants"); see also Francis E. McGovern, *Class Actions in the Gulf South Symposium: Class Actions and Social Issue Torts in the Gulf South*, 74 TUL. L. REV. 1655, 1666-67 (2000) (describing thinking of defendants that class action is only procedure available to save them from lawsuits filed around country).

²¹⁸ See *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980) (highlighting one justification for class action is protection of defendant from contradictory obligations); see also Bloom, *supra* note 217, at 745 (stating that today class action "focuses on judicial economy and capping defendants' liability").

²¹⁹ See Myron S. Greenberg & Megan A. Blazina, *What Mediators Need to Know about Class Actions: A Basic Primer*, 27 HAMLINE L. REV. 191, 193 (2004) (discussing that class action serve to resolve "a large number of similar claims"); see also David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 393-94 (2000) (noting defendants prepare one defense when faced with mass tort claims because claims are common questions of liability and damages).

²²⁰ See Heather M. Johnson, *Resolution of Mass Product Liability Litigation within the Federal Rules: A Case for the Increased Use of Rule 23(b)(3) Class Actions*, 64 FORDHAM L. REV. 2329, 2362-63 (1996) (stating "class certification provides the advantage of offering

cause it means that a single litigation can bind a large number of people, thereby allowing the defendant to insulate itself from further liability.²²¹

The advantages of the class action to defendants became even more explicit following the Class Action Fairness Act of 2005.²²² The Act itself was actually spearheaded by defendants, who recognized the implicit advantages that the class action lent to defendants.²²³ Prior to the passage of the act, there was a tendency among plaintiffs to bring actions in magnet courts, known to be friendly to plaintiffs.²²⁴ As plaintiffs filed in plaintiff friendly state courts, they created a scenario where a single defendant could potentially face multiple class actions pending in multiple state courts at a single time.²²⁵ This became hugely problematic for defendants who were unable to settle class actions with a universal deal.²²⁶ Additionally, they had to foot the bill for the ongoing litigation in each court, causing the actions to become exorbitantly expensive and often forcing defendants to settle

defendants the opportunity to vindicate themselves in one suit, as opposed to defending hundreds of individual suits"); *see also* Rosenberg, *supra* note 219, at 393-94 (observing defendant, when confronted with many similar claims, prepares one defense and litigates as "a de facto class action").

²²¹ *See Geraghty*, 445 U.S. at 402-03 (explaining that justifications for class action "include the protection of the defendant from inconsistent obligations . . . [and] the provision of a convenient and economical means for disposing of similar lawsuits"); *see also* Johnson, *supra* note 220, at 2363 (illustrating that an advantage to class action is that it allows defendants to cap their liability in a single suit).

²²² Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

²²³ *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. 1711-1715, 1332, 1453 (2005)); *see also* Debra Lyn Bassett, *The Defendant's Obligation to Ensure Adequate Representation in Class Actions*, 74 UMKC L. Rev. 511, 529 (2006) (highlighting that business community lobbied for Class Action Fairness Act).

²²⁴ *See* Debra Lyn Bassett, *The Forum Game*, 84 N.C.L. REV. 333, 334-35 (2006) (describing strategy of forum shopping); *see also* Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 775 (1998) (explaining that forum shopping was prevalent in class action lawsuits).

²²⁵ *See* Bassett, *supra* note 224, at 337 (citing criticism of forum shopping); *see also* Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1154-55 (2006) (expressing how easy it was for plaintiffs to choose the state they wanted for a class action lawsuit).

²²⁶ *See* Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385, 385 (2005) (describing problems with class action lawsuit and why congress enacted Class Action Fairness Act); *see also* Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1373 (2003) (discussing Judge Posner's view that class action causes defendants to settle even if they won twelve of thirteen trials).

simply because they could not face the costs of the pending litigations.²²⁷ Other problems arose as plaintiffs began to use defendant's settlements in other ongoing litigations as leverage in their own litigations.²²⁸ While the plaintiffs liked the ability to choose the forum to their advantage it became hugely problematic for defendants and the judicial system as a whole.²²⁹ The onslaught of multi-party, multi-jurisdictional lawsuits became a millstone around the neck of the judicial system with identical cases spanning and clogging both state and federal courts.²³⁰ Therefore, the impetus behind the Class Action Fairness Act was to find a way to consolidate all pending state actions before one judge in federal court and to thereby assure fairer outcomes for class members and defendants.²³¹

Prior to the Act, the diversity of the class was determined by the citizenship of the representative party and not by the citizenship of the class members as a whole.²³² Additionally, in the class action context where diversity was the basis for subject matter jurisdiction each plaintiff had to individually assert a claim that exceeded \$75,000.²³³ This necessity was reaffirmed in *Zahn v. In-*

²²⁷ See Andreeva, *supra* note 226, at 385 (noting that critics of class actions have in past claimed "that plaintiffs' attorneys bring unsupported claims against innocent parties, forcing them to settle rather than risk a large judgment"); see also Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685, 689-90 (2005) (highlighting that defendants would rather settle than pay for costs of litigation).

²²⁸ See Andreeva, *supra* note 226, at 385 (discussing the court's power to reject a settlement for wrongdoing); see also Paula Batt Wilson, *Attorney Investment in Class Action Litigation: The Agent Orange Example*, 45 CASE W. RES. 291, 300-01 (1994) (noting leverage that plaintiffs attorneys get over defendants in class action lawsuit).

²²⁹ See Bassett, *supra* note 224, at 339 (explaining advantages of forum shopping); see also Zywicki, *supra* note 225, at 1154 (describing "bad" forum shopping in class action lawsuits).

²³⁰ See *In re Vitamins Antitrust Litig.*, 320 F. Supp. 2d 1, 15-16 (D.D.C. 2004) (discussing the enormity and complexity of an Antitrust litigation spanning some thirty-two federal courts where over one thousand opinions were rendered on over ten thousand separate filings by at least one hundred law firms); cf Andreeva, *supra* note 227, at 385 (citing criticisms of class actions).

²³¹ Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4 (codified as note to 28 U.S.C.A. § 1711) (stating that the Act aims to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance"); *Id.* at pmbl. (explaining that the Act amends "procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants").

²³² See *Snyder v. Harris*, 394 U.S. 332, 340 (1969) (summarizing the state of diversity rules at that time).

²³³ See *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973) (holding that each plaintiff in class action lawsuit predicated on diversity jurisdiction must satisfy the jurisdictional

ternational Paper Co., where the court held that the fact that the class representative was asserting a claim of \$75,000 was not enough to sustain subject matter jurisdiction in federal court.²³⁴

The Class Action Fairness Act created a system by which it became much easier to consolidate actions in federal court under diversity jurisdiction.²³⁵ The Act mandates that, in class actions only, where the basis of subject matter jurisdiction is diversity there is a \$5 million aggregate requirement.²³⁶ The difference being that the amount in controversy is now looked at in the aggregate and individual claims are not relevant for determining jurisdiction.²³⁷ Additionally, the Act created a liberalization of the diversity requirement called "minimal diversity."²³⁸ Under the new Act, if any class member, named or not, is diverse from any one defendant then there is presumptive jurisdiction.²³⁹

The Class Action Fairness Act has not only diminished the ability of plaintiffs to bring suits in friendly courts, but has also reinforced the notion that the class action can be useful to defendants.²⁴⁰ If defendants are able to remove and consolidate pending state cases in federal court, they can deal with all of the cases through a single disposition which will be binding on every mem-

amount); *see also* Fuller v. Exxon Corp., 78 F. Supp. 2d 1289, 1295 n.13 (S.D.A. 1999) (citing *Zahn* and finding that subject matter jurisdiction requires that every class member's claim must exceed \$75,000).

²³⁴ *See Zahn*, 414 U.S. at 301.

²³⁵ Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 3(a), 119 Stat. 4 (codified as amended at 28 U.S.C.A. § 1711-15).

²³⁶ Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a)(2), 119 Stat. 4, 9 (codified as amended at 28 U.S.C.A. § 1332) (giving federal courts original jurisdiction "of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs," and allowing aggregation of individual class members' claims for purposes of determining whether the \$5,000,000 requirement has been satisfied).

²³⁷ Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a)(2), 119 Stat. 4, 9 (codified as amended at 28 U.S.C.A. § 1332).

²³⁸ Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a)(2), 119 Stat. 4, 9 (codified as amended at 28 U.S.C.A. § 1332).

²³⁹ Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a)(2), 119 Stat. 4, 9 (codified as amended at 28 U.S.C.A. § 1332).

²⁴⁰ *See* Edward A. Hosp, *Settlements Under the Class Action Fairness Act of 2005*, 67 ALA. LAW 124, 126 (2006) (discussing how the Class Action Fairness Act addressed specific perceived abuses including the problem of "forum shopping" resulting in the creation of "magnet" jurisdictions); *see also* Jeffrey T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action Under the Federal Securities Laws*, 55 AM. U.L. REV. 621, 642 (2006) (noting Congress's intention to address the problem of forum shopping by savvy class action lawyers).

ber of every state class.²⁴¹ As a result, a whole new litigation paradigm has begun to develop. Instead of plaintiffs calling for class actions, many more defendants have begun to push for class certification, asking for the broadest possible definition of the class so that a potential settlement will catch the largest number of people within its net.²⁴²

The Act has leveled the playing field by eliminating the ability of plaintiffs to forum shop for advantageous courts and has similarly reduced the means by which plaintiffs can force defendants to “litigate truly interstate class action lawsuits in state courts.”²⁴³ By eliminating the ability of plaintiffs to forum shop and to tie up defendants with multi-jurisdictional multi-state actions, the Class Action Fairness Act of 2005 has turned the class action into a device that is both a cost effective and efficient means by which a defendant can face an onslaught of claims from multiple plaintiffs in a single forum.²⁴⁴

²⁴¹ See Edward F. Sherman, *Complex Litigation: Plagued By Concerns Over Federalism, Jurisdiction and Fairness*, 37 AKRON L. REV. 589, 595n.25 (2004) (illustrating class action defendants’ ability to remove pending state cases to the federal courts as long as such cases satisfy, among other things, the minimal diversity requirement); see also Richard A. Nagareda, Symposium, *Litigation Reform Since the PSLRA: A Ten-Year Retrospective: Panel Four: Class Action Fairness Act: Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1876 (2006) (explaining that the Act was established to facilitate removal of state law class actions to the federal courts).

²⁴² See Hensler & Rowe, *supra* note 187, at 138 (noting financial incentives for defendants who wish to “buy res judicata” by seeking out plaintiff’s attorneys who are willing to settle claims for less); see also Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 38 (2006) (articulating how the Class Action Fairness Act addresses the problem of class action leverage against large corporate defendants who oftentimes settle frivolous lawsuits rather than litigating in order to save money, thus indicating such defendants’ interest in certifying the largest class possible in order to foreclose any future litigation on the subject).

²⁴³ See Andreeva, *supra* note 226, at 394 (noting that “[p]roponents of the Act advocate that many defendant businesses are forced to litigate truly interstate class action lawsuits in state courts”); see also Todd J. Zywicki, *supra* note 225, at 1154 (discussing forum shopping in state class-action litigation and how problems created by “forum-shopping competition” became so severe that Congress had to enact the Class Action Fairness Act in order to remedy the problem).

²⁴⁴ See Nivine K. Zakhari, *Is The Class Action Fairness Act of 2005 a Misnomer? The Impact on Class Action Waivers in Consumer ADR Clauses*, 5 J. AM. ARB. 97, 104-05 (2006) (discussing how the Class Action Fairness Act has reduced requirements for defendant’s removal of cases into federal courts by allowing for claim aggregation to meet the amount-in-controversy requirement for federal jurisdiction and relaxing the diversity requirement; all of which help the defendant deal with claims from multiple plaintiffs in a single forum); see also Elizabeth J. Cabraser, Symposium, *The Class Action Counterre-*

IV. RECOMMENDATIONS

In light of all the good that the class action lawsuit brings to the courtroom, it becomes hard to reconcile the controversy surrounding the use of such suits. And yet, there is still undeniably something driving this very visceral reaction that so many in the legal community and in the United States at large seem to have toward such suits. While it is easy to cite the behavior of certain litigious plaintiffs' attorneys as the motivation for this reaction, such pointed blame falls short of reconciling the true apparent dichotomy. In reality, the negativity surrounding the class action is so pervasive that it cannot possibly be the sole fault of a subset of attorneys. It seems something far more omnipresent is driving the reaction surrounding the class action.

The class action is very different from other forms of litigation.²⁴⁵ Within the class action context, the lawyer often solicits the client, who may or may not know that he has been wronged until approached by legal counsel.²⁴⁶ The lawyer often represents the client on a contingency fee basis, which pits the attorney's interest against the interests of his own clients.²⁴⁷ Further, within the class action context, the lawyer represents an amorphous class as a whole, not an individual plaintiff.²⁴⁸

formation, 57 STAN. L. REV. 1475, 1479 (2005) (noting the utility of the class action to "fairly, efficiently, and cost-effectively provide consistent and binding adjudication of common, recurring questions of fact or law").

²⁴⁵ See Macey & Miller, *supra* note 1, at 3-4 (explaining that the class action is not of the same ilk as other forms of litigation); see also Blank & Zacks, *supra* note 194, at 16 (2005) (noting several differences between class actions and other types of lawsuits).

²⁴⁶ See *Williams v. Balfor Pension Investors*, 150 F.R.D. 109, 118 (1993) (discussing how class actions are "inevitably the child of the lawyer rather than the client" and in some cases "lawyers find clients and precipitate cases where perhaps no one client would ever come forward to complain"); see also Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 434-35 (1999) (noting the view of class action lawsuits as lawyer-generated and lawyer-driven litigation because the lawyer often solicits the class clients when the claimant did not seek out legal advice on their own).

²⁴⁷ See Wilson, *supra* note 228, at 299 (noting that the client's and attorney's interest in class action suits are not always identical, for example, when receiving a contingency fee an attorney "may want to settle early for a guaranteed fee rather than invest additional hours in the case"); see also Schwartz & Mitchell, *supra* note 197, at 1152 (discussing situations when a client's removed status in class action suits can sometimes lead to conflicts of interest, as when contingency fees are involved, a client may "want the lawyer to stay close to the relatively safe minimum rather than risk getting nothing in an effort to increase the settlement").

²⁴⁸ See Macey & Miller, *supra* note 1, at 3 (explaining that the client within the class action context is the class and not any one individual); see also Martha Matthews, *Ten*

Despite these implicit differences, the class action undoubtedly serves an important function within the legal arena.²⁴⁹ The class action allows for the pooling of claims and thereby assures access to the courts, even when no one person has been injured so substantially that it would be economically feasible to litigate a claim individually.²⁵⁰ In allowing such access to the courts, the class action simultaneously ensures that businesses will be held accountable for the injuries they inflict, even when those injuries are not grievous in nature.²⁵¹ From the defendants' perspective, the class action is beneficial, as it provides an efficient and cost-effective means to dispense with numerous actions through a single binding judgment.²⁵²

Given the advantages of the class action as a lawsuit unto itself, it becomes hard to understand why there is so much negativity surrounding the use of such suits. Understandably, the class action looks different from other forms of litigation. And yet, it provides a forum for a very different kind of claim. In fact, these claims would likely go un-litigated were it not for the device of

Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class-Action Cases, 64 *FORDHAM L. REV.* 1435, 1437 (1996) (demonstrating that "[i]n all class actions, the lawyer must apply ethical norms premised on a single client with articulated interests to the amorphous, conflicting, and indeterminate interests of a plaintiff class").

²⁴⁹ See *Deposit Guar. Nat'l. Bank v. Roper*, 445 U.S. 326, 338 (1980) (describing one of the advantages of the class action lawsuit as providing equal access to the courts); see also *Blank & Zacks*, *supra* note 194, at 10 (stating that "[i]n the American legal system, the class action serves multiple purposes").

²⁵⁰ See Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy--Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 *CORNELL L. REV.* 1563, 1588 (2005) ("By allowing claimants to pool resources, the class action lawsuit lessens the burden on individual claimants, making it more attractive to bring suits in the public interest."); see also Hensler & Rowe, *supra* note 187, at 137 ("Class actions for damages can provide compensation for modest but nontrivial losses suffered by widely dispersed but similarly positioned persons as a result of the negligent or illegal behavior of others, allowing recovery for losses that cannot practically be achieved through individual litigation.").

²⁵¹ See Hensler & Rowe, *supra* note 187, at 137 (noting that class actions can deter injurious behavior); see also Andrei Greenawalt, *Limiting Coercive Speech in Class Actions*, 114 *YALE L. J.* 1953, 1971 (2005) (stating that class actions can deter companies and institutions that would otherwise not be sufficiently deterred and possibly motivate them to "change their behavior under the threat of substantial damages from a class action lawsuit").

²⁵² See Hensler & Rowe, *supra* note 187, at 137 (portraying that "class actions also may provide efficient management and resolution of large numbers of similar claims"); see also *Blank & Zacks*, *supra* note 194, at 10 (noting that class actions can protect the defendant from inconsistent obligations and allow them to economically dispose of similar lawsuits).

the class action.²⁵³ Perhaps then the problem is not with the class action itself, but rather with the overarching view that such suits are an offshoot of normal litigation practices. The class action cannot be reconciled with the legal and ethical mandates surrounding other forms of litigation.²⁵⁴ Regardless, it does provide a mechanism through which to adjudicate claims that would be overlooked by more traditional litigation practices. The class action is in fact, its own entity. It does not look like other forms of litigation nor does it operate in a similar manner as these more traditional forms of litigation.²⁵⁵ And yet, given the advantages of the class action,²⁵⁶ it is too integral a part of American legal system to dismiss as nothing more than legalized blackmail.

Undoubtedly things that are new or different do make people uncomfortable. And the class action falls squarely within this categorization. Were it to look or function like other forms of litigation than it might ease some of the criticism, but at the same time it would be exchanging acceptance for utility.²⁵⁷ The reason

²⁵³See Buschkin, *supra* note 250, at 1588 (illustrating that “[w]ithout the class action device, ordinary citizens would rarely bring these public law actions since the costs of litigating a lawsuit would far outweigh any potential return”); see also Blank & Zacks, *supra* note 194, at 10 (noting the class action as an outlet for groups who individually would be ineffective in bringing their opponents into court at all).

²⁵⁴See Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, (Practicing L. Inst., Litig. and Admin. Prac. Course Handbook Series), July, 2006, at 704 (discussing ethical issues and how they arise frequently in class action litigation, including “conflicts of interest, solicitation, application of the no-contact rule, the reasonableness of attorneys’ fees, and the attorney-witness rule”); see also Marc Z. Edell, *Resolution of Mass Tort Litigation: A Practitioner’s Guide to Existing Methods and Emerging Trends*, (A.L.I. – A.B.A. Continuing Legal Educ., Products Liability), Aug. 19, 1994, at 54-57 (noting that class actions usually require the “practitioner to reconcile potentially divergent interests,” for example, conflicts of interests or whether to accept a settlement).

²⁵⁵See Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223, 223 (2004) (commenting that class actions allow individuals to bring actions “that otherwise either would not be possible or would only be possible in a very different form”); see also Macey & Miller, *supra* note 1, at 3-4 (discussing how class actions are different from other forms of litigation and calling for regulatory reform).

²⁵⁶See *Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Class Action*, 117 HARV. L. REV. 2665, 2666-67 (2004) [hereinafter *Locating*] (citing administrative efficiency as “the most prevalent benefit” associated with class action lawsuits and suggesting optimal deterrence as another less prevalent but nonetheless important benefit); see also M. Jared Marsh, *The Class Action Lack of Fairness Act of 2002: Congress Attempts to Federalize Class Action Lawsuits*, 71 UMKC L. REV. 151, 151 (2002) (noting two “paramount” purposes served by class action lawsuits).

²⁵⁷See Sherman, *supra* note 255, at 223-24 (categorizing the class action as “one of the most controversial procedural devices in the American legal system” while also describing several benefits associated with class action litigation); see also Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 TENN. L. REV. 1, 1 (2001) (highlight-

that the class action functions so effectively is specifically because it does look and function differently from other forms of litigation.²⁵⁸ And it is within this bizarre “perversion” of traditional litigation practices that many people have found an outlet and a forum in which they can air their frustrations and adjudicate their claims—no matter how small or irrelevant such claims are to the remainder of society.

What needs to happen then is not a change within the class action device, but rather a change within the overall perception of the class action. Arguing for a change in traditional philosophy may seem outrageous or beyond the pale. And yet, if philosophy was never allowed to shift over time, this country would arguably still be operating under the “separate but equal” doctrine of *Plessy v. Ferguson*.²⁵⁹ Just as this country was able to modify its archaic approval of “separate but equal,”²⁶⁰ it has come time to modify the country’s notion of the class action lawsuit. The class action does not look like traditional litigation because it is not meant to. Similarly, it does not conform to traditional notions of litigation, nor should it have to. The class action is not an offshoot of traditional litigation practices.²⁶¹ It is an entity in and to itself. Just as arbitration and mediation are governed by separate rules, so should be the class action. Not until the legal system begins to develop an individual set of rules and regulations surrounding the class action, will the view of class actions as legalized blackmail begin to change.

ing “great social and legal utility” of class suits before describing scenarios where utility is diminished).

²⁵⁸ See *Locating*, *supra* note 256, at 2666-67 (arguing that class action lawsuits provide benefits such as administrative efficiency and optimal deterrence, which both stem from important differences between class action and individual lawsuits); see also *Marsh*, *supra* note 256, at 151 (claiming that class action lawsuits are beneficial because they allow for more efficient use of judicial and individual resources and allow certain claims to be brought that otherwise might be too insignificant to justify individual litigation).

²⁵⁹ 163 U.S. 537, 547 (1896) (holding “separate but equal” is inherently equal).

²⁶⁰ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (overruling *Plessy* and holding “separate educational facilities are inherently unequal”).

²⁶¹ See *Sherman*, *supra* note 255, at 224-25 (calling the American class action an “invention of equity” and illustrating how class actions were formally created by Federal Rule of Civil Procedure 23); but see *Graham C. Lilly, Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 NEB. L. REV. 1008, 1011 (2003) (noting that the historical model of class actions portrays class suits as a “specific variety of representative actions”).

CONCLUSION

In light of the advantages that the class action brings to the legal arena, the idea of dismissing it as nothing more than legalized blackmail seems shortsighted. Perhaps the ultimate issue lies not with the problems of the class action itself but with the view of class actions as an offshoot of normal litigation practices. The class action is inherently different from other forms of litigation.²⁶² Within the class action context, there is no individual client;²⁶³ the lawyer himself may have more of a financial interest in the outcome than any individual member of the suit;²⁶⁴ and the lawyer often assumes the role of a businessman as opposed to an advocate.²⁶⁵ The idea of the lawyer in this forum cannot be reconciled with the idea of the lawyer as commonly recognized in this country. To dismiss this as wrong, fails to recognize that although such lawyers are not functioning in the same manner as other lawyers, they are in fact still providing important services within the legal community.²⁶⁶ The ultimate answer is to stop looking at such lawsuits as the same entity as other forms of litigation. The class action may not fit into the same mold as other forms of litigation, but maybe it is not meant to. The class action is a law suit that allows a very different form of litigation and the

²⁶² See Lilly, *supra* note 261, at 1009 (praising class actions for enabling one suit to encompass "dozens or even hundreds of individual actions"); see also Macey & Miller, *supra* note 1, at 3-4 (emphasizing that, unlike normal litigation scenarios, class actions call for more control by plaintiff's attorney and not the client).

²⁶³ See Sherman, *supra* note 255, at 223 (pointing out that class action suits allow individuals to sue on behalf of others similarly situated); see also Julie Klusas, *Saving the Class Action: Developing and Implementing a Model Rule of Professional Conduct for Class Action Litigation*, 16 GEO. J. LEGAL ETHICS 353, 359n.31 (2003) (stating "the defined 'client' in traditional litigation is different than the amorphous 'client' in a class action").

²⁶⁴ See *Saylor v. Lindsley*, 456 F.2d 896, 900-01 (2d Cir. 1972) (highlighting differences between individual plaintiffs' interests and those of the class's attorney, and positing that class attorneys might have greater financial interests in settlement); see also Coffee, *supra* note 12 at 677-78 (recognizing that class suits are uniquely susceptible to "collusive settlements that benefit plaintiff's attorney rather than their clients").

²⁶⁵ See Macey & Miller, *supra* note 1, at 3-4 (labeling class action litigation as "entrepreneurial litigation" due to unique role played by plaintiff's attorney); see also Coffee, *Understanding*, *supra* note 15, at 677-78 (viewing plaintiff's attorney as a "utility-maximizing entrepreneur who manages a portfolio of actions and thus makes litigation decisions in an individual case based upon their overall impact on the portfolio").

²⁶⁶ See *Deposit Guar. Nat'l. Bank v. Roper*, 445 U.S. 326, 338 (1980) (describing advantages associated with class action lawsuits, which are often funded by contingent-fee arrangements); see also Hensler & Rowe, *supra* note 187, at 137 (highlighting several social benefits derived from the use of private class actions for money damages).

ultimate answer may be to recognize it for the benefits that it brings and stop trying to reconcile it with the ethical and practical rules that regulate the remainder of the legal arena.

