PROFESSIONAL PLAINTIFFS AND INCENTIVE AWARDS: AN EMPIRICAL ANALYSIS OF THE JUDICIAL POLICY OF PAYING PLAINTIFFS TO SERVE AS CLASS REPRESENTATIVES

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Abstract

When class actions settle, the class representatives usually receive an "incentive award" — typically a payment of a few thousand dollars or more, intended to reward them for bringing suit and to encourage additional class action lawsuits. But no statute, rule, or Supreme Court case authorizes incentive awards. Indeed, the most analogous statute and Supreme Court cases deem such payments unlawful. The courts that authorize incentive awards do so on the basis of their own policy choices and senses of equity.

Policy should be made by Congress, not lower courts. And a review of the empirical evidence leads to the conclusion that allowing incentive awards is a poor policy choice. New data shows that incentive awards are not effective in their stated goal of encouraging the filing of class actions; the availability of incentive awards does not have a significant impact on the filing rate. Nor is encouraging more class-action litigation a goal worth pursuing. Data collected from numerous pre-existing studies strongly suggest that the costs will outweigh the limited benefits that would result from an incremental increase in class-action litigation.

Furthermore, the availability of incentive awards misaligns the class representatives' economic incentives by encouraging them to maximize their private award, rather than the benefits to the class as a whole. And since it is class counsel who decide what award to seek for the representatives, the lure of incentive awards increases the power of class counsel over the clients who are supposed to be monitoring them.

The lower courts have taken a wrong turn in choosing a bad policy when they should not be making such policy choices at all.

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The views and opinions set forth herein are the personal views or opinions of the author; they do not necessarily reflect views or opinions of the law firm with which they are associated.

INTRODUCTION

"Professional plaintiff" was, at one point, an epithet. When reforming securities-law class actions, Congress sought to eliminate "professional plaintiffs" — litigants who were not truly aggrieved, but who, "motivated by the payment of a 'bonus' far in excess of their share of any recovery," were incentivized "to participate in abusive class action litigation."[1] Most courts, however, have endorsed the opposite policy. When class actions settle, courts routinely authorize "incentive awards" to be paid from the settlement fund to the class representatives. These awards, empirical studies show, are in fact typically in amounts that are far in excess of the representatives' share of any recovery. Courts make these awards with the express purpose of "encourag[ing] class representatives to participate in class action[s]."[2]

Most class representatives are not *professional* plaintiffs in the most literal sense, since it is rare for anyone to make most of their income this way.[3] But the prevalence of incentive awards turns litigation into gig work, or a side hustle. And for most courts that have addressed the issue, incentivizing class actions through payments to class representatives is a desired outcome:

> Rule 23 class actions still require named plaintiffs [class representatives] to bear the brunt of litigation … which is a burden that could guarantee a net loss for the named plaintiffs unless somehow fairly shifted to those whose interests they advance. In this important respect, incentive payments remove an impediment to bringing meritorious class actions.[4]

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[1] S. Rep. No. 104-98 at 10 (1995) (Senate report accompanying S. 240, the Private Securities Litigation Reform Act of 1995).

[2] *Moses v. New York Times Co.*, 79 F.4th 235, 253 (2d Cir. 2023).

[3] *See* Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L Rev. 74, 99 (Apr.-May 1996) (finding that there were relatively few "repeat players" who served as representatives in multiple class actions).

[4] *Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340, 353 (1st Cir. 2022).

So what is the problem? Why shouldn't we remove "an impediment to bringing meritorious actions?" One problem is that tinkering with the incentives of class representatives does little to increase the filing of class actions suits — but it does incentivize representatives to prioritize their own awards over the interests of the class as a whole. Furthermore, to the extent incentive awards increase class-action filings, non-meritorious cases will increase along with the meritorious ones — and there are a lot of class actions that lack merit. Class-action litigation is at best a mixed blessing. It is only rarely effective at its core function of compensating victims, and the benefits all come with significant societal costs.

Congress has expressed a similar view. As part of its efforts to weed out abusive practices in cases brought under the securities laws, Congress specifically prohibited incentive awards in those types of cases.[5]

A further problem is that, at least in the view of the Eleventh Circuit, two 19th century Supreme Court cases barred the use of incentive awards. *See Johnson v, NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020), *rehearing en banc denied* 43 F.4th 1138 (11th Cir. 2022). These two cases, *Greenough* and *Pettus*, held that plaintiffs whose actions created a common fund for the benefit of a class could recover their attorney fees, but could not recover allowances for their personal services.[6] But outside the Eleventh Circuit courts have not followed *NPAS*, deeming *Greenough* and *Pettus* irrelevant to modern class-action procedure. Incentive awards therefore remain nearly ubiquitous, outside of securities-law cases.

In authorizing incentive awards, courts have taken any number of wrong turns. They relied on unsupported assertions regarding the effects of their chosen policy, without consulting

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[5] 15 U.S.C. §§ 77z-1(a)(4), 78u-4(a)(4).

[6] *Trustees v. Greenough*, 105 U.S. 527 (1881); *Central RR & Banking Co. of Ga. v. Pettus*, 113 U.S. 116 (1885).

the available empirical data. They ignored Congress' concerns, and the policy choices underlying the statutes that were intended to reform class-action litigation. The courts instead acted as if they had a free hand to craft policy on a blank slate. And they disregarded Supreme Court precedent. This includes more than the 19th century cases relied upon by *NPAS*. The modern Supreme Court has repeatedly held that policy-making is a job for Congress, not the courts, and that includes policies on whether fees should be awarded to incentivize litigation. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 241 (1975).

The end result is that the lower courts have made bad policy, when it was not their role to make policy at all.

This article focuses on the real-world data that should inform this debate, and on Congress' policy concerns. We'll start with the legal and factual backdrop: the basic mechanics of class-action litigation; the data regarding how often incentive awards are authorized (and in what amounts); and what courts and Congress have said on the issue. A central assumption among those who support incentive awards is that eliminating awards would deal a crippling blow to plaintiffs' willingness to bring class actions. Developing new data, this article tests this assumption, and finds it lacking.

Next, the article examines the costs and benefits of encouraging additional class actions — not as a theoretical matter, but by amassing the empirical studies that shed light on the issue. These data show that class actions are costly, and that increasing the number of such cases is unlikely to be beneficial. An additional harm from incentive awards is that they diminish the already-attenuated willingness of class representatives to monitor and provide an independent check on class counsel.

Lastly, the article shows that incentive awards are not supported by traditional notions of equity, and that the policy of authorizing these awards usurps Congress' role in making value-based policy decisions.

I. BACKGROUND — CLASS ACTIONS, INCENTIVE AWARDS, AND CONGRESSIONAL POLICY

A. The Basics — What Class Actions Are, and How They Work

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[7] In a class action, remedies are sought not just for the specific people or entities who brought the case (the "named plaintiffs"), but also on behalf of all those who are similarly situated — the "class."[8] Upon certification of a class, the named plaintiffs are deemed "class representatives." The other class members are known as "absent" or "unnamed" class members, since they generally do not actively participate in the litigation, and their identities might not be known until late in the litigation (if ever).

Rule 23 of the Federal Rules of Civil Procedure governs class action proceedings, and imposes a raft of procedural requirements. Generally speaking, these requirements are designed to ensure that the litigation is fair to the absent class members, that the court can effectively manage the litigation, and that in the specific circumstances of the case the class-action device is the most efficient manner of proceeding.

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[7] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (internal quotation marks and citation omitted).

[8] Court can, in appropriate circumstances, certify a class of defendants. *See* Fed. R. Civ. P. 23(a)(3), 23(c)(1)(A). Defendant classes, however, are rare. "Of the 688 class action settlements approved in 2006 and 2007, 685 involved plaintiff classes and only three involved defendant classes." Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, Journal of Empirical Legal Studies, Vol. 7, Issue 4, 811, 817-18 (Dec. 2010). *See also* Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L Rev. 74, 119-20 (Apr.-May 1996) (discussing kinds and frequency of defendant classes).

This article speaks only to the far more typical circumstance where a plaintiff seeks to certify a class of plaintiffs.

A class-action complaint will typically allege the prerequisites of class certification, but unnamed class members do not become parties to the litigation unless and until the court "certifies" the class and appoints class counsel.[9] Courts are instructed to rule on class certification "[a]t an early practicable time" — a flexible standard that could permit class certification motions to be filed after discovery is closed, or even after summary judgment motions are adjudicated.[10] A class can be certified solely "for purposes of settlement."[11]

To obtain class certification, the plaintiffs must prove each of the prerequisites set out in Rule 23(a).[12] Plaintiffs must show that (1) there are numerous members of the class, (2) class members share common questions of law or fact, (3) the class representative's claims are typical of the class, and (4) "the representative parties will fairly and adequately protect the interests of the class."[13] The plaintiffs must also prove that the case falls within one of the three types of class actions permitted under Rule 23(b). The most common type of class action is where money is sought for the class, and "the questions of law or fact common to class members predominate over any questions affecting only individual members."[14] Class actions often involve allegations that an entire class was unlawfully harmed by improper conditions of employment, consumer fraud, violations of securities laws, or violations of antitrust laws.[15]

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[9] *See* Fed. R. Civ. P. 23(c)(1), 23(g)(1).

[10] Fed. R. Civ. P. 23(c)(1); *see also* Committee Notes on Rules — 2003 Amendments.

[11] Fed. R. Civ. P. 23(e).

[12] *See also Wal-Mart*, 564 U.S. at 350-51 ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule").

[13] *See* Fed. R. Civ. P. 23(a)(1)-(4).

[14] *See* Fed. R. Civ. P. 23(b)(3). Class actions can also be appropriate where separate actions would risk imposing incompatible standards of conduct on the defendant, separate actions would prejudice the interests of parties not present, or where the entire class would benefit from an injunction. *See* Fed. R. Civ. P. 23(b)(1), (2).

[15] *See* Carlton Fields, *2023 Carlton Fields Class Action Survey; Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* (2023) at 8, *available at* https://www.carltonfields.com/insights/class-action-survey (last visited Jan. 23, 2024).

Class counsel must attempt to notify class members when a class is certified.[16] This allows the absent class members to protect their rights. For example, class members usually have the right to "opt out" of the class so that they can pursue their own claims (if they so choose), without being bound by the eventual judgment in the class proceedings.[17]

Many class actions settle (and as discussed below, settlements are far, far more common than trials). Settlement starts with an agreement between the defendant and class counsel.[18] In a typical classwide settlement, class counsel agree, on behalf of all class members, to dismiss the claims with prejudice in exchange for a sum of money.[19] Unlike most settlement agreements, a settlement that resolves the claims of a certified class requires court approval.[20] The settling parties (as a practical matter, class counsel with the defendant's consent) ask the court for preliminary approval of the settlement.[21] If the court so approves, class counsel will proceed to notify class members of the settlement and its terms, and provide them with the opportunity to object.[22] Class counsel will also seek to be awarded their fees and expenses from the settlement

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[16] *See* Fed. R. Civ. P. 23(c)(2).

[17] *See* Fed. R. Civ. P. 23(c)(2)(B)(v).

[18] In cases with multiple defendants, a settlement agreement could relate to some defendants but not others (who might then settle at a later date). But the basic mechanics of settlement are the same, so for the sake of simplicity we'll discuss settlement in the context of a single-defendant case.

[19] Other kinds of settlements are of course possible. Many cases originally brought as class actions settle without a class ever being certified. In those instances, the putative class members (the people who would have been class members had a class been certified) receive no remedies, but they are not bound by the settlement and are free to refile their claims. Such settlements do not involve court oversight. *See* Fed. R. Civ. P. 23 advisory committee notes on 2003 Amendment (Rule 23(e) amended to clarify that court approval was not needed for "settlements with putative class representatives that resolved only individual claims").

A settlement might include injunctions or other equitable relief, in addition to or instead of money. Indeed such equitable relief is the primary remedy sought for classes certified under Rule 23(b)(2).

[20] *See* Fed. R. Civ. P. 23(e).

[21] *See* Fed. R. Civ. P. 23(e)(1)(A).

[22] *See* Fed. R. Civ. P. 23(e)(1)(B), (e)(5)(A).

funds, and will so notify the class.[23] And although no rule addresses incentive awards, class counsel typically also request that the court authorize these payments to the class representatives.

Following notice to the class, the court will conduct a "fairness hearing" at which objectors can be heard.[24] The court will then approve the settlement if it is "fair, reasonable, and adequate."[25] The court will also rule on class counsel's requests for fees, expenses, and incentive awards. This will end the case, apart from any appeals, or any issues arising from the disposition of the settlement funds.

B. Incentive Awards, and Their Frequency and Size

After a class-action settles, all class members, named and unnamed alike, may be entitled to a pro rata share of the proceeds. An "incentive award," also sometimes labeled a "service award," reflects a payment to a class representative that is in addition to the representative's pro rata share.

Empirical studies show: (1) incentive awards are commonplace, and (2) incentive awards are typically many times the size of the recovery of the average class member.

(1) <u>The Frequency of Incentive Awards</u>

Courts and commentators believe that "such awards are commonplace in modern class-action litigation."[26] The available data support this assessment, and show that incentive awards have become increasingly pervasive in recent years.

A 1996 study of class actions filed in four district courts found that incentive awards were common in all four districts, with the frequency varying from one district to the next: "the

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[23] *See* Fed. R. Civ. P. 23(h)(1).

[24] *See* Fed. R. Civ. P. 23(e)(2).

[25] *See* Fed. R. Civ. P. 23(e)(2). *See also* Fed. R. Civ. P. 23(h)(2), (3) (procedure for approving class counsel's fee applications).

[26] *See*, *e.g.*, *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244, 1260 (11th Cir. 2020).

percentages [of settlements] that included such awards were 26%, 46%, 40%, and 37%."[27] A "study of 374 opinions from 1993 to 2002" came to a lower rate: "awards were granted in about 28% of settled class actions."[28] But rates have skyrocketed since then. A study of "1,200 class actions resolved between 2006-2011" concludes that incentive awards were awarded in 71.3% of class actions.[29] Even within this latter study period the trend of increasing numbers of awards was pronounced, rising to "nearly 80% of all cases (78.6%) by 2011."[30]

Similar results were seen in a study of cases deemed "no injury" class actions. Out of "432 cases resolved between 2005-2015," "it was possible to determine the incentive award" in 303 cases (70% of all cases studied).[31]

(2) The Size of Incentive Awards

There is tremendous variation in the size of incentive awards. Based on four studies summarized in Appendix A, the median award seems to be in the range of $3,000-$5,000. *See also* McLaughlin on Class Actions, § 6.28 & n. 4 (citing 16 cases in which the amount of incentive awards is specified; awards range from $1,000 to $55,000; the median amount awarded in this sample is $5,000). Some awards are higher.[32]

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[27] Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L Rev. 74, 101 (1996).

[28] Theodore Eisenberg and Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1303 (Aug. 2006).

[29] William B. Rubenstein, 5 *Newberg and Rubenstein on Class Actions* § 17:7 (6th Ed.) (Nov. 2023 update).

[30] *Id.*

[31] Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions*, Emory University School of Law Legal Studies Research Paper Series, Research Paper No. 16-402 (Apr. 8, 2016) at pp. 1, 19, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905 (last visited Feb. 14, 2024).

Professor Shepherd classified cases as "no injury" if there was no harm, negligible economic harm, or "if the only harm was a technical statutory violation." *Id.* at 1. Laws frequently invoked in such cases include the Fair Debt Collection Practices Act and the Telephone Consumer Protection Act (which penalizes unwanted phone calls, faxes, and texts). *See id.* at 2, 13 & Figure 2.

[32] *See*, *e.g.*, *In re Namenda Direct Purchaser Antitrust Litig.*, 2020 WL 3170586, at *2 (S.D.N.Y. June 6, 2020) (awarding $75,000 to each of the two representative plaintiffs).

Unlike attorney fees (see discussion below), incentive awards are seldom a significant portion of the settlement fund.[33] "Incentive awards, however, are still significantly larger than the typical pro rata recovery in a consumer class action."[34] Indeed, while incentive awards are almost always measured in the thousands of dollars, the amount allocated to a class member is typically measured in the hundreds, if that. *See* Appendix A. For example, Professors Eisenberg and Miller found that the median incentive award was over four thousand dollars, which is over nine times the median recovery per class member (as determined by the same study).[35]

There are no formulas providing any real guidance on how big an incentive award should be. A number of multi-factor tests have emerged in the case law, instructing district courts regarding what issues can be considered. But these tests provide no ability to actually calculate a number, nor any means of determining whether, for example, a "fair" award would be $5,000, $20,000, or some other number.[36] The Second Circuit held that "calculation of such an award is standardless," and that "the decision to grant the service award, and the amount thereof,

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[33] *See* Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1303 (Aug. 2006) ("When given, incentive awards constituted, on average, 0.16 percent of the class recovery, with a median of 0.02 percent.").

[34] Jason Jarvis, *A New Approach to Plaintiff Incentive Fees in Class Action Lawsuits*, 115 Nw. U. L. Rev. 919, 930 (2020).

[35] Theodore Eisenberg and Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1319, 1333-34, 1350 & Appendix Table 1 (Aug. 2006).

[36] The test in the Ninth Circuit, for example, is as follows:

> "An incentive payment cannot be so large that it amounts to a preferred position in the settlement or a salary. Thus, district courts must … consider[], among other factors, the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort the plaintiff expended in pursuing the litigation, and any financial or reputational risks the plaintiff faced."

In re Apple Inc. Device Performance Litig., 50 F.4th 769, 786 (9th Cir. 2022) (quotation marks and citation omitted).

See also William B. Rubenstein, 5 *Newberg and Rubenstein on Class Action* § 17:13 (6th ed.) (setting out tests from the Seventh Circuit, California, and New York).

rests solely within the discretion of the [District] Court."[37] The lack of any quantitative metrics (and the ability of class counsel to identify other cases where generous awards were authorized) explains cases such as *Namenda*. There, the two named plaintiffs who "made only a minimal contribution to the prosecution of the case" each received $75,000 despite the court's view that "this was attorney-driven litigation," and "[a]ll the class representatives really did was sit for a deposition."[38]

In practice, class counsel will propose a round number without any quantitative explanation of how they arrived at the number. At times courts reject or reduce the award due to lack of substantiation,[39] but these instances are rare. Likely as a result of the standardless nature of the inquiry, "[n]early all incentive awards end in three zeroes: $5,000, $10,000, and so on."[40]

C. The Judicial Invention of Incentive Awards

No rule of civil procedure addresses incentive awards. The only relevant statute prohibits them in securities-law class actions. The award of incentive fees is contrary to the traditional rules of equity, as set out by the Supreme Court in the 19th century *Greenough* and *Pettus* decisions.[41] The caselaw permitting incentive awards in modern class action litigation reflects nothing more than lower courts' policy preferences.

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[37] *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 721-22, 723 (2nd Cir. 2023) (quotation marks and citation omitted).

[38] *In re Namenda Direct Purchaser Antitrust Litig.*, 2020 WL 3170586 at *2. In authorizing so much, the judge noted that the request was $150,000 (which she cut in half), and that "like amounts have been awarded in similar cases." *Id.* And although she did not say so, she might also have been influenced by the fact that the class recovered a gargantuan $750 million. *See id.* at *1.

[39] *See Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340, 353-354 (1st Cir. 2022) (collecting cases); *Chieftan Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455, 467-69 (10th Cir. 2017).

[40] Jay Tidmarsh and Tladi Marumo, *Good Representatives, Bad Objectors, and Restitution in Class Settlements*, 48 B.Y.U. L. Rev. 2221, 2247 (2023).

[41] *Trustees v. Greenough*, 105 U.S. 527 (1881); *Central RR & Banking Co. of Ga. v. Pettus*, 113 U.S. 116 (1885).

1) <u>The Traditional Rule In Equity: *Greenough and Pettus*</u>

The era modern class action is generally viewed as beginning in 1966, when Federal Rule of Civil Procedure 23 was overhauled.[42] But "common fund" cases, similar in nature to class actions, predate Rule 23 by decades.

Greenough, decided in 1881, was one such case. A bondholder of the Florida Railroad Company sued the company, alleging that its trustees were syphoning away the company's assets to the detriment of the bondholders. The suit was very successful. It recovered "large sums of money" and "saved from spoliation … over ten millions of acres" that would otherwise have been sold as part of a fraudulent scheme.[43] And it was not just the named plaintiff who benefitted from his lawsuit: "dividends have been made amongst the bondholders, most of whom came in and took the benefit of the litigation."[44]

The *Greenough* court made two holdings relevant here. First, "a party who recovers a fund for the common benefit of creditors is entitled to have his costs and expenses paid out of the fund."[45] This recovery includes "counsel fees" and "expenses incurred in the fair prosecution of the suit."[46]

Second, the Supreme Court put a limitation on recoveries from common funds. Allowances for "personal services" were deemed "decidedly objectionable."[47] The Court explained:

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[42] S. Rep. No. 109-14 at 6 (2005) (CAFA) ("the concept of class actions that are a familiar part of today's legal landscape did not arise until 1966, when Rule 23 was substantially amended to expand the availability of the device").

[43] *Greenough*, 105 U.S. at 530.

[44] *Id.* at 529.

[45] *Id.* at 534.

[46] *Id.* at 537.

[47] *Id*.

> It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time.[48]

In modern parlance, it is contrary to public policy to incentivize professional plaintiffs to bring suit.

A few years after *Greenough*, the Supreme Court repeated its holding in *Pettus*.[49]

Neither *Greenough* nor its first holding (allowing for the payment of attorney fees in common-fund cases) is a forgotten relic. In 1980 the Supreme Court recognized *Greenough* as the lead case on the issue of common-fund attorney fees,[50] and the Court relied on *Greenough* again in 2013.[51] In all, *Greenough* has been cited by 1,024 cases, including 12 in the year 2023.[52]

Greenough's second holding, that named plaintiffs are not allowed a service award, was forgotten for over a century. And the Supreme Court has not returned to the subject of incentive awards, other than in two oblique references.[53]

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[48] *Id.* at 538.

[49] *Pettus*, 113 U.S. at 122.

[50] *See Boeing Co. v. Van Gemert*, 444 US 472, 479 (1980).

[51] *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100, 104 (2013).

[52] As shown by Westlaw (last visited Feb. 14, 2024). *See also*, *e.g.*, *In re Wawa, Inc. Data Sec.*, 85 F.4th 712, 716 & n. 2 (3d Cir. 2023) ("The idea of a 'common fund' traces back to the Supreme Court's decision in [*Greenough*].").

[53] A reference to incentive awards appears in a footnote in *China Agritech*, which is best viewed as making a factual statement about how class actions are administered, rather than a holding that incentive awards are authorized or beneficial. *China Agritech, Inc. v. Resh*, 584 U.S. 732, 747 & n. 7 (2018) ("The class representative might receive a share of class recovery above and beyond her individual claim."). The case itself focused on the extent to which a pending class action tolled statutes of limitations related to the claims of unnamed class members.

Similarly, in *Frank v. Gaos*, the Court had granted certiorari in order to review the approval of a "cy pres" settlement. The Court remanded the case to determine whether the plaintiffs had standing, making no holdings of any kind regarding class-action settlements, but mentioning in passing that the settlement agreement contained an incentive payment. *Frank v. Gaos*, 586 U.S. —, 139 S.Ct. 1041, 1045 (2019).

2) <u>The Lower Courts' General Acceptance of Incentive Awards</u>

As discussed above, the data show that incentive awards are allowed in the vast majority of class-action settlements. While courts sometimes balk at specific awards, until recently there was little debate that awards would be allowed where fair and equitable. One treatise speaks of the "near-universal recognition that it is appropriate for the court to approve an incentive award payable from the class recovery …."[54]

But although a caselaw developed regarding how to determine the "fairness" of an incentive award, "as of June 2020, no court had addressed its authority to approve incentive awards head on."[55] Rather, the reasons for making an award were discussed in pragmatic terms, such as in this leading case from the Seventh Circuit:

> Since without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable.[56]

3) <u>*NPAS*: The Eleventh Circuit's Rejection of Incentive Awards</u>

In *NPAS*, the Eleventh Circuit was presented with objections to a settlement that was "just like so many others that have come before it."[57] And that, the majority of the panel declared, is "exactly the problem." The approval of the settlement "repeated several errors" that "have become commonplace in everyday class-action practice."[58] One such error was the award of an incentive fee.

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[54] 2 McLaughlin on Class Actions § 6:28 (20th ed.).

[55] *NPAS*, 975 F.3d at 1265 (Martin, J. dissenting).

[56] *In re Cont'l. Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992), *as amended on denial of reh'g* (May 22, 1992).

[57] *NPAS*, 975 F.3d at 1248.

[58] *Id.*

The *NPAS* decision reviewed *Greenough* and *Pettus*, and held that those opinions remained binding precedent. The widespread allowance of incentive awards was deemed to be "a product of inertia and inattention, not adherence to law. The uncomfortable fact is that the judiciary has created these awards out of whole cloth."[59] The majority in *NPAS* held that the incentive award before it was "part salary and part bounty," and prohibited by *Greenough* and *Pettus* under either rationale.[60]

4) <u>*NPAS'* Critics</u>

The majority opinion in *NPAS* did not go unchallenged. It drew a dissenting opinion, and another dissent (two years later) when the Eleventh Circuit denied a petition for rehearing.[61] Courts outside the Eleventh Circuit did not follow *NPAS*.[62] One Second Circuit panel thought that "[s]ervice awards are likely impermissible under Supreme Court precedent," but the court's hands were tied by intervening Second Circuit precedent.[63] Another Second Circuit panel[64] was much more enthusiastic in rejecting *NPAS*, as were decisions in the First and Ninth Circuits.[65] Law review articles and notes also lined up against *NPAS*.[66]

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[59] *Id.* at 1259.

[60] *See id.* at 1258-59.

[61] *See NPAS*, 975 F.3d at 1264-69; *Johnson v. NPAS Solutions, LLC*, 43 F.4th 1138, 1139-53 (Jill Pryor, J., dissenting from the denial of rehearing en banc).

[62] The dissent from denial of rehearing noted that "since the majority opinion in this case issues, every court outside this circuit to have considered it has declined to follow it." *NPAS*, 43 F.4th at 1139 & n. 2 (collecting cases).

[63] *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 721 (2d Cir. 2023).

[64] *See Moses v. The New York Times Co.*, 79 F.4th 235, 253-56 (2d Cir. 2023).

[65] *See Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340, 352-54 (1st Cir. 2022); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785-87 (9th Cir. 2022).

[66] *See* Benjamin Gould, *On the Lawfulness of Awards to Class Representatives*, 2023 Cardozo L. Rev. de novo 1 (2023), *available at* https://cardozolawreview.com/on-the-lawfulness-of-awards-to-class-representatives/ (last visited Feb. 13, 2024); Jay Tidmarsh and Tladi Marumo, *Good Representatives, Bad Objectors, and Restitution in Class Settlements*, 48 BYU L. Rev. 2221, 2222 (2023), *available at* https://digitalcommons.law.byu.edu/lawreview/vol48/iss7/8 (last visited Feb. 13, 2024); Christie Shaw, *Penny Pinchers of Conflict-Free Crusaders? Why the Eleventh Circuit Eliminated Service Awards for Class-Action*

There is of course some variation in rationales. But generally, it was thought that "historical developments … appear[] to have left *Greenough* and *Pettus* in the rear view."[67] Modern class actions, the argument goes, are governed by the intricate mechanisms of Rule 23 and just aren't analogous to 19th century common-fund cases. "*Greenough* and *Pettus* have been superseded, not merely by practice and usage, but by Rule 23, which creates a much broader and more muscular class action device than the common law predecessor that spawned the nineteenth-century precedents."[68]

At bottom, the rejection of *Greenough* and *NPAS* was driven by policy concerns that were based on unwarranted and unexamined assumptions: the assumed desirability of class actions as "the most effective way to hold corporations accountable," the assumption that disallowing incentive awards "will have a very real and detrimental impact on class actions," an assumption that it was the job of the courts to set rules encouraging the filing of class actions, and the assumption that without incentive awards "[t]he public will be the ultimate loser from this undermining of class actions as an important tool for protecting consumers."[69]

As discussed at length below, the actual empirical data debunks these assumptions.

D. Congress' Attempts to Curb Abusive Class-Action Litigation

Congress has enacted two major statutes that directly address class actions: the Private Securities Litigation Reform Act of 1995 ("PSLRA"),[70] and the Class Action Fairness Act of

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Representatives, 100 N.C. L. Rev. 1293 (May 2022), *available at* https://scholarship.law.unc.edu/nclr/vol100/iss4/7 (last visited Feb. 13, 2024).

[67] *Moses*, 79 F.4th at 255.

[68] *Id.* at 254.

[69] *NPAS*, 43 F.4th at 1151-52 (dissent from denial of rehearing).

[70] Public Law 104-67.

2005 ("CAFA").[71] Congress recognized that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties …."[72] But both statutes were enacted because Congress saw a need to crack down on abusive class-action practices — including incentive awards.

(1) PSLRA — Congress Prohibits Incentive Awards and Other Perceived Abuses in Securities Class Actions

PSLRA's "twin goals," according to the Supreme Court, are "to curb frivolous, lawyer-driven litigation, while preserving investors' [class members'] ability to recover on meritorious claims."[73] PSLRA focuses specifically on securities lawsuits, and thus is not binding in other kinds of class actions.[74] But securities cases are not all that different from other class actions, so Congress' policies and concerns should command attention when setting policy applicable to class actions generally.

Within the confines of securities cases, Congress banned incentive awards: "The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class."[75] Consistent with *Greenough*,[76] Congress permitted class representatives to recover their "reasonable costs and expenses (including lost

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[71] Public Law 109-2.

[72] Pub. Law 109-2 § 2(a)(1) (CAFA formal findings); *see also* S. Rep. No. 104-98 at 6 (1995) (PSLRA intends "to encourage plaintiffs' lawyers to pursue valid claims … and to encourage defendants to fight abusive claims").

[73] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

[74] *See* 15 U.S.C. §§ 77z-1, 78u-4 (limiting scope of class-action provisions to actions brought under the securities laws).

[75] 15 U.S.C. §§ 77z-1(a)(4), 78u-4(a)(4). These provisions were enacted through a section of the statute that was titled "Reduction of Abusive Litigation." Pub. Law 104-67, Title I, § 101.

[76] *Greenough*, 105 U.S. 527.

wages)."[77] But class representatives may not be given awards to incentivize further litigation, to compensate them for time and effort incurred, or in recognition of any risks taken.

Congress' explanation of this provision in the accompanying the senate report does not cite to *Greenough*. But the rationale is very similar:

> The proliferation of "professional" plaintiffs has made it particularly easy for lawyers to find individuals willing to play the role of the wronged investor for purposes of filing a class action lawsuit. Professional plaintiffs often are motivated by the payment of a "bonus" far in excess of their share of any recovery.
>
> The Committee believes that lead plaintiffs are not entitled to a bounty for their service.[78]

This ban on incentive awards was in furtherance of one of the primary goals of PSLRA: "to empower investors so that they — not their lawyers — exercise primary control over private securities litigation."[79] Because "professional" plaintiffs are so readily available to class counsel:

> … investors in the class usually have great difficulty exercising any meaningful direction over the case brought on their behalf. The lawyers can decide when to sue and when to settle, based largely on their own financial interests, not the interests of their purported clients.[80]

2) CAFA — Further Efforts to Curb Abusive Class Actions

CAFA did not address incentive awards. But Congress held deep reservations regarding how the class-action device was being used, including policy concerns relevant to the discussion about incentive awards.

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[77] 15 U.S.C. §§ 77z-1(a)(4), 78u-4(a)(4).

[78] S. Rep. No. 104-98, at 10 (1995).

[79] *Id.*

[80] *Id. See also id.* (lawsuits resulting from "professional plaintiffs" who "stand ready to lend their names to class action complaints" "represent a 'litigation tax'" on businesses).

Congress wanted to "assure fair and prompt recoveries for class members with legitimate claims."[81] But at the same time Congress decried the "abuses of the class action device" that have "harmed class members with legitimate claims and defendants that have acted responsibly," and that thereby "undermined public respect for our judicial system."[82]

The Senate Report accompanying CAFA detailed some of the problems plaguing modern class-action practice. One concern, in common with the motivations for PSLRA, was that "the lawyers who bring the lawsuits effectively control the litigation …. the clients are marginally relevant at best."[83] Class actions were often unfair to class members: "Lawyers receive disproportionate shares of settlements."[84] Some settlements were coercive, and unfair to defendants (a concern that had also that motivated PSLRA).[85] Aggregating the class members' individual claims can allow for staggering high damages claims. This "unbounded leverage" can allow class counsel to use lawsuits as "judicial blackmail."[86] "Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling — rather than litigating — frivolous lawsuits."[87] "Not surprisingly, the ability to exercise unbounded leverage and the lure of huge attorneys' fees have led to the filing of many frivolous class actions."[88]

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[81] Pub. Law 109-2, § 2(b)(1) (formal purposes of CAFA).

[82] Pub. Law 109-2, § 2(a)(2)(A), (C) (CAFA formal findings).

[83] S. Rep. No. 109-104, at 4 (2005).

[84] *Id.* at 14.

[85] *See* S. Rep. No. 104-98, at 9 (1995) ("Most defendants in securities class action lawsuits choose to settle rather than face the enormous expense of discovery and trial. … These cases are generally settled based not on the merits but on the size of the defendant's pocketbook.").

[86] S. Rep. No. 109-14, at 20 (2005).

[87] *Id.*

[88] *Id.* at 21.

Having provided the backdrop, this article will now take a deep dive into the policy arguments relating to incentive awards, using the available evidence to analyze how theoretical hypotheses play out in the real world. In the next sections of this article, we will examine whether incentive awards actually achieve their goal of increasing filings, what benefits and harms would result from an incremental increase in such filings, and the pitfalls arising from a deliberate distortion of class representatives' economic incentives.

II. INCENTIVE AWARDS DON'T ACTUALLY INCENTIVIZE CLASS-ACTION LITIGATION

Proponents of incentive awards assume that these awards in fact incentivize potential class representatives, and that the absence of awards would dramatically reduce the number of class action filings. Such concerns were voiced in both dissents in the *NPAS* case. Judge Martin, dissenting from the merits decision, "expect[ed] potential plaintiffs will be less willing to take on the role of class representative in the future."[89] Judge Pryor, dissenting from the denial of rehearing *en banc*, gave a starker warning: "The stakes are high. … [The] banning [of] all incentive awards in class actions … threatens the very viability of class actions in this circuit."[90] Similar predictions appear in scholarly works.[91]

There's a surface appeal to these arguments. At a very broad level of generality, if an activity becomes unprofitable, fewer people will want to do it. Further, as shown by the

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[89] *NPAS*, 975 F.3d at 1264 (Martin, J. dissenting).

[90] *NPAS*, 43 F.3d at 1140 (Pryor, J. dissenting from denial of rehearing en banc); *accord id.* at 1152 ("I expect that it will have a very real and detrimental impact on class actions in this circuit").

[91] *See* Jay Tidmarsh and Tladi Marumo, *Good Representatives, Bad Objectors, and Restitution in Class Settlements*, 48 B.Y.U. L. Rev. 2221, 2222 (2023) ("*Johnson* [*v. NPAS*] might lead to fewer class actions, for most people would be willing to assume the burdens of representing a class without payment for their efforts"); Christie Shaw, *Penny Pinchers of Conflict-Free Crusaders? Why the Eleventh Circuit Eliminated Service Awards for Class-Action Representatives*, 100 N.C. L. Rev. 1293, 1293 (May 2022) (*NPAS* "will lead to a decrease in willingness as class representative, and attorneys may prefer to bring claims in other, incentive-award-friendly locations rather than the Eleventh Circuit);

empirical studies summarized in Appendix A, a class member's *pro rata* share of a class action settlement tends to be a few hundred dollars, and often less — hardly enough to make worthwhile the aggravation and effort involved in being a class representative without the encouragement of an incentive award.

But the empirical data shows no such effect.

The *NPAS* decision creates a natural experiment. *NPAS* prohibited incentive awards in the Eleventh Circuit but not elsewhere. If the viability of class action litigation depends on incentive awards, then one would expect class-action filings to plummet in the Eleventh Circuit. Of course many factors could conceivably affect filings: legal developments, economic conditions, responses to the then-ongoing COVID-19 epidemic, etc. But the courts outside of the Eleventh Circuit, which did not follow *NPAS*, can act as a control group. The hypothesis to be tested, therefore, is that after *NPAS* filings in the Eleventh Circuit fall both (a) precipitously, and (b) in a markedly different pattern from the trend outside the Eleventh Circuit. This hypothesis is disproved by the data.

The necessary data can be found in Westlaw's database of federal dockets, which specifically identifies class action complaints. The panel decision banning incentive awards in the Eleventh Circuit was issued on September 17, 2020. Before then, "such awards [were] commonplace."[92] Plaintiffs' petition for rehearing en banc was pending for almost two years; the denial of that petition, and the issuance of the Eleventh Circuit's mandate, did not occur until August 3, 2022.[93] The timeline can therefore be divided into three periods: (1) before the panel

[92] *NPAS Solutions, LLC*, 975 F.3d at 1260 ("Although it's true that such awards are commonplace in modern class-action litigation, that doesn't make them lawful").

[93] *NPAS*, 43 F.4th 1138 (11th Cir. 2022).

decision in *NPAS*; (2) between the panel decision and the denial of rehearing en banc; and (3) after the denial of rehearing en banc.

For the six quarter-years preceding the *NPAS* panel decision,[94] on average 409 class-action complaints were filed per quarter in district courts within the Eleventh Circuit.[95] For the seven quarters between the panel decision and the denial of the petition for rehearing, class-action filings within the Eleventh Circuit dropped to (on average) 286 per quarter, which is 70% of the pre-*NPAS* period. However, class-action filings also dropped *outside* the Eleventh Circuit, where *NPAS* had no effect.[96] During the same time period, class-action filings in the First through Tenth Circuits dropped to 87% of the pre-*NPAS* period. So we know that factors other than *NPAS* and incentive awards were causing filings to drop everywhere. While the drop was more pronounced in the Eleventh Circuit, data from more recent time periods indicates that in the long term *NPAS* had no discernible effect.

The Eleventh Circuit denied rehearing of the *NPAS* decision in the third quarter of 2022. *NPAS*' holding then became permanent, and at this point the case had gathered considerable attention.[97] One would expect, if incentive awards significantly incentivized class-action filings, that such filings would fall further. But the opposite happened — average quarterly class-action filings in the Eleventh Circuit ***rose*** from 286 per quarter to 342. And Eleventh Circuit filings were rising while filings elsewhere were slightly down. For the five quarters following the

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[94] The first quarter of 2019 through the second quarter of 2020. The panel decision was issued in the third quarter of 2020.

[95] Quarter-by-quarter results, along with the exact methodology, are reported in Appendix B.

[96] Eleventh Circuit decisions of course do not bind courts outside of the circuit. Furthermore, there was no change of law in other circuits. Courts outside of the Eleventh Circuit either disagreed with *NPAS*, (*e.g. Murray*, 55 F.4th at 352-354 (1st Cir. 2022), or felt that binding precedent prevented them from following *NPAS*. *See Fikes Wholesale*, 62 F.4th at 721-22.

[97] There were five amicus briefs addressed to the petition for rehearing. *See NPAS*, 43 F.4th 1138.

denial of the rehearing petition, Eleventh Circuit filings were at 84% of the pre-*NPAS* period, essentially the same rate as filings in the First through Tenth Circuits (86% of the pre-*NPAS* period).

In sum, comparing the pre-*NPAS* filing rate to the rate experienced after the *NPAS* mandate issued, the Eleventh Circuit showed the same trendline as the rest of the country: filings were down, but not precipitously, with no reason to attribute the decline to the *NPAS* decision.

It remains possible that the *NPAS* holding had some slight, incremental effect on filings. But the actual empirical data shows, with a great deal of confidence, that that the class-action device will continue to thrive, with or without incentive awards.

III. DO WE WANT MORE CLASS-ACTION LITIGATION? THE LIMITED UPSIDE OF INCREASED LITIGATION, AND ITS COST

Let's assume that incentive awards do have some incremental effect on class-action filings. That leads to the next question: Do we ***want*** to incentivize additional class-action lawsuits? Is this a worthwhile goal to pursue?

Policy arguments in favor of class actions generally focus on the need to deter wrongdoing, and to provide compensation to victims of wrongdoing whose individual claims are too small to make an individual (non-class) lawsuit worthwhile. As Judge Posner famously stated in the *Carnegie* case, where a defendant was alleged to have cheated 17 million consumers out of $15 to $30 each, the "*realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[98]

[98] *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.).

But just because a class action ***can*** be pursued on behalf of 17 million people, it does not mean we ***want*** to encourage more such suits. Using *Carnegie* as an anecdote to illustrate the statistical information, we see many of the limits and downsides of class actions. In *Carnegie*, the parties litigated for eight years before finally settling. Less than 2% of the 17 million putative class members received money. If one believes class counsel's allegations, the class settled for far less than its damages. But, as all but admitted by class counsel, their claims were probably not meritorious. So at the end of the day the defendants had to pay significant amounts of money to get rid of (probably) false accusations — while class counsel received millions of dollars, the class representative received thousands, a tiny fraction of the class got $80.68 each, and the rest of the class received nothing.

The empirical data shows that this kind of outcome is extremely common.

A. Most Class Action Lawsuits Are Terrible At Providing Compensation For Injured Class Members.

When enacting PSLRA, Congress' view was that the "'victims' on whose behalf [class-action] lawsuits are allegedly brought often receive only pennies on the dollar in damages."[99] It's actually worse than this. Here's why.

(1) Almost All Compensation to Class Members Comes From Settlements, In Amounts Lower Than What Plaintiffs Claim As Damages

In theory, a class action could proceed to a trial, where the jury would determine liability, and make a damages award in an amount calculated to fully compensate all class members. But this almost never happens.

A number of studies, summarized in Appendix C, analyze the frequency of various outcomes of class-action cases. One study reported than ***none*** of the cases analyzed resulted in

[99] S. Rep. No. 104-98, at 9 (1995).

trial.[100] The most comprehensive of the studies (although the oldest), indicated that there were trials in 3% of the cases analyzed[101] — but "plaintiffs did not fare well at trial. Except for one default judgment that led to a class settlement, no trial resulted in a final judgment for a plaintiff class."[102] The scarcity of class-action trials is consistent with statistics regarding litigation generally. In 2023, the typical federal judge terminated about 575 cases while conducting about 15 trials.[103]

Many cases settle: the studies summarized in Appendix C show that between 12% and 33% of cases filed as class actions terminate with a class settlement. A settlement, however, is a compromise. Both sides face the risk of an adverse judgment, and a settlement almost always requires both parties to accept a result that takes this risk into account. Class counsel, on behalf of the class, will therefore typically accept substantially less money than they believe the class is properly owed.

For example, in *Carnegie*, the plaintiffs presented expert testimony that the class suffered damages of $93 million, which (if accepted by a jury) would have yielded an award of $279 million under RICO's automatic trebling provisions. Plaintiffs settled for $39 million.[104]

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[100] Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013) at 4 & figure 2.

[101] *See* Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, A*n Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L Rev. 74, 179 (Apr.-May 1996). Table 1 of this study reports 7 judgments following a jury trial, 3 judgments following a bench trial, and 1 default judgment, and these 11 matters constitute about 3% of the cases reported in this chart that reached a final resolution.

[102] *Id.* at 152.

[103] United States Courts, *United States District Courts — Combined Civil and Criminal Federal Court Management Statistics (December 31, 2023)* at 1, *available at* https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2023/12/31-1 (last visited Feb. 26, 2024). This statistic actually overestimates the likelihood of a trial on the merits, since "trials" is defined to include hearings on temporary restraining orders and preliminary injunctions. *See* United States Courts, *Explanation of Judicial Caseload Profiles; District Courts*, *available at* https://www.uscourts.gov/statistics-reports/federal-court-management-statistics-december-2023 (last visited Feb. 26, 2024).

[104] *Carnegie v. Household Int'l, Inc.*, 445 F.Supp.2d 1032, 1034, 1036 (N.D. Ill. 2006).

Similarly, in *NPAS*, the plaintiffs asserted a claim for statutory damages of $500 for each violation, and settled for $7.97 per class member.[105]

(2) Many Settlements Do Not Benefit Any Unnamed Class Members

In many class actions, the named plaintiff dismisses the action without obtaining class certification. Any dismissal that does not involve a certified class does not provide any compensation to any member of the class beyond the named plaintiff. Such dismissals could reflect any number of scenarios: the plaintiff may have simply given up, there may have been a nominal or so-called "nuisance" settlement payment to get rid of a junk claim, or there could have been a settlement reflecting an assessment that the named plaintiff had a strong case on the merits but a poor chance of obtaining class certification. Or there could have been a meritorious class claim, with class counsel accepting a substantial payment for (in effect) agreeing to refrain from seeking compensation for the class.

All four studies summarized in Appendix C indicate that non-class settlements together with other individual dismissals are more common than class settlements.[106] In other words, the class received nothing even in a majority of the cases that the named plaintiff *agreed* to dismiss.

[105] *NPAS*, 975 F.3d at 1249, 1251.

[106] The 2003 amendments clarify that there is no need to disclose individual settlements (i.e. settlements that do not bind class members). After that date, in almost all cases the court file would contain a short notice of dismissal, but the reasons for the dismissal (and the terms of any settlement) would be known only by the parties.

The RAND study of insurance companies (*see* Appendix C) was a survey of defendants, so in that study — but not the more recent ones — voluntary dismissals can be distinguished from individual settlements.

(3) Before Settlements Funds Are Paid To Class Members, Attorney Fees and Other Expenses Are Deducted

A significant portion of settlement funds go to class counsel, rather than to class members. Studies show that class counsel fees consume around 21-30%[107] of the total,[108] although estimates range from 15%[109] to 38%.[110] In the Ninth Circuit, "the 'benchmark' fee award is 25%, which can be adjusted upward or downward based on the circumstances of the case."[111] Other courts have rejected a 25% benchmark, and make higher awards.[112] Costs can also consume a portion of the settlement fund.[113]

(4) Most Distributions of Settlement Funds Require Class Members To Submit A Written Claim; The Vast Majority Of Class Members Do Not, And As A Result Receive Nothing

Even where defendants provide substantial settlement funds, there is no benefit to class members unless the money is distributed to them. In a minority of cases compensation occurs through an "automatic distribution" or "direct payment" system. In cases featuring an automatic distribution, the claims administrator[114] determines the identity of the class members, calculates the amount owed each under the plan of distribution, and sends payment — all without requiring the involvement of the class members.

But these kinds of automatic distributions are often impossible, such as where there is no data that would establish who exactly is eligible for compensation (or in what amounts).[115] As a

[107] The following studies fell within this range:

Stephen J. Choi, Jessica Erickson, and Adam C. Pritchard, *Working Hard or Making Work? Plaintiffs' Attorney Fees in Securities Fraud Class Actions*, J. Empirical Legal Stud. 17, no. 3: 438-65 (2020) at 36 & Table 1 (the average fee varied depending on the size of the total settlement fund; for most cases average fee was between 23 and 28%, but for the cases resulting in the largest settlement funds the average fee was 18.5%).

Consumer Financial Protection Bureau, *Arbitration Study; Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March 2015) at § 8 p. 33 & Table 10 (attorneys fees average 21% of the cash relief, 16% if factoring in the stated value of free or discounted services included in some of the settlements).

Nicholas M. Pace, Stephen J. Carroll, Ingo Vogelsang, and Laura Zakaras, *Insurance Class Actions in the United States*, RAND Institute for Civil Justice (2007) at 54 ("our calculated fee and expense award percentages … ranged from 12 percent to 41 percent of the gross common fund, with a mean of 29 percent and a median of 30%").

Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, Cornell Law Faculty Publications, Paper 356 (2004) at 73 & Table 7 (the average fee varied depending on the size of the total settlement fund and on the data source; for smaller recoveries the median fee percent was 30%, and for the largest (recoveries over $190 million) 10.1%.

Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L Rev. 74, 155 (1996) ("Median rates ranged from 27% to 30%. Most fee awards in the study were between 20% and 40% of the gross monetary settlement.").

[108] Defining what precisely the "total" is can be a tricky concept. In many settlements defendants agree to pay specified amounts to every class members who submits a claim — but, as discussed below, most class members do not submit a claim form. As a result, the ultimate pay-out is much less than the potential stated in the settlement agreement, and counsel fees, expressed as a percentage of the money actually paid by the defendant, is much higher than calculated in most studies.

The law firm Jones Day published two White Papers that calculated payments to class counsel as a percentage of actual payments made by defendants in consumer fraud class actions. Jones Day, *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)* (Apr. 2020); Jones Day, *Update: An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2019-2020)*, (July 2021). "Class counsel received an average of 36.53% of settlement awards." Jones Day, *Update*.

The author is a partner at Jones Day, but did not participate in creating the cited White Papers.

[109] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, Journal of Empirical Legal Studies, Vol. 7, Issue 4, 811, 811 (Dec. 2010) (class counsel received about 15% of the total, but when fees were set through a percentage-of-the-settlement method, mean and median fees were "around 25 percent").

[110] Jones Day, *Update: An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2019-2020)* (July 2021) (26.53%); Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions*, Emory University School of Law Legal Studies Research Paper Series, Research Paper No. 16-402 (Apr. 8, 2016) at pp. 1, 20, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905 (The average percentage to class counsel in the 432 cases is 37.9 percent and the median is 30.9 percent).

[111] *In re Google Inc. St. View Elec. Commc'ns. Litig.*, 21 F.4th 1102, 1120 (9th Cir. 2021).

[112] *See Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1263-64 (10th Cir. 2023) (approving a 33% award, and citing "cases treating awards from 22% to 37.3% [as] reasonable").

[113] *See* Eisenberg, *Attorney Fees in Class Action Settlements* at 70 ("Costs and expenses … were, on average, 4 percent of the relief for the class").

[114] The claims administrator is generally a professional, hired by class counsel. The claims administrator, sometimes with the assistance of a notice administrator, undertakes the actual work of identifying class members, sending out notices (to inform and solicit claims form), reviewing claims, making the first assessment of which claims are valid, and paying out the money.

[115] Take, for example, a lawsuit against a manufacturer on behalf of consumers who purchased a product from an unaffiliated retailer, rather than directly from the defendant manufacturer. The manufacturer isn't likely to have records that could identify the members of the consumer class, and even if the manufacturer had a list of names, there might not be data that could establish when relevant purchases were made or in what quantities. By contrast, automatic distribution may be feasible where the defendant has a direct and ongoing relationship with the class members, such as where the class members are all beneficiaries of the same ERISA retirement plan. *See* Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013) at 12.

result, most cases use a "claims made" distribution process, where class members must file a claim to be eligible for compensation.[116]

And where a claims-made process is used, the rate of participation among class members is almost always dismal. The Federal Trade Commission (FTC), in a systematic study of this issue,[117] found that "the median calculated claims rate was 9%, and the weighted mean (*i.e.*, cases weighted by the number of notice recipients) was 4%."[118] Other researchers, though hampered by the limited nature of the available data, came to comparable results.[119] [120]

[116] In the most comprehensive study, the FTC identified 119 cases using a "claims made" process, as compared to only 30 cases where some or all class members received a direct payment without the need to submit a claim. Federal Trade Commission, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* (Sept. 2019) at 18 & Table 1.

Accord Consumer Financial Protection Bureau, *Arbitration Study; Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March 2015) at § 8 p. 20 & Figure 3 (63% of settlements including cash relief did not include automatic cash distribution); Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013) at 8-13 (identifying 18 claims-made cases, 13 automatic-distribution cases, and 9 cases where the only relief was injunctive or cy pres); Nicholas M. Pace, Stephen J. Carroll, Ingo Vogelsang, and Laura Zakaras, *Insurance Class Actions in the United States*, RAND Institute for Civil Justice at 55 (2007) (class members required to submit a written claim in 29 out of 36 cases).

[117] Most studies to examine this issue are based upon court files, but researchers uniformly report that most court records do not contain the necessary data. The FTC avoided this problem by issuing subpoena to major claims administrators.

[118] FTC, *Consumers and Class Actions* at 11.

[119] Jones Day, *Update* at 4 (finding an average take rate of 6.3%, and a median of 3.74%); Consumer Financial Protection Bureau (CFPB), *Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March 2015) at § 8 (average claims rate was 21%, the median was 8%, and the weighted average was 4%); Mayer Brown, LLP, *Do Class Actions Benefit Class Members* at 10 (in six cases where there was available data, finding claims rates of 0.000006%, 0.33%, 1.5%, 9.66%, 12%, and 98.72% (in a highly unusual case where the average class member's claim was $2.5 million)).

[120] There are a number of potential explanations for why claims rates are so low. An FTC survey of consumers indicates that a significant number of consumers receiving an emailed notice of settlement (a) did not understand that they were being offered compensation or a refund, (b) did not understand how to go about the next steps for obtaining compensation, (c) thought that the email was a scam, and/or (d) did not think that filing a claim was worth the effort. *See generally* FTC, *Consumers and Class Actions* at Chapter 3: Notice Study. The FTC found ways to improve upon the claims rate (*see id.*), but provided little hope that even best practices would yield a respectable claims rate. The real-world claims rate for emailed notices (3%) is even lower than the rates found in more expensive efforts to provide hard-copy packets (10%) or postcards (6%). *See id.* at 11.

In *Carnegie*, the settlement was entered into on behalf of 1,723,610 consumers. Only 309,092 people (about 18% of the settlement class) submitted claim forms.[121] Apparently 82% of the members of the settlement class did not obtain any compensation at all.[122]

The 18% claims rate in *Carnegie* is actually *better* than average. *NPAS*, with a claims rate of 5.3%, is more typical.[123]

(5) In Some Cases, Some Or All Of The Settlement Funds Are Given "Cy Pres" To Entities That Are Not Class Members

Where class members cannot be "identified through reasonable effort," or where "the amounts involved are too small to make individual distributions economically viable," some or all of the settlement payments will be distributed "cy pres" — meaning that the money will be given to a charity or other recipient who is not a member of the class, and who is not alleged to have been harmed by the defendant.[124] The Jones Day studies indicate that in consumer fraud class actions almost a quarter of settlement funds are paid to recipients other than class members or class counsel.[125]

Some cases solve this problem by distributing all money allocated to the class to those class members who file a claims form. For example, instead of giving every class member a set amount of money ($X per claimant, with the unclaimed funds reverting to the defendant or being

[121] *See Carnegie*, 445 F.Supp. 2d at 1034.

[122] Note that there is a large difference between the class as originally defined (estimated at 17 million consumers) and the settlement class (the settlement was reached on behalf of 1,723,610 identified consumers). It's unclear how many of the 17 million lost their case, and how many were never part of a certified class. The case was narrowed by a motion to dismiss that was granted in part, motions for summary judgment that were granted in part, and a ruling that most claims could not be made on a classwide basis. *See id*. at 1036. In any event, only 1.8% of the original 17 million consumers participated in the settlement.

[123] *See NPAS*, 975 F.3d at 1251 (in a class of 179,642, "only 9,543 class members submitted claims").

[124] *See In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063-64 (8th Cir. 2015) (discussing the "controversial" practice of "*cy pres* distributions").

[125] Jones Day, *Update: An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2019-2020)*, (July 2021).

donated cy pres to charity), the class members' portion of the settlement funds could be divided equally among all claimants.[126] This solves the problem of cy pres recoveries, but does not address the low claims rates and other issues discussed above.

B. Additional Class Actions Are Unlikely To Meaningfully Increase Deterrence

The threat of class-action litigation can deter wrongdoing. Companies may well abandon strategies of dubious legality (or outright illegality) if aware that those strategies could lead to a lawsuit. Similarly, companies might create and enforce compliance policies to avoid future litigation. But because class-action litigation is and will always be extremely common, it is difficult to make the empirical case that ***more*** litigation is necessary.

Two noteworthy data points emerge from a recent survey of large corporations conducted by the law firm Carlton Fields. First, the corporations surveyed faced an average of 9.6 class actions each in 2022, projected to increase to 10.3 matters per company in 2023.[127] The fact that large corporations are defending (on average) about 10 class actions each seems inconsistent with the hypothesis that class actions are generally both meritorious and effective at deterrence. If class actions are so good at deterring wrongdoing, why didn't these corporations get the message after one or two? Hypothetically, perhaps there are some hard-core recidivists who just won't get the message until class action number 11 rolls in. But this seems less likely than the alternative hypothesis that some companies who are trying to do things the right way are being sued nonetheless.

[126] This method was used in both *NPAS*, 1250 F.4th at 1251 (boosting the potential recovery from $7.97 per class member to $79 for each class member who submitted a claim) and *Carnegie*, 445 F.Supp.2d at 1034 (boosting the recovery from $15 per class member to $80.68 for each claimant).

[127] Carlton Fields, *2023 Carlton Fields Class Action Survey; Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* (2023) at 14, *available at* http://www.carltonfields.com/insights/class-action-survey (last visited Jan. 23, 2024).

Certainly the corporate defendants tend to subscribe to the latter theory. A second important data point from the Carlton Fields survey is that "[s]ix out of 10 in-house attorneys agree that baseless claims bring a substantial risk for class actions, by far the most common risk in this survey."[128] The deterrent value of increased litigation has diminishing returns if businesses view class action suits as unavoidable. For a corporation facing ten class actions, the eleventh and twelfth such suits are less likely to be seen as a motivation for additional compliance measures, and more likely as simply the "litigation tax" that motivated Congress to pass the PSLRA.[129]

C. Many Class Action Suits Are Not Meritorious

Some class actions do, of course, expose serious wrongdoing. But corporate counsel (and Congress) are not imagining things when they say that many lawsuits lack merit. Complaints are filed every day that — while not necessarily frivolous or made in bad faith — make accusations that cannot be proven.

1) A Significant Percentage of Class Actions Are Dismissed On The Merits

As discussed above and in Appendix C, the empirical evidence confirms the conventional wisdom that class actions almost never go to trial. It is therefore exceedingly uncommon for a class action to be adjudicated on the merits in favor of a plaintiff class. However, it is much more common for defendants to win on the merits, either through a motion to dismiss or a motion for summary judgment.

A study conducted for the Federal Judicial Center is the most comprehensive study on class action outcomes (although the data is 30 years old). This study found that almost half of all

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[128] *Id.* at 12. The next most feared class-action-litigation risk, "hybrid work policies," was cited by only half as many companies.

[129] S. Rep. No. 104-98, at 9 (1995).

class actions (46%) were dismissed on motion or on summary judgment.[130] A more recent study by the Mayer Brown law firm found that 31% of class actions were dismissed on the merits.[131]

2) Many Cases That Settle Lack Merit

When *Carnegie* settled, to obtain court approval class counsel needed to prove that the settlement was "fair, reasonable, and adequate," taking into account a number of factors including the risk of trial.[132] In support of the settlement, class counsel argued, and the court agreed, that the plaintiffs had only "a 40 percent chance of achieving a successful verdict on liability."[133] Given these odds, the District Court was correct to find that the settlement was fair *to the class*. True, the class obtained far less than its claimed damages, and about 82% of the settlement class received nothing.[134] Still, over 300,000 class members received $80.68 each,[135] which is probably $80.68 more than they would have obtained if they went to trial.

But let's step back for a minute. Although the defendants probably did nothing wrong — all agreed that a jury would have probably sided with them — they ended up paying $39 million.[136] And this was after paying the litigation costs from eight years of litigation, "full

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[130] *See* Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L Rev. 74 (Apr.-May 1996) at 179 & Table 1. *See also* Appendix C.

[131] *See* Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 2013) at 4 & fig. 2. *See also* Appendix C.

One recent survey, which looked only at class actions involving consumer financial cases, came to a much lower percentage of dismissals — only 10%. However, consistent with the other outcome studies, classes in consumer financial class actions are unlikely to recover anything. Only 12.3% of such cases resulted in a class settlement, and only 0.5% resulted in a judgment for the class. Consumer Financial Protection Bureau, *Arbitration Study; Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March 2015) at § 6, pp. 36-42. *See also* Appendix C.

[132] Fed. R. Civ. P. 23(e)(2)(C)(i).

[133] *Carnegie*, 445 F.Supp. 2d at 1036.

[134] *See* discussion above, and *id.* at 1034.

[135] *Id.*

[136] *Id.*

discovery," numerous motions, two interlocutory appeals, and trial preparation.[137] It was no doubt rational for the defendants to settle, and thereby eliminate the risk of a much higher liability at trial (where they had a 40% chance of losing). But this outcome is unjust, the kind of lawsuit that, according to Congress, "undermine[s] public respect for our judicial system."[138]

It is impossible to know how many class action settlements resulted from meritorious claims, and how many are like *Carnegie* — or like *NPAS*, which was also meritless.[139] Congress concluded that "[j]udicial blackmail forces settlement of frivolous claims," and that "the lure of huge attorneys' fees have led to the filing of many frivolous class actions."[140] The same incentives to obtain attorney fees is also at play in the broader category of cases where (like *Carnegie*) the case is better than frivolous, but still a probable loser. Class counsel in *Carnegie* received $6.25 million for having "obtained an excellent result for the class."[141] It may be right that only a "only a lunatic or a fanatic sues for $30."[142] But it is perfectly rational for class counsel to bring a class action that a jury would reject, and to settle the case before finding out for sure.

And that is an endemic problem with class actions. Weak cases will be brought alongside the meritorious ones: partly because it is not always easy for a plaintiff to gauge the strength of a

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[137] *Id.* at 1036.

[138] Pub. Law 109-2, § 2(a)(2)(C) (formal findings in CAFA).

[139] In *NPAS*, the plaintiffs asserted liability under an aggressive reading of the Telephone Consumer Protection Act. The Supreme Court, in an unrelated case, eventually held that this legal theory was untenable. *See Johnson v. NPAS Solutions, LLC*, 2023 WL 4038182, *3 (S.D. Fla. June 1, 2023), (the Supreme Court "eliminated liability in this type of case on the part of the Defendant.") *citing Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021).

Unfortunately for NPAS Solutions, it had already settled. NPAS was therefore stuck with an agreement to pay $1,432,000 even though its conduct was not illegal.

[140] S. Rep. No. 109-14, at 21 (2005) (CAFA); *accord* S. Rep. No. 104-98, at 9 (1995) (PSLRA) ("the economics of litigation may dictate a settlement even if the defendant is relatively confident that it would prevail [at] trial").

[141] *Carnegie*, 445 F.Supp. 2d at 1038.

[142] *Carnegie*, 376 F.3d at 661 (7th Cir. 2004).

claim before embarking on discovery, and partly because counsel can at times make a good living by settling weak cases.

D. Class Action Litigation Imposes Substantial Costs On Defendants

There are a lot of class action lawsuits. Over 13,000 are filed each year just in federal district courts,[143] in addition to an unknown number filed in state courts. Defending these lawsuits imposes a substantial price. "In 2022, companies spent a record $3.5 billion on class action defense."[144] "In 2023, class action spending is expected to be one of the fastest-growing areas of legal spending."[145] Businesses may pass these costs on to consumers in the form of higher prices, leading some scholars to conclude that class actions are on balance harmful to consumers.[146] Incentivizing additional litigation means that someone will need to pay for the cost of defending against these additional lawsuits.

E. Class Actions Contribute To Delays In The Court System

Every day that a judge spends on a class action cases is a day that cannot be spent on anyone else's case. There are no readily available metrics on how time-consuming class actions are for judges, but it is a fair assumption that these cases are more burdensome than the average lawsuit. Unlike ordinary suits, class action litigation requires judges to rule on motions to certify classes, to appoint class counsel, to approve settlements, and to approve attorney fees and plans

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[143] *See* Appendix B (table of class-action filings by quarter).

[144] Carlton Fields, *2023 Carlton Fields Class Action Survey; Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* (2023) at 2, *available at* https://www.carltonfields.com/insights/class-action-survey (last visited Jan. 23, 2024).

[145] *Id.* at 4.

[146] Professor Joanna Shepherd, in her study of "No-Injury" class actions, so concludes, citing to "several empirical papers [that] confirm that businesses pass on litigation expenses to consumers across many different industries." Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions*, Emory University School of Law Legal Studies Research Paper Series, Research Paper No. 16-402 (Apr. 8, 2016) at pp. 23-24, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905.

of allocation.[147] Furthermore, the aggregation of claims can put large sums of money at issue, which can make it economically rational for the parties to litigate such cases more intensively.

The federal district courts are already overburdened. As of December 31, 2023, there were 757,573 pending cases,[148] which comes to 1,119 pending cases per judgeship.[149] Median time to trial for civil cases is almost three years.[150] All of these figures are record highs across the six-year period reported on by the Administrative Office of the U.S. Courts.[151]

IV. INCENTIVE AWARDS CREATE INCENTIVES THAT GENERATE CONFLICTS OF INTEREST, AND RENDER CLASS REPRESENTATIVES LESS ADEQUATE

The very purpose of an "incentive award" is to change the economic incentives of potential class representatives — to induce them to file lawsuits due to the prospect of obtaining compensation above and beyond the causes of action being prosecuted on behalf of the class. The incentives in play here are not incremental in nature. As discussed above and in Appendix A, incentive awards are typically many times higher than the class representative's actual damages claim. A 10-to-1 ratio is a fair estimate, although there is significant variation from case to case. The *Carnegie* settlement, for example, paid about $81 to class members who submitted claims forms, and paid $7,500 to the class representative, resulting in a 92-to-1

[147] *See* Fed. R. Civ. P. 23(c)(1)(A), 23(e), 23(g), 23(h).

[148] United States Courts, *United States District Courts — Combined Civil and Criminal Federal Court Management Statistics (December 31, 2023)* at 1, *available at* https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2023/12/31-1 (last visited Feb. 26, 2024).

[149] *Id.* Note that a "judgeship" "reflects the number of authorized federal judgeships approved by Congress. United States Courts, *Explanation of Selected Terms* (2024) at 1, *available at* https://www.uscourts.gov/statistics-reports/federal-court-management-statistics-september-2023 (last visited Jan. 23, 2024). However "a total of 60 vacancies existed in the district courts." *Id.* Taking into account the vacant judgeships, the caseload per actual sitting judge exceeds 1,200.

[150] United States Courts, *United States District Courts — Combined Civil and Criminal Federal Court Management Statistics (December 31, 2023)* at 1, *available at* https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2023/12/31-1 (last visited Feb. 26, 2024).

[151] *See id.*

ratio.[152] Similarly, in *NPAS*, class members who submitted claims forms stand to receive $79 each.[153] The district court in *NPAS* awarded the class representative $6,000, although of course the Eleventh Circuit reversed on that point.[154]

A further distortion of class representatives' incentives stems from the practical consideration that it is class counsel who decides whether to seek an incentive awards and in what amount.[155] In a very real sense, class counsel isn't hired by the client; the class representative is hired by counsel.

It is the obligation of every class representative to "fairly and adequately protect the interests of the class."[156] A policy of changing class representatives' incentives through incentive awards systemically weakens this protection for two reasons. First, because the representative is dependent upon class counsel to seek the incentive award, the lure of such awards destroys the representative's economic incentive to serve as an independent check upon class counsel. Second the class representative's primary economic interest lies in maximizing the incentive awards, not in maximizing the amount available to be paid to the class.

A. Incentive Awards Cause Class Representatives To Be Dependent Upon The Goodwill Of Class Counsel

In theory at least, "class action law presumes that a function of the class representative is to monitor class counsel."[157] In keeping with this view, there is a line of cases holding that the

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[152] *Carnegie*, 445 F. Supp. 2d at 1034, 1038. No explanation was provided for the approval of the incentive award.

[153] *NPAS*, 975 F.4th at 1251.

[154] *See id.* at 1248.

[155] "Class counsel typically make a motion for approval of incentive awards in conjunction with their own petition for an award of attorney's fees …." William B. Rubenstein, 5 *Newberg and Rubenstein on Class Actions*, § 17:10 (6th ed.).

[156] Fed. R. Civ. P. 23(a)(4).

[157] William B. Rubenstein, 1 *Newberg and Rubenstein on Class Actions* § 3:70 (6th ed.).

"adequacy" requirement of Rule 23(a)(4) is not met where the class representative is too closely aligned with class counsel by blood, friendship, business, or employment.[158] As Judge Posner wrote: "The named plaintiffs are the representatives of the class — fiduciaries of its members — and therefore charged with monitoring the lawyers who prosecute the case on behalf of the class (class counsel)."[159] "There ought therefore to be a genuine arm's-length relationship between class counsel and the named plaintiffs."[160]

In reality, as Judge Posner also wrote, "control of the class over its lawyers usually is attenuated, often to the point of nonexistence."[161] Many class actions are "in fact entirely managed by class counsel," with the practical result that "'class action attorneys are the real principals and the class representative/clients their agents.'"[162] [163] And this has come about, in part, because the named plaintiff "is dependent on class counsel's good will to receive the modest compensation [incentive award] that named plaintiffs typically receive."[164]

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[158] *See id.* (collecting cases).

[159] *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014); *see also id.* at 722 ("The impropriety of allowing Saltzman to serve as class representative as long as his son-in-law was lead class counsel was palpable.").

[160] *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014) (Posner, J.).

[161] *Eubank*, 753 F.3d at 719.

NPAS provides an extreme example of this. The sole class representative, Charles Johnson, had been dead for two years before his lawyer noticed. *Johnson v. NPAS Solutions, LLC*, Case No. 9:17-cv-80393-RLR, Docket Item 90 at 1 (Feb. 13, 2024) (notice filed by class counsel). In the meanwhile — after Mr. Johnson died but before class counsel knew about his passing — class counsel filed a certiorari petition with the Supreme Court, opposed the petition filed by an objector to the class, successfully moved the district court to stay proceedings while the cert petitions were pending, and then appeared at a hearing to defend their fees.

[162] *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1080 (7th Cir. 2013) (Posner, J.), *quoting* William B. Rubenstein, 1 *Newberg & Rubenstein on Class Actions* § 3:52 (5th ed. 2011).

[163] This is not a new thought. It was recognized as early as 1973 that: "it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is sheer sophistry." *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 & n. 9 (3d Cir. 1973).

[164] *Redman*, 768 F.3d at 629.

Congress viewed this as a problem. CAFA was intended to curb abuses that flourished because "the lawyers who bring the lawsuit effectively control the litigation," and "the clients are marginally relevant at best."[165] Similarly, PSLRA (which banned incentive awards in securities class actions)[166] was intended to "empower investors [class members] so that they — not their lawyers — exercise primary control over private securities litigation."[167]

It is already an uphill struggle for class representatives to monitor and check the conduct of class counsel. Counsel are generally far more experienced and sophisticated in litigation than the representatives, and almost always the representatives have only a modest economic incentive to seek the best deal for the class. Class counsel's control over the motion to seek incentive awards destroys any economic motivation to act as a check on counsel. Instead, the representatives have a much greater incentive to curry favor with class counsel, hoping that counsel will seek the largest possible incentive awards. There can be no "genuine arm's-length relationship between class counsel and the named plaintiffs"[168] when counsel control the vast majority of the named plaintiffs' compensation.

B. Due To Incentive Awards, Class Representatives' Economic Incentives Are Not Aligned With Class Members

Incentive awards misalign class representatives' economic incentives. From an economic perspective, the possibility of obtaining a better settlement or jury verdict is of minimal concern — the economic incentive is to make sure that the case settles. This creates an unprovable

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[165] S. Rep. No. 109-14, at 4 (2005).

[166] 15 U.S.C. §§ 77z-1(a)(4), 78-u(a)(4).

[167] S. Rep. No. 104-98, at 4 (1995). The goal of empowering class representatives to control the litigation being conducted in their name also appears in the caselaw, although not consistently. *See*, *e.g.*, *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 484 (5th Cir. 2001) (in PSLRA case, "Class action lawsuits are intended to serve as a vehicle for capable, committed advocates to pursue the goals of the class members through counsel, not for capable, committed counsel to pursue their own goals through those class members.").

[168] *See Redman*, 769 F.3d at 638.

suspicion, in every case with an incentive award, that the class representative *might* not be acting in the best interest of the class. But it's a suspicion that is impossible to police on a case-by-case basis. So long as a settlement is broadly within the realm of reasonableness, courts won't have any real evidence as to whether the representative acted on the wrong incentives. And courts won't (and shouldn't) invalidate settlements based on unproven suspicions. The result is that the availability of incentive awards creates misaligned incentives that sometimes will result in detriment to the class, and the judge won't know whether those effects are present in any specific case.

Let's again take *Carnegie* as an example, illustrating the misalignment of incentives. Recall that the class members who submitted claims received about $80 each, the class representative received $7,500, and class counsel received $6,250,000. All agreed that this was a good deal for the class because they only had a 40% chance of prevailing at trial.[169] But what if the *Carnegie* plaintiffs really had a 90% chance of winning at trial? [170] At trial they might have won three times, or even five times, the amount obtained through settlement. Under this scenario, the class would have been well served by going to trial. But why would Lynn Carnegie, the class representative, support this outcome? She would be walking away from a guaranteed $7,500 incentive award (plus $80 for her actual cause of action) in favor of a 90% chance to increase her recovery from her cause of action by $160-$320. The prospect of a better outcome for the class simply isn't worth the chance of losing at trial, even where the odds of failure are quite low. "[G]oing to trial would put their [incentive awards] at risk in return for

[169] *See Carnegie*, 445 F. Supp. 2d at 1034-38.

[170] This is a hypothetical only. There is no implication here that the *Carnegie* plaintiffs' odds of prevailing were actually different from what they presented to the court.

only a marginal individual gain even if the verdict were significantly greater than the settlement."[171]

In *Amchem*, the Supreme Court explained that Rule 23(a)(4)'s "adequacy inquiry" "serves to uncover conflicts of interest between named parties and the class they seek to represent."[172] "A class representative must be part of the class and ***possess the same interest*** and suffer the same injury as the class members."[173]

The lower courts, however, do not take literally the need for class representatives to "possess the same interest" as the class. Rather, "[o]nly conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement."[174] Given that watered-down standard, courts have rejected arguments that incentive payments render the class representative inadequate. A number of courts have held that "[i]ncentive payments to class representatives do not, by themselves, create an impermissible conflict between class members and their representatives."[175] Other courts deem it sufficient to police awards by refusing to approve "unjustified" awards, or awards that are "more aptly analogized to a salary."[176] Incentive awards will thus be approved in the absence of

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[171] *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 959-60 (9th Cir. 2009). *Rodriguez* correctly saw that these perverse incentives arose from an agreement between the representative and class counsel requiring counsel to seek incentive awards. However, *Rodriguez* got it wrong in failing to recognize that these incentives exist, even in the absence of such an agreement, wherever class representatives can assume that class counsel are likely to seek an incentive award.

[172] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Disqualifying conflicts of interest include where the class members have different injuries (a class that mixes plaintiffs who are known to be injured with plaintiffs who may potentially develop illnesses), where different class members can assert different causes of action, or where the class representative is subject to defenses that are not common to the class. *See id.*; *Kim v. Allison*, 87 F.4th 994 (9th Cir. 2023); *Hesse v. Sprint*, 598 F.3d 581 (9th Cir. 2010).

[173] *Amchem*, 521 U.S. at 625-26 (emphasis added) (internal quotation marks and citation omitted).

[174] *Kim*, 87 F.4th at 1000.

[175] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015).

[176] *Moses v. New York Times Co.*, 79 F.4th 235, 255 (2d Cir. 2023); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 786 (9th Cir. 2022).

"case-specific analysis for concluding that the form or substance of the incentive payments … prevented the named plaintiffs from adequately representing the class."[177]

But the problem with this kind of after-the-fact analysis is that judges simply don't have the evidence before them that would allow them to determine whether the incentive awards had an impact on the settlement. At settlement, judges receive a presentation from class counsel, (uncontradicted by defense counsel), describing the settlement as fair and adequate, arrived at through tough, arms-length negotiation following hard-fought litigation. There is no requirement that the settlement papers even address the views of the class representatives, and it would be rare for settlement papers to indicate any disagreement.[178]

For any given settlement, unless there are significant red flags, it is perfectly plausible that the class representatives put aside their personal interests and were wholly motivated by the best interests of the class. But almost always, there is nothing in the court papers that would allow a judge to distinguish such a settlement from one that the class representatives would not have agreed to but-for the desire to obtain incentive awards.[179]

Take, for example, the *NPAS* litigation, although our information here relates to plaintiffs' appellate strategy rather than their settlement strategy. After the panel decision invalidating the incentive award, class counsel, with the consent of the class representative, delayed proceedings by seeking a rehearing from the Eleventh Circuit en banc, and then seeking

[177] *Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340, 353 (1st Cir. 2022).

[178] Members of the class can, and sometimes do, object to the terms of settlement. Objectors, however, typically will not have more information than the judge.

[179] The settlement structure can be so lopsided as to provide evidence of the perverse incentives at work. *See Frank*, 139 S.Ct. at 1047 (Thomas, J. dissenting) ("the fact that … the named plaintiffs were willing to settle the class claims without obtaining any relief for the class—while securing significant benefits for themselves—strongly suggests that the interests of the class were not adequately represented"). But the real problem is where the settlement isn't so one-sided. The *incentives* are always present, and where the class receives some compensation one cannot know whether the incentives played a role in shaping the ultimate settlement agreement.

review by the Supreme Court. But when the class representative, Charles Johnson, gave his consent, he was "experiencing financial distress and no longer had a working telephone" and "his housing situation was uncertain."[180] None of this came to light until years later.[181] The unfortunate Mr. Johnson may have provided the same guidance to class counsel even if indifferent to his incentive award. But he wasn't. His motivation for authorizing counsel's appellate strategy, according to class counsel, was "the importance of the $6,000 award to Mr. Johnson personally."[182]

Most class representatives will not be in such harrowing straights as Mr. Johnson, but people in normal circumstances could easily view the incentive award as the most important aspect of the litigation. Incentive awards therefore introduce into ***every*** class action a reason for the representative to disregard the Rule 23(a)(4) mandate to "protect the interests of the class."

V. INCENTIVIZING LITIGATION IS A POLICY DECISION RESERVED FOR CONGRESS

So should courts be awarding incentive awards? It certainly seems like bad policy. But it must be acknowledged that while empirical data informs the debate, there are limits to what is knowable. In the end the question cannot be answered without making judgments about the gaps in the data, and weighing competing values. In other words, it is the kind of political question reserved for Congress. Indeed, the Supreme Court, in a closely analogous circumstance, has recognized that Congress, not the courts, should decide whether litigation should be incentivized.

For example, we know that a substantial percentage of class actions are meritless because empirical studies have gathered real world-data regarding how often these cases are thrown out

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[180] *Johnson v. NPAS Solutions, LLC*, Case No. 9:17-cv-80393-RLR, Docket Item 90 at 3 & n. 1, 4 (Feb. 13, 2024) (notice filed by class counsel).

[181] *See id.* at 1.

[182] *Id.* at 4.

of court. Logic tells us that some portion of the cases that settle also lack merit, but it is very difficult to put hard numbers around that concept; assumptions based on anecdotes and experience must be made about whether coerced settlements are a rarity or a pervasive problem.

Beyond this, it takes a value judgment to decide whether the benefits of incentivizing meritorious class actions justifies the toll taken by the meritless ones. William Blackstone wrote: "It is better that ten guilty persons escape than that one innocent suffer."[183] Is it better that innocent corporations pay money to defend and settle false accusations so that guilty corporations will be forced to pay compensation to their victims? And is the answer to that question influenced by the empirical data showing that class actions, in general, don't do a good job at compensating class members?

If we do want more class actions, are incentive awards the right mechanism for obtaining that result? Empirical evidence shows us that incentive awards do not actually incentivize much litigation. The evidence also shows that class representatives' compensation stems almost entirely from incentive awards, and not from their actual causes of action. Logic tells us that this distortion of economic incentives will diminish representatives' ability to protect the interests of the class. Should we care? Congress does. But many courts don't, accepting as a given that representatives are *de facto* hired and controlled by their lawyers.

And that's a sure sign that these courts have taken a wrong turn. Regardless of who has the better of the policy argument, policy decisions are for Congress. Indeed, "[t]he plausibility of the contentions on both sides illustrates why such [policy] disputes are appropriately addressed to Congress, not the courts."[184] The Supreme Court has disclaimed any interest in

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[183] Wikipedia, *Blackstone's ratio, available at* https://en.wikipedia.org/wiki/Blackstone%27s_ratio (last visited Feb. 7, 2024) (citing William Blackstone, *Commentaries on the Laws of England* (1893)).

[184] *Sandoz Inc. v. Amgen Inc.*, 582 U.S. 1, 22 (2017).

policy-making in case after case: "who should win [a policy] debate isn't our call to make. Policy arguments are properly addressed to Congress, not this Court."[185]

The Supreme Court's deference to the political branches extends to questions surrounding the desirability of incentivizing litigation, as shown by *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 241 (1975). The *Alyeska* plaintiffs were environmental groups who successfully sought an injunction that blocked construction of the trans-Alaska oil pipeline. No statute provided for an award of attorney fees, but the plaintiffs argued that their fees could and should be awarded pursuant to the court's equitable powers. Anticipating the arguments later made in favor of incentive awards, the *Alyeska* plaintiffs argued that they had vindicated crucial rights while "performing the services of a 'private attorney general.'"[186]

The Supreme Court disagreed: Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted."[187] Courts have no business wading into policy disputes regarding whether to incentivize litigation.

> It is … apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But … it is not for us to invade the legislature's province by redistributing litigation costs.[188]

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[185] *SAS Institute Inc. v. Iancu*, 584 US —, 138 S.Ct. 1348, 1357-58 (2018). *Accord*, *e.g. Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 113 (2011) ("We find ourselves in no position to judge the comparative force of these policy arguments.").

[186] *Alyeska*, 421 U.S. at 241. *Compare Murray*, 55 F.4th at 353 (justifying incentive awards because, "through class actions, Congress has chosen to empower citizens as private attorneys general to pursue claims for well-defined statutory damages") (internal citation and quotation marks omitted).

[187] *Alyeska*, 421 U.S. at 260. *Accord Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 134-35 (2015) ("Whether or not the Government's theory is desirable as a matter of policy, Congress has not granted us roving authority to allow counsel fees whenever we might deem them warranted.") (internal quotation marks, citation and alterations omitted).

[188] *Alyeska*, 421 U.S. at 271.

In the 19th century *Greenough* case, the Supreme Court set the baseline rule and rationale: awards to plaintiffs for their "personal services" were "decidedly objectionable" because the Court did not want to create an incentive to "intermeddle."[189] In 1995, well into the era of modern class actions, Congress banned incentive awards in securities actions because it didn't want it to be "particularly easy for lawyers to find individuals willing to play the role of wronged investor for purposes of filing a class action lawsuit."[190] The empirical evidence assembled above shows that Congress' concerns were — and remain — reasonable. Although many judges believe that sound policy supports incentive awards, that is not their call to make.

VI. INCENTIVE AWARDS ARE NOT JUSTIFIED AS AN EXERCISE OF COURTS' EQUITABLE POWER

The holdings rejecting *NPAS* and *Greenough* are clear. But what, beyond the judges' policy preferences, provides actual authority for a judge to grant incentive awards? Some courts and scholars have argued that incentive awards are an equitable reward to the class representatives whose effort helped the class achieve success: "incentive awards often level the playing field and treat differentially situated representatives equitably relative to the class members who simply sit back until they are alerted to a settlement."[191]

Courts have also attempted to ground their authority in Federal Rule of Civil Procedure 23(e)(2)(D). Under Rule 23(e)(2) a court may only approve a class action settlement "on finding that it is fair, reasonable, and adequate after considering" a list of issues, including whether "(D) the proposal treats class members equitably relative to each other." The argument is that class

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[189] *Greenough*, 105 U.S. at 538.

[190] 15 U.S.C. §§ 77z-1, 78u-4; S. Rep. No. 104-98, at 10 (1995).

[191] *Moses*, 79 F.4th at 253. *Accord* Jay Tidmarsh and Tladi Marumo, *Good Representatives, Bad Objectors, and Restitution in Class Settlements*, 48 B.Y.U. L. Rev. 2221 (2023) (viewing incentive awards as restitution for services rendered for the benefit of the class).

representatives do more work than other class members — they "bear the brunt of litigation … which is a burden that could guarantee a net loss for the named plaintiffs unless somehow fairly shifted to those whose interests they advance."[192] Mixing policy concerns with notions of equity, it is argued that "incentive payments remove an impediment to bringing meritorious class actions and fit snugly into the requirement of Rule 23(e)(2)(D) that settlement 'treats class members equitably relative to each other.'"[193]

These approaches have numerous deficiencies.

First, courts do not have a "roving authority" to implement their own sense of equity.[194] The Supreme Court has rejected the argument that courts have a general equitable power "to grant relief whenever legal remedies are not practical and efficient."[195] Courts' equitable jurisdiction, as well as the "substantive prerequisites for obtaining an equitable remedy," are bounded by "the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."[196]

Second, the traditional equitable rule was set out in *Greenough*, which denied compensation for personal services to avoid giving parties the "temptation" to "intermeddle."[197] And in *Alyeska*, (which cited *Greenough* with approval), the Supreme Court held that courts'

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[192] *Murray*, 55 F.4th at 353.

[193] *Id.*; *accord Moses*, 79 F.4th at 245.

[194] *See Alyeska*, 421 U.S. at 260.

[195] *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 321 (1999) (internal quotations omitted).

[196] *Id.* at 318 (internal quotations omitted).

[197] *Greenough*, 105 U.S. at 538.

equitable powers to reallocate litigation costs did not extend beyond the traditional rules of equity.[198]

Third, as the Supreme Court has repeatedly held, it is for Congress, and not the courts, to determine whether a legal rule has outlived its usefulness. "When there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than [the Supreme Court] both to perceive them and to design the appropriate remedy."[199]

Fourth, when enacting PSLRA Congress rejected the argument that incentive awards were justified by equitable considerations. It prohibited such awards, and explained in the accompanying committee report that: "The Committee believes that lead plaintiffs are not entitled to a bounty for their service."[200]

Fifth, policies should not be set without reference to the available data about the policy's probable effects. Regardless of the motivation for granting incentive awards, they will have the detrimental effects described at length above.

Lastly, the arguments about equity and restitution are to a degree circular. Certainly people who undertake services with the reasonably expectation of compensation should be compensated. But there is nothing unfair about denying compensation to an "intermeddler" who undertook the work ***without*** a reasonable expectation of compensation. The rule of law sets the baseline. So given the absence of a directive more recent than *Greenough*, representatives should not have a reasonable expectation of compensation beyond what was traditionally permitted in equity practice.

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[198] *Alyeska*, 421 U.S. at 257, 260, 271.

[199] *Grupo Mexicano*, 527 U.S. at 322.

[200] Senate Report 104-98 at 10.

The argument that Rule 23(e)(2)(D) reset the rules of equity fares no better, again for multiple reasons. First, Rule 23(e)(2)(D) doesn't say anything about incentive awards. Rule 23(h), consistent with *Greenough*, explicitly permits awards of attorney fees. But no part of Rule 23 has ever addressed incentive awards, and the Rules Committee gave no indication that it was looking to overrule Supreme Court precedent.

Second, Rule 23(e)(2)(D) dates back only to 2018. But courts have been allowing incentive awards for decades, purely as a matter of judge-created common law.

Third, there is no indication that Rule 23(e)(2)(D) was promulgated in order to regularize the longstanding practice of incentive awards. The Committee Notes identify very different concerns: "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief."[201]

Fourth, it is highly debatable that the Rules Committee should, or even could, engage in policy-driven amendments, such as incentivizing plaintiffs to file class-action lawsuits. Under the Rules Enabling Act, rules of procedure "shall not abridge, enlarge or modify any substantive right."[202] A debate has arisen in the caselaw regarding the similar question of whether cy pres distributions of class-action settlements are lawful. Some judges question whether Rule 23 can be said to allow such distributions in light of the restrictions of the Rules Enabling Act.[203] It is

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[201] Committee Notes on Rules — Notes to 2018 Amendments

[202] 28 U.S.C. § 2072(b).

[203] *See In re Google Inc. St. View Elec. Commc'ns. Litig.*, 21 F.4th 1102, 1123 (9th Cir. 2021) (Bade, J. concurring) (questioning "the use of Rule 23 of the Federal Rules of Civil Procedure, a wholly procedural device, to shape substantive rights, arguably in violation of Article III, the Rules Enabling Act, and the separation of powers doctrine"); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 481 (5th Cir. 2011) (Jones, J. concurring) (same). *But see Marshall v. National Football League*, 787 F.3d 502, 511 & n.4 (8th Cir. 2015) (Rules Enabling Act does not prohibit cy pres distributions if agreed upon by the parties); *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 173 & n. 8 (3d Cir. 2013) (same).

similarly fair to question whether procedural rules are an appropriate vehicle for authorizing the social-engineering policies behind incentive awards. "Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected."[204]

VII CONCLUSION, AND THE FIRST RULE OF HOLES

This article has been focused on what courts shouldn't do — grant incentive awards that they're not authorized to grant, that don't really accomplish what they're intended to do, that would increase the detrimental aspects of class action litigation alongside the limited benefits of more litigation, and that weaken named plaintiffs' incentives to protect the classes they represent.

The question of what Congress should affirmatively do is far more difficult. Before thinking about whether there should be more (or fewer) class actions, what we really need to figure out is how to get *better* class actions. We want more meritorious class actions, but fewer that waste everyone's time and money with unfounded accusations. Between fees, costs, cy pres distributions, and the inability to get payment to most class members, class members receive less than half of the money paid out by class-action defendants[205] — so we need distribution systems that do a better job of compensating class members. And we want better controls on class counsel, and better assurances that they and the named plaintiffs are working entirely for the class, and not just for themselves. More data would help: numerous scholars have concluded that the data needed to inform public debate is unobtainable.[206]

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[204] *Grupo Mexicano*, 527 U.S. at 322.

[205] Jones Day calculated that class members receive only 38.72% of consumer fraud class action settlements. Jones Day, *Update: An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2019-2020)* (July 2021) at 9.

[206] Opinions about the lack of good data can be just as categorical as opinions on the utility of class actions. "Notwithstanding the fierceness of the class action debate … there is a lot we do not know about federal court class

Setting out the reforms necessary to achieve all this is well beyond the scope of this article. Perhaps, with a full slate of reforms, there would be a place for a carefully calibrated, well-thought-through system of incentive rewards. But given where we are now, creating incentives for "more of the same" is the wrong approach. As the first rule of holes teaches: when you're in a hole, stop digging.[207]

actions, and we have no data that can be used to reliably determine whether class actions are good, bad, or some of each." Jonah B. Gelbach and Deborah R. Hensler, *What We Don't Know About Class Actions But Hope To Know Soon*, 87 Fordham Law Rev. 65, 65 (2018). *Accord* Amanda M. Rose, *Classaction.gov*, 88 Chicago Law Rev. 487, 488 (2021) ("it is an empirical question whether class actions in general, or particular types of class actions, increase or reduce social welfare, but the data that would help to answer it are largely inaccessible to researchers.").

[207] Wikipedia, *Law of Holes*, available at https://en.wikipedia.org/wiki/Law_of_holes#:~:text=The%20law%20of%20holes%2C%20or,stop%20making%20the%20situation%20worse

Appendix A

Amounts of Incentive Awards and Amounts Allocated for Class Members

Study	Study Focus	Date Range Studied	Incentive Award per named representative	Settlement Allocation to Class, per Class Member[1]
Federal Trade Commission[2]	Large settlements[3]	2013-2015	[not studied]	Median: $50 to $100.[4]
Rubenstein[5]	[database not described]	2006-2011	Median $5,250, Mean $11,697	[not studied]
Shepherd[6]	"No-Injury" class actions	2005-2015	Median $3,000, Average $8,620[7]	[not studied]
RAND[8]	Insurance class actions	1993-2002	[not studied]	Median $97,[9] Mean $5,233.[10]
Eisenberg & Miller[11]	Published cases	1993-2002	Median $4,357.4	Median: $476.1
Federal Judicial Center[12]	Cases in four federal district courts	1992-1994	Median under $3,000 in 3 courts, $7560 in ND Cal.	Median: from $315 to $528

Appendix B
Class Action Filings 2019-2023

	2019				2020				2021				2022				2023			
	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4
11th Circuit	456	487	415	321	357	416	279	246	309	364	231	266	263	326	369	305	345	390	362	307
Circuits 1-10	3812	3434	3392	3275	3261	3723	3814	3111	3223	3230	2714	2962	2911	3062	3034	2741	3175	3032	3126	2975

Methodology:
- On Westlaw, click on "Dockets"
- Click on "Federal District Courts" under "Federal Dockets by Court"
- Check 11th Circuit (for 1st row); for second row check circuits 1-10 (courts within the DC and Federal Circuits were omitted due to the specialized nature of their dockets.)
- Click "Advanced"
- Click "Class Action" under "Case Type", specify range for "Filing Date"
- Search
- Record number of hits

Key dates of *NPAS* litigation are highlighted: panel decision 9/17/2020 (Q3 of 2020); rehearing denied 8/3/2022 (Q3 of 2022)

Searches on Westlaw conducted 1/9/2024

Appendix C

Dispositions of Class Action Cases

Federal Judicial Center[13] Cases in four federal district courts, 1992-1994	**Dismissed on Motion or Summary Judgment**	**Voluntary or Stipulated Dismissal**	**Approved Non-Class Settlement**[14]	**Class Settlement**	**Judgment Following Trial**
	148 (46%)	74 (23%)	19 (6%)	73 (22%)	11 (3%)

Mayer Brown[15] Published cases filed in 2009	**Dismissed on Merits**	**Voluntary Dismissal or Individual Settlement**	**Dismissed (arbitration)**	**Class Settlement**	**Trial**
	31%	35%	1%	33%	0%

CFPB[16] Consumer financial cases filed 2010-2012	**Dismissed on Dispositive Motion or sua sponte**	**Voluntary Dismissal or Non-Class Settlement**	**Dismissed or Stayed (arbitration)**	**Class Settlement**	**Non-Class Judgment**	**Classwide Judgment**
	57 (10.0%)	243 (61.1%)	45 (8.0%)	69 (12.3%)	7 (1.3%)	3 (0.5%)

RAND[17] Insurance class actions 1993-2002	**Pretrial Ruling for Defense**	**Voluntary Dismissal**	**Individual Settlement**	**Class Settlement**	**Other (transfers to other jurisdictions & trials)**
	37%	27%	20%	12%	4%

NOTES TO APPENDICES

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[1] For exact methodology please refer to the source documents, but generally this column reflects the amount of money allocated to class members by the settlement documents (gross amount to be paid by the defendant net of attorney fees, costs, and cy pres allocations, without providing a value to injunctive relief). As discussed in the text of the article, the amount of money actually received by class members is often far lower than the amounts set out in the settlement papers.

[2] Federal Trade Commission, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* (Sept. 2019).

[3] The FTC "subpoenaed data from seven of the nation's largest class action administrators," seeking "data for the ten largest settlements (gauged by number of notices) from each administrator, in the years 2013, 2014, and 2015." *Id.* at 12.

[4] Out of 130 cases studied, median redress was less than $10 in 12 cases, $10-$50 in 47 cases, $50-$100 in 20 cases, $100 to $200 in 20 cases, and more than $200 in 31 cases. *See id.* at 31 & Figure 7 (aggregating "direct payment cases" and "claims-requiring cases").

[5] 5 Newberg & Rubenstein on Class Actions § 17:8 (6th ed.) (Nov. 2023 Update). The chart above shows the value of awards in 2011 dollars. The figures in 2021 dollars are $6,450 (median per plaintiff) and $14,371 (mean per plaintiff). *Id.*

The same treatise states in an earlier section that "incentive awards … average between $10,000 to $15,000 per class representative." *Id.* at § 17:1.

[6] Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions*, Emory University School of Law Legal Studies Research Paper Series, Research Paper No. 16-402 (April 8, 2016) at pp. 1, 19-20 & Figure 7, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905.

[7] *See Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 228, 239 (N.D. Ill. 2016) (granting $1,500 incentive awards and noting that, in TCPA cases, $5,000 awards are "routinely granted").

[8] Nicholas M. Pace, Stephen J. Carroll, Ingo Vogelsang, and Laura Zakaras, *Insurance Class Actions in the United States*, RAND Institute for Civil Justice (2007). These researchers "received 988 case-level questionnaires from 57 large insurance companies operating in the United States, describing 748 distinct cases that were open at at least one point during the period of 1993 to 2002." *Id.* at 5.

[9] *Id.* at 53; *accord id.* ("In 18 out of the 22 settlements … class members had a theoretical benefit of less than $200 and, in four instances, it was less than $20").

[10] *Id.* The mean is skewed upwards due to outlier cases involving denials of uninsured or underinsured motorist coverage. In such cases, "the considerable size of the individual benefit is a reflection of the fact that class members in such cases are essentially seeking to recover what they might have received from a tort trial or settlement had the tortfeasor had sufficient assets to cover the losses." *Id.*

[11] Theodore Eisenberg and Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1319, 1333-34, 1350 & Appendix Table 1 (Aug. 2006).

[12] Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L Rev. 74, 84-85, 101 (1996). Regarding the average recovery per class member: "Across the districts, the median level of the average recovery per class member ranged from $315 to $528; 75% of the awards ranged from $645 to $3341; and the maximum awards ranged from $1505 to $5331." *Id.* at 84-85

[13] Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L Rev. 74, 179 (1996). The figures in the chart above aggregate the numbers set out in Appendix, Table 1 of the cited materials.

[14] This category of dispositions no longer exists. In 2003, the Rules were amended to clarify that there is no need to seek court approval of a settlement that does not compromise the interests of absent class members. *See* Committee Notes on Rules — 2003 Amendments.

[15] Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013) at 4 & figure 2.

[16] Consumer Financial Protection Bureau, *Arbitration Study; Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March 2015) at § 6, pp. 36-42. Figures do not add up to 100% because some cases were not resolved when the study period closed. Furthermore, due to cases with multiple defendants, more than one outcome is possible in each case. The judgments reported in the last two columns were in favor of the consumers (plaintiffs).

[17] Nicholas M. Pace, Stephen J. Carroll, Ingo Vogelsang, and Laura Zakaras, *Insurance Class Actions in the United States*, RAND Institute for Civil Justice (2007) at pp. 45-46 & Table 3.15.