On the Modern American Class Action: A Tale of Faux Classes and Fake Imbeciles

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In Shakespeare’s Henry VI, Part 2, rebel leader Jack Cade, a pretender to the throne, boldly declares a utopian vision for his kingdom-to-be. 

There shall be in England seven half-penny loaves sold for a penny: the three-hoop’d pot shall have ten hoops; and I will make it felony to drink small beer: all the realm shall be in common, he says.

God save your majesty! his gang shouts in unison.

When I am king, Jack continues, there shall be no money; all shall eat and drink on my score; and I will apparel them all in one livery, that they may agree like brothers, and worship me their lord.

One of Jack’s henchmen, Dick the Butcher, then utters the famous line: The first thing we do, let’s kill all the lawyers.

Scholars ever since have debated the meaning of Dick’s proposal: whether he meant to praise lawyers as the guardians of social order, or to suggest instead that their elimination might restore sanity to commercial life. As a defense lawyer, I lean to the latter view in the belief that Shakespeare probably had a nagging premonition about the havoc wreaked by the use of rule 23(b)(3) of the Federal Rules of Civil Procedure.

In the interest of self-preservation, however, along with the restoration of sanity to commercial life, rather than “all the lawyers,” I think we should kill the damage class action. The many food, beverage and drink companies being forced to defend their product labeling against scarcely credible allegations of consumer deception — in a continually proliferating web of large proposed damage class actions (centered chiefly in California federal courts) — might agree. So, I say, “The first thing we do, let’s kill rule 23(b)(3).”

This article examines this proposal — from a defense attorney’s perspective — using as an example the present scourge of food litigation being driven by

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class-action attorneys on the dubious theory that a regulatory violation of any magnitude amounts to an unfair or deceptive trade practice under state consumer protection statutes. It concludes by endorsing recommendations that rule 23 be scaled back and limited to injunctive relief class actions only, which was its original purpose.

The Golden Age of Public-Interest Lawyers

In a compelling anatomy of the state of the modern American class action, Professor Linda Mullenix explains that this unique procedural mechanism emerged in the mid-1960s, “during a period of celebrated liberal legislative initiatives intended to expand the civil rights and liberties of ordinary American citizens” — the hallmark of President Lyndon Johnson’s “Great Society legislative program.” Linda S. Mullenix, Ending Class Actions As We Know Them: Rethinking the American Class Action, 64 Emory L. J. 399, 401 (2014). These new substantive rights, however, served little purpose without a means for enforcing them. So, in tandem with Congress’ massive reordering of civil society, the Advisory Committee on Civil Rules “embarked on a contemporaneous initiative to liberalize” rule 23 of the Federal Rules of Civil Procedure. Id. Its resulting 1966 amendment generally cut class actions loose from the early contractions and ambiguities of equity, helping to facilitate major social justice reforms in the late 1960s and early 1970s. See Fed. R. Civ. P. 23, advisory committee’s note (1966); see also Benjamin Kaplan, 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 380 (1967) (“In the wash of more than a quarter-century’s experience, rule 23 did not come out very well.”).

This was the “so-called golden age of class litigation,” when public interest lawyers used rule 23’s new “class action mechanism to integrate school systems, deinstitutionalize mental health facilities, reform conditions of confinement for inmates in prison systems, challenge discriminatory housing and public accommodation laws, and address various types of employment discrimination.” Id. at 402. The distinguishing feature of these landmark cases is that the lawyers and representative plaintiffs behind them sought only injunctive relief — notwithstanding the availability of damage class actions courtesy of the 1966 amendments. See Fed. R. Civ. P. 23(b)(3). The lawyers who mounted these cases were motivated by genuine altruism, not money. The Evolution of Mass Tort Class Actions: The Dark Ages

By the late 1970s, the proverbial bloom was off the class-action rose. Mass torts driven by less altruistic lawyers seeking compensatory damages and chunky fee awards under rule 23(b)(3) quickly replaced institutional reform litigation “as the new paradigmatic complex litigation.” Id. at 403. Over the course of the next 20 years, class-action litigation became big business, with enterprising plaintiff’s attorneys flooding state and federal courts with all manner of mass-tort class actions. By the late 1990s, this litigation had been pushed almost entirely into the closet of the state courts by a series of restrictive federal appellate and Supreme Court decisions, continued on page 6

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Rebuttal: A Response To the ‘Tale’ on Class Action

By Jonathan W. Cuneo, Taylor Asen and Ben Elga

Messrs. Wallace and Kelly’s (Authors) historical account of the Rule 23(b)(3) class action (see article infra, p. 1) goes like this: Once, “public interest lawyers” used the class action to “help[ ] facilitate major social justice reforms,” but now, avaricious plaintiffs’ attorneys misuse it to enrich themselves at the public expense. Though they used to bring class actions to do good, plaintiffs’ attorneys now bring them to get rich. And what is the solution to the corrupting of the modern plaintiffs’ lawyer? Why, ban the rule 23(b)(3) action altogether. And in any event, they say, whatever plaintiffs’ attorneys’ intentions, they are not doing any good: Class actions do not deter malfeasance, and do not compensate victims.

DOING GOOD AND DOING WELL

One problem with the Authors’ public interest/private enrichment dichotomy is that it is based upon the incorrect assumption that attorneys may only act either in the public interest or for their own financial gain. Must surgeons choose between doing good and making money? Must inventors? Must architects? Of course not! Monetary reward for success is the genius of capitalism, and entrepreneurship has a positive connotation except when it appears in the same sentence as “lawyer.” But it should have a positive connotation in this sphere as well. Our small firm alone has played a role in recovering over $15 billion for investors and consumers, including: over $7 billion plus for Enron investors; over $6 billion for WorldCom investors; over $1 billion for homeowners with defective building products; and over $25 million for Holocaust survivors whose personal property was misappropriated by the government.

In bringing these lawsuits and others like them, we have hoped to do well, but we have also hoped to do good. And as much as the plaintiffs’ bar is the bogeyman for corporate America, its dynamism and success is a testament to what is best about capitalism. Incentivized not just by altruism but also by profit, plaintiffs’ attorneys have served as vigilant watchdogs against corporate misconduct, not only recouping consumer and investor losses, but uncovering scandals that would never have been uncovered if detection had been left to underfunded government agencies. For example, through his incredible detective work, Georgia lawyer Lance Cooper uncovered the GM ignition switch defect, which in turn saved the lives of countless drivers of General Motors vehicles. See Martha Neil, Solo Practitioner ‘Single-Handedly Set The Stage’ for Massive GM Recall, ABA Journal (Mar. 17, 2014), http://bit.ly/1K2fuZ. The National Highway Traffic Safety Administration — one of the agencies that the authors believe could protect the American people on its own — was caught flatfooted, to put it politely. Mr. Cooper is now helping to lead a class action against GM.

DEBUNKING MYTHS

According to the Authors, the notion that the rule 23(b)(3) provides any benefit is based on “myth.” First, there’s the “myth” that class actions compensate victims, which, according to the Authors, is belied by the fact that “the vast majority of class members” do not make claims in class actions. In fact, thorough and objective studies have demonstrated that the majority of rule 23(b)(3) class actions are “successful” — meaning there is a “delivering to a significant portion of the class compensation commensurate with the expected value of their claims.” Brian T. Fitzpatrick & Robert C. Gilbert, An Empirical Look at Compensation in Consumer Class Actions at 3 (2015), http://bit.ly/1DqUyig.

The Authors also claim that the notion that class actions deter wrongdoing is “myth,” in that any deterrence achieved is “largely hypothetical.” Again, we disagree. Class actions are the only mechanism by which suits involving small claims are feasible. Without them, miscreants could steal in peace. Therefore, they serve as the only real deterrence against corporations committing relatively petty malfeasance against members of the American public. For example, currently there is a suit against a bank that allegedly charged improper overdraft fees to its customers. No single client could possibly seek to remedy such misconduct. But as a class, the bank’s customers have a chance to redress the wrong, and thereby deter future wrongdoing by this defendant and other banks. (In fact, we have already seen how boldly corporations will push the limits imposed by the law when they are allowed to impose class action waivers and mandatory arbitration clauses on consumers.) Jessica Silver-Greenberg and Michael Corkery, Failed by Law and Courts, Troops Come Home To Repossessions, New York Times (Mar. 16, 2015), http://nyti.ms/1eQM9Y6.

GOVERNMENT CAN DO IT

The Authors seem to suggest that governmental agencies can do a sufficient job deterring this sort of misconduct. That viewpoint ignores the well-recognized problem that agencies lack the funding necessary to do their jobs effectively. Both the Antitrust Division of the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) rely upon a vibrant class action system to augment their efforts. As the Supreme Court has noted, “[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.” Roper v. Deposit Guar. Nat’l Bank, 445 U.S. 326, 339 (1980). In other words, we tried it the Authors’ way, and it did not work. Indeed, continued on page 4
empirical studies have repeatedly demonstrated that private class actions are more effective than, and are a necessary complement to, government regulation in deterring corporate malfeasance. See, e.g., Stephen Choi & Adam Pritchard, SEC Investigations and Securities Class Actions: An Empirical Comparison (2012), http://bit.ly/1DnMhKD (finding that that private class actions are more effective than SEC investigations at deterring securities fraud and lead to a higher incidence of top officer resignations); see also Deborah R. Hensler & Thomas D. Rowe, Jr., Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform, 64 Law & Contemp. Probs. 137, 137 (2001) (noting that damages class actions can “supplement regulatory enforcement by administrative agencies that are underfunded, susceptible to capture by the subjects of their regulation, or politically constrained”).

Furthermore, as scholars have noted for some time, “to impose upon public agencies the task of asserting civil sanctions on behalf of injured groups will require a substantial increase in size, personnel and expenditures.” Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 720 (1941). However much moneyed interests rail against the class action, we doubt they would support the class action’s demise if it were contingent upon a ballooning of the administrative state.

**ABUSE BY Plaintiffs’ ATTORNEYS**

The Authors’ main complaint appears to be that the plaintiffs’ attorneys can easily abuse the class action device. The truth is, however, that there are many safeguards against class action abuse. No case can proceed as a class action until the court says it can. The Supreme Court has put exacting standards in place for class certification. See Adam Liptak, Corporations Find a Friend in the Supreme Court, New York Times (May 4, 2015), http://nyti.ms/1eQM2Uu (detailing how recent decisions by the Supreme Court have made class actions more difficult to prosecute in federal court). And several cases at issue next term, including Tyson Foods v. Bouaphakeo, could make these standards even more stringent.

**Practice Tip**

imposed on corporate employees for violations of law that occurred during their tenure if they had the power, by virtue of their position, to prevent or correct violations of law but failed to...
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the attorney was still forced to endure two indictments, a trial, and extensive press coverage — a series of events that sent a collective chill down in-house attorneys’ spines.

It is therefore crucial that in-house attorneys vigilantly protect themselves from the ever-expanding morass of personal liability risk. It is recommended that all in-house counsel: 1) confirm that they have appropriate and adequate insurance coverage; 2) never lose sight of the fact that the company is the client; 3) maintain an open dialogue with all corporate players; 4) object when appropriate; 5) retain and consult with outside counsel; and 6) document any advice given.

**Insurance Is Important**

In-house attorneys should confirm that they have insurance coverage for their professional activities from their client corporations and those corporations should, in turn, want to protect their legal team. An absence of insurance coverage may prevent a corporation from retaining the best talent; because of the ever-present risk of personal liability, successful, high-quality attorneys will likely balk at joining a company that does not extend protection to its lawyers.

Many Directors and Officers (D&O) Liability policies contain “professional services” exclusions which may exclude coverage for legal work performed by in-house counsel. One option for a corporation is to include its in-house counsel and other legal staff as “insured persons” under its current D&O policy. In-house counsel should ensure that such insurance is available for all of their activities, i.e., the provision of both legal advice and business-oriented advice to the company. It is vital that in-house counsel review and analyze the scope of coverage available to them under the company’s existing D&O policy so that any gaps in coverage can be readily identified and addressed.

Another option is for a company to purchase Employed Lawyers Professional Liability (ELPL) Insurance. There are added benefits to ELPL Insurance because those policies are: 1) usually written with a broader definition of “insured persons,” which will allow a corporation to insure its entire in-house legal team more easily; 2) specifically tailored to cover lawyers, and can include coverage for ethics or licensure proceedings; 3) lacking co-defendant requirements (which can limit coverage under a D&O policy for in-house counsel only where he/she is named as a co-defendant with the company or a director/officer); and 4) include personal injury perils coverage (e.g., malicious prosecution/defamation) as well as defense cost coverage for claims made by the insured organization. ELPL coverage can be provided as a separate stand-alone insurance policy, or as an extension to a company’s existing D&O policy.

**Never Forget Your Client Is the Company**

In-house attorneys eventually become closely entwined with the members of the company’s management. Cultivating these relationships is important, and, in the end, may greatly benefit the company overall. Nonetheless, every in-house attorney must remember that management is not the client — the company is. The primary concern of every member of an in-house legal team must be the best interests of the company. Obligations to the company must always come first, and close relationships with management — no matter how beneficial — can never get in the way of those obligations. Further, it is important to consider the interests of the company holistically. Even if proposed conduct is not technically illegal, in-house counsel need to look beyond the mere question of legality and consider what is ultimately best for the company.

American Bar Association Model Rule 1.13(f) provides: “In dealing with an organization’s directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.” This rule codifies the obligation of an in-house attorney to put the company first consistently, and to firmly remind those who question an attorney’s loyalty who his or her client actually is. Reminding management that one’s duty is to the company and not to them personally will not only help protect in-house counsel from liability later, but it may also inspire management to remember that ultimately their work is for the company.

**Keep an Open Dialogue**

In order to safeguard the company — and themselves — from liability in the event a potentially unlawful act occurs, in-house counsel should strive to preempt issues from escalating into full-blown crises. To achieve this, general counsel and other in-house counsel should promote a culture of accessibility and keep an open dialogue with company officers and directors about legal issues on an ongoing basis. Corporate counsel should emphasize that the time to seek their opinion is not when an issue has already escalated but, rather, whenever any legal question or issue arises in the first instance.

**Object When Appropriate**

One of the most important steps in-house counsel can take to protect themselves from liability in a product liability suit against the company is to object when necessary to actions being taken by the company or even its outside counsel. It is crucial that in-house attorneys never agree silently to company actions when they, in fact, disagree. Without speaking up and objecting, counsel could find themselves just as culpable if the issue escalates, and may even face malpractice claims for failing to advise the company properly. When objecting, in-house counsel are advised to:

1. articulate the problem clearly (in continued on page 6
an effort to avoid more confusion or future mistakes); and 2) follow the objection with creative alternatives to the same issue.

When objecting to a course of action is not enough, in-house attorneys may find themselves forced to withhold their approval. Merely signing-off with a disclaimer stating that the attorney is uncomfortable with or opposes the action being taken may not protect in-house counsel from liability.

In-house attorneys are key gatekeepers, and with the imposition of the RCO doctrine, the duty to object and act takes on a heightened magnitude. In-house counsel have a responsibility to deter fraud and misconduct and, to meet this responsibility, in-house attorneys must keep an open dialogue with management and address issues up front in an effort to prevent claims. If the signs of potential future improper conduct start to appear, in-house attorneys are advised to speak up, object to the course of action, and work with management to eliminate the problem. If it becomes clear to in-house counsel that the corporation nonetheless intends to embark on a course of action that will be harmful to the corporation and is likely to result in the commission of a legal violation, the attorney should report the issue immediately to the upper echelons of management and document all such communications.

**Rule 23(b)(3)**

where it remained “until Congress enacted the Class Action Fairness Act of 2005.” Id. & n.12 (collecting cases that briefly ended federal mass tort class litigation pre-CAFA).

With deceptive advertising claims now dominating the 21st-century landscape, the modern American class action has traced an arc “from the golden age of class litigation during the 1960s” to the Dark Age. Id. at 404. For instance, rather than deciding not to continue to purchase food products that do not meet their expectations or claimed preferences, because the food is not “natural” or “fresh” or “pure” enough for them, nominal plaintiffs are instead seeking millions of dollars in restitution or disgorgement in rule 23(b)(3) damage class actions — alleging violations of consumer protection statutes. Frequently, however, the representative plaintiffs lending their names to these suits are simply pawns in a game being played by a group of enterprising lawyers looking for their next big payday. See id. at 416 (describing class counsel “as entrepreneurial bounty hunters stirring up faux class actions in the attorneys’ own primary interest of recovering large fees”); Martin H. Redish, Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit 24-35 (2009) (voicing concern about the “faux” class action from a systemic perspective).
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The upshot is that the modern American class action is “a fundamentally new and different procedural animal” with “its own unique procedural DNA;” and the most disconcerting aspect of it is that “[t]he nature of the relationship between clients and attorneys … is like no form of litigation our system has ever seen,” nothing remotely like the traditional attorney-client relationship. Martin H. Redish, Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalist Socialism in the Litigation Process, 64 Emory L. J. 451, 454 (2014).

For those on the sharp end of this stick — courts, defendants, and consumers who ultimately foot the bill for the lawsuits (in the form of increased costs) — this is an intolerable state of affairs. “While a just society must always protect its genuine imbeciles, courts must not let the law be gamed by those merely posing as imbeciles in order to steal from others.” Am. Tort Reform Found, Food Class Actions by “Fake Imbeciles” Seek to Mislead, Manipulate Courts, Judicial Hellholes (Sept. 4, 2012). That is exactly what is going on, however, and the damage class action is the fulcrum.

RETHINKING THE MODERN AMERICAN DAMAGE CLASS ACTION

The modern-day pretenders to the throne of the golden age of the American class action cast themselves as “white knights” or “beknighted private attorneys general” stepping into the breach of public regulatory enforcement, pursuing and vindicating justice where governmental enforcement is feeble or lacking.” Mullenix, supra, at 411. And “with scant empirical proof,” they claim to be promoting compensation, deterrence, and judicial efficiency. The truth is anything but that.

The Myths

1. Compensation. Like others before them, the attorneys responsible for the tsunami of food litigation now flooding court dockets across the country have “conceive[d] the tort, advertise[d] it to the public, and [found] … clients to pursue the claims.” Id. at 414, quoting Kelly Brilleaux & Stephen G.A. Myers, Reevaluating the 401/403 Balance in Twenty-First Century Mass Torts, For Def. 48 (Feb. 2014). See also S. Storm, Lawyers from Suits Against Big Tobacco Target Food Makers, N.Y. Times (Aug. 18, 2012) (quoting a lawyer leading a recent surge in food litigation to effect that he and his partner firms targeted food and beverage makers after “research[ing] regulations and product labels for two years”). In the big picture, they are not helping anyone but themselves.

Further, the little evidence available on participation rates in class-action litigation settlements shows that very few claims are ultimately filed with settlement administrators. The settlement approved In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig., 851 F.Supp.2d 1040, 1050 (S.D. Tex. 2012), is illustrative. It provided a “minimal recovery for Plaintiffs” and “was noteworthy mostly for the fact that one member of the class objected that the settlement was unfair to the Defendant because most of the class members were not harmed, an assertion borne out by the extraordinarily low claim rate of eleven total from a class of over 100 million.” Stephanie M. Lantagne, A Matter of National Importance: The Persistent Ineficiency of Deceptive Advertising Claims, 8 J. Bus. & Tech. L. 117, 133-34 (2013) (emphasis in original). And we have no reason to believe that the claim rate in food litigation is any different in this respect.

More likely than not, the vast majority of class members have no notion of harm in the circumstances, or (if so) consider it too minor to be worth the bother, or simply are not the type to pursue class-action litigation as a trivial pursuit in life. Mullenix, supra, at 413. Here, again, the lawyers driving these cases are helping only themselves, because their fees are generally fixed as a percentage of the settlement fund, not the actual claim rate. They are also often aiding allied interests to the extent unclaimed settlement funds not returned to defendants are distributed to various public-interest groups as cy-pres awards.

2. Deterrence. While no company wishes to find itself in the eye of a class action, most simply reckon the beast a cost of doing business today, with the cost covered by insurance companies or passed on to consumers in the form of higher prices. Cheap settlements with no admission of liability further minimize the claimed deterrence value of class litigation, and cases not certified obviously deter nothing: “In sum, nuisance-value class suits that are quickly compromised at discount rates,” which fairly describes the few food class-action settlements publicized to date, “are unlikely to serve any deterrent function.” Id. at 421. Take for instance the case of Mirabella v. Vital Pharmaceuticals, Inc., a putative class action alleging that an energy drink maker hid dangerous side effects of its products from consumers. The parties eventually settled the named plaintiffs’ claims for about the cost of one drink each. Mirabella, No. 12-62086 (S.D. Fla. Mar. 16, 2015). As with the compensation function, arguments for “the deterrent effect of class litigation are largely theoretical, conclusory pronouncements.” Mullenix, supra, at 420. Still, they are repeated with “religious-like” fervor. Id. at 440.

3. Judicial Efficiency and Economy. Finally, the bundling of claims under rule 23(b)(3) is said to promote both judicial efficiency (by relieving docket congestion), and the speedy resolution of multiple claims in one proceeding. But tell that to California federal judges sitting in the Central and Northern Districts (the nation’s “food court”), whose dockets are loaded with food class actions; or to food companies facing duplicative cases characterized by the serial amendment of class-action complaints in the face of dispositive motions practice — followed by expensive class discovery, certification briefing, related hearings, seemingly endless motions for reconsideration, continued on page 8
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further dispositive motions, and, quite often, appeals. Here, again, empirical evidence is lacking to support the assertion that class action litigation is more efficient than traditional litigation. Id. at 423. LAWYERS, FOOD AND MONEY

Food litigation grounded on deceptive and misleading labeling claims is just the latest example. Motivated by the prospect of large fee awards — commonly enhanced by the availability of trebled damages, punitive damages, and attorneys’ fees under many consumer protection statutes — plaintiffs’ attorneys gather their clients into courthouses across the country, alleging that their clients (and thousands, sometimes millions, of supposed hapless and helpless folks just like them) were hoodwinked into purchasing grocery items that were either not “natural” enough for them, or mislabeled in some other hyper-technical manner that plaintiffs may never be able to articulate in deposition. The class-action vehicle, in turn, is said to be the superior means of resolving these claims because they are otherwise hardly worth the bother, given the high cost of litigation. The problem is that “everyone involved is incentivized to act against the best interests of the people for whom the system was designed to help — consumers and the general public.” Id. The class-action, in short, “functions as a second rip-off of the consumer.” Lawrence W. Schonbrun, The Class Action Racket, Am. Thinker 2 (Apr. 1, 2013).

All things considered, a good case can be made that rule 23 damage class actions render rule 1 a dead letter. With rare exception, there is simply nothing “just, speedy, and inexpensive” about them. See Fed. R. Civ. P. 1. Any good the odd damage class action might do arguably comes at tremendous systemic cost, chiefly in terms of the typically spurious litigation it breeds. Rule 23 should be killed. “[S]even half-penny loaves” cannot be “sold for a penny,” “the three hoop’d pot” cannot have ten hoops,” and modern class-action plaintiffs’ lawyers are no more worthy of “worship” than was Jack Cade.

THE FIX: KILL THE DAMAGE CLASS ACTION

Much like what was said of original rule 23, the advisory committee’s invention of damage class actions in 1966 has not come out very well in the wash of more than half a century. As Judge William Young observed in the context of a data breach class action he oversaw several years ago: “Simply put, the class action vehicle is broken.” See In Re TJX Cos. Retail Sec. Breach Litig., No. 07-101162 (D. Mass. Nov. 3, 2008). And the damage class action, which has grown to “dominate the litigation landscape,” is the problem. Mullenix, supra, at 439. In hindsight, the addition of rule 23(b)(3) looks more like a lawyer’s relief act than it does a measure intended “to ensure the participation of the poor and disadvantaged” in civil society. Schonbrun, supra, at 2.

A practical solution would be to leave enforcement of consumer protection statutes to regulatory authorities and other public officials, such as state attorneys general, who tend (for various reasons) to be much more circumspect in the exercise of their enforcement powers than private attorneys (motivated by extraneous factors). With the National Association of Attorneys General now routinely flexing its muscle, extracting large cash settlements and voluntary injunctions from companies and entire industries for allegedly unfair and deceptive trade practices, the original justification for deputizing “bennight-ed ‘private attorneys general’” to do the job — the enfeebled regulatory state — seems questionable. Allowed the luxury of an unfettered discretion not available to public officials, private lawyers have time and time again demonstrated a propensity to invest in class actions that end up making “the little injuries of life” considerably larger with simple multiplication (of claims) and addition (of their fees). Id. at 3.

As a scarred veteran of the class-action battleground, I believe that the observations of Mullenix and others are exactly right. Eliminate the damage class action, which seems to “exist [primarily] to remunerate (and reward) entrepreneurial attorneys with outsized fee awards,” and “return the class action to its primary function in the 1960s: the injunctive relief class only.” Mullenix, supra, at 440. Leave it to regulators to deal with corporate behavior that gives rise to the small-bore harms that generally characterize the modern class action — through “penalties, fines, product recalls or withdrawals, or criminal sanctions.” Id. In response to those who might say that private attorneys general are needed to supplement perceived laxity in public enforcement of consumer protection laws, “the answer is … not to promote a class action system with its own egregious problems but instead to advocate and labor for more robust regulatory oversight and enforcement systems.” Id.

CONCLUSION

Rather than “kill all the lawyers” to solve the plague of damage class actions, reformers should consider returning rule 23 to its roots by killing the (b)(3) category instead, which has proved to be the source of altogether too much mischief. This one act would arguably go a long way to restoring sanity to commercial life and clearing the legal landscape of much dead wood.

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