

A Matter of National Importance: The Persistent Inefficiency of Deceptive Advertising Class Actions

Stacey M. Lantagne

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/jbtl>

 Part of the [Advertising and Promotion Management Commons](#), [Civil Law Commons](#), [Civil Procedure Commons](#), [Consumer Protection Law Commons](#), and the [Marketing Law Commons](#)

Recommended Citation

Stacey M. Lantagne, *A Matter of National Importance: The Persistent Inefficiency of Deceptive Advertising Class Actions*, 8 J. Bus. & Tech. L. 117 (2013)

Available at: <http://digitalcommons.law.umaryland.edu/jbtl/vol8/iss1/6>

This Articles & Essays is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Business & Technology Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

STACEY M. LANTAGNE*

A Matter of National Importance: The Persistent Inefficiency of Deceptive Advertising Class Actions

ABSTRACT

DECEPTIVE ADVERTISING CLASS ACTIONS HAVE RECENTLY BECOME increasingly popular. However, an examination of their functioning reveals that they are inefficient for all parties involved: plaintiffs, defendants, and the court system itself. In response to concern that cases of national importance were getting mired in state courts, Congress passed the Class Action Fairness Act of 2005 (CAFA), a statute that purported to streamline class action procedure. But CAFA can only do so much in the deceptive advertising realm, where the entrenched state law nature of the claim continues to stymie efficient and effective litigation. Settlements remain challenging and often unsatisfying for both plaintiffs and defendants, and continued litigation of the class action often results in duplicative litigation and inconsistent precedent, with forum-shopping and jurisdictional manipulations a matter of course.

In this day and age, most advertising is nationwide and most harm suffered is thus also nationwide. This Article argues that there is therefore no reason for deceptive advertising to remain a state cause of action. Further, deceptive advertising is not the sort of injury that should be vindicated by class action at all, and the field of deceptive advertising should be restored to its regulatory roots.

© 2013 Stacey M. Lantagne

* J.D., Harvard Law School; B.A., Boston College. Ms. Lantagne is currently a Westerfield fellow at Loyola University New Orleans College of Law.

A MATTER OF NATIONAL IMPORTANCE

- I. INTRODUCTION
- II. DECEPTIVE ADVERTISING AS A CAUSE OF ACTION
- III. THE DECEPTIVE ADVERTISING CLASS ACTION
 - A. *Federal Rule of Civil Procedure 23*
 - B. *Issues with Class Actions*
 - 1. *Settlement*
 - 2. *Jurisdictional*
 - C. CAFA
 - 1. *Settlement*
 - 2. *Jurisdictional*
- IV. DECEPTIVE ADVERTISING CLASS ACTIONS: STILL BROKEN AFTER CAFA
 - A. *Settlement*
 - B. *Inconsistent Precedent*
 - C. *Statewide Classes*
 - D. *The Frailty of CAFA's Jurisdictional Provisions*
- V. FIXING THE BROKEN SYSTEM
- VI. CONCLUSION

I. INTRODUCTION

Class actions have fueled debate throughout their history. Depending on who you ask, they are either the premier vehicle for the vindication of the rights of the little guy or a blackmail tool to extort settlements for frivolous claims.¹ But whatever they are, they are undeniably popular right now.²

Deceptive advertising class actions are no exception to the rising tide of class action litigation.³ These class actions, however, ably illustrate how the current system benefits no one, neither plaintiffs, defendants, nor the judiciary. Such class actions almost universally involve national ad campaigns which, if harmful, are surely harmful nationwide.⁴ However, the deceptive advertising cause of action is a *state* one.⁵ This results in a singularly inefficient tangle of warring litigations, forum-shopping, topsy-turvy incentives, and haphazard fact-finding, resulting in inconsistent precedent and unhappy plaintiffs, defendants, and courts.⁶ Defendants may frequently find themselves between a Scylla of litigating the same case dozens of times and a Charybdis of settling the same case dozens of times; plaintiffs frequently find themselves so indifferent to the final outcome as to not even bother to claim their damages; and courts frequently find themselves presiding over duplicative cases.⁷

This Article argues that the current system makes little sense and serves little purpose and that deceptive advertising, as was originally supposed when it was first conceived, should be entrusted to regulators to police. Part II examines deceptive

1. See, e.g., Lloyd Milliken, Jr., *Fixing the Broken Class Action Lawsuit System*, 47 RES GESTAE 19, 19 (2003) (explaining the purpose of class actions is to make courts accessible to the “little guy” who has an issue with a more economically powerful company); see also Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 103 (2007) (noting class actions “could be used to ‘blackmail’ defendants who could not risk the possible ruin of a jury verdict into agreeing to settlements which benefited mostly the plaintiff’s counsel”).

2. See, e.g., Mandi L. Williams, *The History of Daubert and its Effect on Toxic Tort Class Action Certification*, 22 REV. LITIG. 181, 200 (2003) (“Over the past decade, class actions have become increasingly popular.”); Christopher J. Willis, *Aggregation of Punitive Damages in Diversity Class Actions: Will the Real Amount in Controversy Please Stand Up?*, 30 LOY. L.A. L. REV. 775, 775 (1997) (stating the class action device is becoming “ever more popular,” and state law class actions are increasing in frequency).

3. See, e.g., *infra* notes 25–26.

4. See, e.g., *Worthington v. Bayer Healthcare, LLC*, Nos. 11-2793 (ES), 11-3017 (ES), 11-3299 (ES), 2012 WL 1079716, at *1 (D.N.J. Mar. 30, 2012); *Walewski v. ZeniMax Media, Inc.*, No. 6:11-cv-1178-Orl-28DAB, 2012 WL 834125, at *8 (M.D. Fla. Jan. 30, 2012).

5. See, e.g., *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 581 (9th Cir. 2012); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 945 (6th Cir. 2011); *Bruno v. Eckhart Corp.*, 280 F.R.D. 540, 540 (C.D. Cal. 2012).

6. See William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order out of Chaos*, 80 CORNELL L. REV. 837, 837–38 (1995) (citing duplicative litigation activity, multiple trials, inconsistent outcomes, and incentives to distort the operation of traditional legal processes as some of the setbacks of class actions); Vance G. Camisa, *The Constitutional Right to Solicit Potential Class Members in a Class Action*, 25 GONZ. L. REV. 95, 114 (1989–90) (“This situation presents a very real opportunity for forum shopping and its attendant inequities to play a major role in class actions.”).

7. See Schwarzer, *supra* note 6, at 837.

advertising as a cause of action.⁸ Part III turns to the class action as a litigation procedure.⁹ Part IV analyzes the ways in which deceptive advertising class actions fail plaintiffs, defendants, and the judiciary.¹⁰ Finally, Part V considers alternatives to the current framework, proposing that the system should return to its roots and the regulatory scheme should suffice.¹¹

II. DECEPTIVE ADVERTISING AS A CAUSE OF ACTION

Initially, in the realm of the shadowy historical common law from which the Lanham Act claimed its purpose, the action of deceptive advertising was intended to address the situation of a seller in possession of counterfeit goods who told consumers they were *bona fide* goods.¹² It was a slant on the “passing off” cause of action.¹³ In the early years, courts kept a tight rein on the standing requirements imposed on such causes of action, determined not to “open a Pandora’s box of vexatious litigation.”¹⁴ As commentators have explained, “In effect, such judicial statements really amount to saying, ‘Yes, there may be false advertising here, but you can’t complain about it. Let the government do it.’”¹⁵

To paraphrase an old advertising campaign, deceptive advertising as a cause of action has “come a long way,”¹⁶ both in breadth of the injury that the cause of action captures and in the standing permitted by those suing to avenge the injury.¹⁷

8. See *infra* Part II.

9. See *infra* Part III.

10. See *infra* Part IV.

11. See *infra* Part V.

12. See J. THOMAS MCCARTHY, 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:1 (4th ed. 2012) (“[T]his is a variation of the ancient prohibition against passing off one’s goods as the goods of another.”); see also Lanham Act, Pub. L. No. 79–489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. § 1051 *et seq.* (2006)).

13. See MCCARTHY, *supra* note 12. Passing off remains a cause of action today, most often used in “cases where defendant has made an unauthorized substitution of the goods of one manufacturer when the goods of another manufacturer were ordered by the customer.” *Id.* § 1:12.

14. N.Y. & R. Cement Co. v. Coplay Cement Co., 44 F. 277, 278 (C.C.E.D. Pa. 1890).

15. MCCARTHY, *supra* note 12, at § 27:2.

16. Stuart Elliot, *The Media Business Advertising: A Possible Impact of Thomas Case*, N.Y. TIMES, Oct. 15, 1991, at D3 (describing the 1970s ad campaign by Philip Morris which featured confident, liberated women smoking Virginia Slims, congratulating them with the slogan, “You’ve come a long way, baby”).

17. Courts, naturally, still examine standing in the context of false advertising causes of actions, and the courts sometimes do find the case for standing to be too nebulous. See *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 580 (N.D. Ill. 2005) (finding no “identifiable basis for standing” in a case where membership in the class required only the purchase of the product in question). However, such rulings are countered by opposite outcomes in nearly identical cases. See, e.g., *Johns v. Bayer Corp.*, 280 F.R.D. 551, 555, 560 (S.D. Cal. 2012) (identifying as a class “all persons who purchased the Men’s Vitamins in the State of California”); *In re Ferrero Litig.*, 278 F.R.D. 552, 562 (S.D. Cal. 2011) (certifying a class of “all persons who . . . bought one or more Nutella® products in the state of California”); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 380 (N.D. Cal. 2010) (certifying a class where membership in the class required only the purchase of the product in question); *Nelson v. Mead Johnson Nutrition Co.*, 270 F.R.D. 689, 691 (S.D. Fla. 2010) (granting a motion for Class Certification wherein the class was “[a]ll Florida consumers who purchased Enfamil® LIPIL®”); Kelly v.

Courts no longer appear to think that the government ought to be the primary defense against deceptive advertising.¹⁸ Indeed, the “Pandora’s box of vexatious litigation” seems to have been quite decisively opened — and possibly as irreversibly as that of the myth.

The history of deceptive advertising is one of expansionism. Tucked into § 43(a) of the Lanham Act and originally envisioned “as a minor, but useful section,” the courts’ interpretations of the section prodded it into singular importance in unfair competition jurisprudence.¹⁹ However, standing to sue for deceptive advertising under § 43(a) has traditionally been denied to consumers.²⁰ Federal courts voiced the fear that permitting consumers standing under § 43(a) “would lead to a veritable flood of claims brought in already overtaxed federal district courts, while adequate private remedies for consumer protection, which to date have been left almost exclusively to the States, are readily at hand.”²¹ This stance left the door open for state courts to fill the gap, fracturing deceptive advertising into dozens of smaller battles as part of one larger war.

States became the controllers of consumer deceptive advertising causes of action.²² Whether brought in state or federal courts, the complaints rest on state statutes, like the California Consumer Legal Remedies Act²³ or the Illinois Consumer Fraud and Deceptive Business Practices Act.²⁴ If the complaint *is* brought in federal court, it is based on diversity jurisdiction, not federal question

Phiten USA, Inc., 277 F.R.D. 564, 567–69 (S.D. Iowa 2011) (receiving Class Certification on purchased products for settlement purposes).

18. *But see* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) (“Moreover, as an administrative agency which deals continually with cases in the area, the [Federal Trade] Commission is often in a better position than are courts to determine when a practice is ‘deceptive’ . . .”).

19. MCCARTHY, *supra* note 12, § 27:7; *see also* Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2006).

20. *See* MCCARTHY, *supra* note 12, § 27:39; *see also* Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2006).

21. Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 693 (2d Cir. 1971); *see also* Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2006).

22. MCCARTHY, *supra* note 12, §§ 27:114–115 (discussing the Uniform Deceptive Trade Practices Act and little Federal Trade Commission Acts). Plaintiffs have also resorted to common law unjust enrichment and breach of warranty causes of action to vindicate their rights. *See, e.g.,* Mazza v. Am. Honda Motor Co., 666 F.3d 581, 587 (9th Cir. 2012); Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 945 (6th Cir. 2011); Montanez v. Gerber Childrenswear, LLC, No. CV 09-7420 DSF (DTBx), 2011 WL 6757875, at *1 (C.D. Cal. Dec. 15, 2011); *In re Ferrero*, 278 F.R.D. at 556; *Kelly*, 277 F.R.D. at 567; Oscar v. BMW of N. Am., LLC, 274 F.R.D. 498, 502 (S.D.N.Y. 2011); Heisler v. Maxtor Corp., No. 5:06-cv-06634-JF (PSG), 2011 WL 1496114, at *1 (N.D. Cal. Apr. 20, 2011); Worthington v. Bayer Healthcare, LLC, Nos. 11-2793 (ES), 11-3017 (ES), 11-3299 (ES), 2012 WL 1079716, at *1–2 (D.N.J. Mar. 30, 2012); Wolph v. Acer Am. Corp., 272 F.R.D. 477, 481 (N.D. Cal. 2011); Bruno v. Eckhart Corp., 280 F.R.D. 540, 543 (C.D. Cal. 2012); Walewski v. ZeniMax Media, Inc., No. 6:11-cv-1178-Orl-28DAB, 2012 WL 834125, at *1 (M.D. Fla. Jan. 30, 2012); Hartless v. Clorox Co., 273 F.R.D. 630, 634 (S.D. Cal. 2011); *Nelson*, 270 F.R.D. at 691; Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742 (DLC), 2010 WL 3119452, at *2 (S.D.N.Y. Aug. 5, 2010); Fitzpatrick v. Gen. Mills, Inc., 263 F.R.D. 687, 692 (S.D. Fla. 2010); *In re Sears, Roebuck & Co. Tools Mktg. and Sales Practices Litig.*, Nos. 05 C 4724, 05 C 2623, 2007 WL 4287511, at *1 (N.D. Ill. Dec. 4, 2007); Yeroushalmi v. Blockbuster Inc., No. CV 05-225-AHM (RCX), 2005 WL 2083008, at *1 (C.D. Cal. July 11, 2005); *Oshana*, 225 F.R.D. at 578.

23. CAL. CIV. CODE § 1750 *et seq.* (West 2012).

24. 815 ILL. COMP. STAT. 505/1 *et seq.* (West 2012).

jurisdiction.²⁵ The spotlight in the field of deceptive advertising solidly belongs to the states.

The state specific remedies for deceptive advertising stand in stark contrast to the nationwide harm they are meant to address.²⁶ An idea that may have seemed logical in 1971 looks less logical by the dawning of the twenty-first century mass media. The proposition that any one state has more of an interest than any other state in regulating nationwide advertisements is nonsensical when the harm to consumers stems from cohesive national ad campaigns. The corollary that consumers in one state are harmed in a different way by the same advertisement than consumers in any other state is equally ludicrous.

In short, the state-centric nature of consumer deceptive advertising actions feels like a historical curiosity, a relic from a time when deceptive advertising sported a different character altogether and was thought to be the primary preoccupation of competitors, not consumers, intended as a backstop to government regulations. That is no longer the case.

25. See *Mazza*, 666 F.3d at 589; *Morgan v. Gay*, 471 F.3d 469, 471 (3d Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447 (7th Cir. 2005); *Bruno*, 280 F.R.D. at 545; *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096, 1100 (C.D. Cal. 2012); *Walewski*, 2012 WL 834125, at *4; *Wolph*, 272 F.R.D. at 485; *In re Yasmin and Yaz Mktg. Sales Practices and Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2012 WL 865041, at *8 (S.D. Ill. Mar. 13, 2012); *Hartless*, 273 F.R.D. at 636; *Fine v. ConAgra Foods, Inc.*, No. CV 10-01848 SJO (CFOx), 2010 WL 3632469, at *1 (C.D. Cal. Aug. 26, 2010); *Sanchez v. Wal-Mart Stores, Inc.*, No. Civ. 2:06-CV-02573-JAM-KJM, 2009 WL 1514435, at *1 (E.D. Cal. May 28, 2009); *Yeroushalmi*, 2005 WL 2083008, at *1; *Berry v. Am. Express Publ'g Corp.*, 381 F. Supp. 2d 1118, 1120 (C.D. Cal. 2005); *Oshana*, 225 F.R.D. at 583.

26. See *Guido v. L'Oreal, USA, Inc.*, Nos. CV 11-1067 CAS (JCx), CV 11-5465 CAS (JCx), 2012 WL 1616912, at *1, *6 (C.D. Cal. May 7, 2012) (reviewing state class certification requests by Plaintiffs seeking remedies for injuries induced by a flammable hair styling product that had not been appropriately labeled and was sold in large quantities across the country); *Worthington*, 2012 WL 1079716, at *1 (relying upon the New Jersey Consumer Fraud Act, among other statutes, to redress a class's deceptive advertising claim involving a probiotic health product with a nationwide marketing campaign); *Gianino*, 846 F. Supp. 2d at 1099 (denying Plaintiffs' motion to apply California law to a class certification of plaintiffs contesting the nationwide marketing of the product, Emergen-C); *Walewski*, 2012 WL 834125, at *8 (applying Florida law to a deceptive advertising suit because Florida had a strong interest in protecting its citizens, while admitting that the misrepresentations "could have 'emanated' from a variety of locations"); *In re Ferrero*, 278 F.R.D. at 562 (certifying a California class of persons who purchased Nutella products that had been nationally marketed as part of a "balanced breakfast"); *Kelly*, 277 F.R.D. at 568 (applying California's False Advertising Act, California's Unfair Competition Law, California's Deceptive Practices Act, and Iowa's Consumer Fraud Act to a case for remedies wherein the product was sold across a nationwide market); *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW (AGRx), 2011 WL 4599833, at *7 (C.D. Cal. Sept. 29, 2011) (finding that Plaintiffs could not assert that their claim was limited to activities occurring in California, and that as a result, the class could not be certified); *Fitzpatrick*, 263 F.R.D. at 691 (discussing the nationwide marketing campaign to sell Yo-Plus yogurt that was being addressed only by the Florida Deceptive and Unfair Trade Practices Act); *In re Sears*, 2007 WL 4287511 at *1 (discussing how "Made in USA" was an inappropriate label for mostly foreign supplied Craftsman tools and how the label was perpetuated throughout the entire country). *But see Pilgrim*, 660 F.3d at 948 (noting that the ads in question were not uniform from state to state).

III. THE DECEPTIVE ADVERTISING CLASS ACTION

While a deceptive advertising cause of action does not *have* to be a class action, it is an undeniably popular choice.²⁷ Most state class actions resemble federal class actions procedurally.²⁸ In addition, even though focused on state law, many deceptive advertising class actions are litigated in the federal court system and therefore governed by federal procedure.²⁹ An examination of Federal Rule of Civil Procedure 23 is thus instructive in revealing the inefficiencies of deceptive advertising class actions.³⁰

A. Federal Rule of Civil Procedure 23

The class action is supposed to be a win-win-win situation. It is supposed to increase judicial efficiency by consolidating many cases into one, promote the litigation of injustices that might not be worthwhile otherwise, and enable defendants to settle common issues quickly and efficiently in one fell swoop.³¹ “As one state supreme court observed, the modern class action ‘is a procedural device that was adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency and fairness in handling large numbers of similar claims.’”³² In this way, class actions are supposed to benefit plaintiffs, defendants, and courts themselves.

Rule 23(a) sets forth four “prerequisites” for a class action:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of

27. This Article focuses on class actions brought for deceptive or misleading advertising, and it does not discuss class actions relying exclusively on other causes of action, such as breach of warranty. *See, e.g., Walewski*, 2012 WL 834125, at *1.

28. *See* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1500 (2008).

29. *See infra* Part III.A.

30. *See infra* Part III.A.

31. *See* Kalee DiFazio, Note, *CAFA's Impact on Forum Shopping and the Manipulation of the Civil Justice System*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 133, 135–36 (2012); *see also* O'Shea v. Epson Am., Inc., No. CV 09–8063 PSG (CWx), 2011 WL 4352458, at *1 (C.D. Cal. Sept. 19, 2011) (“Class certification is appropriate when it ‘saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23 [of the Federal Rules of Civil Procedure].’”) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982)); Burbank, *supra* note 28, at 1487; Steven B. Hantler et al., *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1137 (2005); Shapiro, *supra* note 1, at 79.

32. JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS § 1:1 (7th ed. 2010) (quoting *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 62 (W. Va. 2003)).

A MATTER OF NATIONAL IMPORTANCE

*the class; and (4) the representative parties will fairly and adequately protect the interests of the class.*³³

These prerequisites are commonly referred to as numerosity, commonality, typicality, and adequate representation.³⁴ Once these prerequisites have been fulfilled, the class action then must fit into one of the three categories enumerated by 23(b): (1) individual litigations would carry the risk of either inconsistent judgments or the foreclosure of subsequent litigants' rights; (2) relief is sought for conduct that is consistent to the class as a whole; or (3) questions common to the class predominate over individual questions and a class action would be superior to all other methods of adjudication.³⁵

The idea of class actions as a vehicle for litigation has existed for decades. In 1937, it was formally adopted from Equity Rule 38, which explicitly recognized that a class action could exist where numerous persons shared a common interest.³⁶ Thus, the numerosity and commonality requirements are well-entrenched in American jurisprudence, although the initial motivation behind this Rule seemed to be to make sure that unincorporated associations could sue and be sued, despite their lack of status as a legal entity.³⁷ The typical class action today, brought by a loose coalition of people who have never met, is a very different creature.

From the very beginning, class actions have enjoyed a reputation for working better in theory than in practice. The initial incarnation of Rule 23 "proved obscure and uncertain," hindered by terms that proved challenging to the courts to define and interpret.³⁸ As a result, in 1966 the Rule was overhauled in an attempt to add clarity and predictability to class actions. There was also concern that the original Rule did not "assure procedural fairness," especially when it

33. FED. R. CIV. P. 23(a).

34. See, e.g., *Guido v. L'Oreal, USA, Inc.*, Nos. CV 11-1067 CAS (JCx), CV 11-5465 CAS (JCx), 2012 WL 1616912, at *2 (C.D. Cal. May 7, 2012); *In re Yasmin and Yaz Mktg. Sales Practices and Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2012 WL 865041, at *14 (S.D. Ill. Mar. 13, 2012); *Johns v. Bayer Corp.*, 280 F.R.D. 551, 555 (S.D. Cal. 2012); *Montanez v. Gerber Childrenswear, LLC*, No. CV 09-7420 DSF (DTBx), 2011 WL 6757875, at *1 (C.D. Cal. Dec. 15, 2011); *Carrera v. Bayer Corp.*, No. 08-4716 (JLL), 2011 WL 5878376, at *2 (D.N.J. Nov. 22, 2011); *Badella v. Deniro Mktg. LLC*, No. C 10-03908 CRB, 2011 WL 5358400, *3 (N.D. Cal. Nov. 4, 2011); *Walter v. Hughes Commc'ns, Inc.*, No. 09-2136 SC, 2011 WL 2650711, at *6 (N.D. Cal. July 6, 2011); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 637 (S.D. Cal. 2011); *Sanchez v. Wal-Mart Stores, Inc.*, No. Civ. 2:06-CV-02573-JAM-KJM, 2009 WL 1514435, at *1 (E.D. Cal. May 28, 2009).

35. FED. R. CIV. P. 23(b).

36. See FED. R. CIV. P. 23 advisory committee's note 1937 (2006) (note to Subdivision (a)).

37. See FED. R. CIV. P. 23 advisory committee's note 1937 (2006) (clause (1), Joint, Common, or Secondary Right).

38. FED. R. CIV. P. 23 advisory committee's note 1966 (2006) (amendment difficulties with the original rule).

came to notification of class members.³⁹ The 1966 amendment, by overhauling the original Rule, intended to:

*[D]escribe[] in more practical terms the occasions for maintaining class actions; provide[] that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refer[] to the measures which can be taken to assure the fair conduct of these actions.*⁴⁰

B. Issues with Class Actions

1. Settlement

Despite these amendments, problems — whether real or perceived — persisted with class actions. For one thing, there was a perception that for the majority of the time class actions only benefited plaintiffs’ attorneys, who collected enormous fees from settlements.⁴¹ Indeed, some plaintiffs’ attorneys form their entire practice around the bringing of such class actions.⁴² In many cases, the perceived goal is not

39. *Id.*

40. *Id.*

41. See Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 76 (2009) (“[Class actions] contribute to the skyrocketing number of lawsuits filed. Given the small amount that each individual plaintiff has at stake in the lawsuit, no one benefits but the lawyers who bring the lawsuits. They are viewed as nothing more than ‘money generators’ for lawyers.”); see also *Sanchez v. Wal-Mart Stores, Inc.*, No. Civ. 2:06-CV-02573-JAM-KJM, 2009 WL 1514435, at *4 (E.D. Cal. May 28, 2009) (“[T]he only persons likely to benefit from a class action in this case are class counsel . . .”).

42. See, e.g., *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 583 (N.D. Ill. 2005) (noting that proposed class counsel had “prosecuted hundreds of class actions”). Some courts have issued sharp criticisms of plaintiffs’ attorneys who drive the class action litigations instead of soliciting the plaintiffs’ active involvement. See *In re Yasmin and Yaz Mktg. Sales Practices and Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2012 WL 865041, at *17–18 (S.D. Ill. Mar. 13, 2012) (finding a named plaintiff to be an inadequate representative because she was a close friend of class counsel’s, who recruited her to the litigation); *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW (AGRx), 2011 WL 4599833, at *13 (C.D. Cal. Sept. 29, 2011) (“Defendants correctly note that there is at least some basis for concern about whether Plaintiffs are ‘not simply lending [their] name to a suit controlled entirely by the class attorney.’” (quoting *Beck v. Status Game Corp.*, 89 Civ. 2923, 1995 U.S. Dist. LEXIS 9978, at *16 (S.D.N.Y. July 13, 1995) (quoting 7A Wright, Miller & Kane, *Federal Practice & Procedure* § 1766 (2d ed. 1986))); *id.* at *13 (“Both Plaintiffs in their depositions exhibited a lack of familiarity with the case. Both testified they did not understand the differences between the original complaint and the SAC or why the changes were made.”); *Sanchez*, 2009 WL 1514435, at *3 (“Such a ‘cart before the horse’ approach to litigation is not the proper mechanism for the vindication of legal rights.”). This criticism perhaps reflects a concern that unsavory practices might be underway. See *Red*, 2011 WL 4599833, at *14 (“Much more troubling than this, they also note that The Weston Firm’s former co-counsel testified under oath that Mr. Weston had (1) offered a ‘kickback’ to an employee’s roommate in return for serving as a named plaintiff in a class action; (2) promised a ‘finder’s fee’ to his employee in return for ‘signing up’ her roommate as a named plaintiff; and (3) agreed to compensate the firm’s non-lawyer employees with settlement proceeds on a percentage basis.”). However, others appear unconcerned by the practice. See *O’Shea v. Epson Am., Inc.*, No. CV 09–8063 PSG (CWx), 2011 WL 4352458, at *5 (C.D. Cal. Sept. 19, 2011). Additionally, there have been unsavory accusations sometimes

to litigate but to extract a settlement with a generous provision for attorneys' fees.⁴³ "[C]onventional wisdom is that class actions are 'Frankenstein monsters' whose very existence allows plaintiffs to engage in judicial blackmail inducing defendants to settle frivolous claims."⁴⁴ Even if the claims were legitimate, too often, the story was that class members received mere pennies or coupons of little to no value, which they seldom even bothered to collect.⁴⁵

2. Jurisdictional

In addition to no longer benefitting consumers and being seen as tools of jurisprudential blackmail,⁴⁶ class actions were also perceived as encouraging jurisdictional games that prejudiced defendants and represented a drag on judicial efficiency.⁴⁷ There was concern that these jurisdictional games were causing cases of national importance to get trapped in state court, leading to states exercising undue amounts of influence over injuries that were truly nationwide in scope.⁴⁸ This was a singularly inefficient way to adjudicate in a court system founded on *stare decisis*: courts got caught up in sticky questions of issue and claim preclusion⁴⁹ and defendants found themselves serially addressing the issues at hand.⁵⁰ Such was

lobbied at plaintiffs' class action law firms. See, e.g., *Pre-Paid Legal Servs. Inc. v. Gilmer Law Firm*, 260 Fed. Appx. 731 (5th Cir. 2007) (reviewing the action of a class action law firm wherein the lawyers were accused of tortious interference with a business relationship).

43. See Hantler et al., *supra* note 31, at 1137 ("Over time, class actions have become the equivalent of high-stakes litigation poker. The potential costs of losing often force companies to fold their hands and settle rather than call the plaintiffs' lawyer's bluff."); MCLAUGHLIN, *supra* note 32, at § 1:3 ("Class actions are an attractive option for plaintiffs' lawyers' for the same reason that they pose a tremendous hazard to defendants—the consolidation of numerous claims into one action multiplies the potential damages award, often to a figure so large that it exerts irresistible pressure on defendants to agree to substantial settlements for claims that they would be willing to litigate to judgment if the liability risk were less daunting."); Shapiro, *supra* note 1, at 78, 103. But see Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385, 404 (Apr. 2005) ("This argument, however, does not account for the existence of Rule 11 protections against frivolous lawsuits. If the defendants are correct in saying that too many class actions nowadays are 'meritless,' then why don't they simply utilize a motion to dismiss to eliminate frivolous class actions? Moreover, if a suit is frivolous, it will not survive a Rule 11 motion whether it was filed in a state or a federal court.") (internal citations omitted).

44. Ellis, *supra* note 41, at 76 (internal citations omitted).

45. See *id.* at 92; Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1599 (2008); *Walter v. Hughes Commc'ns, Inc.*, No. 09-2136 SC, 2011 WL 2650711, at *13 (N.D. Cal. July 6, 2011).

46. See Shapiro, *supra* note 1, at 103.

47. See DiFazio, *supra* note 31, at 133; see also Ellis, *supra* note 41, at 89 (calling class actions the "messiest" part of the judicial system); Erichson, *supra* note 45, at 1596–97; Shapiro, *supra* note 1, at 78, 80, 103, 136.

48. See Andreeva, *supra* note 43, at 388; Milliken, *supra* note 1, at 19.

49. See Burbank, *supra* note 28, at 1509 ("Contemporary class action practice seems to confound the basic assumptions of preclusion law by preferring multiple cases to just one."); MCLAUGHLIN, *supra* note 32, at § 1:1.

50. See DiFazio, *supra* note 31, at 133, 142; see also 151 CONG. REC. H735 (daily ed. Feb. 17, 2005) (statement of Rep. Cannon); Andreeva, *supra* note 43, at 394 ("[T]he filing of a single class action in a state court often leads to a number of 'copycat' cases being filed in other jurisdictions.") (citing 151 CONG. REC.

especially the case in deceptive advertising class action lawsuits, which, although typically involving a nationwide issue, orbited around disjointed state law.

Because of the state law nature of deceptive advertising, in order for a deceptive advertising consumer class action to be brought in federal court and to be subject to Rule 23, diversity jurisdiction has to be satisfied. Traditionally, this required the satisfaction of two elements: (1) diversity of citizenship between the plaintiffs and the defendants, and (2) an amount in controversy higher than the statutorily defined minimum.⁵¹ In the case of a class action, these elements could be easily thwarted. The federal requirement of complete diversity meant that clever plaintiffs' attorneys could defeat federal jurisdiction merely by choosing a named plaintiff with the same citizenship as one of the defendants.⁵² Because of the national breadth of the advertising campaigns at issue, this does not normally present a hurdle. Furthermore, because of the decentralized nature of the individual harm present in a class action, it was a simple matter for plaintiffs' attorneys to assert that none of the plaintiffs' claims ever met the requisite amount in controversy, which was generally set high enough to ensure that minor disputes did not clutter the federal court system.⁵³ Finally, because diversity jurisdiction was traditionally intended to prevent out-of-state defendants from being victimized by an unfamiliar court system,⁵⁴ defendants are not allowed to remove a case that would otherwise satisfy the diversity jurisdiction requirements if the case is brought in a defendants' home state.⁵⁵ For this reason, plaintiffs' attorneys could defeat federal jurisdiction by filing in the state court of the defendant's citizenship.⁵⁶ Again, because of the nationwide sprawl of the harm, consumer deceptive advertising class actions are generally intensely flexible cases.⁵⁷ Forum-shopping state courts is a fairly easy task in this context.⁵⁸

S1248-49 (2005) (statement of Sen. Frist)); Burbank, *supra* note 28, at 1509; Timothy Kerr, *Cleaning Up One Mess to Create Another: Duplicative Class Actions, Federal Courts' Injunctive Power, and the Class Action Fairness Act of 2005*, 29 HAMLIN L. REV. 217, 219 (2006); Milliken, *supra* note 1, at 19–20.

51. See 28 U.S.C. § 1332 (2006) (providing the statutory requirements for diversity jurisdiction).

52. See Burbank, *supra* note 28, at 1517–18; DiFazio, *supra* note 31, at 140–41; Shapiro, *supra* note 1, at 81.

53. See DiFazio, *supra* note 31, at 141; see also *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005) (holding that if one plaintiff meets the amount-in-controversy requirement then supplemental jurisdiction can be had over the claims of other plaintiffs); Shapiro, *supra* note 1, at 81 (explaining that only minimal complete diversity is required in class actions).

54. See Burbank, *supra* note 28, at 1460; Ellis, *supra* note 41, at 108.

55. See 28 U.S.C. § 1441(b) (2006).

56. See *id.*; Burbank, *supra* note 28, at 1517–18; DiFazio, *supra* note 31, at 141.

57. See, e.g., *Walewski v. ZeniMax Media, Inc.*, No. 6:11-cv-1178-Orl-28DAB, 2012 WL 834125, at *8 (M.D. Fla. Jan. 30, 2012) (noting that, because defendant did business nationwide, “the alleged misrepresentations or omissions to any particular member of the purported class could have ‘emanated’ from a variety of locations”).

58. Evidence of such activities can be gleaned from the unusual amount of class actions filed in some state courts as opposed to others. See Ellis, *supra* note 41, at 93 (“An example of one such jurisdiction is Madison County, Illinois. Citing the large numbers of class actions filed even where there is no evidence that the

C. CAFA

With class actions exploding as a litigation vehicle,⁵⁹ the Class Action Fairness Act of 2005 (CAFA) sought to address both the perceived issues of unfair settlements and jurisdictional shortcomings.⁶⁰

1. Settlement

As far as the allegedly unfair settlements went, CAFA provided judges with assistance in their required evaluation of settlements.⁶¹ In order to make sure that class actions do not devolve into collusion between defendants' and plaintiffs' attorneys at the expense of the class's interest, Rule 23 has always required court approval for settlements.⁶² The court must determine that the settlement is "fair, reasonable, and adequate" in order for such settlement to be acceptable.⁶³ Rule 23 does not specify further what the court's gatekeeper function in this respect is,⁶⁴ but in practice courts tend to review settlements to make sure they are "fair, reasonable, and adequate" for the *class*, rather than for all of the parties involved in the litigation.⁶⁵ CAFA provided more guidance in some respects, especially with regard

residents of that county are 'somehow cursed or more plagued by injuries than the average citizen,' one Congressman suggested that the only reasonable explanation was 'aggressive forum shopping by trial lawyers to find courts and judges who will act as willing accomplices in a judicial power grab, hearing nationwide cases and setting policy for the entire country.'" (referencing Andreeva, *supra* note 43, at 394 (statement of Rep. Sensenbrenner)). The number of class actions filed against Fortune 500 companies in state courts increased by more than 1,000% in the 1990s, as opposed to a 338% increase in federal courts. See Hantler et al., *supra* note 31, at 1137 (noting that this "reflect[ed] the belief that plaintiffs are more likely to obtain and prevail on questionable class actions in state courts"); see also Ellis, *supra* note 41, at 92 (noting the perception that state courts are more likely to certify a class).

59. See Hantler et al., *supra* note 31, at 1137 (noting the significant increase of class actions in the 1990's).

60. See S. REP. NO. 109-14, at 4 (2005) (acknowledging the purpose of diversity jurisdiction and the abuse of class action settlements).

61. See Ellis, *supra* note 41, at 105-07 (discussing the new mechanisms and requirements for judicial evaluation of settlements).

62. See FED. R. CIV. P. 23(e) (2006); Kerr, *supra* note 50, at 219 ("Class counsel may collude with defendants and their attorneys, against class interests, in order to increase their prospects of being the lucky attorney to collect fees, and, thus allow defendants forum-shopping opportunities."); *id.* at 224-25.

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

64. Even the committee notes accompanying the initial implementation of this rule provided no guidance for the curious court, stating simply, "subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action." FED. R. CIV. P. 23 advisory committee's note 1966 (2006) (Subdivision (d)). The 2003 committee notes attempt to expand on this, suggesting that the court look to *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 316-24 (3d Cir. 1988), and the *Manual for Complex Litigation* for guidance, Fed. Judicial Centr., *Manual for Complex Litig.* 172 (Judge Stanley Marcus et al. eds., 4th ed. 2004). FED. R. CIV. P. 23 advisory committee's note 2003 (2006) (Committee Notes of Rules- 2003 Amendment, Paragraph (1)).

65. See *Hartless v. Clorox Co.*, 273 F.R.D. 630, 636 (S.D. Cal. 2011) ("In approving a class action settlement, a district court must ensure fairness to all members of the class presented for certification." (emphasis added) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003))); *Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564, 570 (S.D. Iowa 2011) ("When making this determination, 'the district court acts as a fiduciary,

to the coupon settlements that had attracted the most ire prior to CAFA.⁶⁶ CAFA also limited or prohibited other types of settlement (e.g., so-called “net loss” settlements in which the plaintiffs had to pay class counsel a fee that resulted in a net loss, and settlements where geography dictated recovery amounts).⁶⁷ Finally, CAFA established requirements to notify government officials of the settlement, introducing an additional “layer of independent oversight” beyond the court.⁶⁸

2. Jurisdictional

As for jurisdiction, CAFA expanded federal jurisdiction to include class actions, attempting to close the loopholes that plaintiffs’ attorneys had been wiggling through.⁶⁹ Among other things, federal courts could now exercise jurisdiction over any class action suit where the amount in controversy exceeded \$5 million, regardless of the amount of individual harm to each class member, as long as the class had over one hundred members.⁷⁰ If a single plaintiff was diverse from any of the defendants, then diversity jurisdiction was satisfied, so it no longer mattered if plaintiffs’ attorneys tried to get clever with named plaintiffs.⁷¹ CAFA also permitted a defendant to remove class actions from state courts even if they had been filed in the defendant’s state of citizenship.⁷²

IV. DECEPTIVE ADVERTISING CLASS ACTIONS: STILL BROKEN AFTER CAFA

If class actions were broken before CAFA, then deceptive advertising class actions, at least, remain broken in CAFA’s wake. CAFA’s clarification of settlement scrutiny does not strip class action settlement of the unique challenges it presents — or eliminate the perception that class actions are used as a blackmail tool to extort money for frivolous claims. And CAFA’s attempt to expand federal jurisdiction

serving as a guardian of the rights of absent class members.” (quoting *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005))).

66. See Ellis, *supra* note 41, at 105.

67. See *id.* at 106.

68. *Id.* at 106–07.

69. See *Yeroushalmi v. Blockbuster Inc.*, No. CV 05–223–AHM (RCX), 2005 WL 2083008, at *5 (C.D. Cal. July 11, 2005) (“This result is further supported by the Senate Judiciary Committee’s direction that “[when] a federal court is uncertain about whether “all matters in controversy” in a purported class action “do not in the aggregate exceed the sum or value of \$5,000,000,” the court should err in favor of exercising jurisdiction over the case.” (quoting S. REP. NO. 102–14, at *42 (1991), *reprinted* in 2005 U.S.C.C.A.N. 4, 40)); see also *id.* at *2 (noting that allegations specifically to circumvent jurisdiction were the target of CAFA). CAFA also maintains a number of exceptions to federal jurisdiction over class actions, meant to ensure that truly state-specific class actions remain in state court. See 28 U.S.C. § 1332(d)(4) (2006). These are of limited relevance to the topic of this Article.

70. See Shapiro, *supra* note 1, at 81–82 (noting the change in the amount in controversy requirement).

71. See 28 U.S.C. §§ 1332(d)(2), (d)(5) (2006); DiFazio, *supra* note 31, at 134; Ellis, *supra* note 41, at 101; Shapiro, *supra* note 1, at 81.

72. See DiFazio, *supra* note 31, at 142; Erichson, *supra* note 45, at 1598; Shapiro, *supra* note 1, at 82.

cannot correct the underlying difficulty of trying to redress a nationwide harm with a state statute, which results in inconsistent precedents, inefficient statewide classes, and continued jurisdictional shenanigans.⁷³

CAFA was intended to improve the functioning of the class action, making it, as it was always supposed to be, a win-win-win for all involved.⁷⁴ However, deceptive advertising class actions have continued to operate against the best interests of plaintiffs, defendants, *and* courts.⁷⁵

A. Settlement

Settlements, far more frequently than class actions, often achieve the win-win-win situation that class actions are supposed to achieve: an acceptable outcome to both plaintiffs and defendants while unclogging busy courts.⁷⁶ And the particular quirks of class actions initially make settlement look particularly inviting for both plaintiffs and defendants.⁷⁷ Class actions are inherently more complex than an ordinary lawsuit, requiring much more labor over the course of the litigation and therefore higher litigation costs than a regular case.⁷⁸ Judgments against defendants can be enormous.⁷⁹ Plaintiffs' attorneys, meanwhile, frequently do not get paid unless they win and may therefore be facing a huge monetary loss if they take a case to trial and fail to win.⁸⁰ Moreover, because the act of class certification inevitably spurs some analysis of the merits of the case, there is an incentive for both sides to settle as quickly as possible, before the case cements itself in the brain of the judge as particularly weak or strong, based only on preliminary impressions.⁸¹

73. See *infra* Parts IV.B–D.

74. See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1734 (2008) (discussing the benefits to both plaintiffs and defendants under CAFA).

75. See *infra* Part V.

76. Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 ARIZ. L. REV. 1009, 1012 (2008) (“Judges and litigants generally view settlement as a win-win outcome.”).

77. *Id.* at 1012–13 (discussing the purported benefits of settlement).

78. See, e.g., Mac R. McCoy et al., *Nature of the Beast: Recurrent Ethical Issues Confronting Attorneys Attempting to Settle Florida Class Actions*, 86 FLA. B.J. 36, 36 (2012) (citing *InPhyNet Contracting Servs., Inc. v. Soria*, 33 So. 3d 766, 771 (Fla. Dist. Ct. App. 2010)).

79. See Hantler et al., *supra* note 31, at 1138 (“[T]he aggregation of claims increases both the likelihood that a defendant will be found liable and the size of any damages award that may result.”).

80. Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DEPAUL L. REV. 347, 347–48 (1998) (discussing contingent fees in class action suits).

81. While courts pay lip service to this not being the case, see *Badella v. Deniro Mktg. LLC*, No. C10–03908 CRB, 2011 WL 5358400, at *3 (N.D. Cal. Nov. 4, 2011) (“Motions for class certification should not become occasions for examining the merits of the case.”); *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW (AGRX), 2011 WL 4599833, at *3 (C.D. Cal. Sept. 29, 2011) (“In determining whether a plaintiff has met his burden of demonstrating that each element of Rule 23 has been satisfied, the Court generally does not consider the merits of plaintiff’s claims.”); *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 580 (N.D. Ill. 2005) (“In general, the court must not consider the merits of the case.”); *Yumul v. Smart Balance, Inc.*, No. CV 10-00927 MMM (AJWx), 2011 WL 1045555, at *3 (C.D. Cal. Mar. 14, 2011), it is nonetheless true that merits are discussed. See,

Class action settlements, however, even after CAFA, distort the functioning of the system. While a usual settlement takes place with no admission of liability and no real public stigma, courts view all class action settlements from the starting point of a guilty defendant.⁸² Courts are concerned with the protection of the class interest, which presupposes that the class *has* an interest at all.⁸³ While courts do take into account the strength of the case when evaluating the settlement,⁸⁴ without the benefit of full fact-finding, courts are more inclined to give the class the benefit of the doubt rather than approve an unfair settlement negotiated solely with attorneys' fees in mind.⁸⁵ Furthermore, when the settlement takes place prior to class certification — which a defendant may desire in order to keep litigation costs

e.g., *Jermyn v. Best Buy Stores, LP*, 276 F.R.D. 167, 172 (S.D.N.Y. 2011) (noting that a class certification would have occurred in another case if there had been “some proof” of an alleged policy, and contrasting that with the case in front of it, in which plaintiffs “presented significant (indeed, ample) proof that the illegal policy alleged in fact exists”); *Oscar v. BMW of N. Am., LLC*, 274 F.R.D. 498, 505 (S.D.N.Y. 2011) (remarking that plaintiff had failed to demonstrate why the product in question was defective, but then noting that it did not need to make that merits determination at that time). The courts have acknowledged that a class certification inquiry necessarily involves an “overlap” with the merits of the case. *Guido v. L’Oreal, USA, Inc.*, Nos. CV 11–1067 CAS (JCx), CV 11–5465 (JCx) 2012 WL 1616912, at *3 (C.D. Cal. May 7, 2012); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1051 (S.D. Tex. 2012); *In re Ferrero Litig.*, 278 F.R.D. 552, 557 (S.D. Cal. 2011); *Schramm v. JPMorgan Chase Bank, N.A.*, No. LA CV09–09442 JAK (FFMx), 2011 WL 5034663, at *3 (C.D. Cal. Oct. 19, 2011) (quoting *Wal-Mart Stores, Inc. v. Dukes*, No. 10–277 U.S. 1, slip op. at 10, 131 S. Ct. 2541 (2011)); *Yumul*, 2011 WL 1045555, at *4. In fact, at least one court has flatly admitted,

[T]he merits of the class members’ substantive claims are often highly relevant when determining whether to certify a class. More importantly, it is not correct to say a district court *may* consider the merits to the extent that they overlap with class certification issues; rather, a district court *must* consider the merits if they overlap with [sic] Rule 23 (a) requirements.

Johns v. Bayer Corp., 280 F.R.D. 551, 555 (S.D. Cal. 2012) (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011)) (emphasis in original).

82. See *In re Corrugated Container Antitrust Litig.*, 556 F. Supp. 1117, 1125–26 (S.D. Tex. 1982), *aff’d*, 687 F.2d 52 (5th Cir. 1982) (“The proposed settlement is a compromise of disputed claims, but this compromise does not imply that Mead or any of the other defendants in this litigation are liable for the claims made by the plaintiffs.”); see also *Raymark Indus., Inc. v. Stemple*, No. 88–1014-K, 1990 WL 72588, at *22 n.7 (D. Kan. May 30, 1990) (“In addition, the Kansas Supreme Court has recently recognized that although a consent judgment (which is very similar to the type of settlement agreement at issue in this case) is construed largely as a contract, it is enforced like an order.”).

83. See FED. R. CIV. P. 23(a)(4) (2006) (stating the representative parties will protect the interests of a potential class).

84. See, *e.g.*, *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 639 (S.D. Cal. 2011); *In re Ky. Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 280 F.R.D. 364, 375 (N.D. Ill. 2011). In practice, this examination is necessarily brief and perfunctory, it sometimes last no more than a few sentences. See, *e.g.*, *Hartless*, 273 F.R.D. at 639–40 (discussing the merits of the class action for the purpose of settlement).

85. See *Hartless*, 273 F.R.D. at 639–40 (discussing a judge’s unwillingness to approve a settlement for fear of attorney collusion and because she was concerned that there was significant risk to the plaintiff class in accepting settlement).

as low as possible — the scrutiny of the settlement is even more severe.⁸⁶ As well-intentioned as this system is, it places all parties involved in unusual, less than desirable positions. It forces both defendant and plaintiff to frankly expose case weaknesses in an effort to win court approval, and forces a court to preside in judgment over a case based on limited information. It places defendant in a position of arguing in favor of class certification that it would otherwise oppose, leading to possible inconsistent stances if the settlement is refused. It rewards a class with recovery that it might not otherwise be entitled to, and it casts suspicion and doubt on what might be a perfectly respectable settlement.

For instance, in *In re Bluetooth Headset Products Liability Litigation*, the appellate court expressed concern that an attorneys' fees award of \$800,000 was possibly inappropriate when the class's total recovery was only \$100,000.⁸⁷ However, in a non-class-action case, it would not necessarily be unusual for attorneys' fees to stretch into the high six figures and for settlement to be much less if the plaintiffs' case was weak.⁸⁸ In *Bluetooth*, among other cases, collusion was suspected merely because of the extra scrutiny given to class action settlements.⁸⁹ Indeed, in *Bluetooth*, the district court had concluded, "[P]laintiffs' case was not particularly strong in light of defendants' significant defenses."⁹⁰ What would otherwise have been an unremarkable settlement was twisted into suspicious activity.

Even more illustrative is the case of *Walter v. Hughes Communications, Inc.*⁹¹ In *Walter*, Plaintiffs sued on behalf of a class, claiming violations of California's Consumer Legal Remedies Act, California's Unfair Competition Law, negligent misrepresentation, and intentional misrepresentation and omission.⁹² The accusations were based on the allegation that Defendant had misrepresented the Internet speeds that its subscribers would receive.⁹³ The parties presented a proposed settlement to the court for approval, which the court denied — twice.⁹⁴ The first time the court rejected the settlement summarily, noting that it had not received vital information it needed to assess the settlement.⁹⁵ The second time, the

86. See *In re Bluetooth*, 654 F.3d at 946; *Hartless*, 273 F.R.D. at 639 ("Courts require a higher standard of fairness when settlement takes place prior to class certification to ensure class counsel and defendant have not colluded in settling the case."); *Walter v. Hughes Commc'ns, Inc.*, No. 09-2136 SC, 2011 WL 2650711, at *11 (N.D. Cal. July 6, 2011).

87. See *In re Bluetooth*, 654 F.3d at 945.

88. See Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty Into Offers of Judgment*, 91 MINN. L. REV. 865, 868 (2007) (discussing six figure attorney's fees when settlement amounts are substantially lower).

89. *In re Bluetooth*, 654 F.3d at 946.

90. *Id.*

91. *Walter*, 2011 WL 2650711, at *1.

92. *Id.* at *3.

93. *Id.* at *2.

94. *Id.* at *1.

95. See Order Den. Mot. for Settlement at 2–3, *Walter v. Hughes Commc'ns, Inc.*, 2011 WL 2650711 (N.D. Cal. Feb. 3, 2011) (No. 09-2136 SC), at *2.

court expressed skepticism that a nationwide class could be certified, pointing to several defects in Plaintiffs' counsel's papers.⁹⁶ The court went on, however, to discuss the fairness and adequacy of the settlement, and admitted point-blank that the structure of the settlement was such that it was forced to assume "the role of class advocate."⁹⁷ In this way, the court drew scathing conclusions about the structure of a settlement that was actually fairly standard for this sort of class action: an alteration to Defendant's advertising and treatment of its customers, the offer of a minor refund, and a release from all claims against Defendant.⁹⁸ Indeed, in many ways the settlement was more favorable to the class than other settlements.⁹⁹ Defendant's change to its business methods was significant,¹⁰⁰ and the refunds stretched as high as \$40.¹⁰¹ So, for instance, faced with a similar settlement proposal — a nominal amount of money for each plaintiff who files a claim and some changes to the advertising in question — the court in *Kelly v. Phiten USA, Inc.* approved it,¹⁰² displaying skepticism for the ability of the class to win at trial.¹⁰³ The court in *In re Kentucky Grilled Chicken Coupon Marketing and Sales Practices Litigation* approved a settlement proposal that, at the most, allowed \$15.96 in recovery to Plaintiffs.¹⁰⁴ In fact, the court in *In re Heartland Payment Systems, Inc. Customer Data Security Breach Litigation* also allowed a settlement that resulted in

96. See *Walter*, 2011 WL 2650711, at *7–10. Indeed, the court's disdain for plaintiffs' counsel motion was such that the court expressed doubts as to the adequacy of plaintiffs' counsel:

Plaintiffs allege that "Plaintiffs and putative class members are represented by extremely qualified counsel with extensive collective experience prosecuting complex consumer class actions cases of this nature." Pls.' Supp. Br. at 16. The Court has reviewed the curriculum vitae submitted and sees no issue with the qualification and experience of Plaintiffs' counsel. However, the Court finds that Plaintiffs' counsel's work on this Motion speaks volumes, and the Court is not convinced by this work that Plaintiffs' counsel would adequately represent the class.

Id. at *9.

97. *Id.* at *12.

98. See *id.* at *4–6.

99. Compare *id.* at *5, with *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1080 (S.D. Tex. 2012).

100. See *Walter*, 2011 WL 2650711, at *1 (discussing the injunctive relief afforded to the plaintiffs).

101. *Id.* at *4.

102. *Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564, 568 (S.D. Iowa 2011).

103. *Id.* at 570 ("Based upon the record before the Court, it is clear that the Settlement Class Members faced significant risks in adjudicating their claims. The possibility of a large monetary recovery through future litigation is highly speculative, and any such recovery would occur only after considerable additional delay. Specifically, the Settlement Class Members would have faced challenges by the Defendant regarding their eligibility for class certification due to choice of law limitations, diversity complications, and arbitration agreements. Additionally, they faced the burden of proving falsity and damages, and the litigation would likely have been long and costly, as Defendant has capable counsel at its disposal and intended to challenge nearly every aspect of Settlement Class Members' case. Were the Settlement Class Members to receive a favorable trial verdict, they still would have faced costly and lengthy appeals, delaying the receipt of benefits.") (internal citations omitted).

104. 280 F.R.D. 364, 373 (N.D. Ill. 2011). Indeed, the court called it "excellent results for the Settlement Class." *Id.* at 371.

A MATTER OF NATIONAL IMPORTANCE

minimal recovery for Plaintiffs, and which 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,¹⁰⁵ an assertion borne out by the extraordinarily low claim rate of eleven total from a class of over 100 million.¹⁰⁶

The *Walter* court, however, was not pleased with this unremarkable settlement proposal. It concluded that the claim process was too difficult, the wording of the release too confusing, and that it was unlikely many consumers would bother to make claims.¹⁰⁷ While the court may indeed have been correct on all of these points, the thing to note is that a small amount of claims is only a bad thing *if the defendant is guilty as charged*.¹⁰⁸ Try to imagine a defendant settling a case like this by doing anything other than whole-heartedly admitting wrongdoing. It becomes impossible. The court would not approve any settlement less effective than scorched earth. A class action necessarily requires a settlement that gets something for the class, regardless of the merits of the underlying action. This is especially striking in this particular case, which contains an internal contradiction: the court is skeptical that this class action can even be brought — and no doubt under normal circumstances the defendant might agree — but at the same time deems the settlement unfair to the class — a class it has already admitted it doubts even exists. CAFA's increased detail regarding settlements has not prevented confusing, inconsistent results such as this.

To escape the complications of court approval and to save defendant from having to take an unwanted stance on class certification it might not want to take, the parties could settle without court approval by foregoing certification of the class. Court approval of settlements is only necessary when a class is involved.¹⁰⁹ If the named parties settle the case without ever certifying a class, there is no need for court approval.¹¹⁰ However, doing this would likely defeat the objective of both

105. 851 F. Supp. 2d 1040, 1050 (S.D. Tex. 2012).

106. *Id.* at 1047. While this case was not a deceptive advertising case, it is nonetheless interesting for its settlement analysis.

107. *Walter v. Hughes Commc'ns, Inc.*, No. 09-2136 SC, 2011 WL 2650711, at *15–16 (N.D. Cal. July 6, 2011). The lack of interest in making claims is an ongoing problem in class actions. *See, e.g., In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1047 (noting that only eleven claims were filed from a class of over one hundred million people, “[d]espite a vigorous notice campaign”).

108. *See Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004) (“Where there has been a pattern of illegal conduct resulting in harm to a large group of people, our system has mechanisms such as class action suits for punishing defendants.”).

109. *See Fed. R. Civ. P. 23(e)*. *But see In re Leslie Fay Cos.*, 168 B.R. 294, 305 (Bankr. S.D.N.Y. 1994) (“Compromises may not be made in bankruptcy absent notice and a hearing and a court order.”); *In re Rothwell*, 159 B.R. 374, 379 (Bankr. D. Mass. 1993) (“A settlement agreement [in bankruptcy] is unenforceable without notice of the settlement to creditors or a court order approving it.”).

110. Although, even pre-certification, it is suggested that counsel must reach a settlement that is “fair, reasonable, and adequate” for the class. FED. R. CIV. P. 23 advisory committee’s note, 2003 (2006) (Subdivision (e)).

parties in reaching the settlement.¹¹¹ First, with a settlement, a defendant seeks to get rid of a lawsuit while limiting its financial exposure in doing so.¹¹² If the class is not certified for purposes of the settlement, then the settlement only settles the claims of the named plaintiffs.¹¹³ The rest of the class members have not had their interests addressed in any way.¹¹⁴ The failure to certify the class for settlement exposes the defendant to serial plaintiffs bringing cases against it for the same harm and forces a defendant to have to beat class certification not just once but several times, increasing overall costs.¹¹⁵

For instance, in *Zapka v. Coca-Cola Co.*, the court refused to certify a class.¹¹⁶ Defendant settled the suit, now merely an individual one.¹¹⁷ Defendant then found itself facing a brand new proposed class action, based on the same allegedly deceptive conduct, seeking relief under the same statute.¹¹⁸ Defendant argued the new class action was precluded by the *Zapka* class certification denial.¹¹⁹ The court found, however, that “in some circumstances denial of class certification may be given estoppel effect,” but not in *all* circumstances.¹²⁰ The court noted that the new case was attempting to correct the problems of the *Zapka* case, and found that collateral estoppel did not apply.¹²¹ Thus, the denial of class certification in *Zapka* exposed Defendant, who settled the case, to more litigation. It may have been in Defendant’s best interest not to fight class certification and instead to settle on a classwide basis.

111. See, e.g., Burbank, *supra* note 28, at 1497–98 (describing the act of settling a class action as “a vehicle by which plaintiffs could secure prompt relief at less cost and mass tort defendants could receive a comprehensive resolution of a litigation problem that might otherwise consume years, if not decades” and adding that “[f]or defendants seeking ‘global peace,’ the settlement class action seemed just the thing”); Staton v. Boeing Co., 327 F.3d 938, 964 (9th Cir. 2003) (“[A] defendant is interested only in disposing of the total claim asserted against it.”) (citation omitted).

112. See, e.g., Leslie, *supra* note 76, at 1012 (“[S]ettlement brings certainty to an inherently uncertain process. All interested parties seek repose: defendants want to minimize their exposure. . . . A settlement guarantees that defendants will not face bankrupting liability. . . .”); see also *id.* at 1012 n.6 (“Another potential problem is that by aggregating hundreds of thousands and sometimes millions of small claims, class counsel can threaten defendants with exposure so great that they are reluctant to take the risk of going to trial even if they believe they have good defenses; even a small risk of a very large loss may be one the defendant is unwilling to take.”) (quoting DAVID BOIES, COURTING JUSTICE: FROM NY YANKEES V. MAJOR LEAGUE BASEBALL TO BUSH V. GORE, 1997–2000 229 (2004)).

113. See 32B AM. JUR. 2D *Federal Courts* § 1595 (“Where a plaintiff’s stake in the controversy disappears before there has been an effort to certify the class action, the action must be dismissed as moot even if it is capable of repetition but evading review.”).

114. *Id.* § 1595 n.1 (“A federal court should normally dismiss a putative class action as moot when the named plaintiff settles its individual claim and the district court has not certified a class.”).

115. See DiFazio, *supra* note 31, at 138–39 (2012); see also S. REP. NO. 109–14, at 23 (2005).

116. No. 99 CV 8238, 2000 WL 1644539, at *5 (N.D. Ill. Oct. 27, 2000).

117. See Minute Order of Mar. 20, 2002 at 1, *Zapka*, 2000 WL 1644539 (N.D. Ill. Oct. 27, 2000) (No. 1:99-cv-08238).

118. *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 577–78 (N.D. Ill. 2005).

119. *Id.* at 578–79.

120. *Id.* at 579.

121. *Id.*

The lesson, in fact, is clear: battling class certification just forces a defendant to keep litigating the question, against plaintiffs who will continue to bring motions or suits until they manage to win or the defendant capitulates and settles the whole class.¹²² Indeed, the court in *Worthington v. Bayer Healthcare, LLC* dismissed the case because a California case was first-filed but deliberately gave leave to re-file the case should the California court deny class certification.¹²³ Effectively, a victory for Defendant in the California case will just result in the resumption of the New Jersey case and the same fight.¹²⁴ The case dismissal in New Jersey acts as more of a time-out than an actual dismissal.¹²⁵ So established is this try-try again idea, that at least one named plaintiff argued immediately for re-briefing after discovery if class certification was denied.¹²⁶ The court, however, rebuffed this bet-hedging.¹²⁷

A quintessential illustration of how victory can just bring a defendant more grief is found in *Thorogood v. Sears, Roebuck & Co.*¹²⁸ For instance, Sears, Roebuck & Company found itself subject to a class action lawsuit brought by a named plaintiff, Steven Thorogood.¹²⁹ The court considered the class action suit to be “near-frivolous.”¹³⁰ It was based on representations by Sears that its dryer drums were

122. See, e.g., *Carrera v. Bayer Corp.*, No. 08–4716 (JLL), 2011 WL 5878376, at *1 (D.N.J. Nov. 22, 2011); *Badella v. Deniro Mktg. LLC*, No. C 10–03908 CRB, 2011 WL 5358400, at *1 (N.D. Cal. Nov. 4, 2011) (denying class certification and simultaneously setting briefing schedule for new class certification motion); *Red v. Kraft Foods, Inc.*, No. CV 10–1028–GW (AGRx), 2011 WL 4599833, at *1 (C.D. Cal. Sept. 29, 2011) (denying class certification and simultaneously setting briefing schedule for new class certification motion); *Kingsbury v. U.S. Greenfiber, LLC*, No. CV 08–00151 AHM (JTLx), 2011 WL 2619231, at *1 (C.D. Cal. May 23, 2011) (regarding plaintiffs’ fourth motion for class certification); *Campion v. Old Republic Home Prot. Co., Inc.*, No. 09–CV–748–JMA(NLS), 2011 WL 1935967, at *1 (S.D. Cal. May 20, 2011) (“A motion for reconsideration may not be used to get a second bite at the apple.”); *id.* at *6 (“It is unclear as to whether Plaintiff, who states ‘it can sometimes take plaintiffs two, three, or even four bites at the class-certification apple to propose a class that meets Rule 23’s requirements’ intends to re-seek certification as to the previously proposed class or to modify his proposed class definition and then seek certification as to a new proposed class.”); *Heisler v. Maxtor Corp.*, No. 5:06–cv–06634–JF (PSG), 2011 WL 1496114, at *1 (N.D. Cal. Apr. 20, 2011); Order on Pls.’ Mot. for Class Certification, *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 413 (D. Me. 2010) [hereinafter “Order”] (listing thirteen prior attempts to certify a class of light cigarette smokers). Some commentators have noted that the recent Supreme Court decision in *Walmart v. Dukes* seems to make it harder for plaintiffs to certify a class. See Erwin Chemerinsky, *New Limits on Class Actions*, 47 TRIAL 54, 54 (Nov. 2011); Timothy D. Edwards, *Class Action Suits after Walmart v. Dukes*, 84 WIS. LAW. 18, 18 (Nov. 2011), available at <http://www.wisbar.org/>. However, the Supreme Court’s decision in *Smith v. Bayer Corp.* seems to counter that by permitting plaintiffs’ attorneys more opportunities to try to get a class certification to stick. See 131 S. Ct. 2368 (2011).

123. See Nos. 11-2793 (ES), 11-3017 (ES), 11-3299 (ES), 2012 WL 1079716, at *7 n.5, *8 (D.N.J. Mar. 30, 2012).

124. *Id.* at *7 n.5.

125. *Id.*

126. See *Walewski v. ZeniMax Media, Inc.*, No. 6:11-cv-1178-Orl-28, 2012 WL 834125, at *3 (M.D. Fla. Jan. 30, 2012), *report and recommendation adopted*, 6:11-cv-1178-Orl-28, 2012 WL 847236 (M.D. Fla. Mar. 13, 2012).

127. *Id.* at *3, *9.

128. 678 F.3d 546 (7th Cir. 2012).

129. *Id.* at 547.

130. *Id.*

stainless steel, which the named plaintiff alleged he understood to mean *entirely* stainless steel, when in fact there was a portion of the drum made of ceramic-coated regular steel that could only be seen “if [the user] craned his head inside the drum.”¹³¹ A class was initially certified, but the Seventh Circuit decertified it based on a ruling that “there [were] *no* common issues of law or fact.”¹³² At first glance, this may seem like a win to Sears. Not so: another named plaintiff then brought a copycat suit in California.¹³³ Sears moved to enjoin the suit based on the Seventh Circuit’s ruling in the first suit, and initially won.¹³⁴ However, the Seventh Circuit, based on the Supreme Court’s ruling in *Smith v. Bayer Corp.*, later threw up its hands and decided that there was nothing it could do to prevent Sears from having to defend against a number of such copycat suits based on what appeared to be “near-frivolous” allegations.¹³⁵ As the Seventh Circuit noted, Sears’s strongest arguments for why it should be protected from such serial suits were matters of policy stemming from this common misuse of the class action procedure; there was no jurisdictional doctrine to protect it.¹³⁶ As the Seventh Circuit saw it, “the policy concerns are acute.”¹³⁷ But the Seventh Circuit found it had no choice but to permit the copycat suit to go forward.¹³⁸ In this case, Sears would have been better off not fighting class certification and either dealing with the merits of the “near-frivolous” case or just settling to try to get out of the labyrinth.

In addition to the cycle of duplicative cases facing a defendant who does not settle a class action, it is an ethical violation for plaintiffs’ attorneys to agree, as part of a settlement, not to pursue further claims against the defendant.¹³⁹ This means that failure to certify the class in settlement would result in the possibility of not just multiple cases involving the same class of plaintiffs but multiple cases involving the same *plaintiffs’ attorneys*.¹⁴⁰ Nor is there any guarantee that a motion to dismiss or motion for summary judgment will stand up due to the complicated preclusive issues of different causes of action in different states.¹⁴¹

131. *Id.* at 548–49.

132. *Id.* at 549 (internal quotations omitted) (emphasis in original) (quoting *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 747 (7th Cir. 2008)).

133. *Id.* at 547.

134. *Id.* at 548.

135. *Id.* at 547–48 (citing *Smith v. Bayer*, 131 S. Ct. 2368 (2011)); *id.* at 552.

136. *Id.* at 552.

137. *Id.*

138. *Id.*

139. See McCoy et al., *supra* note 78, at 40.

140. *Thorogood*, 678 F.3d at 547 (“Not only was it a copycat suit, but Murray had been a member of Thorogood’s proposed (and certified, but later decertified) class, and was represented in his own suit by counsel who had represented Thorogood in the latter’s class action suit.”).

141. See, e.g., Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 976–77 (1998).

Meanwhile, it is in the plaintiffs' best interest to get the class certified, too.¹⁴² The very nature of deceptive advertising causes of action ensures that it is unlikely all class members will independently sue.¹⁴³ The settlement of the whole class is the best way for most consumers to ever achieve any redress.¹⁴⁴ Even plaintiffs' attorneys have an incentive to get the class certified and the settlement approved.¹⁴⁵ While serial cases may sound nice in the abstract, one fell swoop of money surely sounds even nicer. Therefore, even with the challenges of settling a certified class, there remains unusually strong incentive on both sides to settle — and to settle *early*, because costs rise quickly in class actions.

In fact, in order to even reach a wildly unpredictable and dubiously helpful class certification decision, all parties must engage in lengthy, expensive discovery.¹⁴⁶ The named plaintiffs often must sit for depositions.¹⁴⁷ Class members beyond the named plaintiffs may be deposed, too,¹⁴⁸ which requires the identification and location of

142. See, e.g., Heather M. Johnson, *Resolution of Mass Product Liability Litigation Within the Federal Rules: A Case for the Increased Use of Rule 23(b)(3) Class Actions*, 64 *FORDHAM L. REV.* 2329, 2333 (1996) ("Rule 23 allows plaintiffs to combine resources and litigate claims or issues together, thereby providing access to the civil justice system for plaintiffs who lack financial resources to bring individual claims.").

143. See, e.g., Debra Pogrud Stark & Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, 56 *CLEV. ST. L. REV.* 483, 490 (2008) (reasoning that in cases of consumer fraud, "a consumer is unlikely to bring an individual lawsuit on the basis of the common law action for fraud to recover her losses because the legal fees and costs for the lawsuit far outweigh the amount the consumer could recover from the lawsuit").

144. See *id.*; see also Leslie, *supra* note 76, at 1012–13.

145. See Leslie, *supra* note 76, at 1010, 1012–13.

146. See § 1785.3 Timing of Certification, 7AA *FED. PRAC. & PROC. CIV.* § 1785.3 (3d ed. 2005) ("[C]ourts frequently have ruled that discovery relating to the issue whether a class action is appropriate needs to be undertaken before deciding whether to allow the action to proceed on a class basis.").

147. See, e.g., Guido v. L'Oreal, USA, Inc., Nos. CV 11–1067 CAS (JCx), CV 11–5465 CAS (JCx), 2012 WL 1616912, at *3 (C.D. Cal. May 7, 2012), *reconsideration granted*, Guido v. L'Oreal, USA, Inc., Nos. CV 11–1067 CAS (JCx), CV 11–5465 CAS (JCx), 2012 WL 2458118 (C.D. Cal. June 25, 2012) (referencing deposition of named plaintiff); *In re Yasmin and Yaz Mktg. Sales Practices and Prods. Liab. Litig.*, No. 3:09–md–02100–DRH–PMF, 2012 WL 865041, at *16 (S.D. Ill. Mar. 13, 2012) (reviewing the deposition of Ms. Burns, a named plaintiff); *Carrera v. Bayer Corp.*, No. 08–4716 (JLL), 2011 WL 5878376, at *3 (D.N.J. Nov. 22, 2011) (discussing the named plaintiff's deposition testimony as it relates to the Defendants' case); *Badella v. Deniro Mktg. LLC*, No. C 10–03908 CRB, 2011 WL 5358400, at *2 (N.D. Cal. Nov. 4, 2011) (detailing the circumstances of one named plaintiff's departure following his deposition); *In re Ferrero Litig.*, 278 F.R.D. 552, 560 (S.D. Cal. 2011) (referring to a named plaintiff's deposition testimony regarding Nutella); *Red v. Kraft Foods, Inc.*, No. CV 10–1028–GW (AGRx), 2011 WL 4599833, at *6 (C.D. Cal. Sept. 29, 2011) (recalling exact language from two named plaintiffs' testimony about "indulgent treats"); *Zeisel v. Diamond Foods, Inc.*, No. C 10–01192 JSW, 2011 WL 2221113, at *4 (N.D. Cal. June 7, 2011) (using a named plaintiff's deposition testimony to determine the plaintiff's standing); see also *Heisler v. Maxtor Corp.*, No. 5:06–cv–06634–JF (PSG), 2011 WL 1496114, at *4–5 (N.D. Cal. Apr. 20, 2011); *Fitzpatrick v. Gen. Mills Inc.*, 263 F.R.D. 687, 691–92 (S.D. Fla. 2010), *vacated*, *Fitzpatrick v. Gen. Mills Inc.*, 635 F.3d 1279, 1281 (11th Cir. 2011); *Nelson v. Mead Johnson Nutrition Co.*, 270 F.R.D. 689, 695 (S.D. Fla. 2010); *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 411 (D. Me. 2010); *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742 (DLC), 2010 WL 3119452, at *2 n.3, *8 (S.D.N.Y. Aug. 5, 2010); *In re Sears, Roebuck & Co. Tools Mktg. and Sales Practices Litig.*, Nos. 05 C 4742, 05 C 2623, 2007 WL 4287511, at *7 (N.D. Ill. Dec. 4, 2007).

148. See, e.g., *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. at 416; *Weiner*, 2010 WL 3119452, at *3.

these class members — an enormous expense in a day and age when the amount of retained information has exploded.¹⁴⁹ Witnesses for the defendant are often deposed as well.¹⁵⁰ The parties frequently engage experts, another sizeable expense.¹⁵¹ Indeed, in at least one case the court criticized one defendant's expert for not having undertaken a survey, implying that not only the use of an expert but the costly exercise of a full-blown consumer survey may now be *de rigeur* at the class certification stage.¹⁵²

Because attorneys' fees are approved based in part on percentage of settlement amount, the defendant has a better chance of keeping the overall settlement low if it can settle before attorneys' fees rack up.¹⁵³ Otherwise, the defendant may be forced to increase the settlement amount just to justify the increased attorneys' fees.¹⁵⁴ Therefore, even with CAFA's additional guidance, settlement remains tricky to navigate in the class action context.

149. See, e.g., *In re Ky. Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 280 F.R.D. 364, 387 (N.D. Ill. 2011).

150. See *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1081 n.13 (6th Cir. 1996); *In re Ky. Grilled Chicken*, 280 F.R.D. at 372; *Weiner*, 2010 WL 3119452, at *8.

151. See, e.g., *Thorogood v. Sears, Roebuck & Co.*, 678 F.3d 546, 548 (7th Cir. 2012) (relying on the plaintiff's engineering expertise); *Heisler*, 2011 WL 1496114, at *3 (filing expert disclosures); *Red*, 2011 WL 4599833, at *12 (offering the testimony of a Columbia Business School professor); *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 482 (N.D. Cal. 2011) (using expert testimony to demonstrate the plausibility of their claim); *Zeisel*, 2011 WL 2221113, at *2 (submitting an expert report from a medical doctor); *Carrera v. Bayer Corp.*, No. 08-4716 (JLL), 2011 WL 5878376, at *3 (D.N.J. Nov. 22, 2011) (using expert testimony of a doctor); *Salon Fad v. L'Oreal USA, Inc.*, No. 10 Civ. 5063(DLC), 2011 WL 4089902, at *8 (S.D.N.Y. Sept. 14, 2011) (supporting their claim with an expert report of an economics professor); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 377 (N.D. Cal. 2010) (offering expert testimony as to the materiality of Blue Sky's product labeling and marketing); *Fitzpatrick*, 263 F.R.D. at 697 (submitting an expert report that explains the brand benefit garnered when a product helps digestive issues); *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. at 408 (introducing expert testimony demonstrating the defendant's knowledge of the harm of cigarettes); *Weiner*, 2010 WL 3119452, at *4, *9–10 (S.D.N.Y. Aug. 5, 2010) (offering expert testimony on the certification of plaintiff's class).

152. See *Weiner*, 2010 WL 3119452, at *8 (criticizing Defendant's expert for not citing any specific studies or specific market research that would make his reports more reliable). Earlier court decisions appear to have permitted less costly declarations in lieu of full-blown expert reports. See *In re Am. Med. Sys., Inc.*, 75 F.3d at 1081 n.15 (using a mere statement of a doctor as support for an argument). However, that precedent may now be passé. See *Jenkins v. Hyundai Motor Fin. Co.*, No. C2-04-720, 2008 WL 781862, *3 (S.D. Ohio Mar. 24, 2008) (refusing to characterize expert testimony as such if it only expresses legal conclusions and not facts).

153. See *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) (awarding attorneys' fees based on the lodestar method because a settlement was reached); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1074–75 (S.D. Tex. 2012) (discussing how attorneys' fees are tied to the value of the benefits actually provided to the class, which is largely based on the amount of hours actually worked); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. 2011) (finding attorneys' fees reasonable based on achieving a favorable result and the expertise required to successfully try the case); *In re Ky. Grilled Chicken*, 280 F.R.D. at 379–80 (reimbursing attorneys from the settlement fund). CAFA also explicitly links attorneys' fees in coupon settlements to the value of the coupons redeemed. See 28 U.S.C. § 1712 (2006) (“[T]he portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.”).

154. See *In re Bluetooth*, 654 F.3d at 945 (finding an issue with the attorneys receiving 83.2% of the class' total award and ultimately rejecting the proposed settlement by remanding it back to the District Court).

B. Inconsistent Precedent

A wealth of inconsistent precedent, not entirely attributable to warring state statutes but certainly not helped by them,¹⁵⁵ ensures that it is impossible to establish uniform guidance for national advertising campaigns — or the class action litigations that result. A brief comparison of different cases' treatment of reliance on the allegedly deceptive statements illustrates this.

In *Fine v. ConAgra Foods, Inc.*, Plaintiffs sought to certify a class of consumers who had purchased popcorn marked “no added diacetyl,” yet still containing some diacetyl.¹⁵⁶ Under California law, the court denied certification, stating that there was no indication that the class had relied on the statement in question.¹⁵⁷ *Chavez v. Blue Sky Natural Beverage Co.*, likewise brought under California statutes, also concerned an allegedly untrue statement on a product: this time, the statement that the product originated from Santa Fe when the beverages in question were not made in Santa Fe.¹⁵⁸ In this case, however, the court granted certification.¹⁵⁹ While the Defendant raised the issue that had prevented class certification in *Fine* — namely, that it was impossible to know if each consumer in the class had relied on the statement in question in purchasing the product — the court dismissed the concern as irrelevant.¹⁶⁰ Indeed, the court in *Kelly v. Phiten USA, Inc.* seemed to agree with *Chavez*, certifying a class for settlement purposes under California and Iowa law while acknowledging that “some significant number of purchasers” bought the product “without regard to” the alleged deceptive statements.¹⁶¹ In *Red v. Kraft Foods, Inc.*, however, also under California law, the court refused to certify a class that, *inter alia*, it found to be unascertainable, even though the class definition was remarkably similar to that of classes that had been certified in other deceptive advertising cases,¹⁶² because it would be impossible to determine which consumers

155. See *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096, 1100 (C.D. Cal. 2012) (detailing differences between state laws).

156. No. CV 10-01848 SJO (CFOx), 2010 WL 3632469, at *1 (C.D. Cal. Aug. 26, 2010).

157. *Id.* at *3.

158. 268 F.R.D. 365, 368–69 (N.D. Cal. 2010) (contending that Blue Sky's beverages were not manufactured or bottled in Santa Fe or anywhere in the state of New Mexico).

159. *Id.* at 368.

160. *Id.* at 376 (holding that plaintiff does not need to show individualized reliance in order to allege claims of CLRA or fraud).

161. *Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564, 570 n.7 (S.D. Iowa 2011).

162. See *Johns v. Bayer Corp.*, 280 F.R.D. 551, 555 (S.D. Cal. 2012) (certifying a class of all persons who purchased Men's Vitamins in the state of California from the date that they were first sold with “prostate health” claims); *In re Ferrero Litig.*, 278 F.R.D. 552, 562 (S.D. Cal. 2011) (certifying a class of all persons who, on or after August 1, 2009, bought a Nutella product in the state of California for their own or household use); *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW (AGRx), 2011 WL 4599833, at *8 (C.D. Cal. Sept. 29, 2011) (refusing to certify the class because its members were unascertainable); *Kelly*, 277 F.R.D. at 567–69 (granting certification of a class of all persons who purchased one or more of Phiten products in the U.S. during the relevant period); *Chavez*, 268 F.R.D. at 380 (certifying a class of all persons who, during the relevant period, purchased in the U.S. any beverage bearing the Blue Sky mark or brand); *Nelson v. Mead Johnson Nutrition*

had purchased the product at issue in reliance on the allegedly deceptive statements.¹⁶³ This is not even a result of different state statutory requirements: all of these cases were applying California law.

Likewise, courts have reached wildly different conclusions about the importance of whether consumers continued to buy the product at issue, even after the alleged deception was revealed. In *Nelson v. Mead Johnson Nutrition Co.*, the named plaintiff testified at deposition that she continued using the product at issue, even after learning the truth about the product.¹⁶⁴ In *In re Light Cigarettes Marketing Sales Practices Litigation* the named plaintiff testified at deposition that he continued using the product at issue, even after learning the truth about the product.¹⁶⁵ The court in *Nelson* granted class certification under Florida law;¹⁶⁶ the court in *Light Cigarettes* denied it under California, District of Columbia, Illinois, and Maine law.¹⁶⁷ There were undeniable differences between the two cases, and neither decision pivoted exclusively on whether or not the named plaintiff had continued to use the allegedly deceiving product.¹⁶⁸ However, both courts pointed to that fact as supporting completely opposite conclusions.¹⁶⁹ Faced with seemingly inconsistent plaintiff testimony, a defendant may not know whether that testimony will be helpful or not to the defense. Indeed, the court in *In re Ferrero Litigation* viewed the knowledge that one of the named plaintiffs continued to purchase the product — even after learning the truth about it — as having no bearing on the class certification analysis.¹⁷⁰ Increasing the confusion, other courts have stated that

Co., 270 F.R.D. 689, 691 (S.D. Fla. 2010) (certifying a class of all Florida consumers who purchased Enfamil LIPIL within the applicable statute of limitations).

163. See *Red*, 2011 WL 4599833, at *8; see also *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 581, 583 (N.D. Ill. 2005) (denying class certification because class membership would require consumers “to show they were misled, deceived, tricked, or treated unfairly,” although reliance was not required under the Illinois Consumer Fraud Act).

164. *Nelson*, 270 F.R.D. at 695.

165. See *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 412 (D. Me. 2010) (noting that plaintiffs continued to purchase cigarettes after learning of the alleged fraud).

166. *Nelson*, 270 F.R.D. at 698.

167. *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. at 423.

168. See *id.* at 416–17, 422 (holding that issues of predominance and superiority prevented class certification); *Nelson*, 270 F.R.D. at 695 (continuing to discuss other class certification factors in spite of evidence showing that plaintiff continued to use the defendant’s product after learning it was defective).

169. See *Nelson*, 270 F.R.D. at 695–96 (finding it unpersuasive that the plaintiff continued to purchase the defendant’s product, even after learning of its alleged defects); *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. at 421 (finding the issue of continuing to purchase the alleged defective product to weigh against issues of commonality, but enough to alone bar class certification); see also *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW (AGRx), 2011 WL 4599833, at *12 (C.D. Cal. Sept. 29, 2011) (finding the issue of continuing to purchase the alleged defective item to destroy plaintiff’s ability to establish reliance or materiality of the alleged misrepresentations).

170. See *In re Ferrero Litig.*, 278 F.R.D. 552, 560 (S.D. Cal. 2011) (noting that plaintiff’s continued purchases of the defendant’s product after learning of the alleged defect did not impact issues of class commonality). *But see* *Guido v. L’Oreal, USA, Inc.*, Nos. CV 11-1067 CAS (JCx), CV 11-5465 CAS (JCx), 2012 WL 1616912, at *7 (C.D. Cal. May 7, 2012) (finding it noteworthy that all of the named plaintiffs had testified that they would not have bought the product without the allegedly misleading statements).

whether or not the plaintiff continued to purchase the product after learning the truth about the product has nothing to do with class certification, but rather with the strength of the case, and is inappropriate to examine at the class certification stage.¹⁷¹

Finally, some of the language in the cases is so broad as to appear to preclude class actions for deceptive advertising under any circumstances. In *Salon Fad v. L’Oreal USA, Inc.*, the deceptive advertising at issue was variations of the phrase “Sold in Salons Only” found on hair care product bottles.¹⁷² The court remarked:

*[I]t is difficult to imagine how there could be class-wide proof of causation and injury. How salon customers would react to learning that a product which was advertised as exclusively sold in salons was also available in another retail environment is inherently an individualized question. To some consumers, it may be of little significance that the product is also available outside of the salon, unless of course it could be acquired more cheaply in a general retail establishment.*¹⁷³

The same could be said of any piece of allegedly deceptive advertising: some consumers might not care at all about it. For example, surely some consumers buying the beverage at issue in *Chavez* did not care if the beverage was manufactured in New Mexico or not.¹⁷⁴

Frankly, regardless of the differences between state statutes, it appears to be the case that courts are inevitably influenced by their opinion of the underlying merits of the case in their decisions whether to certify a class, which makes practical class certification precedent hard to come by. Where a court is skeptical about the underlying merits, that court finds issues in facts and details that another court, persuaded by the underlying merits, finds to be irrelevant.¹⁷⁵ For instance, the court in *Walewski v. Zenimax Media, Inc.*, commenced its analysis of the Plaintiffs’ class certification motion with a harsh critique of Plaintiffs’ tactics in bringing the motion.¹⁷⁶ The court then went on to raise scathing issues with the class Plaintiffs sought to certify.¹⁷⁷ For instance, the court made much of the fact that, as defined, not every member of the class would necessarily have complaints about the

171. See *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 575, 583 (N.D. Ill. 2005) (finding that plaintiff’s continued purchases of the defendant’s product after learning of the alleged defect is an aspect of case’s merits and is not decided during class certification analysis).

172. *Salon Fad v. L’Oreal USA, Inc.*, No. 10 Civ. 5063(DLC), 2011 WL 4089902, at *1–2 (S.D.N.Y. Sept. 14, 2011).

173. *Id.* at *7.

174. *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 378 (N.D. Cal. 2010).

175. See *infra* notes 176–84 and accompanying text.

176. No. 6:11-cv-1178-Orl-28DAB, 2012 WL 834125, at *3 (M.D. Fla. Jan 30, 2012) (recommending that plaintiff’s motion for class certification be denied because it was filed in an untimely manner).

177. *Id.* at *3–4.

product.¹⁷⁸ However, other courts have been unconcerned with the prospect that class members might not have complaints about the product (and, indeed, might still be purchasing the product).¹⁷⁹ The *Walewski* court also fretted over the inability to identify all members of the class.¹⁸⁰ Meanwhile, other courts faced with a similar issue were unconcerned.¹⁸¹ For instance, the court in *Johns v. Bayer Corp.*, faced with the challenge of certifying a class of purchasers of multivitamins, never even discussed the difficulties of identifying who these purchasers might be.¹⁸² Needless to say, the court did not certify the class in *Walewski*.¹⁸³ While such influence by the merits of the underlying case is not technically permitted,¹⁸⁴ it nonetheless seems to occur.

C. Statewide Classes

The inability to certify a nationwide class to address issues of national significance can have far-reaching consequences, subjecting the courts to duplicative litigations and the parties to multiple copycat disagreements, as CAFA recognizes.¹⁸⁵ This certification failure not only makes final court resolution of the issues nonexistent, but it also stalls settlements, as a defendant may only wish to settle a class action if that defendant can settle the entire nationwide issue.¹⁸⁶ However, certifying a nationwide class for the state law governed field of deceptive advertising is tricky:

Where the applicable law in a case derives from the law of numerous states, as opposed to just one state, differences in state law will compound the disparities among class members from different states. . . . Certifying a class

178. *Id.* at *4–5 (finding issues with plaintiff’s class definition because it would include members who did not have any complaints about defendant’s game).

179. See *In re Ferrero Litig.*, 278 F.R.D. 552, 560 (S.D. Cal. 2011) (dismissing the issue of whether or not potential class members had concerns with defendant’s product).

180. See *Walewski*, 2012 WL 834125, at *4 (finding plaintiff’s class definition “fraught with difficulties” because of the issues in identifying the class members); see also *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 422 (D. Me. 2010) (noting the concern in finding all purchasers of defendant’s cigarettes); *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742 (DLC), 2010 WL 3119452, at *13 (S.D.N.Y. Aug. 5, 2010).

181. See *In re Ferrero*, 278 F.R.D. at 562 (certifying a class of purchasers of Nutella®); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 378 (N.D. Cal. 2010) (finding that a class of all purchasers of an inexpensive beverage would be identifiable).

182. 280 F.R.D. 551, 556 (S.D. Cal. 2012). *But see* *Thompson v. Bayer Corp.*, No. 4:07CV00017 JMM, 2009 WL 2424352, at *3 (E.D. Ark. Aug. 6, 2009) (expressing doubt that a class of purchasers of multivitamins could ever be ascertainable).

183. *Walewski*, 2012 WL 834125, at *1.

184. See *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 480 (7th Cir. 2002) (“A court may not refuse to certify a class on the ground that it thinks the class will eventually lose on the merits . . .”).

185. See, e.g., S. REP. NO. 109–14, at 27 (2005) (“These provisions will create efficiencies in the judicial system by enabling overlapping and ‘copycat’ cases to be consolidated in a single federal court, rather than proceeding simultaneously in numerous state courts under the current system.”).

186. See *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003) (“[A] defendant is interested only in disposing of the total claim asserted against it.”).

A MATTER OF NATIONAL IMPORTANCE

*when the laws of every state apply can create insuperable obstacles in adjudicating the case in a fair and efficient manner.*¹⁸⁷

While resolving all the alleged injury in one fell swoop is clearly most efficient for all involved, the state law nature of deceptive advertising thwarts that efficiency: “Variations in state law can swamp any common issues and interject a multitude of different legal standards governing a particular claim. The presentation of evidence at trial, jury instructions, and verdict forms become cumbersome, time-consuming, confusing, and unduly prejudicial to the parties.”¹⁸⁸

For instance, in a case involving allegedly deceptive statements on the boxes of several different products sold nationwide, a California federal court declined to certify a national class.¹⁸⁹ The court, however, stated that, if there had not been other problems with the case, it might have certified a smaller California-only case — even though, again, the allegedly deceptive statements at issue were part of a nationwide campaign.¹⁹⁰ Similarly, despite the nationwide character of the allegedly deceptive statements at issue, a California court refused to certify a nationwide class while agreeing to certify a California-only class.¹⁹¹ As one court stated:

If this case proceeded to trial as a nationwide class, the Court would face the impossible task of instructing the jury on the law of 50 different states. . . . The trial would devolve quickly into an unmanageable morass of divergent legal issues. Certain evidence would be admissible for some class members but not others. Fifty different sets of jury instructions and verdict forms would have to be crafted with the jury having the daunting task of applying those instructions and verdicts to a nationwide class encompassing millions of consumers. Needless to say, the trial would be incredibly time-consuming, unnecessarily disjointed, hopelessly confusing, and unfairly prejudicial to [Defendant] and many, if not all, of the members of the class.

187. *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096, 1099 (C.D. Cal. 2012) (internal quotations and citations omitted).

188. *Id.*

189. See *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW (AGRx), 2011 WL 4599833, at *7 (C.D. Cal. Sept. 29, 2011) (denying class certification for, *inter alia*, concerns that defendant’s misrepresentations actually originated in California).

190. *Id.* (noting that there were several other issues with the class that precluded certification).

191. See *In re Ferrero Litig.*, 278 F.R.D. 552, 561 (S.D. Cal. 2011); see also *Carrera v. Bayer Corp.*, No. 08-4716 (JLL), 2011 WL 5878376, at *1 (D.N.J. Nov. 22, 2011). *But see* *Bruno v. Eckhart Corp.*, 280 F.R.D. 540, 549 (C.D. Cal. 2012) (finding defendant did not carry its burden of proving material conflict between California’s consumer protection laws and the rest of the nation’s consumer protection laws).

*Justice demands that this case not be adjudicated as a nationwide class action.*¹⁹²

Multiple lawsuits over the same deceptive statements often inevitably crop up in this situation.¹⁹³ In fact, so prevalent are multiple litigations in the class action context that some courts have refused to certify a class *without* the presence of duplicative litigation.¹⁹⁴ Many times, these multiple lawsuits actually proceed.¹⁹⁵ Indeed, if a court does dismiss duplicative litigation, it must minimize differences in the state statutes to do so.¹⁹⁶ These court actions do not promote judicial efficiency in any way.¹⁹⁷ Courts often find themselves litigating cases that other courts are simultaneously litigating, with the risk of inconsistent results.¹⁹⁸ For instance, a New Jersey court refused to allow the Plaintiff of a first-filed California suit based on the same allegedly deceptive advertisements to intervene, stating there was no risk of inconsistent rulings because different statutes were at issue.¹⁹⁹ However, a few

192. *Gianino*, 846 F. Supp. 2d at 1104 (internal citations omitted); see also *In re Sears, Roebuck & Co. Tools Mktg. and Sales Practices Litig.*, Nos. 05 C 4742, 05 C 2623, 2007 WL 4287511, at *10 (N.D. Ill. Dec. 4, 2007) (“[P]laintiff’s essentially conclusory assertions that the . . . consumer fraud laws are ‘very similar’ are wholly unpersuasive. The differences in the . . . consumer fraud laws of the states are another factor that renders the proposed class action unmanageable.”).

193. See *Andreeva*, *supra* note 43, at 394 (“[T]he filing of a single class action in a state court often leads to a number of ‘copycat’ cases being filed in other jurisdictions.”) (citing 151 CONG. REC. S1248–49 (2005) (statement of Sen. Frist)); see also *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 938 (9th Cir. 2011) (noting that twenty-six class actions had been filed); *Morgan v. Gay*, 471 F.3d 469, 471 (3d Cir. 2006) (noting that the case had originally been filed in federal court in New York, then consolidated with a previously filed related case in federal court in Utah, then dismissed and brought again in state court in New Jersey); *Guido v. L’Oreal, USA, Inc.*, Nos. CV 11-1067 CAS (JCx), CV 11-5465 CAS (JCx), 2012 WL 1616912, at *1 (C.D. Cal. May 7, 2012) (cases filed in the Central District of California and the Southern District of New York within a day of each other); *Worthington v. Bayer Healthcare, LLC*, Nos. 11-2793 (ES), 11-3017(ES), 11-3299(ES), 2012 WL 1079716, at *1 (D.N.J. Mar. 30, 2012) (dismissed in favor of first-filed California case); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1047 (S.D. Tex. 2012); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 636 (S.D. Cal. 2011) (with its related cases: Case No. 37-2009-93810-CU-BT-CTL in San Diego Superior Court and Case No. 09cv138 in S.D. Cal.); *Walter v. Hughes Commc’ns, Inc.*, No. 09-2136 SC, 2011 WL 2650711, at *2 (N.D. Cal. July 6, 2011); *In re Ky. Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 280 F.R.D. 371, 371 (N.D. Ill. 2011).

194. See *Badella v. Deniro Mktg. LLC*, No. C 10-03908 CRB, 2011 WL 5358400, at *12 (N.D. Cal. Nov. 4, 2011) (noting that the absence of other litigation concerning the same issue weighed against class certification).

195. See *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742 (DLC), 2010 WL 3119452, at *3 (S.D.N.Y. Aug. 5, 2010) (proceeding simultaneously with “a nearly identical action” in federal court in another state).

196. See *Worthington*, 2012 WL 1079716, at *6 (finding substantial overlap between cases filed against the defendant, even when they were filed under different state statutes).

197. Indeed, it goes against one of the purposes of class actions. See MCLAUGHLIN, *supra* note 32, §§ 1:1, 1:3; FED. R. CIV. P. 23 1966 Amendment Clause (A) (“Actions by or against a class provide a ready and fair means of achieving unitary adjudication.”).

198. See MCLAUGHLIN, *supra* note 32, § 1:1 (“Finally, the class action avoids inconsistent results by offering the efficiency and predictability of a unitary adjudication or settlement of the claims of all persons to whom the defendant may be liable based on similar facts.”); *Weiner*, 2010 WL 3119452, at *3 (proceeding simultaneously with “a nearly identical action” in federal court in another state).

199. *Worthington v. Bayer Healthcare, LLC*, Nos. 11-2793 (ES)(CLW), 11-3017 (ES)(CLW), 11-3299 (ES)(CLW), 2011 WL 6303999, at *3 (D.N.J. Dec. 15, 2011); see also *Mazza v. Am. Honda Motor Co.*, 666 F.3d

A MATTER OF NATIONAL IMPORTANCE

months later, the court acknowledged that these different statutes were, in fact, similar enough that the second-filed case should be dismissed.²⁰⁰

The dissent in *Mazza v. American Honda Motor Company, Inc.*²⁰¹ recognizes the practical disaster this jurisdictional splintering creates:

*The majority's holding will prove devastating to consumers. Individual claimants will not bring actions to recover the \$4,000 paid for the CMBS systems. Even if consumers did pursue these claims, and even if these claims proved successful, they "would not only unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs' because 'litigation costs would dwarf potential recovery.'" Hanlon v. Chrysler Corp., 150 F.3d 1011, 1023 (9th Cir. 1998). Without certification of a nationwide class to which California law applies, Honda becomes free to avail itself of the benefits offered by California without having to answer to allegations by consumers nationwide that it has violated the consumer protection laws of its forum state. This situation will allow corporations to take advantage of a forum state's hospitable business climate on the one hand, while simultaneously discounting the potential for litigation by nationwide consumers in response to a particular profit-motivated but harmful action on the other. If the harm to individual consumers is small enough to create a disincentive to individual litigation, and if a nationwide class action is not a potential consequence, corporations can choose increased revenues over the consumer with impunity. Thus, corporations like Honda will be able to act without accountability for past behavior and without a check on future profit-motivated actions that may risk consumer harm.*²⁰²

Moreover, the tangle of precedent for a deceptive advertising class action has become so convoluted that at least one court found it necessary to resort to giving a lesson on persuasive versus binding authority.²⁰³ This confusing federalist tangle stands in contrast to the goal of CAFA to try to eliminate such complication and draw a halt to the abuses of federalism in states applying other states' laws (or not

581, 590, 591 (9th Cir. 2012) (decertifying a nationwide class because of differences in consumer protection laws); *In re Ferrero Litig.*, No. 11-CV-00205-H (CAB), 2012 WL 284265, at *1 (S.D. Cal. Jan. 23, 2012); *Weiner*, 2010 WL 3119452, at *3 (proceeding simultaneously with "a nearly identical action" in federal court in another state).

200. *Worthington*, 2012 WL 1079716, at *6.

201. 666 F.3d 581 (9th Cir. 2012).

202. *Id.* at 598–99 (Nelson, J., dissenting).

203. See, e.g., *In re Yasmin & Yaz Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2012 WL 865041 at *8 (S.D. Ill. Mar. 13, 2012) (warning that persuasive authority should not be presented as controlling authority); see also *Walewski v. ZeniMax Media, Inc.*, No. 6:11-cv-1178-Orl-28DAB, 2012 WL 834125 at *5 (M.D. Fla. Jan. 30, 2012), *report and recommendation adopted*, 6:11-cv-1178-Orl-28DAB, 2012 WL 847236 (M.D. Fla. Mar. 13, 2012) (construing the Maryland Consumer Protection Act by a Florida court).

applying other states' laws).²⁰⁴ The situation becomes unwinnable: Certifying only a state class provokes precedential confusion and inefficiency; certifying a nationwide class forces a court to insult federalism.

D. The Frailty of CAFA's Jurisdictional Provisions

CAFA's expanded federal jurisdiction was supposed to keep cases of national importance out of state courts.²⁰⁵ However, the expanded provisions have limited utility when it comes to deceptive advertising class actions.²⁰⁶ Plaintiffs' attorneys can simply certify that recovery will be limited to below the triggering jurisdictional amount of CAFA.²⁰⁷ This is an easy assertion to make in a situation where only a *statewide* class is at issue, despite the *nationwide* character of the harm.²⁰⁸ In this way, plaintiffs' attorneys certify to limit recovery of a group of plaintiffs who, at this point, do not even know they are part of a class.²⁰⁹ In doing so, the plaintiffs'

204. See *Mazza*, 666 F.3d at 593 (“The importance of federalism when applying choice of law principles to class action certification is reinforced by the Class Action Fairness Act of 2005. Pub. L. 109–2, 119 Stat. 4. A key purpose of the Act was to correct what former Acting Solicitor General Walter Dellinger labeled a wave of ‘false federalism.’ “[T]he problem is that many state courts faced with interstate class actions have undertaken to dictate the substantive laws of other states by applying their own laws to other states, resulting in a breach of federalism principles.” S. REP. NO. 109–14, at 61 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 57 (quotation marks and ellipses omitted). Accordingly, ‘courts should not attempt to apply the laws of one state to behaviors that occurred in other jurisdictions.’ *Id.* at 62–63 (summarizing Supreme Court cases).”).

205. See *Andreeva*, *supra* note 43, at 388 (quoting the Class Action Fairness Act of 2005, Pub. L. No. 109–2, § 2(b)(2), 119 Stat. 4 (“The Act also aims to ‘restore the intent of the framers of the United States Constitution by providing the Federal court consideration of interstate cases of national importance.’”)); Milliken, *supra* note 1, at 19.

206. See Sheila Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 33–34 (2006) (“As others have noted, the Class Action Fairness Act of 2005 (CAFA) is not going to solve the documented abuses of the consumer class action.”).

207. See, e.g., *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069, 1071 (8th Cir. 2012) (“To counter any attempt at removal, however, Rolwing’s complaint included a prayer for relief requesting ‘judgment against defendant in an amount that is fair and reasonable in excess of \$25,000, but not to exceed \$4,999,999.’ The prayer stated further: ‘Plaintiff and the class do not seek—and will not accept—any recovery of damages (in the form of statutory interest) and any other relief, in total, in excess of \$4,999,999.’”); *Tate v. U.S. Bank Nat’l Ass’n*, No. 06-1204-HU, 2007 WL 1170608 at *2 (D. Or. Apr. 17, 2007) (“[A] plaintiff may evade federal court simply by asking for less than the jurisdictional amount, so long as the plaintiff, should she prevail, isn’t legally certain to recover more.”) (citation omitted).

208. See, e.g., *Yeroushalmi v. Blockbuster Inc.*, No. CV 05-225-AHM (RCX), 2005 WL 2083008 at *2 (C.D. Cal. July 11, 2005) (“In the complaint plaintiff alleges that she seeks, on her own behalf and on behalf of the proposed *statewide class*, an amount in controversy below CAFA’s \$5,000,000 jurisdictional threshold. Specifically, plaintiff alleges that ‘[a]ggregate damages for the named plaintiff and the class she seeks to act as a representative total less than \$5,000,000.’ Compl. ¶ 61.”) (emphasis added).

209. See Alison Frankel, *2nd Circuit: Class Members Deserve Notice, Even in No-Money Deals*, THOMAS REUTERS NEWS & INSIGHT: NEW YORK, Aug. 25, 2012, available at http://newsandinsight.thomsonreuters.com/Legal/News/2012/08_-_August/2nd_Circuit_Class_members_deserve_notice_even_in_no-money_deals/ (discussing how some class members are not even given notice of the nationwide claims of which they are members).

attorneys fight against the interest of the class from the very beginning.²¹⁰ An unknowledgeable named plaintiff has been considered a due process violation of the absent class members.²¹¹ Why shouldn't a limitation of the absent class members' rights be equally considered such a violation? It is certainly more obviously harmful than an unknowledgeable named plaintiff. In *Sanchez v. Wal-Mart Stores, Inc.*, the court expressed concern that Plaintiff had chosen not to bring any personal injury claims, engaging in "strategic claim-splitting."²¹² The court found that this "create[d] a conflict between plaintiff's interests and those of the putative class, and render[ed] Plaintiff an inadequate class representative."²¹³ Why doesn't the express limitation of recovery of the absent plaintiffs raise the same concern as limiting their claims?

Courts, however, seem to disagree. For instance, in *Morgan v. Gay*, a class of New Jersey consumers asserted that it would not recover more than the \$5 million necessary to trigger federal jurisdiction.²¹⁴ *Morgan* concerned a case that had previously been in no fewer than *two* federal courts, before being dismissed by class counsel and re-brought in state court.²¹⁵ Despite its prior federal jurisdiction and the fact that the class was seeking punitive damages which *could* have exceeded \$5 million, the court held that class counsel's promise *not* to seek more than \$5 million kept the case in state court.²¹⁶ The vast majority of class members had no say in this refusal of punitive damages.²¹⁷ The court dismissed these concerns:

We note in passing that the defendants' assertion that Sarah Morgan does not have the ability to limit damages of unnamed class members has no merit. The availability of opting out by unnamed class members assuages any concerns that Sarah Morgan's damage limitation harms these other class members. The potential class members in this case will be notified pursuant to New Jersey Court Rules 4:32-1(b)(3) and 4:32-2(b)(2). Under N.J. Ct. R. 4:32-2(b)(2)(E), "the court will exclude from the class

210. See FED. R. CIV. P. 23(g)(1)(B) (requiring plaintiffs' counsel to act in the best interest of the *class*, not merely named clients).

211. See *Sanchez v. Wal Mart Stores, Inc.*, No. Civ. 2:06-CV-02573-JAM-KJM, 2009 WL 1514435, at *3 (E.D. Cal. May 28, 2009) ("Class counsel may not act 'on behalf of an essentially unknowledgeable client,' for to proceed with that plaintiff as class representative 'would risk a denial of due process to the absent class members.'").

212. *Id.*

213. *Id.*

214. 471 F.3d 469, 475 (3d Cir. 2006).

215. *Id.* at 471.

216. *Id.* at 470-71.

217. *Id.* at 477-78 ("The plaintiff has made her choice, and the plaintiffs in state court who choose not to opt out of the class must live with it.").

*any member who requests exclusion, stating when and how members may elect to be excluded.*²¹⁸

In so doing, the court thereby implicitly endorses that the solution to a potentially artificial limitation on recovery on an admittedly nationwide advertising campaign will be to subject the defendant to multiple duplicative lawsuits on the question, even possibly within the same state.²¹⁹ The court does acknowledge that a verdict far in excess of the jurisdictional limit may expose class counsel to accusations of bad faith.²²⁰ However, that presupposes that the case will survive to the verdict stage rather than simply settling.

Likewise, the court in *Berry v. American Express Publishing Corp.* reaches the same conclusion.²²¹ There, the Plaintiff class sought mainly injunctive relief and no monetary damages.²²² The class had also specifically stated that it would not seek more than \$5 million in statutory damages.²²³ The court therefore concluded that it would be difficult for Plaintiffs to recover more than \$5 million in light of these circumstances, finding that the jurisdictional minimum was not met.²²⁴ This ruling, however, ignores the practicality of class members not yet even aware of the class who might disagree with being bound to restrict their recovery and might therefore either object or launch different suits, in California or other states, creating a drag on judicial efficiency and forcing the defendants to litigate the same question multiple times. Furthermore, the Defendant in the case tried to demonstrate that any injunctive relief awarded would cost it more than \$5 million to comply with, which seems likely given the nationwide scope of the practice at issue.²²⁵ However, the court disagreed, finding the Defendant's valuation of this harm speculative at best.²²⁶ If Defendants are unable to assert the true nationwide impact of any injunction that may issue in assessing the jurisdictional amount, then the true national importance of the case cannot be asserted.²²⁷

218. *Id.* at 476 n.7.

219. *See also* Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 450 (7th Cir. 2005) (suggesting that federal jurisdiction could have been avoided if the class had promised not to accept damages in excess of the jurisdictional minimum).

220. *Morgan*, 471 F.3d at 477 n.8.

221. *Berry v. Am. Express Publ'g, Corp.*, 381 F. Supp. 2d 1118, 1123–26 (C.D. Cal. 2005) (finding that the plaintiffs failed to prove that the amount in controversy exceeded the \$5 million minimum).

222. *Id.* at 1123–24.

223. *Id.* at 1124.

224. *Id.*

225. *Id.*

226. *Id.*

227. *See* Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 376–77 (2008) (emphasizing the broader impact of an injunction as “an extraordinary remedy never awarded as of right . . . In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction”) (citations omitted).

A MATTER OF NATIONAL IMPORTANCE

Another court in the same jurisdiction went in the opposite direction, however.²²⁸ There, the complaint stated that the class was seeking less than the \$5 million jurisdictional minimum.²²⁹ The court found this “a clear attempt to avoid federal jurisdiction.”²³⁰ The Plaintiff attempted to argue that she was “entitled to limit her claim for relief and avoid federal jurisdiction.”²³¹ The court disagreed, however, finding that the very purpose of CAFA was to eliminate “misuse” of this nature.²³² Such battles remain ongoing.²³³

V. FIXING THE BROKEN SYSTEM

CAFA was meant to react to the perception that cases of national significance were getting stuck in state court.²³⁴ However, the nature of deceptive advertising actions limits CAFA’s impact. It remains a simple matter to keep cases involving nationwide harm as creatures of state law.²³⁵ This curious situation, as has been shown, promotes efficiency for neither plaintiffs, defendants, nor the courts. The class action, supposedly a win-win-win for all involved, is far from being so in the deceptive advertising realm.

Deceptive advertising has become a classic cause of action to be vindicated by class action procedure.²³⁶ The harm to each individual buyer of an inexpensive low-risk item, such as yogurt, is so small as to be negligible.²³⁷ In this age of expensive, drawn-out litigations, no plaintiff is willing to bring a cause of action to recover the

228. See *Yeroushalmi v. Blockbuster Inc.*, No. CV 05-225-AHM (RCX), 2005 WL 2083008 at *3 (C.D. Cal. July 11, 2005) (ruling that, in cases where the court is unsure if the amount in controversy exceeds \$5 million, Congress intended CAFA to give jurisdiction to the federal courts).

229. *Id.* at *2.

230. *Id.* at *1.

231. *Id.* at *2.

232. *Id.* (citing S. REP. NO. 109–14, at 11 (2005)).

233. See Shapiro, *supra* note 1, at 116 (“One question that the courts have not yet clearly answered is whether or not plaintiffs could limit the amount in controversy by stipulating that they would not accept any more than five million dollars in total recovery for the class.”).

234. S. REP. NO. 109–14, at 27 (2005) (“[F]ederal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy . . .”).

235. Furthermore, the Supreme Court’s recent decision in *Wal-Mart Stores, Inc. v. Dukes* may encourage more state class actions, exacerbating this problem. *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 U.S. 1, slip op. at 10, 131 S. Ct. 2541 (2011); see Apalla U. Chopra & David Lowe, *Class Action Litigation and Arbitration After Wal-Mart v. Dukes and AT&T v. Concepcion*, 870 PLI/LIT 175, 194 (Nov. 2011).

236. See *Guido v. L’Oreal, USA, Inc.*, Nos. CV 11-1067 CAS (JCx), CV 11-5465 CAS (JCx), 2012 WL 1616912, at *12 (C.D. Cal. May 7, 2012) (finding that class action litigation is superior to other methods of litigation for deceptive advertising cases); *Ballard v. Equifax Check Servs., Inc.*, 186 F.R.D. 589, 600 (E.D. Cal. 1999) (“[Class actions] to enforce compliance with consumer protection laws are ‘desirable and should be encouraged.’” (quoting *Duran v. Credit Bureau of Yuma, Inc.*, 93 F.R.D. 607, 610 (D. Ariz. 1982))); see also CAL. CIV. CODE § 1781 (stating that consumers can bring a class action lawsuit if an “unlawful method, act, or practice has caused damage to other consumers similarly situated”).

237. See *Fitzpatrick v. Gen. Mills, Inc.*, 263 F.R.D. 687, 702 (S.D. Fla. 2010), *vacated*, 635 F.3d 1279 (11th Cir. 2011) (“[E]ach class member has a negligible financial interest in the litigation.”).

eighty-nine cents they spent on yogurt. Indeed, “incentive payouts” of several thousand dollars are common to reward plaintiffs who allow themselves to be named in such class actions, under the accepted belief that otherwise they would not bother to bring the cause of action.²³⁸ Such payouts are not without controversy, like all else in the class action realm. Other commentators have raised the issue whether litigation should be permitted at all under circumstances where no single person actually cares enough to bring the litigation without first receiving an incentive payout entirely unrelated to the harm suffered by that person.²³⁹ At least one court has expressed skepticism at the contradiction between the named plaintiffs claiming that recovery at trial would be small enough to discourage individual actions while simultaneously alleging a justified recovery of thousands of dollars on their behalf.²⁴⁰ Nevertheless, in recent years, there has been an explosion of such causes of action.²⁴¹

Given the popularity of these class actions and the nationwide character of the harm, it makes sense that such class actions should at least be in federal court. Making deceptive advertising automatically a federal cause of action, in which the federal courts preempt the states’ ability to recognize it, may be one option to improve the system. Currently, the Lanham Act is limited only to competitors, which keeps these deceptive advertising actions out of the federal courts where they should probably belong.²⁴² This was originally done to protect federal courts from a

238. McCoy et al., *supra* note 78, at 36 (citing *Grosso v. Fid. Nat’l Title Ins. Co.*, 983 So. 2d 1165, 1169 (Fla. Dist. Ct. App. 2008)); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 649 (S.D. Cal. 2011) (approving incentive payouts totaling \$6,000); *Walter v. Hughes Commc’ns, Inc.*, No. 09-2136 SC., 2011 WL 2650711, at *5 (N.D. Cal. July 6, 2011) (proposing incentive payouts of \$5,000 for each named plaintiff); *In re Ky. Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 280 F.R.D. 364, 373 (N.D. Ill. 2011) (approving an aggregate incentive payment of \$25,000 for five named plaintiffs); *Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564, 572 (S.D. Iowa 2011) (approving incentive payments of \$3,000 for each named plaintiff). These incentive payments may be behind the phenomenon of the “serial plaintiff,” which occurs when one party serves as the named plaintiff in multiple class action litigations. *See, e.g.*, *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 534 (C.D. Cal. 2011), *reconsideration denied*, 280 F.R.D. 540 (C.D. Cal. 2012) (noting that Bruno was a plaintiff in another class action litigation); *Montanez v. Gerber Childrenswear, LLC*, No. CV 09-7420 DSF (DTBx), 2011 WL 6757875, at *5 (C.D. Cal. Dec. 15, 2011) (stating that the plaintiff class had a parallel law suit against the Defendant’s competitor).

239. *See Ellis, supra* note 41, at 76 (noting an advantage of class actions is that “[t]hey allow lawsuits to be brought to right a wrong where the interest of no single plaintiff would justify initiation of a lawsuit” and that a disadvantage of class actions is that “they allow lawsuits to be brought when the interest of no single plaintiff would justify a lawsuit”).

240. *See Walter*, 2011 WL 2650711, at *10 (“While it is true that the settlement contemplates awards of \$5 and \$40 to class members who return a claim form, the named plaintiffs seek \$5,000, a considerably higher amount. If this \$5,000 figure represents a potential recovery at trial, then the class’s claims may be large enough to justify individual actions.”).

241. *See John P. Hooper, How Class Action Litigations Have Changed Advertising Campaigns*, 1083 PLI/PAT 255, 257 (Mar. 2012) (citing *Campbell’s Labeling Fight Feared to Embolden Class-Action Attorneys*, *AdvertisingAge* (May 8, 2011)); *see also id.* at 258 (“The landscape has changed in light of the hyper-scrutiny of the plaintiffs’ bar of any and all claims made regarding product efficacy.”).

242. *See Lanham Act*, Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. § 1051 *et seq.* (2006)); *see also Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686, 693 (2d Cir. 1971); *Serbin v. Ziebart*

A MATTER OF NATIONAL IMPORTANCE

flood of litigation — a concern CAFA shows is no longer pressing.²⁴³ Some defendants have argued successfully²⁴⁴ that consumer complaints about deceptive or misleading advertising have been preempted by the Food, Drug, and Cosmetic Act²⁴⁵ and the Nutrition Labeling and Education Act of 1990.²⁴⁶ Allowing such preemption would allow federal law to occupy the field. Nationwide classes could be certified more easily and the litigations could be resolved more efficiently. However, most plaintiffs have been unsuccessful in making this argument.²⁴⁷

Even if the federal statutes were altered to preempt state deceptive advertising causes of action explicitly, the question remains whether or not Rule 23 is equipped to handle these cases at all. Class actions were never designed to address deceptive advertising style causes of action. The notes to Rule 23 indicate that it was contemplated to be of use in situations such as actions by shareholders against a corporation; actions by bondholders against the bond's municipality; discrimination actions brought by the discriminated class; and antitrust and licensing disputes.²⁴⁸ When Rule 23 was overhauled in 1966, the committee contemplated the challenges of using the rule to vindicate a vast fraudulent act:

*[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the . . . kinds or degrees of reliance by the persons to whom they were addressed.*²⁴⁹

Int'l Corp., No. 92-1762, 1992 WL 415248, at *2 (W.D. Pa. Oct. 21, 1999)); Hooper, *supra* note 241, at 260 (citing Kelli L. Sager, *Recent Developments in Defamation, Invasion of Privacy, and Other Content-Based Claims*, 1069 PLI/PAT 15, 44 (Nov. 2011)).

243. See, e.g., Andreeva, *supra* note 43, at 390 (stating that CAFA gave federal courts original jurisdiction over large class action lawsuits).

244. See *Yumul v. Smart Balance, Inc.*, No. CV 10-00927 MMM (AJWx), 2011 WL 1045555, at *9–10 (C.D. Cal. Mar. 14, 2011).

245. 21 U.S.C. § 301, *et seq.* (2006).

246. 21 U.S.C. § 343(r), *et seq.* (2006).

247. See *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 336–42 (3d Cir. 2009) (reversing the district court decision that the cause of action was preempted by the FDCA); *Chavez v. Blue Sky Natural Beverage*, 268 F.R.D. 365, 372 (“Although . . . the regulations promulgated by the FDA may raise an inference that federal law preempts individual state laws governing food labeling, defendants have not met their burden to demonstrate ‘clear and manifest’ intent by Congress to occupy the entire field of food labeling so as to preempt state consumer protection laws which are traditionally within the realm of state police power.”).

248. See FED. R. CIV. P. 23 advisory committee’s note 1937 (2006), advisory committee’s note 1966 (2006).

249. FED. R. CIV. P. 23 advisory committee’s note 1966 (2006) (amending subdivision (b)(3)) (citing *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387, 390 (2d Cir. 1944); *Miller v. Nat’l City Bank of N.Y.*, 166 F.2d 723, 728 (2d Cir. 1948); *Hughes v. Encyclopaedia Britannica*, 199 F.2d 295 (7th Cir. 1952); *Sturgeon v. Great*

In fact, some state causes of action for deceptive advertising, perhaps recognizing the undesirability of the class action vehicle, preclude class actions altogether.²⁵⁰

It may make the most sense to fully restore deceptive advertising to its government regulatory roots. The major benefit to a class action, as commentators have noted, is the fact that it encourages consumers to act as private attorneys general.²⁵¹ As the Supreme Court has recognized, “The aggregation of individual claims in the context of a class-wide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.”²⁵² But is there any need for such activity in a field as heavily regulated as advertising already is? What does the existence of a private cause of action for deceptive advertising actually accomplish that is of use in society? The persistently small number of consumers bothering to claim their damages for such acts seems to indicate a general indifference to the lawsuit from the very people whose interests it is supposedly vindicating.²⁵³

The reasoning behind separate state consumer protection laws makes little sense in the modern day and age. Courts have attempted to continue to defend these laws, pointing to each state’s individual interests in making sure its consumers are protected.²⁵⁴ However, in defending choice of law principles that permit each state to establish protection for its consumers, the courts merely highlight the absurdity of the system. As the courts note, it is possible for companies to pick and choose the consumer protection laws they prefer by locating where the consumer protection laws are most lax.²⁵⁵ In the same way, the converse is true: it is possible for plaintiffs’ attorneys to pick and choose where to bring causes of action based on where the consumer protection laws are most favorable. One court queried:

Does anyone think that, if State A opted to attract telemarketing companies to its borders by diluting or for that matter eliminating any regulation of

Lakes Steel Corp., 143 F.2d 819, 822 (6th Cir. 1944)). Interestingly, the committee also raised reservations about mass tort actions, another favorite class action of today. *See id.*

250. *See Hooper, supra* note 241, at 260 (citing Ryan P. O’Quinn & Thomas Watterson, *Fair Is Fair: Reshaping Alaska’s Unfair Trade Practices and Consumer Protection Act*, 28 ALASKA L. REV. 295, 307 n.86 (2011)); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 597–98 (C.D. Cal. 2012) (Nelson, J., dissenting) (“Louisiana, Georgia, Mississippi, Kentucky, Virginia and Alabama prohibit class actions that allege unfair trade practices under state law.”); *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096, 1101 (C.D. Cal. 2012) (noting that “some states do not permit class actions under their consumer protection laws”).

251. *See Ellis, supra* note 41, at 111.

252. *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980).

253. *Walter v. Hughes Commc’ns, Inc.*, No. 09-2136 SC., 2011 WL 2650711, at *13 (N.D. Cal. July 6, 2011) (noting that “average claims submission rates . . . are typically ten percent or less”).

254. *See Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946–47 (6th Cir. 2011); *see also Mazza*, 666 F.3d at 591 (“Consumer protection laws are a creature of the state in which they are fashioned. They may impose or not impose liability depending on policy choices made by state legislatures or, if legislators left a gap or ambiguity, by state supreme courts.”).

255. *See Pilgrim*, 660 F.3d at 947.

A MATTER OF NATIONAL IMPORTANCE

*them, the policy makers of State B would be comfortable with the application of the “consumer-protection” laws of State A to their residents — the denizens of State B?*²⁵⁶

But the absurdity of this outcome is rooted in the presupposition that consumer protection laws should be merely statewide in scope. In this age of nationwide advertising campaigns, the continuing statewide nature of deceptive advertising causes of action not only seems inefficient but also seems to play little role in the pursuit of anything approaching justice. One court chided a Defendant, “Try as it might, General Mills cannot evade the unmistakable fact that the objective — and realization — of its marketing campaign was to present Yo-Plus to Florida consumers as a product that . . . aids in the promotion of digestive health.”²⁵⁷ But that was not Defendant’s objective. Defendant’s objective was to present it that way to U.S. consumers.²⁵⁸ The courts raise the specter of the ridiculousness of one state’s consumer protection statute covering the entire nation.²⁵⁹ But the courts have hit on the problem: both plaintiffs and defendants seem to behave as if they desire this to be the case, favoring nationwide classes in many instances, and the lack of a nationwide consumer protection law is harming judicial efficiency and consumer protection precedent.²⁶⁰

Another oft-cited purpose of class actions is to deter corporate action (rather than compensate for individual harm).²⁶¹ However, most of the deceptive advertising class actions have been aimed at industries whose advertisements are already government-regulated.²⁶² The Food and Drug Administration (FDA) has approved many of the advertisements that are sought to be vindicated by deceptive advertising causes of action. Oversight and regulation by federal agencies is the best vehicle for fixing these shortcomings.²⁶³ The federal courts have implied as much,

256. *Id.*

257. *Fitzpatrick v. Gen. Mills, Inc.*, 263 F.R.D. 687, 697 (S.D. Fla. 2010).

258. *Id.* at 691.

259. *See Pilgrim*, 660 F.3d at 947 (“[T]he idea that ‘one state’s law would apply to claims by consumers throughout the country—not just those in Indiana, but also those in California, New Jersey, and Mississippi—is a novelty.” (quoting *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002))).

260. *See id.* at 948 (acknowledging that different consumer protection laws can require corporations to have to use different advertisements in each state).

261. *See Andreeva, supra* note 43, at 400 (“[C]lass actions do not exist only to provide relief for private wrongs – another major purpose behind them is to correct, punish, and deter big corporations.”) (citing David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 924 (1998); 151 CONG. REC. H736 (daily ed. Feb. 17 2005) (statement of Rep. Scott); *id.* at H751 (2005) (statement of Rep. Jackson-Lee)).

262. *See Hooper, supra* note 241, at 257.

263. *See, e.g., Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 508–09 (7th Cir. 2009) (“The FDA should be given a chance to opine on the proper labeling before a Lanham Act suit is filed . . . since it has more experience with consumers’ understanding of drug labels than judges do.”).

stepping aside when the issue in dispute intruded on the FDA's territory.²⁶⁴ So closely related are the FDA's actions to deceptive advertising class actions, it seems as if some class actions spring up as a result of the FDA action alerting the consumers (or attorneys) to the problem.²⁶⁵ Defendants raise defenses based on FDA requirements.²⁶⁶ If the FDA explicitly does not consider a label problematic, why should defendant be prosecuted for it? Even the Better Business Bureau has some power over advertising campaigns, spurring changes when its National Advertising Division concludes a statement is deceptive or misleading.²⁶⁷

Furthermore, the Federal Trade Commission (FTC) has been granted broad powers to regulate deceptive advertising²⁶⁸ and has been active in this mission, providing a "comprehensive policy statement on 'deception,' its elements and how it is to be evaluated."²⁶⁹ Basically, the FTC itself has the power "to bring a class action" on behalf of consumers injured by deceptive advertising.²⁷⁰ Courts have already acknowledged the vital influence of the FTC's regulations on private deceptive advertising causes of action.²⁷¹ And, like the FDA, the FTC sometimes seems to flag deceptive advertising cases for private plaintiffs.²⁷² Perhaps it would be appropriate to move deceptive advertising back into the realm it was initially in: less a private cause of action and more a matter for the government to handle.²⁷³

264. *See id*; *see also* All One God Faith, Inc. v. Hain Celestial Group, Inc., 93 U.S.P.Q.2d 1443, 1450 (N.D. Cal. 2009) (stepping aside in favor of allowing the United States Department of Agriculture to exercise its regulatory role properly).

265. *See, e.g., In re Yasmin and Yaz Mktg. Sales Practices and Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2012 WL 865041, at *3 (S.D. Ill. Mar. 13, 2012) (stating that the FDA issued a warning letter to the defendant concerning deceptive advertisements); *Zeisel v. Diamond Foods, Inc.*, No. C 10-01192 JSW, 2011 WL 2221113, at *1 (N.D. Cal. June 7, 2011) (finding an FDA issued warning letter to be one of the factors that instigated the suit).

266. *See, e.g., Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 585 (N.D. Ill. 2005) ("Coca-Cola concludes issues of proximate cause and actual deception under the Consumer Fraud Act require individual determinations precluding typicality and class certification.").

267. *See* Bruno v. Quten Research Inst., LLC, 280 F.R.D. 524, 529 (C.D. Cal. 2011) (noting that the Better Business Bureau's National Advertising Division found that the defendant's advertising claims were not supported.).

268. *See* FTC Act § 5, 15 U.S.C. § 45 (2006).

269. MCCARTHY, *supra* note 12, at § 27:117.

270. *Id.* at § 27:118.

271. *See, e.g., B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 973 (7th Cir. 1999) ("[A]s the administrative agency charged with preventing unfair trade practices, the Commission's assessment of what constitutes deceptive advertising commands deference from the judiciary.").

272. *See, e.g., Thompson v. Bayer Corp.*, No. 4:07CV00017 JMM, 2009 WL 2424352, at *1. (E.D. Ark. Aug. 6, 2009) (noting that the FTC issued an order to stop Defendant from making unsubstantiated representations prior to Plaintiff suing).

273. Even some states initially saw deceptive advertising as a cause of action belonging to the state, not the consumer. *See Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 585 (N.D. Ill. 2005) (discussing how the Illinois Consumer Fraud Act only provided for prosecutions by the state attorney general until 1973, when a private cause of action was added to the statute).

A MATTER OF NATIONAL IMPORTANCE

CAFA itself seems in favor of more government regulation of class actions in general.²⁷⁴ Maybe deceptive advertising class actions should take this impulse one step further and belong entirely to the government.

VI. CONCLUSION

For many years now, deceptive advertising class actions have enjoyed unprecedented popularity.²⁷⁵ However, the state law nature of the cause of action has led to persistent problems.²⁷⁶ The morass of settlement approval, inconsistent precedent, limited statewide classes, and jurisdictional acrobatics have resulted in inefficiency for plaintiffs, defendants, and courts — even after CAFA.²⁷⁷ It would be better for deceptive advertising to leave behind fractured state statutes and tangled class action procedure and return to the regulatory realm of its roots.²⁷⁸

274. See Erichson, *supra* note 45, at 1597 n.21 (noting that CAFA “requires notice of proposed class settlements to government authorities”).

275. See *supra* Part I.

276. See *supra* Parts III.B–C.

277. See *supra* Part IV.

278. See *supra* Part V.