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No-Injury and Piggyback Class Actions: When Product-Defect Class Actions Do Not Benefit Consumers

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No-Injury and Piggyback Class Actions: When Product-Defect Class Actions Do Not Benefit Consumers

Philip S. Goldberg & Andrew J. Trask

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ABSTRACT

Class counsel are more frequently filing product-based class actions that, whether successful or not, offer few practical benefits to real consumers or class members. These no-benefit class actions cause the unnecessary expense of the courts' time and resources, and they often fail to provide actual value to class members while still producing substantial attorneys' fees. This article explores why strategic vagueness in plaintiffs' filings and a lack of vigorous analysis by the courts have allowed no-benefit class actions to unnecessarily consume court resources. The article concludes by offering suggestions for how courts can alleviate some of this pressure, primarily by requiring judges to follow and enforce Federal Rules of Civil Procedure Rule 23(b)(3) as the rule was written and intended.

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INTRODUCTION

Judges are increasingly faced with inventive product-based class actions that, even when successful, offer few (if any) practical benefits to real consumers.[1] For nearly everyone in these putative classes, the product he or she bought has been working and will continue to work perfectly fine. The product may have a theoretical defect, or manifestations of the alleged defect may be exceedingly rare. Or, maybe there was a real or potential issue with the product, but the manufacturer already responded by recalling the product and providing a fix—often under the guidance of federal regulators.[2] These consumers have not sustained any real-world injuries and do not require any judicial remedies.

Nevertheless, attorneys file these class actions. The subsequent litigation leads to motions practice and discovery that are time-consuming and expensive for both the court and the parties involved.[3] Moreover, the "remedies" requested for judicial approval are often more about finding ways to end the lawsuits and pay lawyers than providing actual value to real consumers.[4] These situations—despite their improper manipulation of the judicial system—occur regularly.[5] They require greater scrutiny.

These no-benefit class actions represent the latest development in a five-decade-long evolution of class-action litigation that began with the enactment of Federal Rule 23(b)(3).[6] Experience has shown that the rule is often subject to abuse. When such abuses have arisen in the past, Congress and the courts have responded by barring or dismissing the

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1 John H. Beisner et al., *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM 1, 36, 38 (2022), https://instituteforlegalreform.com/wp-content/uploads/2022/08/ILR-Class-Action-Flaws-FINAL.pdf [https://perma.cc/R6PX-DHJM].

2 *See, e.g.*, Browning v. Am. Honda Motor Co., No. 20-cv-05417, 2022 WL 5287775 (N.D. Cal. Oct. 6, 2022).

3 *See, e.g.*, Garcia v. Volkswagen Grp. of Am., Inc., No. 1:19-cv-331, 2022 WL 2542291, at *15 (E.D. Va. Jul. 7, 2022). *See also* discussion *infra* Section II.C. ("No-Benefit Class Actions Distort Procedure and Substantive Law").

4 *See, e.g.*, Eubank v. Pella Corp., 753 F.3d 718, 729 (7th Cir. 2014).

5 *See* discussion *infra* Sections II.B, II.C.

6 *See generally* Brian T. Fitzpatrick, *The Ironic History of Rule 23*, 1 VANDERBILT UNIV. L. SCH. LEGAL STUD. RSCH. PAPER SERIES, Working Paper No. 17-41 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020306 [https://perma.cc/T29S-35YZ].

lawsuits or class-action tactics.[7] As discussed below, the Supreme Court has issued several rulings that should have closed off efforts to bring class actions asserting speculative risks of physical or economic harm.[8] However, these rulings have not stopped the filings. Class counsel has continually sought to invent new injury theories, often offering novel economic loss concepts that are made to sound concrete so that courts will allow and certify their claims. Federal district and appellate courts have issued conflicting rulings on whether these economic harm theories constitute concrete injuries and, if so, what facts are needed at the pleading and certification stages to demonstrate that the class members have actually suffered these losses.[9]

This article provides a guide to judges for identifying and handling no-benefit class actions. It assists with the identification process by explaining the history behind no-benefit class actions (Section I) and deconstructing the novel economic loss theories upon which the class actions are built (Section II). The article then explores the judicial tools for managing these cases and provides extensive reasoning as to why, when, and how these tools should be used (Section III). It also discusses how courts have been implementing recent Supreme Court jurisprudence on Article III standing and Rule 23 requirements to set aside actions where the class has not sustained any real-world harm and will not gain real-world benefits from the litigation. Lastly, this article offers solutions the Federal Rules Advisory Committee can adopt to address no-benefit class actions at the systemic level (Section IV).

I. THE RISE OF THE NO-BENEFIT CLASS ACTION

Class actions have a long and storied history in American jurisprudence.[10] When properly employed, they can provide valuable tools for resolving large-scale disputes and enacting important social change. The court-ordered desegregation of public schools in *Brown v. Board of Education*[11] and many other civil rights cases were brought under Rule 23; these cases invoked the class mechanism, allowing for

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7 *See generally infra* Sections II.B, II.C.

8 *See generally infra* Section II.A.

9 *See generally infra* pp. 194-98 (providing an example of conflicting holdings between two different federal appellate circuits).

10 *See* Arthur R. Miller, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQUIRIES IN L. 1, 2-3 (2018).

11 Brown v. Board of Education, 347 U.S. 483 (1954).

injunctive relief.[12] The class actions at issue in this article are born out of a different Rule 23 provision: Rule 23(b)(3), which creates monetary damage class actions by authorizing opt-out class actions for financial compensation.[13]

A. The Adventuresome Development of Rule 23.

When the Federal Rules of Civil Procedure were initially promulgated in 1938, monetary class actions were governed by an "opt-in" approach.[14] Occasionally, people filed "spurious" class actions that initially sought limited damages.[15] However, the final liability could expand dramatically as others would wait to see the final judgment and opt-in to the class to take advantage of the award.[16] The uncertainty of liability in these cases made it difficult for defendants to assess their potential liability and settle claims.

Rule 23(b)(3) was enacted in 1966 to address this problem.[17] Under this rule, individuals who qualified for class membership were presumed to be in the class once the class was certified unless they opted out.[18] The plaintiffs' bar initially opposed this reform out of concern that individual plaintiffs would be deprived of their autonomy.[19] However, it soon became apparent that enlarging the class at the early stages of litigation allowed class counsel to aggregate small claims against corporations in ways that were not possible under the opt-in rule.[20]

Rule 23(b)(3) soon spawned entrepreneurial litigation seeking to leverage the class-action device as a method of generating litigation for

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12 David Marcus, *Flawed but Noble: Desegregation Litigation & Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 700-01, 711 (2011) (describing the evolution of Rule 23 from class actions seeking desegregation of public facilities).

13 FED. R. CIV. P. 23(b)(3). *See also* Fitzpatrick, *supra* note 6, at 3-4.

14 Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 602 (2015).

15 *See* Fitzpatrick, *supra* note 6, at 3.

16 *Id.* at 3, 9-10.

17 *Id.* at 2-3.

18 *Id.* at 3-4.

19 *Id.* at 3, 6.

20 *See* Samuel Issacharoff & Peter Zimroth, *An Oral History of Rule 23: An Interview with Professor Arthur Miller*, 74 N.Y.U. ANN. SURV. AM. L. 105, 121 (2018) (Professor Issacharoff noting "sheer entrepreneurialism" of class-action plaintiffs' bar "would have shocked" Rule's drafters).

profit, not necessarily pursuing justice for truly aggrieved individuals.[21] Through the mid-1990s, this effort primarily focused on securities class actions.[22] Class counsel would recruit plaintiffs, file actions based on minor drops in stock prices, and compete vigorously (and sometimes illegally) with each other to bring lawsuits that had the potential to pay out millions of dollars in attorneys' fees.[23] Many of these suits were entirely lawyer-driven: as one lawyer famously said, he had "the greatest practice of law in the world" because he had "no clients."[24]

By 1995, securities class-action abuses led Congress to enact the Private Securities Litigation Reform Act (PSLRA), which imposed substantive limitations on these lawsuits.[25] The PSLRA subjected class actions to the same standard expected of individual claims by requiring plaintiffs to identify the alleged false or misleading statements that caused them actual loss.[26] Given that the Rules Enabling Act states that procedural mechanisms cannot "abridge, enlarge or modify any

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[21] Miller, *supra* note 10, at 14 ("In due course an emboldened and highly aggressive entrepreneurial segment of the American plaintiffs' bar took the class action into other private fields of law such as complex antitrust and securities claims, products liability, unfair trade practices, personal injury, mass disasters, and a wide range of consumer injuries.")(footnote omitted); Issacharoff & Zimroth, *supra* note 20, at 120 (Professor Miller noting that drafters did not anticipate Rule 23(b)(3) class actions about "environmentalism, or product safety, or . . . consumerism."). *See* David Marcus, *The History of the Modern Class Action, Part II: Litigation & Legitimacy, 1981–1994*, 86 FORDHAM L. REV. 1785, 1832–33 (2018) ("From the new Rule 23's first days, securities litigators recognized how the 1966 revisions could empower their suits.")(footnote omitted); Stephen J. Choi & Robert B. Thompson, *Securities Litigation & Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1492 (2006). S*ee generally* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 63, 70-71 (2015).

[22] *See* Marcus, *supra* note 21, at 1832-37.

[23] *Id*. *See also* PATRICK DILLON & CARL M. CANNON, CIRCLE OF GREED: THE SPECTACULAR RISE AND FALL OF THE LAWYER WHO BROUGHT CORPORATE AMERICA TO ITS KNEES (2010) (tracing evolution of securities class action through the career of William Lerach).

[24] 141 CONG. REC. 192, S17, 933 at S17, 956-57 (Dec. 5, 1995).

[25] *See* Marcus, *supra* note 21, at 1836–37; Choi & Thompson, *supra* note 21, at 1489.

[26] *See* 15 U.S.C. § 78u-4(b)(1), 4(b)(2); *see also* Tellabs, Inc. v. Makor Issues & Rights., Ltd., 551 U.S. 308, 313-14 (2007); Julianello v. K-V Pharm. Co., 791 F.3d 915, 920 (8th Cir. 2015).

substantive right,"[27] it made sense that these fundamental requirements would apply to class actions.

By then, various class-action plaintiffs' firms had turned their attention to developing mass-tort class actions over allegations of physical injuries from asbestos and tobacco products.[28] Eventually, overreach in these areas led to further limitations. Federal appellate courts ruled that the personal injuries or fraud plaintiffs alleged created predominance problems for class treatment; the variations in injuries, medical histories, and other factors meant that the individual claims did not share common elements required to justify class certification.[29] In addition, the Supreme Court held that class actions were not an appropriate device for settling the "grand-scale compensation" claims in these mass tort cases.[30] The Court also observed that class counsel were becoming "ever more adventuresome" in the claims and legal theories they pursued.[31]

After this series of rulings in the 1990s, the "adventuresome" class-action plaintiffs' bar split in two directions. Some lawyers continued recruiting physically-injured clients, prosecuting their cases in large, multi-district litigations consolidated before a single federal trial judge.[32] Others developed new class-action theories in an attempt to rekindle the types of returns seen in early class actions. These product-

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27 28 U.S.C. § 2072(b).

28 *See generally* COFFEE, *supra* note 21, at 95, 100-01.

29 *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1296-97 (7th Cir. 1995); Castano v. Am. Tobacco Co., 84 F.3d 734, 744-45 (5th Cir. 1996); Cimino v. Raymark Indus., 151 F.3d 297, 315-16 (5th Cir. 1998).

30 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622, 628–29 (expressing concerns about whether providing sufficient notice, as required by the Constitution and Rule 23, is genuinely possible for a mass-tort class action); Ortiz v. Fibreboard Corp., 527 U.S. 815, 858 (1999) (reasserting that the appropriate settlement device is best left for "legislative consideration.").

31 *See Amchem Prods., Inc.*, 521 U.S. at 617-18.

32 Though not within the scope of this article, much has been written about how the federal multidistrict litigation mechanism for aggregating individual claims has been similarly manipulated for seeking and receiving monetary damages for uninjured claimants. *See, e.g.*, John H. Beisner & Jordan M. Schwartz, *MDL Imbalance, Why Defendants Need Timely Access to Interlocutory Review*, U.S. CHAMBER INST. FOR LEGAL REFORM (Apr. 2019), https://instituteforlegalreform.com/research/mdl-imbalance-why-defendants-need-timely-access-to-interlocutory-review/ [https://perma.cc/6YPL-JRXV]; Philip Goldberg, *How Mass Tort Litigation is Gaming the Judicial System*, BLOOMBERG L. (Mar. 2, 2023, 4:00 AM), https://news.bloomberglaw.com/us-law-week/how-mass-tort-litigation-is-gaming-the-judicial-system# [https://perma.cc/E5R6-PT29].

liability class actions differed from the mass tort cases because they did *not* involve physically injured claimants.[33] In fact, physical injuries were excluded from these class actions.[34] Class counsel argued, for example, that when *others* (non-class members) were physically injured by a defect in a product or *others'* products failed, everyone who bought the product suffered some economic loss.[35] Their product had a "latent" defect that had not yet manifested, making the product worth less.[36]

B. The Supreme Court Has Repeatedly Cautioned Courts Against Putative Class Actions that Do Not Meet the Legal Requirements for Class Treatment.

The Supreme Court, along with many federal district and appellate courts, have been responding to these novel class-wide theories of economic harm by setting limits on what the class action device could achieve and requiring greater scrutiny of each element of Rule 23 for when class treatment is permissible.[37] Several types of no-benefit class actions have reached the Supreme Court, which has largely focused its rulings on two areas: (a) assuring claims have the appropriate level of specificity required under Rule 23 for a class to be certified and (b) establishing the types of injury that satisfy the constitutional minimum under Article III for the plaintiffs to have standing in federal court.[38]

With regard to Rule 23 requirements, the common through-line of this jurisprudence has been insisting on a more demanding process for determining whether a putative class could be certified. In 1982, in *General Telephone Company of the Southwest v. Falcon*, the Court stated that class certification requires a "rigorous analysis."[39] The Court elaborated on that standard almost thirty years later in *Wal-Mart Stores,*

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33 *Cf. In re* Bridgestone/Firestone Tires Prods. Liab. Litig., 288 F.3d 1012, 1016 (7th Cir. 2002).

34 *Cf. Id.*

35 *See* Glazer v. Whirlpool Corp. (*In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.), 722 F.3d 838, 856 (2013).

36 *Contra* Johannessohn v. Polaris Indus. Inc., 9 F.4th 981, 987 (8th Cir. 2021).

37 *See* Andrew J. Trask, *Reactions to Wal-Mart v. Dukes: Litigation Strategy and Legal Change*, 62 DEPAUL L. REV. 791, 793–98 (2013). *See, e.g.*, Shaulis v. Nordstrom, Inc., 865 F.3d 1, 12 (1st Cir. 2017); Johannessohn v. Polaris Indus. Inc., 9 F.4th 981, 983 (8th Cir. 2021).

38 *See, e.g.*, Wal-mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51 (2011); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021).

39 *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982) (addressing a Title VII class action alleging discrimination against Mexican-Americans).

Inc. v. Dukes, a class action seeking to certify a nationwide class of women alleging sex discrimination under Title VII.[40] The Court explained that a rigorous analysis means examining the evidence underlying the plaintiffs' claims—even evidence related to the merits—if relevant to the certification inquiry.[41] The Court expressed skepticism of procedural shortcuts, such as "Trial by Formula," that could not and would not be used in individual cases.[42] In *Comcast Corporation v. Behrend*, the Court held that a plaintiff's proof of class-wide damages must match the theory of liability.[43] Then, in *Tyson Foods v. Bouaphakeo*, the Court held that a rigorous inquiry required that a plaintiff show that "each class member could have relied on [the same evidence] to establish liability if he or she had brought an individual action."[44]

The Court also addressed class actions asserting claims based on purely technical violations of law without any accompanying harm. The Court has long held that Article III of the U.S. Constitution requires a plaintiff to assert an injury-in-fact that is "concrete and particularized" in order to have standing to pursue a claim in federal court.[45] If an individual has not sustained such an injury from the defendant's violation of law, he or she has no right to sue—individually or as part of a class. In *Clapper v. Amnesty International USA*,[46] the plaintiffs acknowledged they had not yet suffered any injury but argued they could establish an injury-in-fact if there was an "objectively reasonable likelihood" they would be injured "at some point in the future."[47] The Court rejected this argument, holding injury-in-fact must be "concrete, particularized, and actual or imminent."[48] The Court clarified that a

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40 *Dukes*, 548 U.S. at 351.

41 *Id.*

42 *Id.* at 350–51.

43 Comcast Corp. v. Behrend, 569 U.S. 27, 38 (2013).

44 Tyson Foods v. Bouaphakeo, 577 U.S. 442, 443 (2016).

45 Lujan v. Def. of Wildlife, 504 U.S. 555, 560-61 (1992).

46 Clapper v. Amnesty Int'l. USA, 568 U.S. 398, 401 (2013). The Court decided Wal-Mart v. Dukes, 546 U.S. 338 (2011) and Comcast Corp. v. Behrend, 569 U.S. 27 (2013) to ensure that the class suffered the same injury tied to the liability theory in the case. The focus of this article is on plaintiffs who sue even though they have no real-world injury.

47 *Clapper*, 568 U.S. at 401.

48 *Id.* at 408-09.

"speculative chain of possibilities does not establish that injury based on potential future [harm] is certainly impending."[49]

Next, the Court heard *Spokeo, Inc. v. Robins,* a class action alleging that Spokeo—an Internet-based search engine that procured information about individual people from other online sources—had violated the Fair Credit Reporting Act because some profiles contained inaccurate information.[50] However, neither the named plaintiff nor the class had articulated a compensable harm from the posting of this misinformation.[51] The Court affirmed the dismissal of the claims, explaining that the plaintiff lacked standing because, although he asserted a technical violation of law, he did not allege any "concrete and particularized" injury from that violation.[52] The Court defined "concrete" as "real, and not abstract"—"not conjectural or hypothetical."[53] It warned that a "bare procedural violation[] divorced from any concrete harm" does not satisfy this requirement; not all violations of law "cause harm or present a material risk of harm."[54]

Finally, in 2021, the Court decided *TransUnion v. Ramirez*.[55] In *TransUnion,* the plaintiff tried to buy a car, but a credit report from TransUnion identified him as a possible match to the Office of Foreign Assets Control's (OFAC's) list of Specially Designated Nationals who may not conduct business in the United States.[56] He was denied the auto loan and embarrassed in front of his father-in-law.[57] The plaintiff filed a class action seeking to represent more than 8,000 people who received a similar letter from TransUnion informing them that their name was a "potential match" to the OFAC list, even though about seventy-five percent of them could not have suffered any injury because no one sought their credit data.[58] The trial court certified a class, and the resulting jury trial awarded several thousand dollars to each class

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49 *Id.* at 414.

50 Spokeo, Inc. v. Robins, 578 U.S. 330, 333-34 (2016).

51 *Id.* at 342.

52 *Id.* at 339 (quoting Lujan v. Defenders of Wildlife, 504 U. S. 555, 560-561 (1992)).

53 *Id.* at 339-40.

54 *Id.* at 341-42.

55 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).

56 *Id.* at 2201.

57 *Id.*

58 *Id.* at 2200.

member based on the idiosyncratic injury Mr. Ramirez actually suffered.[59]

On review, the Supreme Court held that most of these individuals lacked any injury-in-fact and could not be included in the class.[60] It explained that "[c]entral to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm."[61] While the named plaintiff could articulate such harm, most of the class could not. To illustrate this point, the Court offered a hypothetical based on the types of claims that would arise under state tort law:

> Suppose that a woman drives home from work a quarter mile ahead of a reckless driver who is dangerously swerving across lanes. The reckless driver has exposed the woman to a risk of future harm, but the risk does not materialize and the woman makes it home safely. . . . [T]hat would ordinarily be cause for celebration, not a lawsuit. But if the reckless driver crashes into the woman's car, the situation would be different and (assuming a cause of action) the woman could sue the driver for damages.[62]

The Court further explained that injury-in-fact based on such a "risk of future harm" is more difficult to establish in class actions seeking damages than in those seeking injunctive relief.[63] It is when the "risk of future harm materializes [that] the individual suffers a concrete harm, then the harm itself, and not the pre-existing risk, will constitute a basis for the person's injury and for damages."[64]

In these and other rulings, the Court has explained that requiring plaintiffs to have a real-world injury also helps safeguard the judiciary's integrity; it protects the courts and defendants from prolonged, expensive litigation and *in terrorem* settlements driven by litigation risks, not justice.[65] The inherent inefficiencies, inequities, and

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59 *Id.* at 2202.

60 *TransUnion LLC*, 141 S. Ct. at 2198.

61 *Id.*

62 *Id.* at 2211.

63 *Id.*

64 *Id.*

65 Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978). According to Merriam-Webster, *in terrorem* is defined as "by way of threat or intimidation: serving or intended to threaten or intimidate." *In terrorem*, MERRIAM-

transaction costs of class litigation—which are largely borne by defendants who are required to litigate a putative class action regardless of the merits—"may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense."[66] Plaintiffs can and do leverage these dynamics "to extort settlements from innocent companies."[67] This risk, Justice Ginsburg observed, is heightened when "a class action poses the risk of massive liability unmoored to actual injury."[68]

II. THE "NO-BENEFIT" PRODUCT-DEFECT CLASS ACTIONS

In response to this jurisprudence, class-action lawyers have been seeking to create new ways to convert traditional product liability cases into class actions. They recognize that if they base their lawsuits on physical injuries, courts will rule that individualized issues of injury and causation will predominate, precluding class certification. Further, initial efforts to establish product-based class actions on the risk of injury from a latent defect were rejected on Article III grounds.[69] For example, in *Rivera v. Wyeth-Ayerst Laboratories*, the Fifth Circuit ruled that those who had bought a drug with an elevated risk of liver damage did not have an injury-in-fact because they did not personally suffer any physical injury from taking the drug.[70] As the Fifth Circuit stated

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WEBSTER DICTIONARY, https://www.merriam-webster.com/legal/in%20terrorem (last visited Jan. 24, 2024) [https://perma.cc/W9BK-66JY].

66 *Coopers & Lybrand*, 437 U.S. at 476; *accord* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740 (1975).

67 Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 149 (2008); *accord* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail").

68 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

69 The New Jersey Supreme Court, in response to such a claim brought under the state's consumer protection act, held that consumers are not injured merely because the product they bought may have a defect or if some other issue arises. Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 243 (2005). The court understood that these lawsuits were based on the false premise that people are entitled to a product "without any flaws or glitches, without any reasonably-remediable problems, and without any of the ordinary tribulations" of owning a product in the real world—"in other words, a perfect car unaffected by the laws of physics and common sense." *Id.*

70 *See* Rivera v. Wyeth-Ayerst Laboratories, 283 F.3d 315, 319-20 (5th Cir. 2005).

plainly, "[m]erely asking for money does not establish an injury in fact."[71]

Undeterred, class counsel has been testing various novel theories of economic loss based on common-law or statutory claims of fraud and misrepresentation. For example, some claims allege the manufacturer knew the product had a latent defect but still sold it without informing consumers that this latent defect existed.[72] This "consumer protection" theory posits that if consumers had been aware of the potential defect, they would not have purchased the product or would have paid less for it.[73] Thus, their alleged injury is buying or overpaying for the product.

By reframing the litigation this way, class counsel are trying to take two additional legal shortcuts. First, they want to invoke product liability concepts without having to prove the elements of a product liability cause of action for any claimant.[74] By claiming a lesser threshold of proof—just that the defendant did not disclose potential risks associated with a defect—and by carefully selecting a personally injured plaintiff to front the class action, class counsel aims to extend the defendant's liability to all consumers.[75]

Second, they use these tactics to file class actions even when *nobody* has been injured or when the company has *already* fixed the potential issue by putting forth generalized theories of harm that can apply to many, if not all, potential class members.[76] This shifts the focus of the lawsuit entirely onto the company's alleged misconduct, which is leveraged to generate negative media attention and other business pressures and, ultimately, drive the companies to settlement—even

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71 *Id.* at 319.

72 In this way, plaintiffs attempt to recast products liability claims as "consumer protection actions seeking only economic damages." Braverman v. BMW of N. Am., LLC, No. 21-55427, 2023 U.S. App. LEXIS 5721, at *9 (9th Cir. Mar. 10, 2023) (Bennett, J., concurring).

73 *See, e.g.*, Sanchez v. Universal Beauty Prods., Inc., No. 511092/22, 2023 N.Y. Misc. LEXIS 5676, at *2-3 (Sept. 22, 2023) (showing how the plaintiff's complaint used this theory in their argument).

74 *See* discussion *infra* Section II.A.

75 *See, e.g.*, Johannessohn v. Polaris Indus. Inc., 9 F.4th 981, 988 (8th Cir. 2021) ("At its core, Appellants' argument is that purchasers without manifest defects should be able to piggyback on the injury caused to those with manifest defects."); *see also* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2201-02, 2213 (2021) (noting that more than 6,000 class members had not suffered the same concrete harm as the named plaintiff).

76 *See generally* discussion *infra* Section II.B.

when not legally merited.[77] These outcomes have fueled the growth of these entrepreneurial uses of Rule 23(b)(3) actions to the detriment of our legal system.[78]

A. "No-Injury" Fraud Class Actions: The Class Members Have Not Sustained Any Real-World Economic Loss

The first type of no-benefit class action is a "no injury" claim, where all or much of the class never experienced any injury from an alleged defect in a product. The plaintiffs argue it is immaterial whether an injury occurs or is even unlikely to occur because the mere perception of a new risk creates economic loss.[79] Specifically, this perceived risk lowers the value of a product, violates an implied warranty of merchantability, or means a product was deceptively marketed.[80] This tactic seeks to move the suits away from a product liability-based set of claims into a consumer-fraud environment, thereby making the burdens of proof easier to meet.[81]

When a claim sounds in product liability, an individual plaintiff who suffered personal injury has to prove the product was defective and that defect caused the harm.[82] The corresponding burden of proof requires scientific evidence of defect and a risk-utility balancing test, which weighs the product's value against its risks to consumers.[83] However, in claims for a class of consumers brought under misrepresentation or other economic loss theory, class counsel contends they do not have to prove an actual product defect existed—just that the defendant did not

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77 *See* Beisner, *supra* note 1, at 38 (discussing "no-injury" class actions and the preference of defendants to settle rather than incur the economic hardship of a trial).

78 *See generally* discussion *infra* Section II.C.

79 *See, e.g.*, *In re* Takata Airbag Prods. Liab. Litig., 396 F. Supp. 3d 1101, 1119-21 (S.D. Fla. 2019); *In re* Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Liab. Litig., 903 F.3d 278, 281-83 (3d Cir. 2018).

80 *See, e.g.*, Siqueiros v. GM LLC, No. 16-cv-07244, 2021 U.S. Dist. LEXIS 169326, at *17-19, *22-23 (N.D. Cal. Sept. 7, 2021).

81 *See In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1017 (7th Cir. 2002); *see generally* Beisner, *supra* note 1, at 38.

82 *See, e.g.*, Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 847 (N.H. 1978).

83 *See* Barker v. Lull Eng'g Co., 573 P.2d 443, 447-48, 452, 456-57 (Cal. 1978); Kim v. Toyota Motor Corp., 424 P.3d 290, 296 (Cal. 2018).

disclose potential risks associated with a theoretical defect.[84] Further, these consumer-based claims open the door to per-incident fines.[85]

An early iteration of this economic loss theory was based on the "diminution in value" of the product on the resale market. Plaintiffs argued that a person buying the used product would pay less for it if they knew the product had an increased chance of being defective, particularly if someone experienced serious injury from a product where the defect actually manifested.[86] The Wisconsin Supreme Court observed that courts had dismissed these claims for years under fraud, product liability, and other theories because the class members' products had not malfunctioned: "Diminished value premised upon a mere possibility of future product failure is too speculative and uncertain to support a fraud claim."[87] The diminution theory also presented other difficulties for plaintiffs, such as an impracticable burden of proof. Establishing damages would require plaintiffs to conduct studies of resale markets, making cases brought under this theory both costly and sometimes impossible to prove because not all products have resale markets.

For these reasons, class counsel has largely been framing economic loss theories as injuries occurring at the time of purchase, not resale. They allege that consumers did not get the "benefit of the bargain"[88] because purchasers paid premiums thinking they were buying products without defects or safety issues.[89] After these purchasers became aware their products had latent or unmanifested defects, they claim they: (1) would not have bought the products in the first place; (2) would have paid less for the products; or (3) would have bought cheaper alternative products instead.[90] In each case, the difference between the purchase

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84 Plaintiffs' attempt to shift the inquiry from product liability to consumer protection reflects an intentional effort to avoid traditional elements of product liability law. *See* Sheila B. Schuerman, *Against Liability for Private Risk-Exposure*, 35 HARV. J.L. & PUB. POL'Y 681, 691 (2012).

85 *See In re Bridgestone/Firestone, Inc.*, 288 F.3d at 1017.

86 *See, e.g.*, Tietsworth v. Harley Davidson, Inc., 677 N.W.2d 233, 240 (Wis. 2004).

87 *Id.* at 240-41.

88 *See, e.g.*, Lassen v. Nissan N. Am., 211 F. Supp. 3d 1267, 1281 (C.D. Cal. 2016) (noting the tactic of pleading products liability class action as consumer fraud claims).

89 *See, e.g.*, Siqueiros v. GM LLC, No. 16-cv-07244, 2021 U.S. Dist. LEXIS 169326, at *17-20 (N.D. Cal. Sept. 7, 2021).

90 *See, e.g.*, Xavier v. Evenflo Co. (*In re* Evenflo Co.), 54 F.4th 28, 33-34 (1st Cir. 2022); *see generally* Quackenbush v. Am. Honda Motor Co., Inc., No. C 20-

price and the hypothetical lower price is the alleged injury.[91] Class counsel will often delay detailing how much less class members would have paid for the defective product in order to sustain a sufficiently large class.[92] Because the answer of exact payment may differ from person to person, this strategic ambiguity is intended to make it easier to maintain common issues across the class.

Framing these class actions under misrepresentation, fraud, or some other economic loss theory, however, does not guarantee surviving class certification or a motion to dismiss. Some federal appellate circuits, including the Eighth Circuit, have held that a plaintiff bringing a product-defect class action must allege the defect actually manifested, regardless of the theory of liability asserted.[93] As the Eighth Circuit explained, the plaintiffs cannot "reframe the issue by saying that there is an inherent . . . defect common to all" of the products,[94] or that all consumers suffered an economic loss because they would not have paid, "the sticker price if they knew," of the potential defect.[95] Even if styled as a benefit-of-the-bargain or consumer protection act claim, the action "still fails to plausibly allege damages to satisfy the jurisdictional threshold."[96] In short, the plaintiffs benefitted from the bargain because they bought and used the products without issue.

Other courts have held otherwise, concluding that no-injury fraud claims can be viable if properly pleaded, even when based on a risk of harm that never materialized.[97] Recently, the First Circuit held that

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05599, 2021 WL 6116949 (N.D. Cal. Dec. 27, 2021) (certifying class on "price premium" theory because "the damage is incurred at the time of the sale").

91 *See* Sheila B. Scheuerman, *Against Liability for Private Risk-Exposure*, 35 HARV. J.L. & PUB. POL'Y 681, 691 (2012); Edward Sherman, *"No Injury" Plaintiffs & Standing*, 82 GEO. WASH. L. REV. 834, 842 (2014) ("As courts increasingly refused to certify class actions in tort suits due to problems such as standing and individualized issues like reliance, plaintiff lawyers shifted to contract or statutory causes of action applicable to a variety of consumer and business situations.").

92 *See, e.g.*, Johannessohn v. Polaris Indus. Inc., 9 F.4th 981, 987 (8th Cir. 2021) ("Appellants did not define their class to make sure all proposed members have standing.").

93 *See, e.g.*, *id.* ("It is not enough to allege . . . a product is *at risk* for manifesting this defect; rather, the plaintiff must allege that their product actually exhibited the alleged defect."); Penrod v. K&N Eng'g, Inc., 14 F.4th 671, 673-74 (8th Cir. 2021).

94 *Johannessohn*, 9 F.4th at 987.

95 *Id.* at 988.

96 *Penrod*, 14 F.4th at 675.

97 *See* Xavier v. Evenflow Co. (*In re* Evenflo Co.), 54 F.4th 28, 36 (1st Cir. 2022).

economic loss at the time of sale could constitute injury if the defendant made statements before the consumers' purchases that could allegedly be misleading, given the alleged increased risk of harm.[98] The court provided no indication of how specific these misleading statements needed to be for a viable economic loss pleading. While the court acknowledged the tension between its ruling and the Eighth Circuit cases, the First Circuit sought to remedy this conflict by distinguishing the bases for economic loss in the two cases.[99] It stated the plaintiffs in its case asserted both misrepresentation and risk of harm losses at the time of sale, whereas the plaintiffs in the Eighth Circuit relied solely on risk of harm.[100] Class counsel will certainly attempt to leverage this First Circuit ruling to circumvent the manifest defect rule. Such a result would be troublesome since merely re-packaging these class actions as marketing claims would undermine the Supreme Court's admonition against monetizing the risk of future injury.[101]

The First Circuit case also raises a key question: what is the minimum amount of facts necessary for demonstrating a sufficiently concrete injury during the pleading stage? The court previously held that "claims of injury premised on 'overpayment' for a product, or a loss of the benefit of the bargain, require an objective measure against which the plaintiff's allegations may be evaluated."[102] However, if plaintiffs can simply allege overpayment without factual support, the pleading is *ipse dixit*—anyone can assert they would have played less for any product over nearly any reason. This is why Rule 9(b) requires fraud and misrepresentation claims to be pleaded with specificity: it protects the courts and parties from speculative, unsupported claims.[103] For the same reasons, courts hearing these speculative class actions should require plaintiffs to plead sufficient facts to demonstrate injury.

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98 *Id*. at 32-36.

99 *Id*. at 37-38.

100 *Id*. at 38 ("This reliance on misrepresentation distinguishes this case from the products liability actions in which the Eighth Circuit has found standing lacking for want of injury").

101 *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2211 (2021) (agreeing with defendant that, "[i]f the risk of future harm does *not* materialize, then the individual cannot establish a concrete harm sufficient for standing . . . .").

102 Shaulis v. Nordstrom, Inc., 865 F.3d 1, 12 (1st Cir. 2017).

103 FED. R. CIV. P. 9(b) ("Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

The Third Circuit's jurisprudence addresses these concerns; it requires plaintiffs to plead facts, not just levy accusations, that can lead a court to infer economic harm.[104] A "plaintiff must do more than offer conclusory assertions of economic injury in order to establish standing. She must allege facts that would permit a factfinder to value the purported injury at something more than zero dollars without resorting to mere conjecture."[105] Likewise, the Ninth Circuit requires a plaintiff to show that the product "costs more than similar products" and that, "he would not have been willing to pay as much as he did," but-for the alleged misrepresentation.[106] These basic facts demonstrating injury are at the heart of these class actions and should not be discounted.[107] Class counsel should not be able to pick the locks to the courthouse doors through artful pleading; they should have to show their class members have sustained real-world injuries and that their cases will provide these real consumers with real-world benefits.

B. "Piggyback" Class Actions: The Class Members Have No Injury Because their Harms Were Already Remedied

Counsel has also filed lawsuits seeking to represent a class of consumers who bought products that had issues but were subsequently fixed as part of a product recall or other customer-satisfaction effort. These lawsuits have been called "piggyback" class actions because they typically follow the announcement of a recall or satisfaction program.[108] Class counsel wants these lawsuits to focus entirely on the defendant's alleged misconduct or product malfunction and do so by pleading only generalized theories of harm. Such theories are intended to *sound* concrete and are used to generate media attention, apply business pressures, and, ultimately, drive settlement.[109] Like the no-injury cases above, these piggyback claims also lack a real-world benefit to the class.

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104 *See, e.g.*, *In re* Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices. & Liab. Litig., 903 F.3d 278, 281, 285 (3d Cir. 2018).

105 *Id.* at 285.

106 Reid v. Johnson & Johnson, 780 F.3d 952, 957 (9th Cir. 2015).

107 *See generally In re Johnson & Johnson*, 903 F.3d at 281; *see also Reid*, 780 F.3d at 957.

108 John E. Villafranco et al, *The Case of the Piggyback Class Action*, NUTRITIONAL OUTLOOK (Sept. 2012), https://s3.amazonaws.com/cdn.kelleydrye.com/content/uploads/attachments/The-Case-of-the-Piggyback-Class-Action.pdf [https://perma.cc/D6XU-BX53] (providing a definition of piggyback class actions).

109 *See generally* Beisner, *supra* note 1, at 38.

The class members have no current injury because: (1) they never had an injury; (2) their injury was already remedied; or (3) their injury could be remedied by taking advantage of the recall or satisfaction program. Today, plaintiffs in these cases generally allege that relief from the recall or other programs was insufficient to make them whole, so they still have some economic injury.[110] These claims are highly problematic—legally and practically—because they often interfere with or duplicate existing remedies.[111]

Many courts dismiss piggyback class actions on the pleadings, reasoning that plaintiffs have already received a remedy for the harm they allege or that the appropriate government agency is better equipped to oversee a recall.[112] Other piggyback class actions fail at the certification stage because courts have found that pre-existing recall or customer satisfaction programs create multiple class certification hurdles. For example, courts have noted: (1) predominance issues, because the issue of injury is often related to whether the defect manifested and how much of the product was used before the fix was

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110 *See, e.g.*, Cohen v. Subaru of Am., Inc., No. 1:20-cv-08442, 2022 WL 721307 (D.N.J. Mar. 10, 2022) (class action asserting warranty & fraud claims following NHTSA-approved recall of fuel impellers); *In re* Chevrolet Bolt EV Battery Litig., 532 F. Supp. 3d 1413 (J.P.M.L. 2021) ("These putative class actions share factual questions arising from (1) defendant's November 2020 recall of model year 2017-2019 Chevrolet Bolt EVs due to the risk of fire posed by the car batteries when charged at or near full capacity, and (2) its interim remedy, which plaintiffs allege results in a loss of battery mileage in affected vehicles."); Garcia v. Volkswagen Group of Am., Inc., No. 1:19-cv-331, 2022 WL 2542291 (E.D. Va. July 7, 2022) (detailing a class action filed in wake of recall).

111 Elkins v. Am. Honda Motor Co., Inc., No. 8:19-cv-00818, 2020 WL 4882412 (C.D. Cal. July 20, 2020).

112 *See, e.g.*, Hadley v. Chrysler Group LLC, 624 F. Appx 374, 380 (6th Cir. 2015) (affirming dismissal of class action alleging defective airbags for lack of standing because plaintiff had received recall repair); Winzler v. Toyota Motor Sales, U.S., Inc., 681 F.3d 1208, 1211 (10th Cir. 2012) (Gorsuch, J.) (affirming dismissal of class action alleging defective engine control modules because "Ms. Winzler's case contains all these traditional ingredients of a prudentially moot case. . . . By filing documents with NHTSA notifying it of a defect, Toyota set into motion the great grinding gears of a statutorily mandated and administratively overseen national recall process"); *Elkins*, 2020 WL 4882412, at *6 (dismissing theoretical-injury class action alleging defective air conditioning units because plaintiffs either had not taken advantage of existing warranty program or had not suffered malfunction post-repair); Strama v. Toyota Motor Sales U.S., Inc., No. 15 C 9927, 2016 WL 561936, at *4 (N.D. Ill. Feb. 12, 2016) (dismissing piggyback class action as not ripe because plaintiffs had not taken advantage of existing warranty-enhancement program).

offered or made;[113] (2) superiority issues, because the administrative remedy may be a more efficient and comprehensive way to address the problem;[114] and (3) adequacy issues, because a class representative who would file superfluous and costly litigation when a remedy is already available is not an adequate class representative.[115]

These cases are particularly common in the automotive sector. Vehicles are complex machines, and it is not unusual for potential issues to arise that are subject to express warranties, recalls, and other service bulletins. For example, the complaints in both *Browning v. American Honda Motor Co., Inc.*,[116] and *Hackler v. General Motors LLC*[117] were filed after the auto manufacturers issued Technical Service Bulletins (TSBs) addressing certain issues that might arise under their warranty policies. Automobile manufacturers issue TSBs to dealers for various reasons, including when a manufacturer notices increased warranty repairs for particular parts or issues.[118] The issuance of a TSB does not automatically, or even usually, mean the subject part is defective; TSBs often include advice or further clarification on how to repair the part, issue, or other systems on a vehicle when it is presented under

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113 *See, e.g.*, *In re* Toyota Motor Hybrid Brake Mktg., Sales Practices & Products Liab. Litig., 288 F.R.D. 445, 449 (C.D. Cal. 2013) (denying certification of class action alleging defective braking system because existing recall raised individualized questions about injury).

114 *See, e.g.*, Martin v. Ford Motor Co., 292 F.R.D. 252, 284 (E.D. Pa. 2013) (denying certification of class action alleging defective rear axles because it was not superior to preexisting recall); *In re* ConAgra Peanut Butter Litig., 251 F.R.D. 689, 699 (N.D. Ga. 2008) (holding class action was not superior because defendant had already issued a refund for allegedly tainted peanut butter, whether the peanut butter was consumed or not).

115 *See, e.g.*, *In re* Aqua Dots Products Liab. Litig., 654 F.3d 748, 752 (7th Cir. 2011) (affirming denial of certification because any plaintiff "who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests").

116 Browning v. American Honda Motor Co., Inc., No. 20-cv-05417, 2022 WL 5287775 (N.D. Cal. Oct. 6, 2022).

117 Hackler v. General Motors LLC, No. 221-CV-019, 2022 WL 270867 (S.D. Ga. Jan. 28, 2022).

118 *What You Need to Know About Service Bulletins*, LITHIA MOTORS, INC., https://www.lithia.com/research/car-maintenance/what-you-need-to-know-about-service-bulletins.htm#:~:text=A%20TSB%20is%20issued%20by,technicians%20to%20repair%20the%20problem [https://perma.cc/KZ4C-7TRR] (last visited Feb. 25, 2024).

warranty.[119] In essence, these notices efficiently facilitate a manufacturer's ability to address recurring issues under the express limited warranty at no cost to consumers. However, class counsel has argued that TSBs are "proof" that a defendant knew of a product defect and "fraudulently" concealed it by not affirmatively telling customers about it when selling vehicles subject to the TSBs.[120]

Class counsel has also sought "catalyst fees" for bringing class actions connected with existing product recalls, arguing that their lawsuits influenced the corporation's decisions to implement or supplement the remedies. For example, in *Gordon v. Tootsie Roll Industries, Inc.*, the plaintiffs challenged the amount of empty space (or "slack fill") in Junior Mints and Sugar Babies' candy boxes, claiming it made the boxes appear to contain more candy than they actually did.[121] Before class certification had been decided, Tootsie Roll made changes to the boxes, including adding an "ACTUAL SIZE" label under the illustration of the candy and a piece count to the box; Tootsie Roll also moved a pre-existing disclaimer—"PRODUCTS SOLD BY NET WEIGHT NOT VOLUME. CONTENTS TEND TO SETTLE AFTER PACKAGING"—from the back of the box to the front.[122] In response, the plaintiff withdrew her motion for class certification, declared the case moot, and moved for attorneys' fees on a catalyst fee theory, arguing that she had "won" her case.[123] The trial court denied her fee motion,[124] and the Ninth Circuit affirmed, pointing out that the plaintiff had opposed any labeling disclosures as worthless when opposing Tootsie Roll's motion to dismiss.[125]

As a general premise, courts have found piggyback class actions to be duplicative and a considerable drain on judicial resources. In one case, the court chastised plaintiffs for pursuing "voluminous, asymmetric, and time-consuming discovery that resulted in the same

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119 *See, e.g.*, Hurry v. Gen. Motors LLC, 622 F. Supp. 3d 1132, 1153 (M.D. Ala. 2022) (discussing TSB process).

120 *Hackler*, 2022 WL 270867, *7, *9 (In *Hackler*, the plaintiffs did not seek repairs for the condition, did not allege the defendant failed or refused to remedy any defect, and did not suggest the warranty was insufficient.).

121 *See* Gordon v. Tootsie Roll Industries, Inc., 810 F. Appx. 495, 496 (9th Cir. 2020).

122 *Id.* at 496–97.

123 *Id.* at 496.

124 *Id.*

125 *Id.* at 497.

admission that was communicated in [the] original recall notice . . . ."[126] In another case, a federal district court questioned the plaintiffs' rationale of "[choosing] to ignore the [remedial action] offered to them and to instead initiate litigation and attempt to initiate a class action to obtain the precise relief offered to them . . . ."[127] The better option in these cases, noted a third court, is to require plaintiffs to avail themselves of the warranty program so the court can "rule on the efficacy and legal sufficiency" of that program.[128] Otherwise, as yet another court found, the manufacturers' remedies may be "superior to the nation-wide class action suit . . . ."[129] "[T]he administrative remedy provided by NHTSA, including recall of vehicle for inspection and/or repair, is more appropriate than civil litigation seeking money damages in a federal court."[130] NHTSA can "assess the technical merits of such claims and . . . can handle those claims in a more efficient manner by ordering further recall and replacement of the [part], if appropriate."[131]

In a case before the Tenth Circuit, now-Justice Gorsuch explained that deferring to the remediation action is a matter of judicial prudence: "if events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits, equity may demand not decision but dismissal."[132] "At best, [the court] might duplicate their efforts and waste finite public resources in the process. At worst, we might invite inter-branch confusion and turf battles over the details of carrying out an agreed objective" for little to no benefit.[133] The result would "add new transaction costs" and "reduce the incentive manufacturers have to initiate recalls."[134]

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126 Garcia v. Volkswagen Group of Am., Inc., No. 1:19-cv-331, 2022 WL 2542291, at *15 (E.D. Va. July 7, 2022) (detailing a class action filed in wake of recall).

127 Strama v. Toyota Motor Sales U.S., Inc., No. 15 C 9927, 2016 WL 561936, at *3 (N.D. Ill. Feb. 12, 2016).

128 Elkins v. Am. Honda Motor Co., Inc., No. 8:19-cv-00818, 2020 WL 4882412, at *5 (C.D. Cal. July 20, 2020).

129 Ford Motor Co. Ignition Switch Products Liab. Litig., 174 F.R.D. 332, 353 (D.N.J. 1997).

130 *Id.*

131 *Id.*

132 Winzler v. Toyota Motor Sales, U.S.A., Inc., 681 F.3d 1208, 1210 (10th Cir. 2012).

133 *Id.* at 1211.

134 *Id.*

C. No-Benefit Class Actions Distort Procedure and Substantive Law

Because no-benefit class actions are attempts to reclaim product-defect class actions from irrelevance, they tend to cause serious problems for the legal system. When not properly cabined, no-injury and piggyback actions can distort substantive law and spawn legal doctrines and procedural shortcuts that would not be viable if plaintiffs brought their claims individually.

Aggregate damage theories.

Many of the novel economic loss theories used in these cases are unique to class actions. In individual breach-of-warranty or consumer-fraud cases, plaintiffs do not advance vague "price premium" theories of damages, such as "I would have paid less for it or bought a less expensive alternative." Instead, they specify the amount they believe they overpaid as damages and show existing alternatives they would have otherwise bought.[135] In individual automotive warranty ("Lemon Law") cases, for example, owners will seek "benefit of the bargain" damages by calculating the actual price the plaintiff paid for the vehicle, discounted by the mileage driven once the alleged defect compromised their use of the vehicle, among other factors.[136]

By contrast, no-injury and piggyback class actions regularly seek to use "expert" evidence as a replacement for individual evidence of injury. Class counsel is loath to include that evidence in the pleadings or to share it at other early stages of the litigation in an effort to avoid the fact that the report might show differences among the prospective class members.[137] But, without this expert testimony, the plaintiffs may lack any evidence that they were actually harmed.[138] A stark example is the use by class counsel of so-called conjoint analysis, which is a highly

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135 *See, e.g.*, Farrales v. Ford Motor Co., No. 21-cv-07624, 2022 WL 1239347, at *4 (N.D. Cal. Apr. 27, 2022) (calculating restitution for a vehicle, including an offset for the benefit of bargain received based on mileage driven before alleged defect arose).

136 *Id.*

137 *See* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 456 (2016) (allowing statistical evidence in class actions when "each class member could have relied on that [evidence] to establish liability [if he or she had] brought an individual action").

138 *See, e.g.*, Kim v. Benihana, Inc., No. 5:19-cv-02196, 2022 WL 1601393, at *12 (C.D. Cal. Mar. 25, 2022) (excluding expert evidence of injury; denying certification because plaintiff had not offered class-wide evidence of injury).

manipulable survey-based marketing tool companies use to determine how certain product features contribute to a product's desirability.[139] Class counsel has frequently submitted results-oriented conjoint analyses as "evidence" of class-wide financial injury. They argue, for example, that these surveys can be used to determine a class-wide "price premium" over the alleged faulty part or the defendant's alleged misconduct at the point of purchase.[140] Courts are split over whether—and under which circumstances—conjoint analyses may be reliable for serving as evidence of class-wide injury.[141] Due to the Supreme Court's decision in *Comcast v. Behrend*, which states that any class-wide damages model must match the plaintiffs' theory of liability, damages models that can be used for alleging class-wide injuries have gained profound significance.[142]

Presumptions of reliance.

No-benefit class actions push the boundaries of consumer protection acts and claims for misrepresentation and fraud, particularly in the type of marketing class actions allowed by the First Circuit. Reliance is often an essential element of these causes of action, as is the requirement that whatever fact has been misrepresented, omitted, or concealed be material to the buyer. In other words, the buyer must have relied upon and cared about the issue when making the purchase, both of which are largely individualized questions. In these cases, the plaintiffs will generally argue the court should *presume* the allegedly misrepresented fact was material to each purchaser and that every buyer relied on the alleged deception.[143] Allowing this factual fallacy to support class

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139 *See* Mike Kheyfets, *Benefit of the But-For Bargain: Assessing Economic Tools for Data Privacy Litigation*, 23 J. TECH. L. & POL'Y 115, 117-20 (2018) (explaining conjoint analysis).

140 *See, e.g.*, Passman v. Peloton Interactive, Inc., No. 19-cv-11711, 2023 WL 3195941, at *20 (S.D.N.Y. May 2, 2023) (plaintiffs contended that "conjoint analysis establishes that there was a price premium attributable to Peloton's misrepresentations and omissions . . . .").

141 *See* Hadley v. Kellogg Sales Co., 324 F. Supp. 3d 1084, 1105 (N.D. Cal. 2018) (collecting cases).

142 *See* Comcast v. Behrend, 569 U.S. 27, 35 (2013).

143 *See, e.g.*, Kim v. Benihana, 2022 WL 1601393, at *11 (alleging that misrepresen tations about crab meat in restaurant dishes were material to all class members); Silva v. B&G Foods, Inc., No. 20-cv-00137, 2022 WL 4596615, at *2-3 (N.D. Cal. Aug. 26, 2022) (arguing that, "materiality and reliance under the UCL and CLRA can be established by classwide proof because they depend on an objective reasonable consumer standard."); Testone v. Barlean's Organic Oils, LLC, No.

certification can lead to distorted outcomes, including *in terrorem* settlements and subsequent decertification rulings.[144]

Distortions to litigation and trial process.

No-benefit class actions artificially prolong the pleading process. Class counsel is often strategically vague when pleading an injury so as not to destroy their assertion of commonality and other class-wide theories. They will offer only those facts they believe necessary to avoid dismissal.[145] As a result, defendants often file multiple motions to dismiss because the class pleadings are insufficient to pass muster under Article III or Rules 8(a) or 9(b), and trial judges regularly allow amended pleadings.[146] Some courts bluntly acknowledge that their practice is to afford leniency to class counsel, largely to protect putative class members from the mistakes of lawyers who purportedly represent their interests.[147]

When these types of claims survive one or more motions to dismiss, they often lead to cumbersome discovery in an effort for defendants to determine how a statistical injury (not actual overpayment) affected each plaintiff. The result can be even more amended pleadings to focus

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19-CV-169, 2021 WL 4438391, at *13 (S.D. Cal. Sep. 28, 2021) (noting, "split of authority among district courts within the Ninth Circuit as to what evidence of materiality and deception under the UCL, FAL, and CLRA is sufficient to satisfy Rule 23(b)(3).").

144 *See supra* notes 65-67 and accompanying text (definition and discussion of *in terrorem* settlements); *In re* MyFord Touch Consumer Litig., No. 13-cv-03072, 2018 WL 3646895, at *3 (N.D. Cal. Aug. 1, 2018) (decertifying class based on variations in Ford's knowledge over time, which would cause its duty to disclose to vary).

145 *See, e.g.*, Heber v. Toyota Motor Sales, U.S.A., Inc., 823 F. App'x 512, 514 (9th Cir. 2020) (partially affirming dismissal of the fourth amended complaint on Rule 9(b) grounds); Browning v. Am. Honda Motor Co., Inc., No. 20-cv-05417, 2022 WL 5287775, at *2 (N.D. Cal. Oct. 6, 2022) (denying partial motion to dismiss the third amended complaint).

146 *See, e.g.*, Preston v. Am. Honda Motor Co., Inc., 783 F. App'x 669, 670-71 (9th Cir. 2019) (affirming dismissal of amended complaint but remanding for additional amendment).

147 *See* Freitas v. Cricket Wireless, LLC, No. C 19-07270, 2022 WL 3018061, at *6 (N.D. Cal. Jul. 29, 2022) ("Time and time again, plaintiff's counsel have made missteps, and we have found ways to excuse them. Of significance are the *fifteen* potential class representatives who have been dismissed throughout this action. But, at long last, plaintiff's counsel have overreached too far and made too critical a mistake.").

the case on the key issues.[148] They can also result in distorted class trials like the one in *TransUnion*, where a sensationally injured plaintiff represented a largely uninjured class, and the trial focused solely on the colorful injury suffered by the named plaintiff.[149]

Distortions to settlement outcomes.

Finally, no-benefit class actions often lead to settlements that provide no actual, tangible value to the class members but generate millions of dollars in attorneys' fees for class counsel that minimize actual class relief. First, it is difficult to assign or creatively demonstrate value in a class action settlement where many or most class members have not actually suffered any concrete, measurable injury.[150] As a result, class members often have little interest in claiming the proffered settlement relief.[151] They do not feel aggrieved and may view even minor tasks like returning a claims form as not worth the return.[152] They also may have to spend money to take advantage of the offer, such as

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148 *See, e.g.*, *Freitas*, 2022 WL 3018061 at *1-3 (class counsel moved to amend the class definition after the post-certification discovery findings caused the sole plaintiff and class representative to fall outside of the class); *Browning*, 2022 WL 5287775, at *2.

149 Ramirez v. TransUnion LLC, 951 F.3d 1008, 1038–39 (9th Cir. 2020) (McKeown, J., concurring in part) ("[T]he hallmark of the trial was the absence of evidence about absent class members, or any evidence that they were in the same boat as Ramirez.").

150 *See generally* Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & CONTEMPORARY PROBLEMS 97 (1997).

151 Because no-injury class actions are based on a lawyer's theory of harm rather than on actual harms experienced by actual consumers, even when they succeed (usually in settlement) participation in any payout tends to be very low, less than 25%. *See, e.g.*, CFPB, ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), § 8, at 30 (2015) (estimating claims rate on consumer finance class actions at between 8% and 21%); Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions under Federal Consumer Protection Statutes*, 2017 COLUM. BUS. L. REV. 1, 32 (2017) (estimating an average class "compensation rate" of 8.5% to 10% in federal ATM-fee class actions).

152 *See The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act, Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 6 (2015) (statement of Andrew Pincus on behalf of the U.S. Chamber of Commerce reporting on empirical analysis by his law firm).

when the settlement includes coupons or rebates for the class.[153] Second, settling attorneys often turn to questionable means of injunctive relief in an attempt to create enough apparent value to justify releasing the claims and awarding attorney's fees.[154] As a result, the bulk of the money in no-benefit cases does not go to injured individuals but to third parties (*i.e.*, settlement administrators), attorneys, and uninjured class members.[155]

For these reasons, proposed class settlements tend to raise objections from class members. For example, in *Eubank v. Pella*, a class action that sought relief for allegedly defective windows, objectors appealed the approval of a theoretical injury settlement that was, according to the Seventh Circuit appellate panel, "inequitable—even scandalous" given the fees counsel collected versus the relief offered to the class.[156] In that case, the relief available to actual class members totaled "little more than $1 million," but the attorneys collected $11 million, including a $2 million advance before notice even went out to the class.[157] The objectors were former plaintiffs who were dismissed by counsel after questioning the settlement.[158]

Another example is the original settlement attempt from *In re ConAgra Foods, Inc.*, which did not receive final approval.[159] *ConAgra* involved a challenge to the label on Wesson oil products, and plaintiffs sought to recover for the "price premium attributable to the '100% natural' label" on the product.[160] Incredibly, the lawsuit lasted more than a decade.[161] Once the court certified a class, the parties presented a

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153 *See, e.g.*, *In re* Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices, & Prods. Liab. Litig., 952 F.3d 471, 489-90 (4th Cir. 2020) (vouchers were coupons under CAFA where class members had to spend money in order to take advantage of the settlement offer).

154 *See* Pearson v. NBTY, Inc., 772 F.3d 778, 787 (7th Cir. 2014) (discussing class counsel's incentive to, "sellout the class by agreeing with the defendant to recommend the judges approve a settlement involving a meager recovery for the class but a generous compensation for the lawyers . . . ").

155 *See generally* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859 (2017).

156 *See, e.g.*, Eubank v. Pella Corp., 753 F.3d 718, 721, 723, 725-26 (7th Cir. 2014).

157 *Id.* at 723-24.

158 *Id.* at 722.

159 *In re* ConAgra Foods, Inc., No. CV 11-05379, 2021 WL 8153648 at *1 (C.D. Cal. Dec. 22, 2021) (denying final approval of the original proposed settlement).

160 *See id.* at *2-3.

161 *Id.* at *1.

class-wide settlement, which the trial court approved.[162] An objector appealed, and the Ninth Circuit reversed the trial court's ruling because the trial court had not scrutinized the settlement to ensure it effectively protected class members from their counsel.[163] After the trial court allowed the objectors to conduct discovery into the settlement process, it found the magistrate who conducted the mediation never considered the settlement's benefit to class members; he looked only at the defendant's maximum payment and class counsel's desired fee.[164] Moreover, the injunctive relief included in the settlement was worthless to the class because the defendant had already sold the brand to another company but was nonetheless included to justify the fee request.[165] Ultimately, the trial court denied approval of the original settlement,[166] and the case was resolved only after class counsel agreed not to seek attorneys' fees.[167]

Finally, no-injury class actions can prevent genuinely injured plaintiffs from obtaining appropriate compensation as quickly and fully as possible. In addition to the inherent delays caused by the litigation, a rational company would be incentivized to hold back additional benefits from an administrative remedy in anticipation that these benefits would be useful in settling a piggyback action. Further, plaintiffs' counsel in some piggyback class actions has sought orders to *prevent* the defendant from addressing any problem that may exist if they believe the remedy will interfere with their class action.[168] In both situations, consumers are put in worse positions than if piggyback litigation never occurred. These outcomes do not advance justice.

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162 *Id.* at *3-4.

163 *Id.* at *5 (quoting Briseño v. Henderson, 998 F.3d 1014, 1019 (9th Cir. 2021)).

164 *In re* ConAgra Foods, Inc., 2021 WL 8153648 at *1, *5.

165 *Id.* at *3.

166 *Id.* at *1.

167 *In re* ConAgra Foods, Inc., 2022 WL 17243625, at *1 (granting final approval of class settlement, in part, because, "Class Counsel seeks no attorney fees.").

168 *See, e.g.*, *In re* Apple Inc. Device Performance Litig., No. 18-md-02827, 2018 WL 4998142, at *1, *5 (N.D. Cal. Oct. 15, 2018) (plaintiffs in phone battery class action sought order prohibiting battery-replacement program unless defendant notified recipients of pending class action); Tolmasoff v. Gen. Motors, Inc., No. 16-11747, 2016 WL 3548219, at *2 (E.D. Mich. June 30, 2016) (plaintiff in fuel economy class action sought order preventing defendant from notifying potential class members of reimbursement program).

III. RIGOROUS ANALYSIS AT EVERY STAGE REDUCES THE WASTE FROM NO-BENEFIT CLASS ACTIONS

Judges facing no-benefit class actions can prevent the class mechanism from being improperly manipulated by following and enforcing Rule 23, including Rule 23(b)(3), as written and intended. Under the Supreme Court's jurisprudence in this area, plaintiffs bear the burden of showing their assertions of injury meet Rule 23's requirements in addition to Article III standing.[169] Further, judges must conduct a "rigorous analysis" of each Rule 23 requirement, which can include examining evidence of the merits of the case.[170] This inquiry is not "free-ranging"[171]—it must be relevant to the certification inquiry—but it may include evidence that the plaintiffs do not have a claim if that evidence also bears on certification.[172]

Specifically, Rule 23(a) requires the following:

1. the class must be so numerous that joinder of all members is impracticable;
2. there must be questions of law or fact common to the class;
3. the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and

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169 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) ("Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."). *See also* EQT Prod. Co. v. Adair, 764 F.3d 347, 357 (4th Cir. 2014) (holding that a plaintiff, "must present evidence that the putative class complies with Rule 23."); Brown v. Electrolux Home Prods., Inc., 817 F.3d 1225, 1233 (11th Cir. 2016) (stating that, "the entire point of a burden of proof is that, if doubts remain about whether the standard is satisfied, 'the party with the burden of proof loses.'").

170 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. at 351.

171 Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 466 (2013).

172 *See* Halliburton v. Erica P. John Fund, Inc., 573 U.S. 258, 280 (2014). *See also* Powers v. Credit Mgmt. Servs., Inc., 776 F.3d 567, 571-72 (8th Cir. 2015) (holding the court erred in avoiding resolution of legal question: "[i]f plaintiffs' interpretation of § 45-104 is wrong, then the FDCPA and NCPA named plaintiffs lose on this theory attacking the standard-form complaints, and prompt resolution of the summary judgment cross motions would have obviated the need for class certification of these claims. On the other hand, if plaintiffs' state law theory is correct, many individualized inquiries are required to resolve class members' claims.").

4. the representative parties must fairly and adequately protect the interests of the class.[173]

Rule 23(b)(3) class actions may be maintained only if, "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[174]

The following discussion explains how judges should apply these rules to identify and dismiss class actions that do not provide real-world benefits to class members.

A. Early Motions

Class actions are subject to two kinds of early motions: motions to dismiss under Rule 12(b)(6) and motions to strike or dismiss class allegations.[175]

Motions to dismiss.

The purpose of Rules 8 and 9, which set forth pleading requirements, is to allow defendants to know the claims they face.[176] In individual cases, claims tend to rise or fall on the facts supporting them. So, individual plaintiffs have incentives to plead facts supporting their claims of causation and injury. They want to signal to the defendant that the case is strong and may be worth settling without much discovery and expense.[177]

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

174 FED. R. CIV. P. 23(b)(3).

175 Courts have located authority for hearing motions to strike in different areas of the Federal Rules of Civil Procedure. Some have held that Rule 23(d)(1)(D) (previously Rule 23(d)(4)) provides that a court may issue an order "require[ing] that the pleadings be amended to eliminate allegations about representation of absent persons . . . ." FED. R. CIV. P. 23(d)(1)(D); *see also* Carlisle v. Normand, No. 16-3767, 2017 U.S. Dist. LEXIS 78021, at *14 (E.D. La. May 23, 2017). Others rely on Rule 23(c)(1)(A), which states that "[a]t an early practicable time after a person sues . . . as a class representative, the court must determine by order whether to certify the action as a class action." FED R. CIV. P. 23(c)(1)(A); *see also* Hill v. Wells Fargo Bank, N.A., 946 F. Supp. 2d 817, 819 (N.D. Ill. 2013). Still, others have treated it as a motion to strike under Rule 12(f). *See, e.g.*, Desmond v. CitiMortgage, Inc., No. 12-23088, 2015 U.S. Dist. LEXIS 22866, at *4–5 (S.D. Fla. Jan. 23, 2015).

176 FED. R. CIV. P. 8; FED. R. CIV. P. 9.

177 *See* William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 702 (2016) ("a factually detailed, plausible complaint makes the

On the other hand, class action plaintiffs have a greater incentive to plead causation and injury as vaguely as possible; this tactic allows plaintiffs to modify their damages theories to account for facts revealed during litigation.[178] Further, specifying facts about the alleged injuries can create individualized issues that defeat commonality and other Rule 23 requirements.[179] That is why complaints will often focus on the alleged wrongdoing by the defendant and avoid facts supporting causation and damages.[180] Their goal is to make "explosive" allegations against the defendant, define the plaintiff class as expansively as possible, and survive motions to dismiss to shift the economic and discovery burdens to the defendants.[181] As Professor William Hubbard of the University of Chicago has observed, the potential return for class

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plaintiff's case credible by backing up her claims with her money and reputation").

178 *In re* Suboxone Antitrust Litig., 967 F.3d 264, 273 (3d Cir. 2020) ("[W]e have observed that 'it is counsel for the class representative and not the named parties . . . who direct and manage [class] actions. Every experienced federal judge knows that [any] statements to the contrary [are] sheer sophistry.'")(citation omitted); Culver v. City of Milwaukee, 277 F.3d 908, 910 (7th Cir. 2002) ("the real plaintiff in interest is . . . the lawyer for the class"); Martin K. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*, 99 IOWA L. REV. 1659, 1662 (2014) ("For all practical purposes, class attorneys function as far more than class members' legal representative[.] [Instead,] they act as quasi-guardians or trustees on behalf of the absent class members.").

179 *See, e.g.*, Gross v. Vilore Foods, Inc., No. 20cv894, 2022 WL 1063085, at *6 (S.D. Cal. Apr. 8, 2022) (denying certification of food-labeling class action, noting that despite allegation of common nondisclosure of artificial flavoring in juice boxes, deposition testimony showed named plaintiffs actually relied on affirmative representations that juice was "100% natural" or "100% fruit").

180 *See* PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 2.02 cmt. a (AM. L. INST. 2009) ("Advocates of class certification have an incentive to frame legal and factual issues at high levels of generality so as to argue for their commonality, whereas opponents of class certification have an incentive to catalogue in microscopic detail each legal or factual variation suggesting the existence of individual questions."); *see also* Ebert v. Gen. Mills, Inc., 823 F.3d 472, 477 (8th Cir. 2016) ("The parties describe this case very differently and these varying views drive each of their arguments on class certification. General Mills focuses intently on the vast differences between the class plaintiffs on the issues of injury, causation, and damages . . . . [T]he class frames their claims as solely involving questions about General Mills' initial wrongdoing.").

181 *See* Robert H. Klonoff, *Application of the New "Proportionality" Discovery Rule in Class Actions: Much Ado About Nothing*, 71 VAND. L. REV. 1949, 1955 (2018) (concluding after reviewing discovery opinions from 2015–2018 that courts remain "especially liberal in allowing discovery relevant to class certification").

counsel is "so high relative to the costs" that filing class actions "may be cost justified even if the factual basis for the claim is very weak, [or] the plaintiffs' expected likelihood of success is very low."[182]

Given these dynamics and economic realities, courts should *not* treat motions to dismiss in class actions with the same deference they may rightly utilize with individual claimants. When it comes to pleading injury, the facts are indisputably in the possession of the plaintiffs; they do not need discovery to specify their alleged harm. Since class counsel generally develops the cases and recruits clients for the lawsuits,[183] it is fair to deny counsel the right to proceed unless they can articulate plausible allegations of each element, including injury, of each claim they are asserting.[184] If claimants are truly injured, these facts are available and should be included in a well-pleaded complaint. However, if only a few individuals are injured, they can bring their claims individually or seek an immediate resolution with the defendant.[185] Justice does not require class counsel to receive multiple opportunities to amend their complaints to provide the basic facts substantiating the class's injury claims.[186]

Testing allegations earlier.

Because no-injury class actions are largely lawyer-driven rather than consumer-driven, it is essential that courts refrain from assuming the claims of misconduct and injury are sufficiently credible to warrant

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182 Hubbard, *supra* note 177, at 725.

183 *See, e.g.*, Tech. Training Assocs. v. Buccaneers Ltd. P'ship, 874 F.3d 692 (11th Cir. 2017) (internal email at plaintiffs' firm suggests "[w]e could find a plaintiff and approach the defendant about settling" in copycat class action); *see also Unstable Foundation: Our Broken Class Action System and How to Fix It*, U.S. CHAMBER INST. FOR LEGAL REFORM 1, 6-7 (2017), https://instituteforlegalreform.com/wp-content/uploads/2020/10/UnstableFoundationWeb.pdf [https://perma.cc/6NB2-CPAC].

184 Freitas v. Cricket Wireless, LLC, No. C 19-07270, 2022 WL 3018061, at *6 (N.D. Cal. Jul. 29, 2022) ("Time and again, plaintiff's counsel have made missteps, and we have found ways to excuse them.").

185 *In re* Suboxone Antitrust Litig., 967 F.3d 264, 273 (3d Cir. 2020); Stephen Meili, *Collective Justice or Personal Gain? An Empirical Analysis of Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67, 111 (2011) ("Indeed, given that class action lawyers often have the luxury of selecting named plaintiffs who are willing to align their goals with the attorneys, this power is more pronounced in class actions than in individual cases, where the client normally chooses the lawyer.").

186 *See* FED. R. CIV. P. 15(a)(2) ("The court should freely give leave [to amend] *when justice so requires.*") (emphasis added).

judicial resources. Courts should appropriately screen out cases that fail to plead any actual harm to the class and will not develop into real-world compensation or relief for the class members. Despite the protestations from plaintiffs' counsel, these challenges do not create a delay or additional expense.[187] On the contrary, the more information courts require upfront, the better they can prevent wasting valuable time and costs on meritless litigation. Trial courts have significant discretion to dismiss cases that are not based on plausible allegations.[188]

To this end, courts should be wary of promises from class counsel to provide expert testimony about injury and damages later instead of pleading the specific facts at the outset, as required by Rule 8(a), because often, the promised "evidence" never appears.[189] After all, in individual lawsuits, plaintiffs must provide this information to survive pleading challenges.[190]

Motions to strike class allegations.

Courts should also willingly entertain motions to strike class allegations early in a case to focus the litigation on only those claims where the plaintiffs can show an injury; "sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim . . . ."[191] These motions are critical in piggyback class actions

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187 *See* Simona Grossi, *Frontloading, Class Actions, & a Proposal for a New Rule 23*, 21 LEWIS & CLARK L. REV. 921, 945 (2017); Richard D. Freer, *Front-Loading, Avoidance, & Other Features of the Recent Supreme Court Class Action Jurisprudence*, 48 AKRON L. REV. 721, 735 (2015).

188 *See* Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 878, 928 (2009) (noting with disapproval how plausibility standard gives courts greater discretion to dismiss claims).

189 *See, e.g.*, Lohr v. Nissan N. Am., Inc., No. C16-1023, 2022 WL 1449680, at *5 (W.D. Wash. May 9, 2022) (denying certification because plaintiff had still not provided expert testimony supporting conclusory allegations of class-wide damages).

190 *See, e.g.*, Kerin v. Titleflex Corp., 770 F.3d 978, 982–83 (1st Cir. 2014) (affirming dismissal of claims where plaintiff did not plead present injury or present sufficient facts to determine the risk of future injury).

191 Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982); *see also* Donelson v. Ameriprise Fin. Servs., 999 F.3d 1080, 1092 (8th Cir. 2020) (district court abused discretion in denying motion to strike class allegations where pleadings made clear that certification was not possible); John v. Nat'l Sec. Fire & Cas. Co., 501 F.3d 443, 445 (5th Cir. 2007) ("Where it is facially apparent from the pleadings that there is no ascertain able [sic] class, a district court may dismiss the class allegation on the pleadings.").

because these claims often directly compete with government-approved recalls or public-facing consumer satisfaction efforts.[192] They also tend to raise individualized questions about whether all proposed class members have been harmed.[193]

Some courts disfavor granting motions to strike and are hesitant to grant them early in litigation due to the possibility of a theoretical hole through which a plaintiff might pass at certification.[194] Other courts may delay ruling on meritorious early-stage motions to allow litigation to proceed to discovery to "see how settlement efforts proceed."[195] This approach operates as an "effective denial" of the motion and creates significant inefficiency, cost burdens, and confusion about the scope of discovery and the likelihood the case will settle. Requiring class allegations to have the proper foundations can expose flaws with no-injury claims early in litigation.[196] That, in turn, can focus the parties on resolving remaining claims efficiently and fairly. Ultimately, justice requires courts to grant motions to strike class allegations when meritorious.[197]

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192 *See, e.g.*, Baum v. Great W. Cities, Inc. of N.M., 703 F.2d 1197, 1210 (10th Cir. 1983) (affirming dismissal of class allegations because likely existence of individual issues undermined superiority); Kamm v. Cal. City Dev. Co., 509 F.2d 205, 210–11 (9th Cir. 1975) (affirming dismissal of class allegations without discovery where "the [public] record itself provided a sufficient evidentiary base on which the 'superiority' question might be determined" and the administrative remedy already provided was superior).

193 *See, e.g.*, Hadley v. Chrysler Group LLC, 624 F. Appx 374, 380 (6th Cir. 2015); Winzler v. Toyota Motor Sales, U.S., Inc., 681 F.3d 1208, 1211 (10th Cir. 2012); Elkins v. Am. Honda Motor Co., Inc., No. 8:19-cv-00818, 2020 WL 4882412 at *6 (C.D. Cal. July 20, 2020); Strama v. Toyota Motor Sales U.S., Inc., No. 15-C-9927, 2016 WL 561936, at *4 (N.D. Ill. Feb. 12, 2016).

194 *See, e.g.*, Barker v. Nestle Purina Petcare Co., No. 21-cv-01075, 2022 WL 1288355, at *6 (E.D. Mo. Apr. 29, 2022) (denying motion to strike class allegations despite "compelling argument" because "while the Court has 'serious doubts,' to put it lightly, that the Plaintiff will be able to satisfy the predominance requirement of a nationwide class, the Court also is hesitant to strike the nationwide class allegations at this the earliest possible stage.").

195 *See* Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role & Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51, 65 (2007) (noting attorney complaints about judges who "delayed ruling" to encourage settlement).

196 Piemonte v. Viking Range, LLC, No. 14-cv-00124, 2015 U.S. Dist. LEXIS 15154, at *9 (D.N.J. Feb. 9, 2015) (granting motion to strike in product defect case because individual issues of "injury, defect, causation, and damages" would predominate).

197 *See, e.g.*, Martin v. Ford Motor Co., 765 F. Supp. 2d 673, 681 (E.D. Pa. 2011) (denying motion to strike class allegations as "premature" based on issues created

B. Class Certification

At class certification, courts are supposed to subject the class's claims to a "rigorous analysis"[198] that will "exclude most claims."[199] Historically, courts have applied this standard to the plaintiff's assertion that the defendant breached a duty of care to them but not necessarily to their allegations of harm. However, courts are supposed to rigorously analyze *all* elements of the plaintiffs' claims for class treatment, which includes injury and causation.

Deferring expert battles.

Both theoretical injury and piggyback class actions rely heavily on expert opinions because the alleged class-wide "price premium," or the inadequacy of recall-based relief, is often not intuitive or easily measurable. Courts should adhere to their gatekeeping functions and not allow suspect theories of injury or harm to proceed merely because an "expert" has been designated to support it.[200] And, in no circumstance should a class be certified based on expert studies that are unfinished, or, if they are finished, without ruling on properly and timely filed motions relating to the expert opinions and testimony that bear directly on certification.[201] The court wastes valuable time and resources on

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by preexisting recall alleged in complaint); Martin v. Ford Motor Co., 292 F.R.D. 252, 284 (E.D. Pa. 2013) (denying certification because pre-existing recall meant individual issues would predominate and class action was not superior); Bietsch v. Sergeant's Pet Care Prods., Inc., No. 15C5432, 2018 WL 4484201 (N.D. Ill. Sep. 19, 2019) (denying motion to certify class because plaintiffs had proposed no class-wide evidence showing dog treats had caused injury); Bietsch v. Sergeant's Pet Care Prods., Inc., No. 15C5432, 2016 WL 1011512 (N.D. Ill. Mar. 15, 2016) (denying motion to strike class allegations as premature based on causation issues identified in complaint).

198 *See* Wal-mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51 (2011) ("certification is proper only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied'") (citation omitted).

199 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234 (2013).

200 Hicks v. State Farm Fire & Cas. Co., 965 F.3d 452, 465-66 (6th Cir. 2020) (acknowledging "[w]e have yet to settle this matter" but finding that "the district court did not abuse its discretion in declining to rule on State Farm's Motion to Strike [expert] before deciding whether to certify Plaintiffs' proposed class").

201 *See, e.g.*, *In re* JUUL Labs., Inc., Mktg. Sales Practices & Prods. Liab. Litig., No. 19-md-0291, 2022 WL 2343268, at *42 (N.D. Cal. Jul. 28, 2022) (allowing expert testimony on class-wide damages even though expert had not performed required analysis yet). *Contra* Simmons v. Ford Motor Co., 592 F. Supp. 3d 1262, 1295 (S.D. Fla. 2022) (denying certification because expert report only promised later

avoidable litigation when plaintiffs do not follow through on their promises to provide expert injury analyses that support their claim of class-wide harm.[202] Indeed, a majority rule among the federal appellate courts is to require trial courts to resolve conflicts between experts over class-wide evidence, which entails a separate analysis to ensure expert testimony satisfies Rule 702 for admissibility.[203]

Courts should scrutinize proposals to replace class representatives.

A class representative who no longer wants to serve or is no longer qualified to serve should not be kept in the litigation, including when a named plaintiff does not have a valid claim of injury. When a named plaintiff bows out, it should be a red flag to the court that this critical deficiency of the class representative could apply to the class and litigation as a whole. However, far too frequently, courts allow counsel to substitute named plaintiffs with little scrutiny.[204] A "rigorous analysis" that examines why "representative" plaintiffs were dismissed would help weed out sweeping class actions that include class members who were not injured or are not sufficiently similarly situated to justify class treatment.

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analysis; "courts regularly den[y] class-certification claims based on proposed damages models submitted without actual proof").

202 *See, e.g.*, Freitas v. Cricket Wireless, LLC, No. C 19-07270, 2022 WL 3018061 at *6 (decertifying phone-labeling class after plaintiffs did not provide promised expert testimony: "Counsel and their experts should have been reasonable from the start and lived up to the promises made at certification."); Mier v. CVS Pharm., Inc., No. SA CV 20-01979, 2021 WL 6102519, at *3 (C.D. Cal. Nov. 19, 2021) (decertifying class where plaintiff never produced "price premium" model); Price v. L'Oreal USA, Inc., No. 17 Civ. 614, 2021 WL 4459115, at *6 (S.D.N.Y. Sep. 29, 2021) (decertifying class where expert damage model "is not consistent with Plaintiffs' theory of injury as required under *Comcast*").

203 *See, e.g.*, Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982-84 (9th Cir. 2011) ("However, the district court seems to have confused the *Daubert* standard it correctly applied to Costco's motions to strike with the 'rigorous analysis' standard to be applied when analyzing commonality. Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible.").

204 *See, e.g.*, *Freitas*, 2022 WL 3018061 at *6 (decertifying class; noting "significan ce [of] . . . the *fifteen* potential class representatives who have been dismissed throughout this action") (emphasis in original).

Courts should make rigorous findings of predominance.

To certify a damages class under Rule 23(b)(3), a court must find that common issues of law and fact predominate over individualized issues.[205] Those findings must be rigorous, which means courts should not find predominance when large portions of the class have not been injured.[206] This should also be true when the factual determination of which class members, if any, were injured by an alleged overpayment raises individualized issues.

One technique class counsel has developed to try to finesse the predominance inquiry when a significant portion of the class has not been injured is to re-characterize the question of injury as one of damages. This assertion rests on the fallacy that all class members have been injured, but the amount of damages owed to many or all of them may be minimal.[207] This tactic is often used when a defendant has a customer satisfaction program to make consumers whole. Class counsel will argue that the remediation by the defendants "is simply evidence of a reduction in damages, not proof that the class wasn't harmed."[208] However, determining which class members were made whole by the remediation program can require the court to consider how multiple factors affected each member's claim. Maintaining the proper distinction between injury and damages will help courts ensure that classes are appropriately sized after certification. This distinction will also help courts determine when claims settle and reduce the number of class actions that cannot sustain a common trial.

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205 FED. R. CIV. P. 23(b)(3).

206 *Compare* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 685 (9th Cir. 2022) (en banc) (affirming certification of class despite significant portion of class not being injured as defined), *with In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 253 (D.C. Cir. 2013) (reversing certification under same circumstances).

207 *See, e.g.*, *In re* Hannaford Bros. Co. Customer Data Sec. Breach Litig., No. 08-MD-1954, 2013 U.S. Dist. LEXIS 39055 (D. Me. Mar. 20, 2013) ("On the one hand, the First Circuit has said that variations in damages do not prevent class certification and has reversed a court that said they did . . . . Other circuits and authorities often say the same thing. On the other hand, if the issue is phrased as causation (of damages), the courts demand common proof.") (citation omitted).

208 Dawson v. Great Lakes Educ. Loan Serv., Inc., No. 15-cv-475, 2021 WL 1174726 (W.D. Wis. Mar. 29, 2021).

Courts should consider the superiority of non-judicial alternatives.

Courts should determine whether government investigations or remedial actions that have made the class members whole are superior to class actions. Some courts have improperly resisted such rulings, adhering to a narrow, literal interpretation of the word "adjudication,"[209] considering only whether other *judicial* remedies are superior, failing to consider administrative remedies or voluntary efforts to adjudicate or resolve claims by the defendants.[210] Others have suggested that remediation by defendants is a *defense* against allegations of harm, not a determination of whether plaintiffs have demonstrated injury.[211] The better line of cases looks at the remedial action to determine whether there is any real-world harm to be remedied while justifying the court's limited resources and declining to certify classes that are not superior to existing, appropriate remedies.[212]

When companies do right by their customers, there is no need for lawyers and courts to get involved. Non-judicial remedial actions—like government-supervised recalls or private consumer satisfaction programs—frequently offer more reliable and less costly relief to class

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209 *See, e.g.*, *In re* Scotts EZ Seed Litig., 304 F.R.D. 397, 415 (S.D.N.Y. 2015) ("the Court is not convinced non-adjudicative forms of redress may even be considered under Rule 23(b)(3)'s superiority analysis"); Dean v. Colgate-Palmolive Co., EDCV 15-00107, 2018 WL 6265003, at *10 (C.D Cal. Mar. 8, 2018) (in "close issue," finding superiority despite corporate return policy because definition of "'adjudication' . . . does not include non-legal forms of adjudication such as a recall campaign, or presumably, a money-back guarantee"), *aff'd*, 772 F. App'x 561 (9th Cir. 2019); Korolshteyn v. Costco Wholesale Corp., No. 15-cv-709, 2017 WL 1020391, at *8 (S.D. Cal. Mar. 16, 2017) (finding superiority because preexisting refund program was not an "adjudication"); Melgar v. Zicam LLC, No. 14-cv-00160, 2016 WL 1267870, at *6 (E.D. Cal. Mar. 31, 2016) (finding defendants' refund program not superior because "it does not comport with the plain language of Rule 23"); Jovel v. Boiron Inc., No. 11-cv-10803, 2013 WL 12162440, at *5 (C.D. Cal. Mar. 28, 2013) ("[T]he Court shares Plaintiff's doubt that such a private refund program even constitutes an alternative form of 'adjudication.'").

210 *See, e.g.*, *Colgate-Palmolive Co.*, 2018 WL 6265003 at *10 (In a "close issue," the court denied the defendant's opposition to class certification, concluding the superiority requirement only looks at other forms of adjudication, and "'adjudication' . . . does not include non-legal forms of adjudication such as a recall campaign, or presumably a money-back guarantee.").

211 *Dawson*, 2021 WL 1174726 at *13.

212 *Id.*

members than litigation.[213] These remedies can be more tailored to the specific issue or defect, direct resources to product development, improve the consumer experience, and keep the prices of future products from incorporating litigation costs—and attorneys' fees. This is particularly true, as shown in the *Winzler v. Toyota Motor Sales U.S.A.*[214] case when government agencies oversaw the remedial action. In *Winzler*, the court took solace in the recall being carried out under the direction of the National Highway Transportation Safety Administration and under the National Traffic and Motor Vehicle Safety Act, which triggers notice and repair obligations for the manufacturer. Based on the doctrine of prudential mootness, the court concluded that even when plaintiffs would otherwise cross the Article III threshold for injury when a recall is involved, "a case can reach the point where prolonging the litigation any longer would itself be inequitable."[215] Other courts have considered this issue to be one of judicial ripeness.[216] Consideration of whether non-judicial remedies have made the class whole will help separate class actions that seek to provide actual relief to consumers from those that benefit only lawyers.

Courts should rigorously assess typicality.

Courts should also rigorously analyze whether the named plaintiff is actually typical of the class instead of dismissing it as a "permissive" requirement.[217] Unlike commonality, this inquiry focuses on the differences between the named plaintiff and class members with respect to each element and defense of the asserted claims to see whether those

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213 *A Superior Definition of Superiority: Removing Rule 23(b)(3)'s Ban Against Considering Non-Litigation Solutions When Deciding Whether a Class Action is "Superior to Other Available Methods"*, LAWYERS FOR CIVIL JUST. 8 (Sept. 2, 2022), https://www.uscourts.gov/sites/default/files/22-cv-l_suggestion_from_lcj_-_rule_23b3_0.pdf [https://perma.cc/3ML2-ZCEN].

214 *See generally* Winzler v. Toyota Motor Sales, U.S.A., Inc., 681 F.3d 1208 (10th Cir. 2012).

215 *Id.* at 1210.

216 Elkins v. Am. Honda Motor Co., Inc., No. 19-cv-00818, 2020 WL 4882412 (C.D. Cal. July 20, 2020) (explaining concerns over the impact of a warranty extension on Plaintiffs' injuries "beget prudential ripeness considerations.").

217 Just Film, Inc. v. Buono, 847 F.3d 1108, 1116 (9th Cir. 2017); *see also* Custom Hair Designs by Sandy v. Cent. Payment Co., LLC, 984 F.3d 595, 604 (8th Cir. 2020) ("Typicality is fairly easily met so long as other class members have claims similar to the named plaintiff.").

differences preclude them from being sufficiently interchangeable.[218] Courts often focus typicality inquiries on the alleged misconduct instead of also assessing the typicality of the named plaintiff's alleged injuries compared to the rest of the class. Class counsel also may focus on a common *risk of harm* instead of the actual harm caused. Evidence used to establish the named plaintiff's injury must be "typical of the proof of the claims of absent class members."[219] Otherwise, as Judge Posner explained, "a class representative's atypical claim may prevail on grounds unavailable to the other class members."[220]

When such an analysis is properly conducted, it is clear that plaintiffs who have suffered physical or other significant harms, as in *TransUnion*, are *not* typical of class members claiming technical injuries, overpayment, or other benefit-of-the-bargain theories of harm. Yet, if allowed to proceed, the named plaintiff's atypical injuries will drive the narrative and litigation outcomes for the other class members, including those with no injuries.[221] *TransUnion* provided this illustration, as uninjured class members received the same compensation as if they had also been denied credit and humiliated in front of their families. There is no doubt the outcome in *TransUnion v. Ramirez* would have been different had other class members been the named plaintiffs. An uninjured class member could not fairly represent Ramirez's interests; therefore, he cannot fairly represent theirs. If the representative plaintiff is not interchangeable with the other class members for the purpose of the claimed injury or other elements of asserted claims, the typicality requirement is not satisfied.[222]

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218 *See* Dukes v. Wal-Mart Stores, Inc., 474 F.3d 1214, 1232 n.10 (9th Cir. 2007), *rev'd*, 564 U.S. 338 (2011) ("Commonality examines the relationship of facts and legal issues common to class members, while typicality focuses on the relationship of facts and issues between the class and its representatives.") (citing 1 Newberg on Class Actions § 11 3:13).

219 Deiter v. Microsoft Corp., 436 F.3d 461, 467 (4th Cir. 2006).

220 CE Design Ltd. v. King Architectural Metals, Inc. 637 F.3d 721, 724 (7th Cir. 2011) (Posner, J.).

221 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2202 (2021). ("At trial, Ramirez testified about his experience at the Nissan dealership. But Ramirez did not present evidence about the experiences of other members of the class.").

222 *See In re* Am. Med. Sys., 75 F.3d 1069, 1082 (6th Cir. 1996) ("A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members.").

Courts should require rigorous adequacy findings.

Occasionally, courts have combatted piggyback class actions by examining them through the lens of adequacy. The Seventh Circuit, for example, has held that a class "representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests."[223] Unfortunately, courts resistant to finding named plaintiffs or their counsel inadequate to represent a class have ignored that holding.[224] Requiring evidence of adequacy will reduce the number of class actions, partly because, in many instances, the named plaintiffs are not in positions to adequately represent the absent class members.

Each issue turns on the amount of rigor applied to the certification requirements. In these cases, plaintiffs tend to offer seductively simple solutions to complex, thorny issues. The problem is that the proposed solutions do not actually solve the issues; they merely postpone them. A rigorous examination of typicality, adequacy, predominance, and superiority in no-injury or piggyback class actions can reduce certifications that lead to later decertification and deter the filing of class actions with similar flaws. Further, most appellate circuits now expressly require a plaintiff to meet its burden of proof on certification by a "preponderance of evidence."[225] Use of the "preponderance" standard is consistent with the federal rules and, if uniformly applied, would prevent certifications that lack the required evidence.[226] All circuits should explicitly adopt this standard.

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223 *In re* Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 752 (7th Cir. 2011).

224 *See, e.g.*, Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1700 (2004).

225 *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 27, 29–32 (2d Cir. 2006); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307, 320 (3d Cir. 2008); Oscar Priv. Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 268–69 (5th Cir. 2007), abrogated on other grounds by Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011); Howard v. Cook Cnty. Sheriff's Off., 989 F.3d 587, 597 (7th Cir. 2021) ("The plaintiffs bear the burden of proving by a preponderance of the evidence that their proposed class satisfies the requirements of Rule 23."); Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 665 (9th Cir. 2022) (" . . . plaintiffs must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence.").

226 *See* FED. R. EVID. 1101 (rules of evidence apply to all "civil actions and proceedings" except specifically enumerated exceptions).

IV. POSSIBLE RULE REFORMS.

Certainly, the federal courts have the authority to implement all of these measures under the Constitution and the Federal Rules of Civil Procedure. In some instances, the Committee on Rules of Practice and Procedure has amended the rules to clarify courts' gatekeeping and other responsibilities. [227] The Committee should do so again to clarify that it is the courts' distinct responsibility to appropriately apply the Rule 23 criteria and weed out no-benefit class actions.

First, the Committee should add the "preponderance" of evidence standard to the class certification rule. Doing so would codify the best practices of multiple circuits and provide a textual cue to remind courts that the burden to establish the elements of class certification is on the plaintiffs, and they must do so by a preponderance of the evidence.[228] This would help prevent the kind of "certify now, worry later" opinions that prolong no-injury and piggyback class actions.

Second, the Committee should make clear that motions to strike class allegations are not "premature" when the pleadings show the proposed class cannot meet Rule 23's requirements. In some piggyback class actions, courts have denied motions to strike as premature, only to deny certification on superiority or predominance grounds based on the same argument.[229] When a government agency has already taken an interest in the underlying issue or an appropriate customer service program already exists, there is no need to prolong class litigation seeking to redress the very same concern.

Finally, the Committee should revise Rule 23(b)(3) to make clear that product recalls, customer-satisfaction programs and government regulatory actions are relevant to the superiority requirement, perhaps by replacing the term "adjudicate" with "resolve." Such a rule change will alleviate obstacles some courts have put up when considering whether class action lawsuits are truly a needed device.

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227 *See* Mark A. Behrens & Christopher E. Appel, *States Are Embracing Proportional Discovery, Moving into Alignment with Federal Rules*, 29 LEGAL OPINION LETTER (Wash. Legal Found., July 17, 2020) (discussing the 2015 rule reform for proportionality in discovery).

228 The Committee has recently implemented a revision to Rule 702 to make clear that a court should only admit an expert's testimony if a "preponderance of the evidence" shows that the testimony is reliable.

229 *See* Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1926-27 (2014).

V. CONCLUSION

No-benefit class actions, as their name suggests, do not offer real value to class members. They are not worth the time and money spent on them. Yet, they continue to proliferate and consume court and party resources due to a combination of strategic vagueness on the part of the class lawyers and a lack of vigorous analysis by the courts. This lack of gatekeeping by courts allows these cases to evade traditional litigation checkpoints intended to separate meritorious class actions from those, like no-benefit class actions, that do not meet Article III standing requirements or Rule 23's requirements for class treatment.

In practice, though, entrepreneurial class counsel leverages the class action mechanism to continually expand the scope of a case, evade individualized questions of breach, causation, and damages, and generate real and unwarranted settlement pressure, regardless of the claims' merits.[230] American businesses spent $3.37 billion on class action litigation in 2021, continuing a rising trend.[231] Those costs have real-world impacts on businesses and consumers in the form of price increases, reduction of new products and services, outright closures or terminations of companies and jobs, as well as harm to the overall economy.[232] About 57.9% of major companies are engaged in class actions, with the average number of class actions per company more than doubling from 4.4 in 2013 to 8.9 in 2021.[233] Where applicable, these resources should apply to cases that provide actual benefits to real people, not just fees for lawyers.

Fortunately, there are simple, achievable fixes to this problem. Courts can require the pleading and sharing of essential information early in the litigation, abandon automatic, undue deference to class counsel, and apply the federal rules with the rigor that is intended and, in fact, specified by Supreme Court jurisprudence. Lastly, the Rules Committee can and should adopt several amendments to encourage

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230 *See* Victor E. Schwartz & Cary Silverman, *The Rise of 'Empty Suit' Litigation. Where Should Tort Law Draw the Line?*, 80 BROOK. L. REV. 599, 611 (2015).

231 *See 2022 Carlton Fields Class Action Survey*, CARLTON FIELDS, 7 (2022), https://www.carltonfields.com/getmedia/3b092fb6-036c-4a52-9394-0eb6a7e797b2/2022-carlton-fields-class-action-survey.pdf [https://perma.cc/53SK-ETDF].

232 *See generally* MUKESH BAJAJ, ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, ECONOMIC CONSEQUENCES: THE REAL COSTS OF U.S. SECURITIES CLASS ACTION LITIGATION 23 (2014).

233 *See 2022 Carlton Fields Class Action Survey*, *supra* note 231, at 8, 16.

these processes. Class actions will always exist and be hard-fought, but there is no need to tie up the courts and consume massive resources of time and money where plaintiffs have not sustained any real-world injury and will not see meaningful relief from the case.