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## What's Wrong With Consumer Class Action Settlements?

Law360, New York (April 14, 2017, 12:55 PM EDT) -- Nearly 40 years ago, no less a court than the U.S. Supreme Court recognized the critical role class actions play in protecting the rights of consumers, especially those whose claims are too small to pursue individually. As then-Chief Justice Warren Burger explained, when the costs of litigation make individual litigation infeasible, "aggrieved persons may be without any effective redress unless they may employ the class-action device."<sup>[1]</sup>

For decades since, the class action device has proven time and again to be the deliverer of relief to ordinary consumers, providing cash to victims and changes in corporate behavior.

Yet while the courts have repeatedly endorsed the use of class actions to protect consumers, critics of the device, primarily the U.S. Chamber of Commerce and the large corporations which it serves, have waged a prolonged war aimed at ending them altogether.

The Fairness in Class Action Litigation Act of 2017 (FICLA), recently passed by the U.S. House of Representatives, contains a long assembly of provisions designed to destroy all kinds of lawsuits, but one provision is especially devastating to consumer class actions. Section 1718(b)(2) would limit attorneys' fees to the amount actually recovered by class members making claims against the settlement fund.<sup>[2]</sup>

The motivation behind this provision appears to be the belief that class actions provide benefits to only a small fraction of the class. As the committee report accompanying the act makes clear, this provision stems from the perception that consumer class actions primarily benefit lawyers, not consumers, as purportedly evidenced by the low percentage of class members requesting to take the compensation offered.

These low "take rates" — reported as ranging from less than 1 percent to 12 percent — are highly misleading and only tell one part of the story. Low claims rates are poor indicators of the value of consumer class actions to ordinary Americans who routinely engage with the large corporations who sell them products.

In the first place, it is a well-known fact that consumer class actions will at best draw claims of about 10 percent<sup>[3]</sup>. Given that major corporations spending millions of dollars on advertising typically expect single-digit response rates, this should come as a surprise to exactly no one, least of all to these same corporations who routinely defraud consumers (often through advertising).

Notice programs, despite meeting all legal requirements, will never be as effective as corporate advertising, because, among other reasons, the budgets for these programs pale in comparison to those of national corporate advertising campaigns.<sup>[4]</sup>

Class action notice programs simply do not involve the kind of money or operate long enough to



Gary E. Mason

build the kind of brand recognition developed over many years by the manufacturers of the products who defend and settle these cases.[5] Consequently, no one should expect notice programs to achieve the level of response obtained by highly sophisticated marketers of consumer products with huge budgets.

Second, a low claims rate is generally not considered a sign that a settlement is in some way flawed. While a low claims rate could be an indicator that class members did not find the benefits made available worthwhile, or that the claim form was too onerous, or even that the notice program did not achieve its goals, it could also be just the expected rate of return for a notice program that does not directly reach its target audience, as is typical in consumer class actions.

There are numerous reasons why class members might not take advantage of a reasonable settlement. Many class members simply do not have the time to claim a small reward. Others might be interested but discouraged by the prospect of completing a claim form, especially if it requires a search for supportive documentation, like a receipt for a product purchased years earlier or the taking of photographs. Some may be philosophically opposed to class actions or unoffended by the conduct at issue.

As one federal judge recently stated: "To the extent class members do not want to participate, the court cannot force them to do so." [6] A low claims rate may be disappointing, but it "does not govern whether the settlement is fair, reasonable or adequate." [7]

To the contrary, consumer class actions often bring benefits to consumers beyond the small amounts available for compensation. Foremost, class actions deter corporations from engaging in unfair and deceptive business practices. Even when the sum of the claims is meager, class action treatment is often appropriate due to the deterrent effect of class actions. [8]

Despite decades of courts approving consumer class action settlements with single-digit claim rates, FICLA would punish attorneys who successfully resolved a case by limiting their fees to no more than the amount of money received by the members of the class.

This approach not only upends decades of judicial support of consumer class actions, it upturns decades of class action fee jurisprudence.

As far back as 1980, the Supreme Court held that attorneys' fees should be based on the entirety of the benefit created for the class, not just the amount claimed by absent class members. [9]

Following the Supreme Court, courts throughout the country have long recognized that attorneys who work for years to bring class actions to settlement should be awarded fees based on the opportunity they present to class members to obtain compensation, and not only upon the actual claim rate. [10]

This approach makes sense. While class counsel can strive for the most effective notice, there are limits to what class action notice can achieve, and restraints beyond the control of the lawyers.

If notice meets expectations, class counsel should not be penalized merely because a low claims rate was anticipated from the start. For this reason, when considering an award of attorneys' fees in a class action, courts customarily consider more than just claims rates. Other factors include the time and labor involved, the difficulty and novelty of the issues, the necessary legal skill required, the attorneys' opportunity costs in pressing the case, the amount in controversy and the results obtained, and awards in similar cases. [11]

In cases where the benefit obtained for the class is uncertain, an award based on "lodestar," as opposed to percentage of the fund, is often appropriate. [12] An award based on lodestar is also appropriate, if not required, in cases based on statutes that have a fee-shifting provision. [13]

FICLA would cast aside all of these factors and instead limit a court's discretion to award anything greater than the distribution to the class. The unfortunate (but clearly intended) consequence of the act would be to discourage attorneys from bringing class actions by making them economically unfeasible.

Yet there is nothing inherently wrong with the way consumers respond to consumer class actions. Certainly nothing that the fee provision of FICLA will fix. If reform is to be done, it should be focused on the effectiveness of notice programs, including measures to ensure that settling defendants do not underfund these programs. One provision of the FICLA appears to be a step in that direction.[14]

But if the attorney fee provision of FICLA becomes law, fewer consumer class actions will be filed, precisely as its proponents intend, and consumers, for the first time in decades, will not be able to rely upon the legal system to collectively pursue small consumer claims.

As Judge Richard Posner observed, the alternative to class actions is not a multiplicity of law suits, "but zero individual suits, as only a lunatic or a fanatic sues for \$30." [15]

If the small claims of large numbers of victims cannot be economically pursued, powerful corporations, without any restraints imposed by class actions, will abuse ordinary consumers in ways and to a degree not seen in several decades.

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[1] *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

[2] H.R. 985, "Fairness in Class Action Litigation Act of 2017," full text available at <https://www.congress.gov/bill/115th-congress/house-bill/985>.

[3] *Bayat*, 2015 U.S. Dist. LEXIS 50416 at \*5-6 (approving class action settlement with 2 percent claims rate); *Evans v. Linden Research Inc.*, No. C-11-1078 DMR, 2014 U.S. Dist. LEXIS 59432 at \*4 (N.D. Cal. April 29, 2014) (approving class action settlement with 4.3 percent claims rate); *Pollard v. Remington Arms Company LLC*, Case No. 4:13-cv-00086 (W.D. Mo. March 14, 2017) (approving a settlement involving 7.5 million class members where the claims rate was roughly 0.29 percent); but see *Johnson v. Famous Dave's of America Inc.*, No. 2:12-cv-00344 (E.D. Pa. Jan. 23, 2012) (motion to approve settlement denied where no class members filed claims).

[4] In 2015, Procter & Gamble spent about \$7 billion on advertising. See "Advertising Expenditure of Procter & Gamble Worldwide from 2011 to 2016," available at <https://www.statista.com/statistics/262022/advertising-expenditure-of-procter-und-gamble-worldwide/>.

[5] See, e.g., *Weeks v. Kellogg Co.*, No. CV 09-08102, 2011 U.S. Dist. LEXIS 155472, at \*97 (C.D. Cal. Nov. 23, 2011) (notice costs of \$400,000); *In re M3 Power Razor Sys. Mktg. & Sales Practice Litig.*, 270 F.R.D. 45, 52 (D. Mass. 2010) (up to \$2.45 million for notice).

[6] *Remington*, supra, at 22. In his opinion approving the settlement in a class action involving defective guns, Judge Ortrie Smith noted that there were several possible explanations why the claim rate was less than 1 percent: "the class members did not receive notice of the proposed settlement, the class members are satisfied with their firearms and do not want the firearms to be retrofitted, the class members have not experienced issues with their triggers as alleged by the plaintiffs and see no reason to submit a claim, the class members do not want to send their firearms off for an unknown period of time, the class is unique and does not trust the government or attorneys, and the class members do not want to submit claims because they believe the claims process is equivalent to a firearms registry." *Id.*, at 21-22.

[7] *Id.*, at 23.

[8] See, e.g., *Hughes v. Kore of Ind. Enter.*, 731 F.3d 672,677 (7th Cir. 2013) ("A class action, like litigation is general, has a deterrent as well as a compensatory objective.").

[9] *Boeing v. Van GERMERT*, 444 U.S. 472 (1980).

[10] See, e.g., *Landsman & Funk PC v. Skinner-Strauss Associates*, 639 Fed. Appx. 880, 884 (3rd Cir. 2016) (holding that the district court "properly relied on the entire fund as the appropriate benchmark," as opposed to the amount claimed); *Hamilton v. SunTrust Mortg. Inc.*, 2014 U.S. Dist. LEXIS 154762, at \*15 (S.D. Fla. Oct. 24, 2014) ("The question for the court at the final fairness hearing stage is whether the settlement provided to the class is "fair, reasonable and adequate," not whether the class decides to actually take advantage of the opportunity provided").

[11] See, e.g., *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 (4th Cir. 1978).

[12] "Lodestar" is defined as the reasonable hours worked multiplied by a reasonable billing rate. See, e.g., *Petruzzi's Inc. v. Darling-Del. Co.*, 983 F. Supp. 595, 606 (M.D. Pa. 1996) (using lodestar approach where "there is a substantial divergence between the actual recovery and the potential benefit; the benefit is not reasonably calculable; and the defendant who is obligated to pay the fee contests class counsel's claim").

[13] See, e.g., *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S. Ct. 2638, 2641 (1992) ("The 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence").

[14] See FICLA § 1719(a), "Settlement Accountings" (requiring reporting of claims data).

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

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