SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000
FAX: (202) 393-5760
www.skadden.com

DIRECT DIAL
(202) 371-7410
DIRECT FAX
(202) 393-5760
EMAIL ADDRESS
JOHN.BEISNER@SKADDEN.COM

FIRM/AFFILIATE OFFICES
BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEW YORK
PALO ALTO
WILMINGTON
BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
MUNICH
PARIS
SÃO PAULO
SEOUL
SHANGHAI
SINGAPORE
TOKYO
TORONTO

November 22, 2019

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue N.W.
Suite CC-5610 (Annex B)
Washington, DC 20580

RE: *Class Action Notices, Project No. P024210*

I am writing on behalf of the U.S. Chamber Institute for Legal Reform ("ILR") in response to the request for comments arising out of the Federal Trade Commission's ("FTC") recently held "Consumers and Class Action Notices" workshop. The FTC's examination of the state of consumer class actions is welcome news for consumers, who continue to see few (if any) meaningful benefits from such lawsuits. It is also encouraging for American businesses, especially smaller ones, that are increasingly pressured into settling frivolous lawsuits to avoid burdensome, expensive and protracted consumer class action litigation. Indeed, the FTC's inquiry into these subjects could not be more timely, as consumer class action filings are expanding rapidly. A recent report indicated that the number of consumer class action filings rose from 1,223 to 3,382 from 2009 to 2018, nearly ***tripling*** over the ten-year period.[1] Unfortunately, as the volume of consumer class actions has increased, there has also been a commensurate rise in the abuses that have long plagued these kinds of lawsuits.

These comments are focused on two of the most nettlesome abuses of consumer class action litigation: (1) the increasing tendency of consumer class action settlements to enrich plaintiffs' lawyers as opposed to those supposedly aggrieved by a defendant's alleged practices; and (2) the questionable practice of

---

[1] Amanda Bronstad, *Consumer Class Actions Nearly Tripled in the Past Decade, Report Says*, Nat'l L.J. (Oct. 23, 2019), https://www.law.com/nationallawjournal/2019/10/23/consumer-class-actions-nearly-tripled-in-the-past-decade-report-says/?slreturn=20191008121216.

plaintiffs' lawyers using class action litigation as an extortion device. With respect to the first troubling trend, plaintiffs' lawyers continue to use consumer class action settlements as a vehicle for securing excessive fees without delivering any meaningful benefits to class members. Even when the settlements purport to allocate money for consumers, the vast majority of class members do not bother filing a claim because they do not feel aggrieved by the product or service being challenged by the lawsuit, leaving substantial sums of money to lawyers and third-party charities under a dubious practice known as *cy pres*.

The second troubling abuse is the unfair use of the class action device for extortionary purposes. In some instances, counsel send pre-litigation demand letters threatening meritless class action litigation and proposing non-class settlements that would compensate counsel but provide no monetary benefit to the proposed class. In other instances, counsel demand similar named-plaintiff-only deals after class action litigation is filed. In both scenarios, the specter of burdensome and expensive class action litigation pressures American businesses (particularly smaller ones that lack in-house counsel) into settling claims regardless of their merit. At a minimum, the FTC should look into these unseemly practices and consider potential action to stop them.

I. CONSUMER CLASS ACTIONS ARE A TOOL FOR ENRICHING PLAINTIFFS' LAWYERS RATHER THAN COMPENSATING PURPORTEDLY INJURED CLASS MEMBERS.

Plaintiffs' lawyers routinely claim that class actions compensate large groups of purportedly injured individuals. While on occasion, class settlements do provide meaningful benefits to class members, most do not. Indeed, "every study" that has looked at consumer and employee class action settlements has "reached the same conclusion: [t]he overwhelming majority of [such] class actions deliver ***nothing*** to class members."[2] A study by the Consumer Financial Protection Bureau found that, of its sample of 562 cases, 87% of resolved class actions resulted in no benefit to absent class members – i.e., they were either dismissed by the court or settled with the named plaintiff only.[3] Even settled class actions seldom provide meaningful benefits to class members.[4] In fact, some proponents of class actions have effectively recognized as much, admitting that "the class action is not known for its success at delivering compensation to class members . . . sometimes it does it well . . . but, in the ***run-of-the mill case, only a small percentage of victims are made***

---

[2] Andrew Pincus, *Assessing 'The Value of Class Actions'*, Law360 (Aug. 22, 2017), https://www.law360.com/articles/956215 (emphasis added).

[3] Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, Section 6 at 37 (Mar. 2015).

[4] *See* Andrew Pincus, *Unstable Foundation: Our Broken Class Action System and How to Fix It* at 4, U.S. Chamber Inst. for Legal Reform (Oct. 2017) ("Settled Cases Deliver Benefits to Only a Handful of Class Members").

(cont'd)

***whole*.**”[5] This is nowhere truer than in injunctive-relief-only class action settlements that provide for modest changes to a defendant’s practices with no corresponding compensation to the allegedly injured consumers. And even when class actions attempt to earmark money for class members, those funds rarely end up in the class members’ hands because the consumers do not feel aggrieved by the alleged conduct and therefore do not file a settlement claim.[6] Instead, the bulk of the settlement funds often goes to third-party organizations under an archaic doctrine known as *cy pres*, which serves primarily to justify exorbitant attorneys’ fees.

A. FEE-CENTRIC CLASS ACTION SETTLEMENTS ARE BECOMING THE NORM, NOT THE EXCEPTION.

“From the selfish standpoint of class counsel . . . the optimal settlement is one modest in overall amount but heavily tilted toward attorneys’ fees.”[7] This paradigm has taken hold in the consumer class action space, with class counsel exploiting the class action device to generate fee-centric settlements.

One recent class action settlement involving Subway’s “footlong” sandwiches illustrates this problem. The litigation began in January 2013 after an Australian teenager tweeted about a “not-quite-footlong Subway Footlong sandwich,” which “spawn[ed] nine U.S. lawsuits that were eventually centralized in federal court in Milwaukee.”[8] After nine years of negotiations regarding class counsel’s fee award, the parties agreed to a settlement under which Subway would require franchisees to keep a measuring tool on their premises, require monthly inspections of the bread and adoption of other practices designed to ensure that the sandwiches would be twelve inches long.[9] “Although the parties wouldn’t exactly let on, it is a good bet that Subway implemented most if not all of these practices well before the parties settled.”[10] As part of the settlement, Subway also agreed to provide $525,000 in cash; however, “***every cent of that amount ended up with class counsel and the class’s 10 named representatives. The majority of the class got nothing***.”[11] In approving the class action settlement, the district court remarkably

---

[5] Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?* at 183 (Sept. 12, 2017), The Class Action Effect (Catherine Piché, ed., Éditions Yvon Blais, Montreal, 2018); Vanderbilt Law Research Paper No. 17-40, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020282 (emphasis added).

[6] Pincus, *Unstable Foundation*, *supra* note 4, at 4 (“[T]he overwhelming majority of class members do not file claims to obtain payment from these settlement funds.”).

[7] *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014).

[8] Adam Schulman, *Subway Footlong Sandwich Settlement Now on Appeal*, Competitive Enter. Inst. (Mar. 30, 2016), https://cei.org/blog/subway-footlong-sandwich-settlement-now-appeal.

[9] *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 316 F.R.D. 240, 242-44 (E.D. Wis. 2016), *rev’d*, 869 F.3d 551 (7th Cir. 2017).

[10] Schulman, *supra* note 8.

[11] *Id.* (emphasis added).

(cont’d)

reasoned that "the settlement in the present case does not make any class member worse off."[12]

This decision was not well received by the U.S. Court of Appeals for the Seventh Circuit, which overruled the district court's ruling, calling the settlement "utterly worthless."[13] In addition, the circuit court noted that early discovery in the case confirmed that the plaintiffs' claims were "factually deficient" and "extinguished any hope of certifying a damages class."[14] The appellate court further noted that Subway was nonetheless forced to defend against these claims for several years.[15] Rather than "be[ing] dismissed out of hand" – which the Seventh Circuit concluded should have been the outcome – the lawsuit culminated in a "racket" by plaintiffs' attorneys that "'seeks only worthless benefits for the class' and 'yields [only] fees for class counsel.'"[16] Notably, a handful of plaintiffs in this litigation voluntarily dismissed their claims, underscoring what a waste of resources the entire litigation had been.[17]

Importantly, many abusive class action settlements have not suffered the same fate as the Subway deal discussed above. One such suspicious settlement was approved in *Kumar v. Salov North America Corp*.[18] In *Kumar*, the plaintiff commenced a putative class action, alleging that olive oil was deceptively labeled as being "imported from Italy," when it was actually primarily sourced from other countries.[19] Following certification of the class, the parties agreed to mediate and quickly settled the claims.[20] As part of the settlement, the parties agreed that class members who filed a timely claim would receive a cash payment of $0.50 for each product purchase during the class period, with a guaranteed minimum payment of $2.00 for any household that submitted a valid claim.[21] Although the class encompassed millions of class members, only 53,030 valid claims were submitted,

---

12 *In re Subway*, 316 F.R.D. at 249.

13 *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551, 557 (7th Cir. 2017).

14 *Id.* at 554.

15 *Id.* at 552.

16 *Id.* at 553 (citation omitted).

17 Stipulation of Dismissal, *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, No. 2:13-md-02439-LA, ECF No. 84 (E.D. Wis. Oct. 24, 2017).

18 *Kumar v. Salov N. Am. Corp.*, No. 14-CV-2411-YGR, 2017 WL 2902898, at *8 (N.D. Cal. July 7, 2017), *appeal dismissed*, No. 17-16621, 2017 WL 5502713 (9th Cir. Sept. 21, 2017), *and aff'd*, 737 F. App'x 341 (9th Cir. 2018).

19 *See id.* at *1.

20 *Id.* at *2.

21 *Id.*

(cont'd)

yielding a class payout of $210,985.00.[22] In addition, the defendant agreed to keep the "imported from Italy" statement off of its labels for three years, even though it had already removed it ***before*** settlement of the case.[23] Plaintiff's damages expert nonetheless estimated this injunctive relief to be worth ***$19.6 million*** to the class.[24] Relying on this bloated valuation estimate of injunctive relief, the court awarded class counsel $874,231.80, or ***four times*** the amount received by the class in real dollars.[25] Unfazed by such a highly inflated estimate of what amounted to a largely illusory class benefit, the district court approved the fee request. In so doing, the court reasoned that "[e]ven if [plaintiff]'s estimate is overstated, and the valuation is some fraction of that amount, class counsel's fees remain proportionate to the value of the relief obtained."[26]

Settlements like the Subway agreement represent the worst of consumer class action practices because they do not even pretend to compensate class members supposedly defrauded by a defendant's alleged practices. Instead, they provide for marginal changes that would likely have been effectuated even without a settlement awarding plaintiffs' attorneys millions of dollars in fees. Further, as the *Kumar* settlement shows, even when class counsel negotiate settlements that, in theory, would compensate class members who decide to submit a claim for payment, those settlements are often destined to fail from the outset. They produce little or no interest among class members, but instead, only a windfall for the lawyers.

The settlement in *Poertner v. Gillette Co*.[27] is also illustrative. In *Poertner*, a consumer filed a putative class action against a battery manufacturer, alleging that its line of Ultra Advanced Duracell batteries did not last as long as advertised. Although class counsel valued the settlement at $50 million, the class only received $344,850, while class counsel received a grossly disproportionate $5.68 million.[28] As is often the case, class counsel persuaded the court to approve the settlement by comparing the fee request to the maximum but entirely unrealistic theoretical payout (i.e., 100 percent class participation). With $50 million as the comparator, $5.68 million might appear reasonable. However, of the 7.26 million class members, only 55,346 class members (***0.76%***) submitted a claim – a miniscule rate that presumably reflected class members' satisfaction with their batteries or outright indifference to the claims being asserted in the class action. Notably, "[d]espite finding that 'the

---

22 *Id.* at *3.

23 *Id.* at *5.

24 *Id.*

25 *Id.* at *8.

26 *Id.* at *5.

27 *Poertner v. Gillette Co*., 618 F. App'x 624, 626 (11th Cir. 2015) (per curiam).

28 *See id.* at 626 n.1 ("Class counsel calculated this amount by multiplying the number of class members (7.26 million) by the amount that could be claimed without proof of purchase ($6) and adding the fees-and-costs award.").

(cont'd)

$50 million [settlement valuation] calculation [was] somewhat illusory,' the [trial] court concluded that the settlement was fair, reasonable, and adequate."[29] Class counsel relied on an unrealistic participation rate to convince the district court – and the court of appeals that affirmed the lower court's approval – that counsel deserved $5.68 million – an amount that eclipsed class member recovery by more than ***1,600 percent***.

Other examples of fee-focused class settlements abound:

- In *In re Vioxx Products Liability Litigation*, the court approved a settlement of consumer fraud claims asserted by individuals alleging economic injuries stemming from their purchase of the prescription painkiller Vioxx.[30] The settlement created a common benefit fund of $23 million to be shared by eligible claimants.[31] "However, the amount actually paid to claimants was much lower than the total settlement amount, as only $698,767.22 was disbursed to [class members,]" representing only 3% of the $23 million fund.[32] By contrast, the court awarded the attorneys $4.2 million in fees, representing 18.5% of the total $23 million fund.[33] Despite recognizing that it could not be "ignored . . . that the amount of actual recovery in this case was low—far lower than anticipated," the court still found that "the maximum amount of the settlement fund, $23 million, [wa]s the appropriate amount [to consider] for calculating" attorney fees.[34]

- In *In re Motor Fuel Temperature Sales Practices Litigation*, the Tenth Circuit affirmed the approval of a number of settlements arising from allegations that, because gasoline expands when heated, the failure of retailers to control for temperature when selling gasoline or disclose to consumers that gas expands in the heat deprived consumers of receiving the exact amount of gas for which they paid.[35] Even though the district court recognized that "the plaintiffs' 'overall prospects of ultimately prevailing in litigation' were slim," the court still approved the settlement and awarded over $11 million in attorney fees, with

---

[29] *Id.* at 626 (footnote omitted).

[30] Order & Reasons, *In re Vioxx Prods. Liab. Litig.*, No. 2:05-md-01657-EEK-DEK, ECF No. 65586 (E.D. La. Sept. 26, 2018).

[31] *See id.* at 13.

[32] *Id.*

[33] *Id.* at 24-25.

[34] *Id.* at 18, 20.

[35] *In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1102 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1299 (2018).

(cont'd)

zero dollars going to plaintiffs.[36] Instead of money, the class received injunctive relief, which compelled certain defendants to install automatic temperature compensation devices on their gasoline pumps.[37]

- In *Spillman v. RPM Pizza, LLC*, which involved allegations that the defendant pizza company violated the federal Telephone Consumer Protection Act, the court gave final approval to a class settlement that produced a claims rate of ***less than one percent***.[38] The essential components of the notice plan were print publication, internet, the settlement website and press releases. The settlement created a common fund of $9,750,000. However, at the time of the fairness hearing, only ***770*** claims had been filed on the settlement website, which was "less than one percent of the total class."[39] By contrast, attorneys received ***$2.535*** million in fees and costs.[40]

The fee-centric settlements summarized above illustrate the disconnect between the money that goes to class counsel and the benefits actually delivered to the individuals on whose behalf those lawyers are supposedly bringing suit. In some of these cases, the monetary amounts offered to class members were small, but presumably reflected the weak and/or low damages nature of the claims asserted. But in other cases, defendants agreed to terms that offered class members more significant monetary relief. What is generally consistent in class settlements is that (a) the class member participation rate in settlements is low[41] and (b) the payments courts award to class counsel are disproportionately high. This fact augers in favor of directly tying the fees awarded to plaintiffs' counsel to the monetary relief actually delivered to individual class members.

---

[36] *Id.* at 1119.

[37] *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840-KHV, 2015 WL 5010048, at *18 (D. Kan. Aug. 21, 2015), *aff'd*, 872 F.3d 1094 (10th Cir. 2017).

[38] *Spillman v. RPM Pizza, LLC*, No. 3:10-349-BAJ-SCR, 2013 WL 2286076, at *2 (M.D. La. May 23, 2013).

[39] *Id.*

[40] Final Distribution Order ¶ 7, *Spillman v. RPM Pizza, LLC*, No. 3:10-cv-00349-BAJ-SCR, ECF No. 245 (M.D. La. July 29, 2013).

[41] As previously noted, the participation rates are almost invariably low because, *inter alia*, the class members often do not feel aggrieved by the alleged conduct being challenged and therefore do not submit a claim for relief. For example, one analysis found that where notice of a class action settlement was disseminated through the media, claims rates ranged from ***0.002 percent to 9.378 percent, with a median rate of 0.023 percent***. Decl. of Deborah McComb ¶ 5, *Poertner v. Gillette Co.*, No. 6:12-cv-00803-GAP-DAB, ECF No. 156 (M.D. Fla. Apr. 22, 2014).

(cont'd)

B. ***CY PRES* REMAINS A TOOL FOR PLAINTIFFS' LAWYERS TO JUSTIFY EXORBITANT FEES IN CONSUMER CLASS ACTION SETTLEMENTS THAT DO NOT PROVIDE ANY REAL BENEFIT TO CLASS MEMBERS.**

In response to the growing indifference of class members to the settlements supposedly entered into on their behalf, some courts have resorted to permitting *cy pres* deals. *Cy pres* is the practice of distributing unclaimed settlement money in class actions to third-party charities. While the use of *cy pres* in class action settlements has benefited numerous organizations, the practice is troubling because it raises serious questions about the purpose of the class action device. Most fundamentally, and as one court put it, "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else."[42] *Cy pres* also creates a potential for conflicts of interest where class counsel has a relationship with the recipient charity – for example, the recipient organization happens to be the alma mater of the lead plaintiff's lawyer in the case. In addition, *cy pres* settlements often funnel class money to advocacy-based organizations with an ideology or partisan bent that is at odds with that of certain class members.

Moreover, *cy pres* exacerbates a problem reflected by the previously discussed fee-centric settlements – i.e., that counsel have little incentive to identify class members and see that they are compensated. After all, throwing a *cy pres* element into the settlement mix creates the illusion that the overall value of that settlement is much higher than it really is, which only serves to justify a request for even higher attorneys' fees even if class member participation is negligible.

For example, this dynamic was front and center in a recently approved settlement in *In re Easysaver Rewards Litigation*. That case arose out of allegations that the defendants unlawfully enrolled consumers and charged monthly fees in connection with a rewards program. A federal judge in California recently approved a settlement that provided only $225,000 in cash to class members but approximately ***$3 million*** to *cy pres* beneficiaries.[43] Of the 1.3 million consumers that had allegedly been enrolled in the rewards program, only 3,000 had requested the cash refund, a claims rate of roughly ***0.2%***.[44] The settlement also provided class members with email coupons to be used on the defendants' website; however, those coupons contained a series of limitations restricting the time of use and type of purchases. To make matters worse, the *cy pres* beneficiaries included the alma maters of the attorneys on the case. Despite only $225,000 in cash going to class members, class counsel attempted to procure $8.7 million in attorneys' fees based in part on the supposed indirect class benefit from the questionable *cy pres* award. The district

---

42 *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

43 *See In re Easysaver Rewards Litig.*, No. 09-cv-02094-BAS-WVG, 2019 WL 4736210, at *4, *10 (S.D. Cal. Sept. 27, 2019).

44 *Id*. at *4.

(cont'd)

court was unwilling to indulge such an excessive and unreasonable request, but indicated that class counsel can propose a different fee amount in the future.[45]

The problems posed by *cy pres* apply in spades where – as is increasingly the case – the plaintiffs' lawyers do not attempt to allocate ***any*** money for class members at all, earmarking all of the money apart from attorneys' fees and costs to third-party organizations. To be sure, the claims in such cases often arise out of no apparent injury to class members or supposed injuries for which compensation is pointless. However, that fundamental reality should weigh in favor of awarding class counsel significantly less than what they are getting in these kinds of settlements. Simply put, the fact that class counsel are pushing for settlements that do not even ***offer*** class members any monetary relief while simultaneously pursuing windfalls for themselves reflects a clear abuse of the class action device, which is inherently unfair.

For instance, in *Lane v. Facebook, Inc.*, a case that arose out of alleged privacy violations, the Ninth Circuit affirmed a *cy pres* award aimed at establishing a new charity organization called the Digital Trust Foundation, the purpose of which was to "fund and sponsor programs designed to educate users, regulators, and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats."[46] In addition to spending $6.5 million on the foundation, Facebook agreed to pay class counsel ***$3 million***.[47] In a withering dissent, Judge Kleinfeld observed that "Facebook users who had suffered damages . . . got no money, not a nickel from the defendants . . . [while] [c]lass counsel, on the other hand, got millions."[48]

The Ninth Circuit denied a petition for rehearing *en banc*, but several judges dissented, explaining that the *cy pres* award was not "reasonably certain to benefit the class" and did not "advance the objectives of the [privacy] statutes relied upon in bringing suit."[49] Similarly, the Supreme Court declined to review the settlement, but Chief Justice Roberts issued an unusual statement with respect to the Court's denial of certiorari, signaling that the issue was ripe for consideration.[50] Recognizing that *cy pres* was a "growing feature" of class action settlements, Chief Justice Roberts declared that "[i]n a suitable case, this Court may need to clarify the limits on the use of" that practice.[51] In issuing this statement, the Chief Justice cited to a prominent

---

45 *Id*. at *9.

46 *Lane v. Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012).

47 *Id.*

48 *Id.* at 828-29 (Kleinfeld, J., dissenting).

49 *Lane v. Facebook, Inc.*, 709 F.3d 791, 793 (9th Cir. 2013).

50 *See Marek v. Lane*, 134 S. Ct. 8 (2013).

51 *Id.* at 9.

(cont'd)

law review article authored by Professor Martin Redish and other scholars that is highly critical of *cy pres*.[52]

Although the Supreme Court was going to weigh in on *cy pres* during its last term in another case originating in the Ninth Circuit, it remanded the case on standing grounds and did not address the issue of *cy pres*.[53] In other words, it is unclear when (if ever) the Supreme Court will ultimately address this thorny subject, which is precisely why *cy pres* should be on the FTC's radar. In short, unless – and until – meaningful limits are imposed on the use of *cy pres*, plaintiffs' attorneys will likely continue relying on the practice to justify disproportionate fees and to ignore the supposed compensatory purpose of consumer class actions.

Against this backdrop, the FTC should consider paying closer attention to fee-centric settlements, particularly those with significant *cy pres* elements. In so doing, the FTC might consider supporting an approach to attorneys' fees that would tether such fees to the amount of money actually distributed to class members. Notably, the Federal Judicial Center's own Manual for Complex Litigation has long recommended that in class settlements, courts wait to determine attorneys' fees until class members have made claims and been paid, all to ensure a rational relationship between the amount of the fee award and the benefits actually received by class members.[54] Unfortunately, most federal courts are not following this recommendation. Instead, those courts tend to grant fee awards before class benefits are distributed, determining the fee award based on a false premise that all available funds will be claimed by (and paid to) class members and making no effort to confirm that assumption. At the very least, the FTC's consideration of these issues will send a message that the government's top consumer watchdog is closely monitoring the extent to which class actions are actually benefitting ***consumers***.

II. DEMAND LETTERS AND CLASS ACTION COMPLAINTS ARE INCREASINGLY BEING USED AS A WEAPON TO COERCE UNJUSTIFIED PAYOUTS TO PLAINTIFFS' LAWYERS.

Another troubling aspect of consumer class action practice is the recurring use of frivolous demand letters or actual class action complaints to coerce unjustified settlements. This practice not only imposes tremendous costs on American enterprise (particularly small businesses), but also adversely impacts consumers by way of higher prices in the marketplace. The FTC should closely monitor this trend and consider taking action against those whose conduct might run afoul of applicable federal law, as it has done in other contexts.

The shakedown usually unfolds in one of two ways. In the first scenario,

---

[52] *See id.* (citing Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 653-56 (2010)).

[53] *Frank v. Gaos*, 139 S. Ct. 1041 (2019) (per curiam).

[54] Manual for Complex Litigation (Fourth) § 21.71 (2004).

plaintiffs' lawyers send letters to businesses (both large and small) threatening meritless litigation unless the business pays the lawyer to go away. These attorneys sometimes do not even purport to have any clients on whose behalf they would ultimately file a putative class action. And even when they do claim to be writing on behalf of an existing client, they seem to be most interested in securing a fast payout for themselves, ***not*** any sort of relief that would potentially benefit all members of any putative class. In truth, these lawyers are no different from the patent trolls that the FTC itself has taken action against previously.

In other cases, plaintiffs' counsel may file a class action lawsuit (often with little or no merit) and then at some point early in the litigation propose a named-plaintiff-only settlement – that is, a settlement that would pay a nominal amount to the person named in the complaint, a substantial amount to the attorneys, and nothing to the allegedly injured class members. Again, this tactic uses the threat of burdensome litigation as a means of leveraging payments to counsel from a defendant. A study conducted by Mayer Brown LLP for ILR several years ago, which analyzed putative consumer and employee class action lawsuits filed in or removed to federal court in 2009, is instructive. According to that study, nearly 35% of the class actions resolved were dismissed voluntarily by the plaintiff, likely "meaning a payout to the individual named plaintiff and the lawyers who brought suit – ***even though the class members receive nothing***."[55] This figure was quite surprising; it suggests that this practice of named-plaintiff-only settlements (which need not be reported to, or approved by, the federal court overseeing the case) may be occurring frequently.

These tactics have been used against manufacturers of food and other consumer products in cases alleging frivolous theories of deceptive labeling that would never withstand a motion to dismiss, much less survive a motion for summary judgment or ultimate trial. Although defense lawyers have sometimes had success in fending off these demand letters and class action complaints, others have not been so lucky. Indeed, plaintiffs' lawyers have utilized these aggressive tactics with a degree of success in connection with threatened claims under the Americans with Disabilities Act ("ADA"). Specifically, lawyers rely on the ADA to attack vulnerable businesses and essentially extort money from them by threatening "drive-by" ADA lawsuits.

For example, in January 2017, an organization called Access Now sent a demand letter to Omaha Steaks threatening to bring an ADA claim in connection with the company's website. At the outset, Access Now and its law firm offered to drop the claims if Omaha Steaks provided "payment of certain attorneys' fees and expenses."[56] Notably, the demand letter did ***not*** focus on the purported accessibility

---

[55] Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* at 1-2, U.S. Chamber Inst. for Legal Reform (Dec. 11, 2013).

[56] Ted Wheeler, *E-tailer Fights Threat Of 'Drive-By' ADA Lawsuit*, Courthouse News Serv. (Mar. 27, 2017), https://www.courthousenews.com/e-tailer-fights-threat-drive-ada-lawsuit/.

(cont'd)

issues – much less on how to remedy those alleged issues. Rather, the letter was primarily concerned with arranging a confidential settlement agreement. In other words, the intentions of the lawyers were to make a quick dollar, not to benefit disabled individuals. And this suit is not alone. According to a 2017 study, the number of ADA claims increased 143 percent from 2013-2016.[57] It is not hard to imagine how "drive-by" ADA lawsuits played a role in that growth.

These tactics are especially onerous for small businesses, which (unlike larger enterprises) do not have in-house legal departments. As a result, if a small business is ultimately sued, it will have to hire a lawyer, which is generally expensive. According to the National Federation of Independent Business, even a frivolous case can impose $2,000 to $5,000 in defense costs on a small business, a "significant hit" to businesses that typically generate only $50,000 a year for their owners.[58] Cases that last into discovery, or go to trial, are even more costly to defend.

Rather than jump through all of the burdensome and expensive hoops associated with hiring a lawyer and proceeding to costly discovery, small businesses in particular often choose to settle even when the claims set forth in the demand letter or ultimate complaint lack merit. But those settlements are obviously not free. Indeed, one study found that the total burden of tort liability on American businesses (including settlements, defense costs, judgments, and administrative expenses) was $300 billion in 2016.[59]

Although some businesses are able to stay afloat despite these significant costs, others are not. In one notorious example, a single plaintiffs' attorney targeted an entire community of businesses in the small Northern California town of Pollock Pines. The lawyer sent demand letters to the majority of businesses in town, threatening ADA action unless they settled out of court for undisclosed amounts of money. Notably, the attorney did not even patronize the vast majority of establishments he targeted. In the end, some small businesses acquiesced to the lawyer's demands, while others did not, choosing instead to close their doors. [60]

Importantly, these tactics are not just bad for business; they hurt the American consumer as well. According to one recent study, the total costs and compensation paid in the U.S. tort system amounted to 2.3% of U.S. gross domestic

---

[57] Minh N. Vu, Kristina M. Launey & Susan Ryan, *ADA Title III Lawsuits Increase by 37 Percent in 2016*, Seyfarth ADA Title III Blog (Jan. 23, 2017), https://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016/.

[58] Stephen Parezo, *Frivolous Lawsuits: A Serious Threat to Nation's Small Businesses*, Smartpros (Apr. 2005).

[59] Paul Hinton, David McKnight & Lawrence Powell, *Costs and Compensation of the U.S. Tort System* at 21, U.S. Chamber Inst. for Legal Reform (Oct. 2018).

[60] Wendy Schultz, *ADA attorney forces out small business Pollock*, Mountain Democrat (Mar. 2, 2012), https://www.mtdemocrat.com/news/ada-attorney-forces-out-small-business-pollock/.

(cont'd)

product or ***$3,329 per household***.[61] Although these costs adversely affect consumers in myriad ways, one of the most salient examples is the higher prices of goods and services that result from the increased costs of doing business. After all, in order to stay in business, any company (large or small) must generate at least enough revenue to pay its employees and cover its other operating expenses – one of which is the cost of defending and resolving litigation, including by settlement. The company must set prices that will give it the amount of revenue it needs to continue operating, which means that the higher the costs of litigation, the higher (all else equal) prices will be. There is widespread consensus that this "pass-through" of litigation costs to consumers occurs.[62]

Given the enormous costs imposed on American businesses and consumers discussed above, we respectfully urge the FTC to make inquiry into these unscrupulous practices and consider potential enforcement responses. Notably, the FTC has previously taken action against patent trolls who essentially employ the same unseemly practices.[63] As detailed in a prior FTC consent order, a law firm sent out more than 9,000 letters to small businesses threatening litigation over alleged patent infringement. The letters employed a number of deceptive tricks, such as falsely representing that other businesses had already agreed to pay licenses, asserting that the small business had two weeks to respond or else a lawsuit would be filed and attaching the purportedly forthcoming complaint. In truth, as the FTC found, the firm did not file even a single lawsuit in connection with the demand letters. In settling with the FTC, the firm agreed to not make any misrepresentations when asserting its patent rights in the future and agreed to not make any "misrepresentations that a lawsuit will be initiated [or] about the imminence of such

---

61 Hinton, McKnight & Powell, *supra* note 59, at 1, 23.

62 *See* H.R. Rep. No. 115-25, at 4 (2017) ("[U]ltimately these costs are paid by consumers, workers, and investors, throughout the economy–because the diversion of hundreds of millions of dollars away from productive purposes, as well as the time and attention of entrepreneurs, means prices are higher, new products are not brought to market, and new jobs are not created."); Arbitration Agreements, 82 Fed. Reg. 33,210, 33,302 (July 19, 2017) (CFPB acknowledges "risk that some or potentially even all [class action litigation] costs will be passed through to consumers"); Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique* at 33, Mercatus Working Paper, Mercatus Center, George Mason University (Aug. 2015) ("As an empirical matter, evidence shows that financial products firms do pass on changes in their costs . . . ."); *cf. Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 579 (7th Cir. 2004) (Posner, J.) (noting that, assuming a business's costs increased because of fraud by its suppliers, "some part of the increase would undoubtedly have been passed on to consumers in the form of higher prices").

63 *See* Press Release, *FTC Settlement Bars Patent Assertion Entity From Using Deceptive Tactics* (Nov. 6, 2014), https://www.ftc.gov/news-events/press-releases/2014/11/ftc-settlement-bars-patent-assertion-entity-using-deceptive; *see also* Press Release, *FTC Approves Final Order Barring Patent Assertion Entity From Using Deceptive Tactics* (Mar. 17, 2015), https://www.ftc.gov/news-events/press-releases/2015/03/ftc-approves-final-order-barring-patent-assertion-entity-using (final order).

(cont'd)

a lawsuit."[64] The FTC made clear that sending demand letters threatening lawsuits without any actual intention to file a complaint is deceptive.

The same logic applies to baseless demand letters propounded by lawyers who have no intention of ever filing an actual consumer lawsuit. If a baseless threat to file patent infringement lawsuits is deceptive, so too is demanding that a business pay money to avoid a consumer class action that has no chance of being filed in the first place. In addition, even as to class action lawsuits that are ultimately filed, the frequency with which such complaints are voluntarily dismissed with named-plaintiff-only settlements raises questions over whether the demands made in those cases are "unfair," even if not technically deceptive.[65]

Alternatively, and at a minimum, the FTC could ask class action counsel who appear to regularly engage in these practices to provide statistics regarding the letters they send to prospective defendants and their counsel, including, for example: (1) the number of such letters they have sent; (2) the percentage of letters that result in actual lawsuits; and (3) the percentage of those lawsuits that are ultimately dismissed by the court. In addition, counsel who are identified as voluntarily dismissing class actions could be asked to explain why the case was dismissed, perhaps exposing named-plaintiff-only settlements beneficial only to counsel. The information gleaned from this inquiry would help elucidate the scope of the problems discussed above and facilitate effective solutions to mitigate them.

In sum, the FTC should be commended for looking into matters related to consumer class action practices. As part of its consideration of this subject, the FTC should give serious attention to the fee-centric nature of consumer class actions, many of which encompass questionable *cy pres* elements that deliver no meaningful benefits to consumers. In addition, the FTC should also examine the recurring use of coercive demand letters and class action complaints as a means to pressure American businesses into settling meritless claims. Exploring these issues would go a long way towards ensuring that consumer class actions do not veer from their purpose, which is to compensate purportedly aggrieved consumers, ***not*** enrich lawyers or bankrupt small businesses.

Sincerely,

John H. Beisner

---

[64] Press Release, FTC Settlement Bars Patent Assertion Entity From Using Deceptive Tactics (Nov. 6, 2014), https://www.ftc.gov/news-events/press-releases/2014/11/ftc-settlement-bars-patent-assertion-entity-using-deceptive.

[65] 15 U.S.C. § 57b-1(a)(7) ("The term 'violation' means any act or omission constituting an ***unfair*** or deceptive act or practice in or affecting commerce . . . .") (emphasis added).