Bad Bargains: The Mistake of Allowing Cost-Benefit Analyses in Class Action Certification Decisions

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I. INTRODUCTION

In *Reiter v. Sonotone Corp.*,[1] the United States Court of Appeals for the Eighth Circuit elucidated some of the problems commonly associated with class actions:

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1. 579 F.2d 1077 (8th Cir. 1978), *rev'd*, 442 U.S. 330 (1979).

> Often, defendants who are unwilling or unable to defend [class action] suits are compelled for economic reasons to settle actions otherwise meritless. The result of such settlements will inevitably be counterproductive when the costs to the defendant of defense and settlement are passed on to present and future consumers. Moreover, big firms are better able than small or medium-sized businesses to defend or settle such claims under similar circumstances. The ultimate result might be to preserve an oligopolistic economic climate. The deterrent impact of such suits, in our view, does not outweigh their potentially ruinous effect on American business.[2]

The Court of Appeals in *Reiter unanimously* concluded that a benefit of class actions—deterrence—did not justify their social costs, a potentially ruinous effect on businesses. As a result, the court refused to certify the class, instead placing the burden on state attorneys general to "protect the interests of consumers without imposing upon the courts and the economy the risk and burden of nonmeritorious class actions."[3] The Supreme Court reversed, also in a unanimous opinion, advancing two arguments rebutting the social-cost argument that was so persuasive for the Eighth Circuit.[4] First, the Court concluded that although private suits may impose heavy burdens on the federal courts, it is the responsibility of Congress to allocate the resources that allow the judiciary to carry out Congress's commands.[5] Second, the Court noted that although the cost of defending class actions may have "a potentially ruinous effect on small businesses in particular and will ultimately be paid by the consumers in any event. . . . [These] are policy concerns

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2. *Reiter*, 579 F.2d at 1086.

3. *See id.* Note, however, that state attorneys general were not parties to the litigation. The Eighth Circuit's decision would have left consumer-protection litigation exclusively in the hands of state attorneys general.

4. Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979).

5. *Id.* at 344.

more properly addressed to Congress than to [the Supreme Court]."[6]

The discussion in *Reiter* highlights a central problem with the class action device: its potential to achieve positive results is derived from the same features that allow what critics perceive to be negative results.[7] The advantage of the class action device is its ability to aggregate small claims that could not be brought on an individual basis because doing so would be cost-prohibitive.[8] This ensures that claimants with small injuries can have their day in court. By allowing small but legitimate claims to be heard, class

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6. *Id.* at 344–45. Business groups were quick to take their policy concerns to Washington, arguing, for example, that class actions have a ruinous effect on small businesses, that they overly enrich plaintiffs' lawyers, and that they increase consumer prices. For a discussion of these and other objections to the class action device, see *infra* Part II. These criticisms led Congress to look to the Federal Civil Rules Advisory Committee ("Committee") for a solution. After several years of discussion, the Committee proposed eight changes to the Federal Rules of Civil Procedure ("Federal Rules"). Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure, 167 F.R.D. 523, 559 (1996) [hereinafter Proposed Amendments]. One of these changes would have required judges, in considering whether to certify a class, to determine "whether the probable relief to individual class members justifies the cost and burdens of class litigation." *Id.* This proposed change, dubbed the "just ain't worth it" rule, had equally fervent supporters and detractors. *E.g.*, Sheila L. Birnbaum, Proposed Changes to Rule 23 (Mar. 7, 1996), *in* 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 121, 131 (May 1, 1997) (unpublished working paper) (on file with Rules Committee Support Office, Administrative Office of the United States Courts) [hereinafter WORKING PAPERS], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/WorkingPapers-Vol2.pdf ("Attorneys General, regulatory agencies, and even non-governmental entities (*e.g.*, trade associations and the media) are often very effective tools by which consumers with small or relatively insignificant claims are protected and the 'public interest' in deterring wrongdoing is served."); *see also* Steven B. Malech & Robert E. Koosa, *Government Action and the Superiority Requirement: A Potential Bar to Private Class Action Lawsuits*, 18 GEO. J. LEGAL ETHICS 1419, 1422 (2005) ("Actions brought by state attorneys general or other government agencies/officials on behalf of the citizens of their respective states may simply provide a superior method of resolving disputes than a class action lawsuit.").

7. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 471 (2000).

8. *See infra* notes 27–29 and accompanying text.

actions can yield the institutional good of compensation. In turn, compensation yields the institutional good of deterrence since awarding compensation forces companies to internalize costs that had been passed on to consumers.[9] Critics, however, allege that class actions allow frivolous claims to be aggregated in the same class as meritorious claims.[10] The ability of class actions to aggregate small claims thus can produce good results and bad results.

Observers of class actions approach these problems in two ways. Opponents of the class action mechanism believe that the harms associated with class actions outweigh their benefits. They point to administrative agencies and attorneys general as instruments to achieve the goals currently addressed by class actions.[11] In their minds, "[w]e should rely on individual litigation to secure financial compensation for individuals' financial losses, accepting that some losses that were wrongfully imposed by others will go uncompensated because they are simply too small to be worth the cost of individual litigation."[12] Conversely, proponents of class actions believe that the social benefits outweigh the costs. They question the ability of attorneys general and administrative agencies to achieve the results that class actions have made possible.[13] In response to this dialogue, in 1996 the Federal Rules Committee proposed a rule that would have required courts to consider, when

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9. Those costs being equal to the amount that class plaintiffs claim as damages. *See* ROBERT BALDWIN & MARTIN CAVE, UNDERSTANDING REGULATION 11–14 (1999) (describing instances of market failure in which firms pass costs which should be included in the prices of their products on to third parties).

10. *See infra* note 58 and accompanying text.

11. *See supra* note 6.

12. HENSLER ET AL., *supra* note 7, at 471.

13. *E.g.*, Deborah Lewis, Comments of Deborah Lewis, On Behalf of the Alliance for Justice, Regarding the Proposed Amendments to Federal Rule of Civil Procedure 23 (Feb. 21, 1997), *in* 2 WORKING PAPERS, *supra* note 6, at 296–97 (maintaining that "the public agencies cannot enforce the laws alone"); *see also* Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Rule 23 (Jan. 17, 1997), *in* 3 WORKING PAPERS, *supra* note 6, at 465, 472–78 (Testimony of Patricia Sturdevant); Andrew A. Caffrey, III & Jonathan M. Rotter, *Consumer Protection, Patents and Procedure: Generic Drug Market Entry and the Need to Reform the Hatch-Waxman Act*, 9 VA. J.L. & TECH. 1, 86 (2004) (arguing that, in the context of the FTC, "the limitations of the agency make the consumer class action suit a superior means of enforcement").

deciding whether to certify a class action, "whether the probable relief to individual class members justifies the costs and burdens of class litigation."[14] Although this proposed rule failed to pass, some courts continue to weigh costs and benefits when making their certification decisions.[15]

The cost-benefit analyses employed by courts lack any semblance of uniformity and are frequently premised on uninformed conclusions. When courts have considered—either explicitly or implicitly—the costs and benefits of a class action, they have considered widely varying factors. Even when courts employ similar factors, they frequently reach opposite results. In *Barnes v. United States*,[16] for example, the United States Court of Federal Claims declared that it was "obliged to conduct a cost/benefit analysis, weighing any potential problems with the manageability or fairness of a class action against the benefits to the system and the individual members likely to be derived from maintaining such an action."[17] The court in *Barnes* based its decision on two factors: the class members' need for a forum in which to vindicate their rights and the ability of a class action to achieve an economical resolution of a large number of claims.[18] The court balanced these

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14. Proposed Amendments, *supra* note 6 (adding subsection (F) to FED. R. CIV. P. 23(b)(3)).

15. Examples of courts using cost-benefit analysis at the class-certification stage are numerous. *See, e.g.*, London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 n.5 (11th Cir. 2003) (denying certification and noting that "defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff[s]"); Curry v. United States, 81 Fed. Cl. 328, 337–39 (Fed. Cl. 2008) (using a cost-benefit analysis to decide whether the proposed class conforms to R. CT. FED. CL. 23(b)(2), which requires "that a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy" (quoting R. CT. FED. CL. 23(b)(2))); Thomas v. NCO Fin. Sys., Inc., No. CIV. A. 00-CV-05118, 2003 WL 22416169 (E.D. Pa. Oct. 21, 2003) (noting that a cost-benefit analysis is necessary under FED. R. CIV. P. 23(a)(4)); *In re* Ribozyme Pharm., Inc. Sec. Litig., 205 F.R.D. 572 (D. Colo. 2001); *In re* Computer Learning Ctrs., Inc., 344 B.R. 79 (Bankr. E.D. Va. 2006). These cases show that, despite the failure of the proposed rule, the cost-benefit analysis is often a part of the decision to certify or not to certify a class.

16. 68 Fed. Cl. 492 (Fed. Cl. 2005).

17. *Id.* at 499.

18. *Id.* at 499–500.

benefits against "the percolation that occurs when more than one judge of this court considers a particular legal issue" and the "difficulties [that] may be encountered in identifying the potential members of the class . . . ."[19] The court concluded that the potential benefits of the class action outweighed its costs and thus allowed the class action to proceed.[20] On the other hand, in *Legge v. Nextel Communications, Inc.*,[21] the Central District of California balanced the potentially ruinous effect of a statutorily mandated damage award[22] against the small amount each individual claimant stood to gain by the class action and ruled that the class should not be certified.[23] The small individual recovery *Legge* used to argue against class certification was the same factor *Barnes* used to justify granting certification. These two cases are not isolated incidents. Courts employing cost-benefit analyses consistently produce wildly different results.[24]

This Article argues against the use of cost-benefit analyses in class certification decisions. Part II first identifies two criteria with which to evaluate cost-benefit analyses as a tool for use in class certification decisions. One criterion is compensation, the benefit to the individuals who comprise the class; the other is deterrence, a benefit shared by society generally. Compensation and deterrence are the *raison d'être* of class actions, and class action procedural rules should be judged according to how they serve

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19. *See id.* at 500.

20. *Id.* at 499–500

21. No. CV 02-8676DSF(VNKX), 2004 WL 5235587 (C.D. Cal. June 25, 2004).

22. The statute, 15 U.S.C. § 1681n(a) (2006), states that:

> [a]ny person who willfully fails to comply with any requirement imposed under [the act] with respect to any consumer is liable to that consumer in an amount equal to the sum of--(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or . . . (2) such amount of punitive damages as the court may allow; and (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Id.

23. *Legge*, 2004 WL 5235587, at *13–17.

24. *See supra* note 15.

these public policy goals. Part I then identifies several justifications courts have offered for adopting cost–benefit analyses and evaluates these justifications through the lenses of the compensation and deterrence, determining that they do not withstand scrutiny. Part III considers the general practicality of cost-benefit analyses in class certifications, concluding that courts ought not to use cost-benefit analyses in such decisions.

II. EXAMINING COST-BENEFIT ANALYSES UNDER COMPENSATION AND DETERRENCE

This section accomplishes two goals. First, Part II.A advances the criteria of compensation and deterrence as the ends by which courts should measure class action rules. The author argues that courts should use cost-benefit analyses in class action certification decisions only if they achieve the ends of compensation and deterrence and concludes that cost-benefit analyses at the certification stage do not achieve either goal. Part II.B then discusses various justifications courts have offered in adopting cost-benefit analyses at the certification stage. In doing so, the author considers whether these justifications are viable given the ends of class actions expressed in Part II.A.

A. Two Criteria for Examining Cost-Benefit Analyses

Implicit in the need to litigate is compensation. Many of the justifications for class actions, such as the sharing of expenses, specifically act to reduce the pro rata share of an individual's litigation costs, thereby increasing overall compensation. Achieving just compensation for individual litigants is an important end of class actions.[25] Likewise, class action litigation has an important

25. *See In re* Cendant Corp., 260 F.3d 183, 197 (3d Cir. 2001) (concluding that allowing sealed fee bids in a class action enabled attorneys to ensure their payment without regard to whether their clients were adequately compensated); Andrews v. Chevy Chase Bank, 240 F.R.D. 612, 621 (E.D. Wis. 2007) ("Class actions serve the purpose of providing compensation in cases involving public wrongs and widespread injuries."), *rev'd*, 545 F.3d 570 (7th Cir. 2008); Abels v. JBC Legal Grp., P.C., 227 F.R.D. 541, 546 (N.D. Cal. 2005); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 877–79 (1984) (arguing that compensatory damages are essential to a system seeking to preserve personal

external justification: deterrence. The implicit premise is that when individuals or companies are forced to internalize the consequences of their bad acts, they will be less likely to commit those transgressions in the future. Compensation and deterrence were the original justification of the class action mechanism, and courts should therefore keep these ends in mind as they develop rules governing class actions.

1. Compensation

Class actions have the advantage of allowing plaintiffs to bring suit for legitimate claims that are unlikely to be brought on an individual basis because of litigation costs.[26] Courts have long recognized the value of class actions as tools to litigate low-value claims, and many class actions are aggregated "negative value" claims in which the cost of an individual bringing suit would be greater than the damage incurred by the defendant's wrongful act.[27] Courts place great value on the class action mechanism as a tool for pursuing these claims. Justice Ginsburg, for instance, noted that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[28] A class action aggregates "the relatively

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security and autonomy, but recognizing that "deterrence [also] has a distinctive role in a rights-based system").

26. *See* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 809 (1985); Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999); Roger D. Blair et al., *Resale Price Maintenance and the Private Antitrust Plaintiff*, 83 WASH. U. L. REV. 657, 721 n.302 (2005); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1295 (2002).

27. For an analysis of negative value, see HENRY DUNNING MACLEOD, THE HISTORY OF ECONOMICS 628–29 (Plymouth, William Brendon and Son Printers 1896), *available at* http://www.archive.org/stream/historyofeconomi 00macluoft#page/n5/mode/2up. For a more recent discussion, see STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 419–23 (2004).

28. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997); *see also* David S. Schwartz, *If You Love Arbitration, Set it Free: How "Mandatory" Undermines "Arbitration*,*"* 8 NEV. L.J. 400, 413 (2007) ("It is well understood that, but for class actions, many kinds of legal violations committed on a large scale can go unremedied, if the damages caused by each individual violation is

paltry potential recoveries into something worth someone's (usually an attorney's) labor."[29]

The corollary type of class action is that in which each plaintiff stands to recover damages sufficiently large to warrant pursuit of the claim on an individual basis. Courts have been much less receptive to this type of class action because individuals could cost-effectively achieve just compensation through more traditional legal outlets. Some courts have gone so far as to decline to certify a class specifically because it did not fit within the negative value paradigm of Rule 23. For example, in *Rutstein v. Avis Rent-A-Car Systems, Inc.*,[30] the Eleventh Circuit stated that because individual plaintiffs might be entitled to substantial compensatory and punitive damage recoveries should they prevail, the possibility of negative value was absent in the case.[31] In *Nagel v. ADM Investor Services, Inc.*,[32] the Northern District of Illinois similarly refused to certify a class of farmers seeking relief under the Commodity Exchange Act because their claims were for large sums that could easily be litigated on a private basis.[33]

Class actions are an intentional, policy-based derogation of the common-law system for the legal redress for meritorious, but not otherwise feasible, claims. The public policy of effectively permitting legal redress for such claims was at the heart of the legislative creation of the class action mechanism.[34] Courts recognize the value of class actions as tools for litigating low-value claims that were not economically feasible under the common law.[35]

Courts that preclude claims under a "just ain't worth it" justification undermine a basic function of the class action and destroy the public's confidence in the mechanism. By permitting

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small enough to make the filing of individual lawsuits economically unfeasible.").

29. *Amchem*, 521 U.S. at 617 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

30. 211 F.3d 1228 (11th Cir. 2000).

31. *Id.* at 1241 n.21.

32. 65 F. Supp. 2d 740 (N.D. Ill. 1999).

33. *Id.* at 746.

34. *See, e.g.*, STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

35. *See, e.g.*, Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986).

only large claims, courts employing cost-benefit analyses aggravate the overcompensation concerns of the public and undermine the class action's ability to perform its intended role as a mechanism for legal redress of negative-value claims.

2. Deterrence

Class actions, in addition to serving individual needs, also serve the "public good"[36] as a deterrent of injury-causing behavior. Class actions deter defendant-wrongdoers by forcing those defendant-wrongdoers to internalize the social costs of their actions.[37] Indeed, deterrence and compensation were the two predominant public policy goals underlying the creation of the class action mechanism, and they were intended to work together simultaneously and seamlessly. Consumer protection, not corporate sympathy, provided the impetus for the creation of the device.[38] In the words of one scholar, the rule-makers envisioned that "class actions would be upheld in the public interest to deter wrongful activities directed toward large groups of persons, even given the likelihood that aggregate damages recovered from the defendant cannot feasi-

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36. A criterion of public good emphasizes the social benefit of class actions. Among the benefits of class actions that can be identified as conducive to public good are: (1) the ability to set legal precedent that is important for future individual and class action cases; (2) the ability to promote public education concerning questionable business and industrial practices that are being challenged in representative litigation; (3) the ability to uncover a pattern of wrongdoing that otherwise would not be apparent from infrequent or widely scattered individual cases; and (4) the ability to promote intangible psychological benefits accruing to a public that would feel less frustrated about the unavailability of any redress when the vindication of group rights can be observed. DAVID S. GOULD, STAFF REPORT ON THE CONSUMER CLASS ACTION SUBMITTED TO THE NATIONAL INSTITUTE FOR CONSUMER JUSTICE, 48–52 (Aug. 15, 1972). Class actions produce these subsidiary goods while at the same time achieving the goal of compensation.

37. *See generally* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1536 (2006) ("Deterrence . . . is the only rationale that can justify the significant costs—both public and private—that securities class actions impose on investors and the judiciary.").

38. *See, e.g.*, YEAZELL, *supra* note 34, at 232.

bly be distributed to redress claims of class members individually."[39]

Class actions can function as strong deterrents of socially undesirable behavior. The cost of defending class actions forces companies to assume the costs of their wrongdoing, and the threat of having to do so disincentivizes them from wrongdoing.[40] In reality, this threat is a much more effective deterrent than other means such as administrative action. In the words of one scholar:

> [D]oes anyone seriously doubt that there is immense deterrent power in the contemporary class action? Executives tempted to lie about earnings are more concerned about Bill Lerach and Melvyn Weiss than they are about the Securities and Exchange Commission . . . . Companies tempted to skirt fair credit reporting requirements are more concerned with ruinous liability at the hands of the class action bar than they are with the corrective measures and fines that might be meted out following a none-too-likely Federal Trade Commission . . . investigation.[41]

Class actions' deterrent power works at several levels. For example, in the case of torts-based class actions, companies who engage in risky behavior are induced to invest in safety precautions—safer designs, better warning systems, etc.—any time the potential loss[42] avoided is greater than the cost of prevention.[43] Aggregating

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39. 2 WILLIAM B. RUBENSTEIN, HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 5:49 (4th ed. 2002), *available at* Westlaw CLASSACT § 5:49.

40. *Cf.* Coffee, *supra* note 37, at 1536–37.

41. Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105 (2006) ("[C]ompensation is not really an important goal in small-claims class actions."). True, the business world may no longer fear Melvyn Weiss, but they certainly fear the lawyers who will take his place at the plaintiffs' bar.

42. By potential loss I mean the amount a company would be liable in tort multiplied by the probability that a court would find the company liable.

43. *See* Jeffrey G. Casurella & John R. Bevis, *Class Action Law in Georgia: Emerging Trends in Litigation, Certification, and Settlement*, 49 MERCER L.

claims allows for more in-depth research and investigation by plaintiffs' attorneys, which improves the quality of plaintiffs' cases and therefore increases plaintiffs' chance of success. This increased chance of success increases a company's potential losses. As a result of increased potential losses, a company will naturally increase its level of safety precautions. Companies understand that they stand to incur large and sometimes bankruptcy-inducing costs through defense of class action claims.[44] In this way, companies are deterred from engaging in the behavior that would otherwise result in a class action.

Class actions also produce deterrence by forcing companies to internalize their residual injury loss—the loss that cannot be avoided through the use of optimal care. As a result, companies are compelled to moderate their levels of dangerous activity and the concomitant levels of risk.[45] When companies are unable to avoid losses even through optimal care, they are dissuaded from engaging in inherently dangerous acts in the first place. Similar to the activity of "blasting," which is subject to strict liability, increased liability will generally limit availability to the public at large—only those who truly need to blast (and can afford to do so) will be able to employ this inherently dangerous yet necessary method of demolition.[46]

REV. 39, 70 (1997) ("[T]he legacy of product liability class action lawsuits has been to remove harmful products from the stream of commerce and to improve upon the designs for safer substitutes."); Kelly Buechler, Note, *Solicitation in Class Actions: Should Class Certification be Denied Because Class Counsel Solicited the Class Representative?*, 19 REV. LITIG. 649, 667–68 (2000) ("[L]arge verdicts sometimes associated with class actions give would-be defendants economic incentive to invest in risk-management strategies that result in producing a safer good or service . . . . The larger the potential judgment, the more a company will be willing to spend on safety strategies.").

44. For examples of litigation costs driving companies out of business in the weapons industry, see Amanda B. Hill, Comment, *Ready, Aim, Sue: The Impact of Recent Texas Legislation on Gun Manufacturer Liability*, 31 TEX. TECH L. REV. 1387, 1413–14 (2000), and William L. Mccoskey, Note, *The Right of the People to Keep and Bear Arms Shall Not Be Litigated Away: Constitutional Implications of Municipal Lawsuits Against the Gun Industry*, 77 IND. L.J. 873, 902 & n.218 (2002).

45. *See* Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 24–25 (1980).

46. *See, e.g.*, Spano v. Perini Corp., 250 N.E.2d 31 (N.Y. 1969).

Emphasizing that class actions serve as a deterrent neatly disposes of many of the general criticisms directed at class actions. The value of a class action must not be judged by its economic benefits alone. Class actions, much like criminal law, frequently serve, to a certain degree, the public good. When class actions function in their intended role as aggregators of negative value claims, much of the criticism of overdeterrence disappears. Non-government lawyers, in conjunction with the aggrieved members of the public represented in the class, effectively serve as private attorneys general championing the public good in conjunction with their own compensation interests.

If the costs of goods increase in the process, they will do so no more than they would if the government alone pursued public vindication through administrative action. Evidence shows that administrative agencies frequently operate with knowledge of pending or potential class actions and adjust their punishments accordingly so as not to overdeter.[47] Private, non-governmental class actions thus reduce the burden on administrative agencies and confer a public benefit (deterrence) without the use of taxpayer dollars.

Courts have long endorsed class actions' value as a deterrent—many have suggested that class actions' deterrent value alone validates their usage.[48] The Seventh Circuit, for example, has previously accepted that the desire to deter illegal activities can outweigh the manageability problems of class actions.[49] The Supreme Court has also recognized that certain actions should proceed because they are conducive to the public good.[50] For example, in *Farrar v. Hobby*[51] the Court observed that the attorney fee provisions in civil rights statutes are not for the benefit of lawyers, but rather are "tool[s] that ensure[] the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory."[52]

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47. *See* Gilles & Friedman, *supra* note 41, at 157.

48. *See, e.g.*, Simer v. Rios, 661 F.2d 655, 676 & n.43 (7th Cir. 1981).

49. *See id.*

50. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 429 (1963) (noting that litigation is "a form of political expression" which serves to promotes ideas conducive to the public good).

51. 506 U.S. 103 (1992).

52. *Id.* at 122 (O'Connor, J., concurring).

Additionally, courts recognize that forcing wrongdoers to accept full financial accountability helps to fulfill the private attorney general role envisioned by the creators of the modern class action mechanism.[53] Financially, the deterrent benefit of aggregate claims over individual action is obvious.

B. Applying the Criteria to Cost-Benefit Analyses

This section examines several criticisms of class actions that courts have used to justify adopting cost-benefit analysis and concludes that courts should not accept these criticisms as justifications for such an approach. A cost-benefit approach at the certification stage thwarts the proper ends of class action litigation: compensation and deterrence. The criticisms outlined below must be dispelled because they distract courts from the proper ends of class action litigation. Where courts justify cost-benefit analyses in class certification decisions based on these criticisms, they fail to keep in mind the general goals of class actions. In many instances, what critics have identified as harms actually increase the ability of class actions to produce deterrence and compensation. These criticisms are also addressed in order to show that the harms such criticisms attempt to demonstrate are actually benefits, in that they are conducive to deterrence and compensation. Thus, when courts justify cost-benefit analyses at the certification stage based on these criticisms, they undermine the goals of compensation and deterrence by confusing harms with benefits.

1. *De Minimis* Harms

The criticism that typical class action litigants have suffered *de minimis* harms provides no justification for using cost-benefit analyses in certifying class actions. This criticism is misguided because all injuries warrant legal redress under the legal

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53. *See, e.g.*, Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980) (describing the class action mechanism as "a natural outgrowth of the increasing reliance on the 'private attorney general' for the vindication of legal rights"); Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943) (coining the term "private attorney general"), *cert. granted*, 319 U.S. 739 (1943), *vacated as moot*, 320 U.S. 707 (1943).

system, no matter the size of the injury. Furthermore, data reveal that this perception of class actions is empirically false.[54]

Whether an individual can "afford" to absorb the harm has no legal bearing on whether the individual should go uncompensated. If an individual were robbed for a sum of a few dollars, he might be unconcerned about the actual sum lost but might nonetheless desire legal redress. The "*de minimis* harms" criticism presumes that the only harm caused is monetary and that the only compensation is in dollars and cents.[55] But the law is replete with cases where justice has been sought, perhaps for solace or simply to make a point, despite the fact that the financial recovery is insubstantial.

Moreover, empirical data show that median recoveries for class actions are in the realm of $300 to $500—hardly a *de minimis* sum.[56] One would certainly be upset if he lost $500 in the street or in the house, and it is reasonable for someone wrongfully deprived of $300 or $500 to expect the legal system to provide compensation. These data, coupled with the public perception of many class actions as *de minimis*, indicate that judges are similarly likely to underestimate the value of class action recoveries in the early stages of litigation. The strong potential for undervaluing claims demonstrates that employing cost-benefit analysis at the certification stage will tip the scales in favor of the defense.

Allowing companies to avoid litigation of harms that are small individually but large in the aggregate is anathema to the deterrence objectives of the class action mechanism.[57] The law should not give companies the incentive *not* to adopt protective

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54. *See* THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 112 (1996) (showing that median class recoveries are between $315 and $528).

55. See *infra* Part III(A)(1) for a discussion of the value of equitable relief in class actions.

56. *See* WILLGING ET AL., *supra* note 54.

57. *See* Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 146 (2001) ("The deterrence capacity of the legal system would be limited to those instances in which defendants visited substantial harm upon individuals, leaving actions that cause small harms to large numbers of persons . . . unrestricted by private law.").

measures, which is the case when companies are not held fully accountable when they cause large-scale harms.[58] If plaintiffs suffering small harms are precluded from employing the class action mechanism, consumers, especially poor ones, will frequently have no effective recourse absent government action. Similarly, companies, especially those who produce low-cost products or pander to low-income markets, will largely operate with impunity. Failure to apply the law in cases of *de minimis* harms thus completely undermines the deterrent effect of the mechanism.

2. Problems of Deterrence

a. Overdeterrence

Critics respond to the deterrence rationale for class actions by arguing that class actions have the potential to overdeter. Critics contend that class actions produce more than optimal damages because they often "piggyback" on public enforcement.[59] Such

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58. *See supra* note 9 and accompanying text.

59. It is relevant at this point to mention the role of plaintiffs' attorneys, who can benefit the public by acting as private attorneys general, stepping in to pick up the slack of public enforcement organs. Several commentators have pointed both to the inadequacy of public funds—and the inadequate abilities of public enforcers—in pressing for a system that allows for private attorneys general. Lawyers who work as private attorneys general can supplement public law enforcement in at least two ways. First, they may be better at identifying or pursuing wrongdoing. Because of limited public resources, political pressures on public agencies, or even a simple lack of human capital, public enforcers may be reticent to pursue some wrongs. Second, private attorneys general may supplement public law enforcement by "piggy-backing" on public enforcement. If plaintiffs' attorneys are risk-averse (as lawyers notoriously are), they may in some cases be wary of pursuing wrongdoers based on the uncertainty of their success. However, if public enforcers have taken a case, the private attorneys are reassured of the merits of the case, and they are able to free-ride on the investigation that the public agency has done. Bearing in mind that government agencies have limited enforcement capabilities both in terms of liquid and human capital, private attorneys general can increase the utility of the groundwork investigation done by public agencies by providing the necessary human capital to successfully and adequately prosecute the claims. This also produces the added public good of preserving the scarce resources of state and local governments, who avoid the costs of prosecuting the claims to their fullest extent.

critics allege that the plaintiffs' bar takes the results of public investigative action (for example, as part of SEC, FTC, or DOJ investigations) and uses them to begin their own private actions.[60] Following administrative action with class actions, according to critics, yields only excessive penalties rather than increased deterrence. The proposed cost-benefit analysis amendment was suggested, at least in part, to permit judges to use common sense in their certification decisions.[61] For example, if a parallel governmental action is being pursued, judges may conclude that the "benefits" of the proposed class action are diminished. That being said, if overdeterrence is truly a problem then cost-benefit analysis could serve as an effective solution. Critics assume that overdeterrence is a problem of the class action mechanism; research and common sense, however, show otherwise.

It also warrants repeating that numerous state and federal laws explicitly or implicitly rely on private attorneys general for their execution. For example, Congress exacted the 1995 Private Securities Litigation Reform Act in part based on testimony that individuals "might well be able to generate substantial net benefits by acting as litigation monitors." Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2089 (1995). Private litigation can therefore "supplement regulatory enforcement by administrative agencies that are under-funded, susceptible to capture by the subjects of their regulation, or politically constrained." Hensler & Rowe, *supra* note 57, at 137. It is unrealistic to imagine that Congress could amend countless laws to provide for private enforcement of small claims (which would be necessary if cost-benefit calculations were added to class action certification decisions). Congress has given explicit approval to the types of claims sought to be precluded by the proposed rule. Furthermore, Congress has likely relied on the presence of the private enforcement mechanism to ensure the effectiveness of its legislation.

60. *E.g.*, David Rosenberg & James P. Sullivan, *Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law*, 2 J. COMPETITION L. & ECON. 159, 161 (2006) (foreseeing a significant risk of class actions over-enforcing antitrust laws because "many antitrust class actions merely 'piggy-back' on public enforcement outcomes and work product"). For a thorough comparison of privately instigated cases and piggy-back cases, see Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared*, 74 GEO. L.J. 1163 (1986).

61. *See* Proposed Amendments, *supra* note 6.

The central issue, of course, is "whether the penalties inflicted in a follow-on private class action, after government agents have already imposed some sanction, cause the corporate wrongdoer to internalize more than 100% of the social costs of its actions."[62] This is doubtful. Government enforcement often proceeds with knowledge of potential or ongoing class actions,[63] and government agencies do take notice of concurrent private class actions in determining the appropriate sanctions in particular cases.[64] Finally, even when public and private actors pursue enforcement actions, "most piggyback class actions . . . settle for a modest percentage of the overall loss imposed, even factoring in government penalties."[65]

Another overdeterrence concern is the filing of non-meritorious actions by unscrupulous plaintiffs' lawyers who know all too well that they will likely be able to extract (or more accurately, extort) something from a corporation just to go away, even in cases of non-meritorious claims.[66] Perceived costs, even for defending non-meritorious claims, are often enough to make companies bow to unscrupulous lawyers.

This is yet another situation in which perception fails to meet with reality. Motions to dismiss, for summary judgment, and to quash class certification, for example, are available to aid defendant companies in avoiding non-meritorious suits.[67] Furthermore,

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62. Gilles & Friedman, *supra* note 41, at 157.

63. *Id.*

64. *Id.* at 157–58.

65. *Id.* at 158.

66. *See* Joseph A. Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 961, 969–70 (1994) ("[P]rivate class action litigation involves a number of 'lower-quality' lawsuits . . . which serve as a basis for negotiating settlements with defendants unwilling to bear the risks and costs of a trial on the merits. Private parties may, for example, rationally pursue claims that have a relatively low probability of success because defendants have an incentive to settle in order to avoid the costs of defense . . . ."); Hensler & Rowe, *supra* note 57, at 137–38. *But see* 5 RUBENSTEIN, NEWBERG & CONTE, *supra* note 39, at § 15.29 ("[M]ajor factors in the defendant's favor far outweigh any incentives for class counsel to commence a frivolous class action for damages.").

67. HENSLER ET AL., *supra* note 7, at 475; THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL

if a lawsuit is truly meritless, defense attorneys always have the option of seeking Rule 11 sanctions against plaintiffs' attorneys. There is no evidence to suggest that defendants have been unsuccessful in pursuing such adjudicative action when warranted.[68] As a result, one should not expect defendants to roll over and offer up sums simply to make class actions go away. Rather, one should expect them to meet class action claims with motion practice and common sense, cost-efficient action. It seems, then, that this fear is overstated.

b. Underdeterrence

Other critics assert that companies and plaintiffs' lawyers collaborate to create settlements that produce large attorney fees for class counsel but leave the class members with an inadequate recovery.[69] From a deterrence standpoint, this is of great concern because it would indicate underdeterrence. If companies are colluding with class counsel to lower their total payout, they are not forced to internalize the total cost of their wrongdoing. Critics would argue that cost-benefit analysis could prevent cases from

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RULES 8 (Fed. Judicial Ctr. 1996), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$File/rule23.pdf. Another study of class actions showed that out of seventy-three uncertified class actions, thirty-two were dismissed, nineteen resulted in summary judgment for the defendant, and none were litigated. Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 378 (1988).

68. *Cf.* Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 2 (2002) (describing the "chilling effect" of Rule 11 sanctions in federal civil rights suits).

69. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 536 (1991) (arguing that inherent in class actions is "a significant possibility that litigation decisions will be made in accordance with the lawyer's economic interests rather than those of the class"); Hensler & Rowe, *supra* note 57, at 138 ("[S]ome defendants who face stronger claims may seek out plaintiffs' attorneys who are willing to settle such claims at less than their true value in exchange for fees that arguably are more generous than they deserve . . . ."). Indeed, this is not a new concern. *See, e.g.*, Pattillo v. Schlesinger, 625 F.2d 262, 265 (9th Cir. 1980) ("[T]his court cannot be unaware of the fact that the principal beneficiaries of the class action would be plaintiffs' attorneys.").

being certified in cases where judges "smell a rat." The vague nature of the cost-benefit analysis and the wide array of factors it can take into account could foreseeably give judges the leeway they need to prevent certification when it is apparent that abusive lawyers are running the show.

In reality, though, defendants have little to offer class counsel in the way of "under-the-table" negotiation. No jurisdiction allows defendants and plaintiffs' counsel to agree on the amount of attorney fees to be paid from the settlement fund.[70] Instead, class counsel fees are set by courts.[71] Additionally, there is "[no] merit to the notion that defendants are selling a promise to remain silent and not contest the fee application. They will remain silent anyway. They have no dog in that hunt."[72] Thus, there is little reason to fear that class actions will produce a marginalized deterrent effect by allowing class counsel to settle at the expense of the class.

As it stands then, class actions serve as strong deterrents of corporate wrongdoing, largely without the shortfalls of overdeterrence or underdeterrence perceived by critics. Cost-benefit analyses restrict class actions to situations where substantial harms have occurred. By weeding out small but meritorious claims, cost-benefit analyses harm the sanctity of the class action mechanism by stymieing its role as a deterrent. So long as the harms caused are not catastrophic, defendants can use cost-benefit analysis at the certification stage as a counter-punch in order to avoid having to answer to otherwise meritorious claims for injuries they have caused. Furthermore, there is no evidence to suggest that cost-benefit analysis will help eradicate the presence of greedy lawyers in the realm of class action litigation more so than other means already available to defendants (e.g., summary judgment, motions to dismiss). The best interest of plaintiffs' lawyers goes hand-in-hand with the best interests of the class members they represent: when litigation is successful, they both stand to benefit.

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70. Gilles & Friedman, *supra* note 41, at 160.

71. *See id.*; *see also* Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1970 (2002).

72. Gilles & Friedman, *supra* note 41, at 160.

3. Increased Costs of Consumer Goods

Proponents of cost-benefit analysis praise its ability to prevent increases in consumer prices by weeding out small claims. Whether class actions increase the cost of consumer goods, however, is irrelevant to whether courts should use cost-benefit analysis when deciding whether to certify a class. As the following section demonstrates, the comparatively minor side-effect of judgments on consumer prices makes the current class action preferable to foreseeable alternatives.

Critics who fault the class action for its residual effects on consumer prices are off base. By arguing against compensation, these critics mistake the solution for the problem. Stretched to its logical conclusion, this criticism would seem to preclude any lawsuit that alleges wrongdoing by a public corporation because litigation costs are necessarily incorporated into consumer prices.[73] Few, however, would argue that corporations should have free reign to inflict damages on the public at large with impunity. While it is true that class actions increase the price of consumer goods, it does not necessarily follow that harmed individuals ought not to be compensated. It would be legally irrelevant for an individual to state as a defense in tort, "I may have committed a wrong, but paying for it hurts my bottom line, so I'm not culpable."[74] The same is and should remain true for corporations.

More importantly, the deterrence model shows that the assertion that class actions increase consumer prices more so than traditional litigation is generally untrue. Because companies fear litigation, they are naturally deterred from producing harmful products or engaging in harmful business practices when the costs of potential litigation outweigh the costs of increased safety measures.[75] Class actions thus have the capacity to decrease the costs of

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73. *See* Ronen Perry, *It's a Wonderful Life*, 93 CORNELL L. REV. 329, 357 (2008) ("Negating liability by reason of the anticipated increase in the prices of products produced or services supplied by the tortfeasor would sound the death knell for products liability and professional liability . . . .").

74. *See, e.g.*, Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 851 (2003) (identifying cases in the Title VII context holding that cost of compliance is not a valid defense).

75. *See generally* Coffee, *supra* note 37.

consumer goods.[76] Any litigation costs will be reflected in consumer prices. Class actions may amplify the potential losses associated with litigation, but this merely incentivizes companies to create safer products to stay cost-competitive, which in turn results in less litigation.[77] Indeed, class actions may increase prices for certain products that can cause harm, but they also can lower prices by inducing companies to make safer products.[78] In a competitive marketplace, companies are forced to make safer products to avoid litigation so that their pricing can remain in line with that of their competitors.[79]

Class actions help make this possible. Cost-benefit analyses cripple this function by limiting the potential financial threats to companies associated with litigation. In the end, litigation will not be avoided as critics believe. Instead, future litigation will continue unconstrained if companies are not given economic incentive to increase safety.

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76. *See* David G. Owen, *Products Liability: Principles of Justice for the 21st Century*, 11 PACE L. REV. 63, 73 (1990) (asserting that, in the products liability setting, "judgments tend to raise the cost of business for manufacturers, and product use . . . should tend to be deterred to the extent that the increased costs are passed along to consumers as higher prices"). But there is no need to limit this argument to product liability cases. The important point is that individuals can be deterred from buying a relatively more-costly product, where the increase in cost is the result of litigation costs and damages payments being passed on to consumers. If consumers are deterred from buying expensive products that incorporate the costs of prior litigation, then the threat of liability induces companies to create safer products because the production of unsafe products will force them to increase their prices. The companies are therefore deterred from creating unsafe products due to the market disadvantage their manufacture can produce.

77. *Id.*

78. *Id.*

79. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 166 (3d ed. 1986) (recognizing that products liability increases the costs of dangerous products, leading consumers to substitute safer—and thus cheaper—products); Susan W. Brenner, *Toward a Criminal Law for Cyberspace: Product Liability and Other Issues*, 5 U. PITT. J. TECH. L. & POL'Y 2, 68 (2005) ("[P]roducts liability doctrines specifically developed to give manufacturers incentives to design safer products by providing a cause of action to injured consumers."). Implicit in this argument is the premise that manufacturers are unable to pass increased costs on to consumers in the form of higher prices. If manufacturers are able to do so, then liability would not incentivize them to create safer products.

III. THE HARMS OF COST-BENEFIT ANALYSIS

Cost-benefit analyses are not only unsuitable for achieving the ends of compensation and deterrence, but are also impossible to implement in practice. This Part highlights the vagueness of cost-benefit analyses in the context of class certification. The limitless permutations based on specific valuations of the public and private benefits of class certification will inevitably lead to inconsistency.[80] Based on the number of variables that a court must (1) decide to use or not to use and (2) balance once the factors have been selected, one can expect wildly different results based on the judge who hears the motion for certification. As a result, what is "worth it" to one judge may (and probably will) be vastly different from what is "worth it" to another.[81] Such a vague standard has enormous potential for arbitrary judicial action.

A. The Difficulty of Determining Benefits and Costs

It is highly doubtful that judges will be able to calculate, with any measure of reliability or consistency, the costs and benefits of a class action at the certification stage. The issues (and even the potential size of the class) at this stage are so unclear that they preclude accurate estimation of the ultimate costs and benefits of the litigation should the suit proceed as a class action.

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80. The 1996 proposed rule was likewise unhelpful. It simply stated that a judge should consider "whether the probable relief to individual class members justifies the cost and burdens of class litigation." *See* Proposed Amendments, *supra* note 6.

81. Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 940 (1998). Still, judges are forced to make discretionary decisions all the time. Good procedure must undoubtedly rely on sound judicial discretion in myriad circumstances, whereby judges fill in the gaps of rules that are by nature general. However, the potential permutations that are made possible through all the moving parts inherent in a determination of class action costs and benefits make reliance on discretion unwise. Part of what makes complex litigation complex is all these moving parts; what may be safely left to sound judicial discretion in "ordinary" litigation may not necessarily be safely left to discretion in "complex" litigation, precisely because even sound discretion may lead to vastly different results.

1. Determining Benefits

The difficulty of determining the benefits that class certification would produce suggests that cost-benefit analysis is not a useful tool in class certification decision-making. First, a determination of probable relief requires courts to guess at what form of compensation (and subsequently, how much) will be available following a trial on the merits. In the words of Professor Edward Cooper:

> This will lead to wrangling over probable damages. Damages often cannot be estimated without considering the merits of the claim—different theories of [valuation] will support different measure of recovery. Experts will be called by all parties to give mutually contradictory theories and estimates. Defendants will demand discovery of individual injuries. Plaintiffs will need discovery to obtain information about probable class injuries that is available only to defendants . . . .[82]

Courts have not expressed any criteria for deciding which costs or benefits to consider,[83] and there is a total lack of established procedural guidelines for how to treat benefits once they are ascertained.[84] For instance, once a dollar value has been placed on the individual claims, should a court base its valuation on the mean recovery of the class, the median recovery of the class, or the probable recoveries of the class representatives?

Yet another difficulty in determining possible benefits is the difficulty of measuring the value of non-monetary benefits, such as injunctive relief or the value of deterrence to society. The dollars-and-cents aspects of valuing the proposed litigation may be said to be inaccurate at the certification stage, but valuing the intangible benefits is even more difficult, especially so early in the

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82. *Id.*

83. *See supra* note 15; *see also* Proposed Amendments, *supra* note 6.

84. *Cf.* Chris H. Miller, *The Adaptive American Judiciary: From Classical Adjudication to Class Action Litigation*, 72 ALB. L. REV. 117, 144 (2009) (advocating cost-benefit analysis yet conceding that "[cost-benefit analysis] is certainly vulnerable to subjective and inconsistent applications").

course of litigation. For small-sum claims, which are often the target of stringent cost-benefit analyses, the majority of the benefit to litigants and consumers often is not the damages awarded.[85] Rather, the benefit may come in non-monetary form such as a permanent injunction preventing the defendant from committing future bad acts.[86] Therefore, a workable cost-benefit analysis would need to reflect accurately the value of such intangible benefits. This is difficult indeed.

Moreover, the idea of affixing a "value" to the non-monetary benefits flowing from litigation is absurd. For instance, the traditional rule in equity allowed for equitable remedies only where the remedy at law (a damages award) was inadequate.[87] The issuance of an injunction required the plaintiff(s) to have either suffered irreparable harm, or to be facing an imminent risk of it.[88] But the very thing that makes the harm irreparable is the fact that the damage lacks inherent monetary value, or cannot be appraised with sufficient confidence to justify a damage award. Thus, injunctions and other equitable remedies are by their very nature awarded in lieu of damages precisely because the loss cannot be valued. As a result, the idea of valuing equitable remedies or other intangible benefits during the certification phase—or any other phase, for that matter—is to misunderstand the nature of these remedies. Cost-benefit analyses will therefore undoubtedly misjudge the non-monetary benefits of litigation.

2. Determining Costs

The difficulty of determining what constitutes the costs of class action litigation, and subsequently measuring these costs, similarly argues against using cost-benefit analyses in deciding whether to certify classes. For instance, courts might consider the burden on the court system in their analyses; however, how to eva-

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85. *See, e.g.*, Coffee, *supra* note 36.

86. For instance, in school desegregation cases the value of the litigation to the plaintiffs may come through remedial *action*, not through remuneration for past wrongs. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70 (1995); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

87. *See, e.g.*, EBSCO Indus., Inc. v. Lilly, 840 F.2d 333 (6th Cir. 1988); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386 (7th Cir. 1984).

88. DAN B. DOBBS, LAW OF REMEDIES § 2.9(2) (2d ed. 1993).

luate this burden or even whether it should be considered at all is unclear.[89] Similarly, courts must decide whether and how to handle the issues of discovery costs and counsel fees.[90] The traditional subjects of complex litigation have the potential to produce incredible discovery costs,[91] and these costs can be difficult to determine at this early stage in the litigation.[92] In the case of counsel fees, courts will have to decide how counsel fees will be determined if the class is certified. Naturally, the defense will produce a high estimate, and the plaintiffs' attorneys will produce a low estimate.[93] Once the class is certified, however, they will undoubtedly work against their arguments from the certification analysis. Plaintiffs' counsel will argue for large fees, and the defendants will attempt to minimize these fees. This result, which is indicative of the whole cost-benefit paradigm, is unjustifiable and nonsensical. Weighing attorney fees is also problematic because plaintiffs' fees are most often awarded as a percentage of the funds awarded to the class.[94] Unless the judge knows the likely amount of the class recovery, he will be unable to determine this number accurately.[95] Attorney fees, to be sure, are just the tip of the iceberg. Judges must consider and valuate countless other variables advanced by both sides.

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89. *See supra* note 15. The same can be said of the Proposed Amendments, *supra* note 6.

90. The list of potential costs could continue indefinitely. For example, how will (and how well will) courts calculate the costs with respect to negative publicity, slowed research and development, changes in sales, effects of litigation on share prices, et cetera? I thank Dave Weiss for pointing out these additional costs.

91. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007); JAMES HAMILTON, PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995: LAW & EXPLANATION 72 (1996) (contending that exorbitant discovery costs can force defendants to settle unreasonable securities class actions); Rakesh Shukla, *The Case for Electronic Records Management*, FIN. EXECUTIVE, Oct. 1, 2004, at 50, *available at* 2004 WLNR 22474032 (noting that merely retrieving records from backup tapes in the fen-phen litigation cost almost two million dollars).

92. *See infra* Part III.B for a possible solution to this problem. However, my analysis shows that this solution creates problems of its own.

93. *See* Cooper, *supra* note 81, at 940.

94. *See* Hensler & Rowe, *supra* note 57, at 143.

95. This of course would require a preliminary consideration of the merits. The undesirability of such is considered *infra* Part III.B.

One plausible solution to this conundrum would be to focus only on the costs of providing notice and distributing class relief. This solution, however, is flawed. Only if these administrative costs outweigh the aggregate relief would denial of class certification be warranted.[96] It may be easier for courts to determine the costs of notification and distribution of relief, but those must still be weighed against the probable relief. As we have already seen, that determination by itself can become a prohibitively difficult calculation, such that there will never be a reliable figure to which the costs of notice and distribution can be compared. Additionally, doing so necessitates an estimation of the total class size, which in turn yields a calculation that is even more inaccurate.[97] Without a reliable estimate of the number of potential claimants, even the comparatively simple task of calculating the costs of notice and distribution becomes impossibly unreliable.

The practical difficulties of this proposed "solution" demonstrate the problems of evaluating costs and benefits at the certification stage. Any court employing a cost-benefit analysis will have to take numerous complicated factors into account. These factors make arriving at a reasonably accurate figure for any one cost or benefit difficult. Achieving any measure of accuracy in the aggregate therefore poses seemingly intractable problems.

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96. The *necessity* of notification itself is subject to a cost-benefit analysis under Rule 23(c)(2), which requires notice to be sent only to those class members who can be identified with "reasonable effort." Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Actions and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 29 (1991).

97. In the case of toxic torts, for example, the number of claimants who will ultimately come forward will be unknown at the class certification phase (indeed, it may be unknown until several years or even decades after the litigation itself). *See* Georgine v. Amchem Prods., Inc., 83 F.3d 610, 633 (3d Cir. 1996) (recognizing that the "period between exposure to asbestos and the onset of [mesothelioma is] typically between fifteen to forty years"); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1351 (1995) ("[M]any (and sometimes virtually all) class members [in mass tort actions] are 'future claimants'—that is, persons who have not yet experienced any symptomatic illness or disease, but rather share only a statistically enhanced risk of future illness or injury because of their exposure to a toxic product or process.").

B. A Premature Judgment on the Merits

The use of cost-benefit analysis at the certification stage requires a consideration of probable relief. Specifically, the benefits aspect of the analysis speaks in part to the gains the plaintiffs will achieve by bringing the class action. Probable relief, in turn, requires a consideration of the probable merits of the class claim. The appeal, of course, is that peeking at the merits of the claim weeds out "bad" claims, saving significant judicial resources. Similarly, cost-benefit analyses can also help to prevent judicial blackmail, whereby companies are forced to settle even meritless claims because of the potential effects of an adverse judgment.[98] However, due to the indeterminacy of the merits at the class-certification stage, courts should avoid evaluating the merits for the purposes of certification decisions.

One problem with peeking at the merits of a case at the certification stage is that it necessarily occurs so early in the proceedings that it is difficult for courts to consider accurately legal claims in the absence of discovery. Recent case studies show that disagreements over what is even at issue in legal disputes may persist late into the litigation.[99] Therefore, determining the probable relief as directed under the proposed rule would be challenging, and even the best estimate would include a large amount of uncertainty. Analysts studying this dilemma note that often, "[v]iewed from one perspective, the claims appear meritorious and the behavior of the defendants blameworthy, but viewed from another, the claims appear trivial or even trumped up, and the defendant's behavior seems proper."[100] Judges will be faced with the same type of broad discretion that they face when considering damages after a trial, but here their decision will necessarily be much less informed.

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98. *See* Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945, 961 (2003) ("Inevitably, defendants are forced to settle [class action] claims to avoid massive economic risks . . . .").

99. *See* HENSLER ET AL., *supra* note 7, at 416–24.

100. *Id.* at 417 (discussing the claims underlying ten class actions reviewed as part of the study). In the words of the authors, "[W]e felt like a member of the audience at a production of the Japanese drama 'Rashomon.'" *Id.*

Preliminary considerations of the merits are inaccurate largely because of the lack of discovery. Because "merits discovery in class suits usually is postponed until after certification . . . information relevant to valuation [is] unavailable in the pre-certification stage."[101] Merits discovery is informative on issues of class conflict and the need for subclasses.[102] Because this information is unavailable or incomplete at the certification stage, the accuracy of cost-benefit certification decisions is further undermined. Because certification is determined with regard for information other than the merits of the underlying case, at least one scholar predicts that "the pre-certification stage of class suits . . . [will produce] a cacophony of distractions from the merits and estimation of verdict value."[103] Those factors that have little relation to the merits would serve as instruments of obfuscation, further diminishing a judge's accuracy in evaluating a claim's merits.

IV. CONCLUSION

Applying cost-benefit analysis to the expected merits and drawbacks of pursuing the class action could reduce court costs for the simple reason that fewer class actions would ultimately be certified, or in the case of opt-in provisions because the classes would be smaller. This gain, however, would come at the expense of the public and private goods that were the *raison d'être* for Rule 23: compensation and deterrence. Given the inherent inaccuracy of pre-discovery decisions based on the merits, cost-benefit certification decisions are doomed to be fatally misinformed. Meritorious lawsuits will be disposed of and class action defendants will unfairly benefit by keeping useful information hidden and obfuscating the issues. Also, the aggregating nature of class action suits, which makes many individually non-feasible claims possible, along with the compensation that follows, is lost in the shuffle. If compensation and deterrence are to be served, cost-benefit analysis has no place as a basis for certification decisions.

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101. *See* Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 TENN. L. REV. 1, 3 (2001); *see also* MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.14 (2004) ("Courts often bifurcate discovery between certification issues and those related to the merits of the allegations.").

102. Hazard, *supra* note 101, at 3.

103. *Id.*