No. 09-893

In The
Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT and LIZA CONCEPCION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CIVIL PROCEDURE AND COMPLEX LITIGATION PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

WILLIAM B. RUBENSTEIN
HARVARD LAW SCHOOL*
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 496-7320
rubenstein@law.harvard.edu

Counsel of Record and Amicus

[Additional *Amici* Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

KEVIN M. CLERMONT, Robert D. Ziff Professor of Law
CORNELL LAW SCHOOL*

JOHN C. COFFEE, JR., Adolf A. Berle Professor of Law
COLUMBIA LAW SCHOOL*

THEODORE EISENBERG, Henry Allen Mark Professor of Law
CORNELL LAW SCHOOL*

HOWARD M. ERICHSON, Professor of Law
FORDHAM LAW SCHOOL*

DEBORAH R. HENSLER, Judge John W. Ford Professor of Dispute Resolution
STANFORD LAW SCHOOL*

JOHN LEUBSDORF, Professor of Law and Judge Frederick B. Lacey Scholar
RUTGERS LAW SCHOOL – NEWARK*

ARTHUR R. MILLER, University Professor
NEW YORK UNIVERSITY SCHOOL OF LAW*

JUDITH RESNIK, Arthur Liman Professor of Law
YALE LAW SCHOOL*

DAVID L. SHAPIRO, William Nelson Cromwell Professor of Law, Emeritus
HARVARD LAW SCHOOL*

CHARLES M. SILVER, Roy W. and Eugenia C. MacDonald Endowed Chair in Civil Procedure
THE UNIVERSITY OF TEXAS SCHOOL OF LAW*

Amici

---

* *Law school affiliations for identification only*

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

ARTICLES, BOOKS, AND TREATISES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*

The law professors named below teach and write about civil procedure and class action law. *Amici* are among the many scholars who have spent a considerable amount of time thinking, writing, and teaching about the issues before the Court. A partial list of their scholarship on these issues appears as an Appendix. Based on this expertise, and on careful review of this Court's decisions, *amici* argue that class actions serve critical social functions (Part I, *infra*) and that Petitioner and its *amici* have not presented a balanced picture of those functions in their briefs (Parts II & III, *infra*). *Amici* respectfully submit this brief so as to present to this Court a more balanced view of class action law and its importance within the American litigation framework.[1]

SUMMARY OF ARGUMENT

The contract in this case requires consumers to arbitrate disputes but prohibits class-wide arbitration. The lower courts found the class action ban unconscionable under California law. The question presented is whether the Federal Arbitration Act

[1] All of the parties in this case have consented to the filing of this brief. No counsel for any party to this case authored any part of this brief and, other than *amici* on whose behalf this brief is submitted and their counsel, no person or entity contributed money or services to the preparation and submission of this brief.

pre-empts the application of California's unconscionability doctrine in this context. If it does, companies could include class action bans in their contracts, effectively insulating themselves from class actions and limiting consumers with whom they deal to individual arbitrations.

Petitioner and its *amici* argue that the policy ramifications of this are salutary. They identify a series of purported problems with class actions and extrapolate to the conclusion that banning this procedural device is not only unproblematic but pro-consumer.

This characterization ignores nearly a half-century of this Court's jurisprudence and presents a skewed picture of class actions. The goal of this brief is to present a more balanced picture of the purposes of class actions than that presented by Petitioner and its *amici*. Part I does so by reviewing this Court's class action jurisprudence. That long-standing body of case law has recognized that class actions serve at least three important functions: compensation, deterrence, and efficiency. Class action practice is not without its problems, but few commentators short of Petitioner and its *amici* are prepared to throw the baby out with the bath water.

Parts II and III respond to the specific arguments that Petitioner's *amici* present against class actions. Part II addresses the Center for Class Action Fairness's contention that individual arbitration provides a better means of compensating consumers than class

actions. *Amici* show that the Center's brief offers no real support for this conclusion and that, in fact, the opposite conclusion is warranted – class actions are a far more comprehensive and efficient means of providing compensation to large groups of consumers, particularly in small claims situations, than is individual arbitration.

Part III addresses the Chamber of Commerce's argument that class actions do not deter wrongdoing. *Amici* show that the Chamber's brief offers no real support for this conclusion and that, in fact, the opposite conclusion is warranted – class actions are a far more comprehensive and efficient means of deterring wrongdoing, particularly in small claims situations, than is individual arbitration.

Taken together, the three Parts of this brief demonstrate that class actions serve important functions and that a rule enabling corporations to evade class-wide adjudication would have harmful public policy consequences.

ARGUMENT

I. CLASS ACTIONS SERVE IMPORTANT FUNCTIONS

The 1966 amendments to the Federal Rules of Civil Procedure introduced a new class action rule. In the succeeding 44 years, this Court has regularly acknowledged that class actions serve at least three critical functions: compensation, deterrence, and administrative efficiency.

A. Class Actions Provide A Means Of Individual Compensation

Nearly 40 years ago, this Court stated that where individual claims are for small amounts of money, the class action device is often the sole means by which individuals may receive compensation:

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. ***Economic reality dictates that petitioner's suit proceed as a class action or not at all.***

See Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 161 (1974) (emphasis added). Class actions further compensatory goals in a variety of ways.

1. *Class Actions Further Compensatory Goals By Enabling Litigation*. As this Court recognized in

Eisen, individuals have no practical means of bringing suit to be compensated for small harms because the cost of the lawsuit outweighs their individual recovery. The class action device solves this problem by aggregating many individual claims into a single suit and distributing the costs of representation across the entire claimant group. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

This Court has long recognized that, absent the class action device, a dispersed group of individual claimants typically will not be compensated for small harms:

> Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

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

2. *Class Actions Further Compensatory Goals By Creating Equal Incentives Between Plaintiffs and Defendants*. Even if one individual in a class has sufficient incentive to fund litigation, she nonetheless faces a significant disadvantage against a defendant that has harmed a large group of individuals. The defendant has massive resources and, because it potentially faces many similar claims, a disproportionate incentive to use those resources

against the single plaintiff. The individual plaintiff is therefore systematically disadvantaged in developing her case.[2] This is particularly problematic because:

> The type of injury which tends to affect simultaneously the interest of many people is also apt to involve immensely complex facts and intricate law, and redress for it is likely to involve expense totally disproportionate to any of the individual claims.

Harry Kalven, Jr. & Maurice Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

The class action device resolves this power imbalance by pooling the plaintiffs' claims so that the class as a whole may approximate the aggregated resources and incentives that the defendant possesses. This past Term, Justice Ginsburg reaffirmed this value of class action lawsuits, writing:

> When adjudication is costly and individual claims are no more than modest in size, class proceedings may be "the thing". . . . [D]isallowance of class proceedings severely shrinks

[2] *Abron v. Black & Decker (U.S.), Inc.*, 654 F.2d 951, 973 (4th Cir. 1981) ("Without the backing of a comprehensive class, individual plaintiffs or their lawyers will find it difficult to muster the resources and incentives sufficient to tackle industrial giants . . . We will observe classic applications of the strategy of divide and conquer.").

> the dimensions of the case or controversy a claimant can mount. . . .

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758, 1783 (2010) (Ginsburg, J., dissenting).[3]

Aggregation not only levels the playing field, it also reduces plaintiffs' overall fees and costs and hence enhances aggregate recovery.[4]

3. *Class Actions Further Compensatory Goals By Notifying Individuals of Potential Legal Claims and Enabling Their Easy Participation, Thus Ensuring A Wider and Fairer Distribution of Resources*. Class actions promote fair compensation to harmed individuals by providing potential class members with notice of their legal rights and by presuming membership in the class absent an affirmative request to opt out. Fed. R. Civ. P. 23(c)(2). As this Court

---

[3] In *Stolt-Nielsen*, this Court held that parties who agree to arbitrate disputes cannot be held to have agreed to class action arbitration, absent explicit consent. *Id.* The Court rested this decision on the important differences between individual arbitration and class action arbitration. In acknowledging these differences, the Court did not articulate any retreat from the prior holdings, discussed here, that acknowledge the various benefits of class actions.

[4] *See* Theodore Eisenberg and Geoffrey P. Miller, *Attorney's Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL L. STUDIES 248, 264 (2010) ("By aggregating smaller claims into a single larger action, economies of scale in legal services are achieved, which can be passed onto class members in the form of enhanced recoveries.").

recognized in *Shutts*, ignorance is a significant obstacle in the context of small claims litigation:

> The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution.

Shutts, 472 U.S. at 873.

The class action solves this problem by enabling one or a few class members who are aware of their rights to step forward and represent the class as a whole – while simultaneously ensuring that the class receive notice and be given the opportunity to participate in, or opt out of, those efforts. *See* Fed. R. Civ. P. 23(c); (e). It is this notice and opportunity to claim from a class action settlement or judgment that makes relief a reality for most class members in small claims situations. Absent a class action, few class members have either the knowledge or incentive to arbitrate or litigate individually, as this Court recognized in *Shutts*.

Because class actions enable wide participation of class members in aggregate settlements or judgments, compensation is spread more broadly throughout a class of similarly-situated consumers. With individual arbitration alone, a few may benefit but most will not; with class actions, a far wider group will benefit, ensuring a fairer distribution of compensation.

* * *

A system like AT&T's that prohibits aggregated processing sacrifices each of the compensatory functions of the class action: it provides relief to far fewer claimants, in a proceeding between unequal parties, leaving most class members not only uncompensated, but unaware that they even have legal claims.

B. Class Actions Deter Wrongdoing

This Court has long recognized that, in addition to their compensatory function, class actions deter misconduct by harnessing private attorneys general to assist in the enforcement of important public policies. As just discussed, where harms are small and dispersed, defendants can avoid liability because no individual has sufficient incentive to sue. By avoiding liability, defendants place the social costs of their actions on others. In enabling small-claim suits, class actions expose defendants to the risk of liability and thereby deter them from engaging in wrongdoing in the first place. Class actions thereby provide an important private supplement to public enforcement of social norms.

This point is illustrated in three steps: public enforcers are unable alone to deter all wrong-doing; private litigation generally, and class actions specifically, assist in this effort; private enforcement is not only an important complement to public enforcement, but often a superior deterrent mechanism.

1. *Class Actions Deter Because Public Agencies Are Unable To Enforce The Law Alone*. The Court has

recognized that public agencies cannot themselves detect and deter all wrong-doing. Private suits are an important complement to public enforcement. Forty-two years ago, the Court stated that:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.

Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401-03 (1968) (per curiam).

The class action lawsuit is an important component of this private enforcement. This Court has stated that the very genesis of the class action device was to help fill the public enforcement void:

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.

Roper, 445 U.S. at 339.[5]

---

[5] *See generally*, Kalven & Rosenfield, *supra*, 8 U. CHI. L. REV. at 720 ("[T]o impose upon public agencies the task of asserting civil sanctions on behalf of injured groups will require a substantial increase in size, personnel and expenditures.").

2. *Class Actions Deter By Using Damage and Fee Provisions To Enlist The Private Bar In Law Enforcement*. The common fund fee award, regularly recognized by this Court for well over a century,[6] is a mechanism for compensating attorneys whose work creates a fund for a class of claimants. It thereby provides the incentive that enables private attorneys to pursue small claims cases for groups of individuals. This Court has regularly acknowledged the important role that these "private attorneys general" perform in supplementing governmental law enforcement.[7]

In cases outside the common fund context, this Court has observed that Congress often enacts particular litigation rules – such as damage and fee provisions – to enable private enforcement actions that supplement governmental deterrence efforts. Writing of treble damage awards in antitrust cases, this Court stated:

> Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to

---

[6] *See Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trs. of the Internal Improvement Fund v. Greenough*, 105 U.S. 527 (1882).

[7] *See, e.g., Mills,* 396 U.S. at 396-97.

> the Department of Justice for enforcing the antitrust laws and deterring violations.

Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (emphasis added). *See also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975); *Newman*, 390 U.S. at 402; *Roper*, 445 U.S. at 338.

This Court recently recognized the deterrent function of class actions in discussing punitive damage awards. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). The Court stated that the award of punitive damages promotes deterrence by incentivizing litigation. *See id*. at 2621-22. Simultaneously, the Court acknowledged that class actions serve the same function – incentivizing litigation and achieving deterrence – such that the need for punitive damages may retreat where the class suit is available. *See id*. at 2633-34 & n.28.

3. *Class Actions Deter Because Private Enforcement May Be Superior To Public Enforcement*. In certain circumstances, private class actions may be better situated than public enforcement to deter wrongdoing.[8] Private enforcement may offer at least three advantages.

---

[8] *See, e.g.*, 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, 137 (Summer 2001) (noting that damage class actions can "supplement regulatory enforcement by administrative agencies that

(Continued on following page)

First, private enforcement may be more efficient than public enforcement.[9] *Second*, private enforcers may be less conflicted than captured public agencies.[10] *Third*, private enforcers may be less politically constrained than public enforcers.[11] Even if private enforcement is not superior to public enforcement, its very availability is important as the "sheer diversity of enforcers should generate more innovations than a monopolistic government enforcer would produce." Thompson, *supra*, 2000 U. ILL. L. REV. at 206.

* * *

In sum, this Court has long acknowledged that private adjudication generally, and class actions in particular, supplement the government's ability to deter wrongdoing. A system like AT&T's that prohibits class-wide lawsuits and arbitrations, sacrifices the deterrent function of the class action: it enables only

---

are under-funded, susceptible to capture by the subjects of their regulation, or politically constrained").

[9] *See* Mark A. Cohen & Paul H. Ruben, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167, 168-69 (1985).

[10] *See, e.g.*, Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 189-92 (2000) (identifying "scores of reports criticizing agencies for being too deferential in enforcing environmental laws").

[11] *See id.* at 191 ("[P]ublic under enforcement may be intrinsic to the political process by which laws are passed and implemented."); Warren F. Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075, 1093 (1980) (arguing that public enforcement may not be optimal because the legislature, the bureaucracy, and personal goals of career advancement shape the prosecutor's case selection).

individual arbitrations that few consumers have an incentive to pursue, the collective effect of which therefore has little deterrent value.[12] Individual arbitration alone does next to nothing to supplement the government's enforcement of legal norms.[13]

C. Class Actions Promote Administrative Efficiency

This Court has long recognized that aggregate litigation promotes administrative efficiency.[14] Just this past Term, the Court stated that Rule 23 is "designed to further procedural fairness and efficiency." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010). Class actions promote administrative efficiency in at least three ways: by avoiding a multiplicity of actions, by enabling

---

[12] *Abron*, 654 F.2d at 973 ("[T]he deterrent effect of across-the-board class actions challenging systemic discrimination cannot be matched by even a series of single-plaintiff actions or single-issue class actions.") (citation omitted).

[13] *See* Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 177 (2006) ("No matter how cost effective arbitration might be, such small claims simply are not viable as a matter of individual arbitration and stand as effective buffers against any kind of accountability . . . ").

[14] *See, e.g.*, *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 467 n.12 (1975) (acknowledging "the purposes of litigatory efficiency served by class actions"); *Am. Pipe Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974) (characterizing "efficiency and economy of litigation" as "a principal purpose of the [class action] procedure"); *Smith v. Swormstedt*, 57 U.S. 288, 302 (1853).

claim processing through representatives, and by preventing inconsistent adjudications.

1. *Class Actions Further Efficiency Through Consolidation*. Rule 23 prevents multiplicity of actions, and thus conserves both judicial and party resources, by enabling a single litigation through representatives on common issues of law and fact where joinder would be impracticable. As this Court has stated, "A federal class action is . . . a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *American Pipe*, 414 U.S. at 550. By resolving common legal and factual issues in a single adjudication, class actions utilize judicial resources more efficiently than piecemeal individual litigation.[15] Put simply, it is less expensive and time consuming to process one class action than many individual actions.

Class actions are particularly efficient when many similarly-situated individuals have claims sufficiently large that they would each pursue their own individual cases. In these situations, the courts are flooded with repetitive claims involving common

[15] *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("The class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23.").

issues.[16] It is less obvious that class actions serve efficiency goals in the small claims context because there is not a flood of litigation but a drought. Yet, as noted in the previous section, this drought is often the by-product of an inefficient under-enforcement of legal norms. By enabling litigation where there would otherwise be none, class actions create more work for the court system, but thereby generate important spillover effects – what economists call "positive externalities" – that serve to make the enforcement of law more efficient.[17] For example, the small claims class action creates norms that govern and deter defendant behavior in future cases.[18]

Where claims are many, class actions save scarce judicial resources by processing them in groups; where claims are few, class actions save scarce public enforcement resources by enabling private enforcement through aggregate claiming.

---

[16] *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 (1999) ("One great advantage of class action treatment of mass tort cases is the opportunity to save the enormous transaction costs of piecemeal litigation."); *Amchem*, 521 U.S. at 615.

[17] *See* William B. Rubenstein, *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006).

[18] *See Vasquez v. Superior Court*, 4 Cal. 3d 800, 808 (1971) ("A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices. . . .").

2. *Class Actions Further Efficiency By Enabling Litigation Through Representatives at Reduced Cost to Claimants*. The aggregate processing of legal claims saves scarce judicial resources, but it also relieves individual members of the cost and work of litigating their claims individually. As this Court stated in *Shutts*, "[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Shutts*, 472 U.S. at 810.[19]

Because one or a few class representatives stand in for them, class members are spared the time and energy of pursuing their own individual arbitration or litigation. This is particularly efficient when claims are so small that each individual who pursues an individual arbitration invests more in that process than she will get out of it. Empirical evidence demonstrates that aggregation reduces fees and costs.[20]

3. *Class Actions Further Efficiency Through Adjudicatory Consistency*. The class action device also advances administrative efficiency by reducing the risk of inconsistent adjudications. Typically, inconsistent outcomes are viewed as a threat to judicial

---

[19] *See also id.* at 809 ("Unlike a defendant in a civil suit, a class-action plaintiff is not required to fend for himself. The court and named plaintiffs protect his interests.") (citation omitted).

[20] *See* Eisenberg and Miller, *supra* note 4, *passim*.

legitimacy, not a problem of adjudicatory efficiency.[21] But inconsistent results also provide confusing, inefficient signals to both plaintiffs contemplating future litigation and defendants attempting to comply with the law.

The class action solves this problem in two ways. *First*, in cases litigated under Rule 23(b)(3), notice informs everyone in the class of proposed relief and helps make that relief equally available to everyone in the group, providing consistency across the group and *vis a vis* the defendant. *Second*, in special situations where inconsistent outcomes are particularly problematic, Rule 23 enables mandatory classes to be certified precisely to ensure against this problem. *See, e.g.*, Fed. R. Civ. P. 23(b)(1)(A).

* * *

A system that prohibits aggregate litigation, such as AT&T's, sacrifices the efficiencies of aggregate litigation: it requires many proceedings where one might suffice; it requires each individual to proceed herself, though few have the knowledge, capacity, or incentive to do so; and it increases the risk of inconsistent outcomes.

In sum, although this Court's jurisprudence has long identified, and often reiterated, the critical

---

[21] *See, e.g.,* RESTATEMENT (SECOND) OF JUDGMENTS § 29, cmt. F (1982) (noting, in discussing the purposes of issue preclusion, that producing consistent outcomes promotes confidence in the accuracy of judicial determinations).

compensatory, deterrent, and efficiency functions of the class action, Petitioner and its *amici* barely acknowledge any of these virtues. And for good reason: the prohibition on class actions that they defend would sacrifice all of these benefits were it upheld.[22]

II. THE CENTER FOR CLASS ACTION FAIRNESS'S ARGUMENT THAT CLASS ACTIONS ARE NOT AN ESSENTIAL MEANS OF COMPENSATION IS UNCONVINCING

The Center for Class Action Fairness [the "Center"] argues that "in many cases class actions prove particularly inadequate to the task of affording consumers access to meaningful relief," Center Br. at 22, and that individual arbitration is more effective than class actions at providing consumers with such relief. *Id*. at 23. The Center criticizes class actions for taking longer, being more cumbersome, and providing less relief than individual arbitration, concluding its parade of horribles by asserting that "the Ninth

[22] The Circuit Courts have regularly acknowledged this point. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 61 (1st Cir. 2006) (stating that if a class action ban were enforced, the defendant would be "essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law;" noting that "[p]laintiffs will be unable to vindicate their statutory rights;" and that "the social goals of . . . antitrust laws will be frustrated because of the 'enforcement gap' created by the de facto liability shield"); *Dale v. Comcast Corp.,* 498 F.3d 1216, 1223-24 (11th Cir. 2007) (accord).

Circuit's belief that consumers will not file claims in individual arbitrations is incorrect." *Id.* at 26.

The logic of the Center's brief fails on each of these points, but most importantly, the Center's brief fails to inform this Court of one critical fact – although AT&T had nearly 70 million customers by the end of 2007, in the five years between January 1, 2003 and December 31, 2007 only 170 customers in the United States filed arbitrations against AT&T Mobility, AT&T Wireless, or Cingular Wireless.[23] Between October 30, 2006 and December 31, 2007 – the period after AT&T implemented the arbitration clause at issue here with the $7500 provision alleged to enable consumers to seek individual relief – only 10 customers filed for arbitration.[24] This evidence demonstrates that few individuals file individual arbitrations. It also shows that the $7500 clause had no demonstrable effect on individual filing except, perhaps, to decrease that filing. By contrast, the Center offers not a single piece of empirical evidence showing that consumers do file individual arbitration

---

[23] *See* Decl. of Bruce L. Simon in Support of Plaintiffs' Opposition to Defendants' Amended Motion to Compel Arbitration, *Coneff v. AT&T Corp. et al.*, No. 06-944 (W.D. Wash., filed Mar. 14, 2008) (reporting on data collected from American Arbitration Association website statistics); *Coneff v. AT&T Corp. et al.*, 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009) (citing these figures as evidence that the arbitration provisions at issue here "are not having their intended effect").

[24] *Id*. at 2-3.

claims with any regularity – even when given the benefit of the $7500 clause.

A. Class Actions Are More Expeditious Than Individual Arbitrations

The Center's initial point is that class actions may take two to three years to resolve. *See* Center Br. at 6-7. By contrast, it argues, "the average time from filing to final award for the consumer arbitrations studied was 6.9 months." *Id*. at 23. From these two data points, the Center concludes that arbitration is more efficient at resolving consumer claims than class actions are.

The Center's logic fails to account for one critical fact: the two-three year class action typically resolves thousands, possibly tens of thousands, of claims, while the seven-month arbitration resolves but one. Were arbitration to resolve even 1,000 claims, this would take 7,000 months, or close to 600 years – all to do what one (relatively small) class action lawsuit does in two to three years. Of course, 1,000 individual arbitrations would not necessarily proceed sequentially, so perhaps 600 years is an exaggeration; but it is equally obvious that 1,000 arbitrations would not proceed simultaneously and, at seven months per arbitration, would not likely be resolved within the

two-to-three year period that it typically takes to resolve a class action.[25]

The Center's brief might be focused solely on one individual who files arbitration, noting that for this individual seven months is shorter than two to three years. However, this focus belies the fact that a negligible portion of the affected class ever files for arbitration, so few individuals enjoy the benefit of the seven month time frame. Indeed, absent a class action, most class members will be aware of neither their arbitration rights nor of an alleged harm. *See* Part I(A), *supra*. Expeditious processing is of no value to individuals who are ignorant of, or as a practical matter are unable to exercise, their rights. Once individuals learn of their rights, they will likely file claims in larger numbers, *see* Part II(B), *infra,* and the larger number of claimants will necessarily extend the seven month time frame for each individual arbitration.

In short, the Center's comparison of the time it takes to process a class action for many consumers to the time it takes to process one individual arbitration

---

[25] The American Arbitration Association reports that it conducts a total of about 15,000 consumer arbitrations per year (data *available at* http://www.adr.org/si.asp?id=5027). If all consumer class action claim forms were transformed into individual arbitration cases, this 15,000 claims/year system would be flooded and the seven-month processing period would necessarily change dramatically. Moreover, this would significantly increase the number of arbitrators and lawyers involved in processing claims.

is specious. The proper comparison is between the time it takes to process all claims in a class suit and the total time it would take to arbitrate that number of claims individually. There can be little doubt that the aggregate processing time of the class action is significantly less than the sum of the time it would take to arbitrate individually each class member's claim.

B. Class Action Claiming Is Less Onerous Than Individual Arbitration

The Center's second argument is that even in settled class cases, claiming is cumbersome and ineffective for two reasons – because the class must be noticed of the settlement and because the claim form may be complex. *See* Center Br. at 8-11. The Center suggests that claiming is modest in class suits because of these problems. *Id*. at 10-11. Both of these problems (notice and claiming) infect individual arbitrations to an even greater extent and hence claiming rates under individual arbitration clauses are much lower than they are in class action lawsuits.

1. *Notice is Better in Class Suits Than In Individual Arbitrations*. For individual consumers to know they have a right to arbitrate, they must locate the contract with their consumer company. This alone often proves impossible. Assuming consumers do find the contract, they must then read through it to determine their rights. The average consumer will not

know what an arbitration clause is, much less, having found it in a contract, how to proceed under it.

The arbitration clause before the Court (Appendix C to the Petition for a Writ of Certiorari) is exemplary. The clause is seven pages long and consists of a number of tightly spaced paragraphs, one of which lasts for more than a page. The language is complex and full of legalese. AT&T's chosen method of maximum emphasis – writing text in all capitals and in bold font – is used only to emphasize the clause that bars class arbitration. The agreement gives instructions on how to send a "Notice of Dispute." Unless the complaint is resolved, the consumer may, thirty days later, "commence an arbitration proceeding." But the agreement itself does not explain how a person is to commence such a proceeding.[26] Empirical studies of arbitration agreements shows that this agreement is not atypical.[27]

---

[26] *See also* Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1135-36 (2006) (reproducing the author's Cellular Service Agreement, which included an arbitration clause that failed to explain important aspects of the arbitration process).

[27] *See, e.g.,* Linda Demaine and Deborah Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 67-70 (Winter 2004) (finding that 31% of arbitration contracts did not explain who would administer the arbitration, 73% said nothing about how arbitrators would be selected, two-thirds said nothing about discovery, and 42% provided no information about costs and fees).

This arbitration "notice" is far less availing than notices in class suits. Indeed, in a class suit, the notice advises the consumer that she has a claim and need only file a form; notice in the individual arbitration context merely advises the consumer she has a process available to her – if the consumer can even find that small print in her contract. Class action notices have as their purpose informing a lay-person of his or her rights, *see* Part II(B)(2), *infra*; the agreement before the Court, in contrast, seems designed primarily to defeat lawsuits.

2. *The Claims Process Is Simpler In Class Actions Than In Individual Arbitrations*. The claiming process in a class action suit is far simpler for consumers to navigate than is undertaking an individual arbitration from start to finish. As just noted, a non-lawyer will be hard pressed to even identify the right to arbitrate, much less how to initiate an individual arbitration. It may be that it is easier for a non-lawyer to undertake an individual arbitration without a lawyer than it would be for the non-lawyer to undertake a court case without a lawyer. But the relevant comparison is between a non-lawyer filling out a class action claim form and a non-lawyer undertaking an individual arbitration from start to finish. Class action claim forms, though occasionally dense, are often quite straightforward. Rule 23(c)(2) requires that notice in 23(b)(3) class actions be stated "clearly and concisely" in "plain, easily understood language."

Fed. R. Civ. P. 23(c)(2). The Federal Judicial Center provides litigants simple examples.[28] An entire industry exists for the purpose of making notice and claiming user-friendly. The same cannot be said for consumer contracts and their individual arbitration clauses. *See supra* note 27.

3. *Claiming Rates Are Higher In Class Actions Than In Individual Arbitrations*. The Center diverts attention from low claiming rates in arbitration systems by attacking claiming in class actions, stating that class action attorneys have an incentive to create "claims processes that make it prohibitively difficult for class members to make successful claims," Center Br. at 9, and that "[t]he award to the class and the agreement on attorney fees represent a package deal." *Id*. at 10. These statements are either simply wrong or grossly exaggerated.

There is no empirical evidence that improper fee practices are widespread.[29] Courts have adequate

---

[28] *See* FED. JUDICIAL CTR., "*Illustrative" Forms of Class Action Notice*, *available at* http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/376.

[29] *See, e.g.*, 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1803.1 n.5 (3d ed. 2005 & Update 2010); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards,* 7 J. EMPIRICAL L. STUDIES ___ (forthcoming, 2010) (reporting that in all federal class action settlements in 2006, attorneys received only 13% of the settlement amount, and in 2007 only 20%, and noting that "these percentages are far lower than the portions of

(Continued on following page)

means of preventing conflicts of interest from tainting the class settlement. Courts strongly discourage litigants from simultaneously negotiating attorney's fees and the class's claims.[30] Moreover, processes that frustrate claiming are less likely to be approved by courts.[31] Courts often set attorney's fees only after learning what claims rates are.[32] And unclaimed monies in class settlements rarely revert to the defendant, so class action attorneys are not making deals for high fees in exchange for reversionary funds.[33] There is so little to support this picture of class action practice today that the Center's brief cites only a passage in a 23-year-old law review article (taken out of context) and a half-sentence from one 14-year-old case. Center Br. at 9-10 (citing John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883-84

---

settlements that contingency-fee lawyers receive in individual litigation, which are usually at least 33%.").

[30] *See* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.7 (2004).

[31] *See id*. at § 21.62.

[32] *See id*. at § 21.71 ("It is common to delay a final assessment of the fee award and to withhold all or a substantial part of the fee until the distribution is complete.").

[33] *See* 3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 10:17 (4th ed. 2002 & Update 2010) ("Generally, reversion of such funds . . . has been rejected by courts because reversion would defeat the important deterrence objectives of the underlying statute. . . .").

(1987) and *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996)).

Most damning to the Center's picture of class action practice is the fact that the extent of claiming without class actions will be far less than it is with class actions. There are, unfortunately, no sound empirical studies of class action claims rates, in part because such data are rarely reported to courts at the conclusion of the claiming process.[34] Without data, the Center simply finds two low claiming cases to represent the whole – one in which 2,676 out of 10 million class members made claims and one in which 165 class members in 291,000 made claims. Center Br. at 11.[35]

What the Center fails to report is that under individual arbitration clauses, such as this one, consumers find even less relief than in these "bad"

---

[34] *See* Nicholas M. Pace and William B. Rubenstein, *How Transparent Are Class Action Outcomes?: Empirical Research on the Availability of Class Action Claims Data*, in CAN INCREASED TRANSPARENCY IMPROVE THE CIVIL JUSTICE SYSTEM? (tentative title) (forthcoming, 2011).

[35] The data that are available on class action claiming show rates far exceeding the Center's two selective examples. *See, e.g.*, Pace and Rubenstein, *supra*, at 32 (reporting that in nine cases with claiming information available, three had distribution rates below 5%, two of which were below 1%; four cases had distributions rates between 20-40% of the class; and two cases had distributions rates above 50%, one at 65% and one at 82%).

class actions. As noted above,[36] fewer than 200 consumer arbitrations involving AT&T and Cingular were conducted in a five-year time span, while at the end of that same time span AT&T had over 70 million customers. The claims rates in the worst class action lawsuit the Center could find to cite is .027% (2,676 claims in a class of 10 million). Yet only .00029% (200 individual arbitrations from a base of 70 million customers) of AT&T's customers ever initiated individual arbitration, for any reason whatsoever, over a five year period.

* * *

The Center aims to demonstrate that individual arbitration is a superior compensatory mechanism to the class action but its brief fails to accomplish that task. There can be little doubt that if defendants are able to use adhesion contracts to opt out of class actions, compensatory goals will be seriously frustrated.

III. THE CHAMBER OF COMMERCE'S ARGUMENT THAT CLASS ACTIONS DO NOT DETER MISCONDUCT IS UNCONVINCING

The Chamber of Commerce [the "Chamber"] argues that class arbitrations do not meaningfully deter unlawful conduct for three reasons: (1) the

---

[36] *See supra* text accompany notes 23-24.

availability of public law enforcement reduces the need for class arbitration as an additional deterrent device; (2) the potential for overwhelming liability in the form of a class judgment forces defendants to settle regardless of whether they act unlawfully, meaning that class actions are arbitrary and create no deterrent effect; and (3) that requiring class arbitration will cause defendants to abandon arbitration altogether and individual consumers will be forced to forgo their claims completely, leaving many meritorious claims unprosecuted. This section responds to each of these contentions, demonstrating that foreclosing class actions would undermine the deterrent effect of the law.

A. Class Actions Provide A Necessary Supplement To Public Law Enforcement

The Chamber states that compensation is the primary purpose of the class suit and deterrence a secondary one. Chamber Br. at 5-6. It therefore concedes that the class action aims to deter, but it argues that the availability of public law enforcement mechanisms obviates the need for this private deterrence. *Id*. at 6-7.

First, the Chamber's claim that compensation is the primary function of the class action is not universally accepted. Many prominent commentators have argued that efficient deterrence is either a, or the, primary function of modern class actions:

> If each is left to assert his rights alone if and when he can, there will be at best a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to undermine the deterrent effect of the sanctions which undermine much contemporary law.

Kalven & Rosenfeld, *supra*, 8 U. CHI. L. REV. at 686; *see also* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534 (2006).

Second, and more importantly, the Chamber's argument that the availability of public law enforcement obviates the need for private law enforcement is at odds with most every authority on this topic: this Court's well-established precedents, Congress's stated preferences, and the scholarly consensus. This evidence is set forth in detail above, *see* Part I(B), *supra*, and need not be repeated here.

While that evidence severely undermines the Chamber's argument that public enforcement is sufficient, what fully forecloses the Chamber's position is the fact that public enforcers themselves do not share in the belief that public enforcement alone is a sufficient deterrent mechanism. Agency leaders have explicitly acknowledged their reliance on private enforcement as a supplement to their own deterrent capacities.

For example, in 1995, the former Chair of the Securities and Exchange Commission ("SEC"), Arthur Levitt, testified to the House subcommittee considering class action reform that, "Private actions . . . provide a necessary supplement to the commission's own enforcement activities by serving to deter securities law violations."[37] The SEC's reliance on private enforcement is so significant that its own website advises concerned investors to "find out whether a private class action has been filed against the company you invested in. . . ."[38] The SEC is not alone. The former Chair of the Federal Trade Commission, Thomas B. Leary, stated that, "The Federal Trade Commission is a relatively small agency with broad competition and consumer protection responsibilities. . . . We depend on private litigation to supplement our efforts."[39]

Despite entitling its argument, "There Are More Important Deterrents To Unlawful Conduct Than Class Actions," Chamber Br. at 5, the Chamber's brief offers no evidence in support of the proposition that public enforcement is a "more important deterrent"

---

[37] *Common Sense Legal Reform Act: Hearing before the Subcomm. on Telecomm. and Fin., H. Comm. on Commerce*, 104th Cong. (1995) (statement of Arthur Levitt, Chairman of the U.S. Sec. & Exch. Comm.).

[38] Sec. & Exch. Comm'n, Investor Claims Funds, http://www.sec.gov/divisions/enforce/claims.htm (last visited Sept. 13, 2010).

[39] Press Release, Fed. Trade Comm'n, FTC's Thomas B. Leary Address Summit (June 26, 2003), *available at* www.ftc.gov/fopa/2003/06/learyspeech.htm.

than private conduct, nor does the brief, in any way, engage with this Court's, Congress's, scholars', and agency chiefs' insistence that private litigation generally, and class actions specifically, are critical complements to public law enforcement.

B. The Chamber Fails To Demonstrate That Class Actions Do Not Deter Misconduct

The Chamber's second argument, entitled "Class Arbitration Does Not Deter Misconduct," Chamber Br. at 7, actually argues that class actions, not class action arbitrations, fail to deter misconduct. *Id*. at 7-12. Although the argument is a mish-mash, its essence boils down to three assertions: (1) the effect of class certification is so great that it compels defendants to settle, *id*. at 7; (2) defendants settle regardless of their liability, *id*. at 10-11; and (3) if defendants settle regardless of their liability, no deterrent effect is created, *id*. at 10. Not one of these three assertions is proved.

1. *Defendants Do Not Invariably Settle Class Actions*. The Chamber asserts that once a class is certified, the potential liability is so great that "[d]efendants will inevitably settle in those circumstances." *Id*. at 7. Assuming, *arguendo*, the truth of this proposition, it pertains to but a small portion of filed class actions – those actually certified. As the Chamber's brief itself recognizes 10 pages later: "only

20% of putative classes are certified." *Id*. at 17 (citing empirical studies).

The Federal Judicial Center's empirical evidence shows that roughly two out of three class actions have a ruling on a motion to dismiss, a motion for summary judgment, or a *sua sponte* dismissal order and that "approximately three out of ten cases . . . [are] terminated as the direct result of a ruling on a motion to dismiss or a motion for summary judgment."[40] Indeed, the FJC study suggests that there is little empirical evidence supporting the proposition that certified class actions are any less likely to go to trial than are individual actions. *Id.*

Thus, the Chamber's first premise – that class suits invariably settle – ignores available empirical evidence on class action dispositions; even if the Chamber's point is that all *certified* cases settle, that captures only a small portion of all class actions. Therefore, the Chamber's logic – because all class actions settle none deter – is undermined at its very first step.

2. *There Is Little – or No – Proof That Class Action Settlements Are Unrelated to A Case's Merits*. The Chamber's second point is that not only do class suits settle, but they do so regardless of the merits.

---

[40] Thomas E. Willging, et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 8 (Federal Judicial Center, 1996).

The Chamber seeks to support this proposition on two bases – with a logic experiment and by reference to a few highly criticized law review articles. The logic experiment is found on page 8 of the Chamber's brief:

> Defendants have a financial incentive to settle class actions even when the plaintiff's claim has little or no merit. Basic mathematics and risk aversion make it so: Attorneys' fees aside, a risk-averse defendant that thinks it has a 90 percent chance of defeating a $100 million class action is still better off settling for $9.9 million. The result is an *in terrorem* effect that compels defendants to settle claims ***that have no merit***.

Chamber Br. at 8 (emphasis added).

There are two problems with the Chamber's logic. In the example provided, plaintiffs' case had a 10% chance of securing $100 million and hence was worth $10 million. If a defendant can settle that case for $9.9 million, it is coming out ahead. It is not, as the Chamber ends up arguing, settling "claims that have no merit." *Id*. It is settling a claim worth $10 million for less than $10 million. Indeed, in the Chamber's own example, the settlement is in line – almost perfectly – with the expected merits of the case. The Chamber's *in terrorem* argument that class actions settle regardless of their merits is also undermined by the empirical evidence presented above showing that not all class suits, even those certified, settle. *See generally,* Charles Silver, *"We're Scared to Death:" Class Certification and Blackmail,* 78 N.Y.U. L. REV. 1357 (2003)).

Beyond the failed logic experiment, the Chamber offers evidence from scholarly studies purporting to show that class action settle without regard to their merits. Chamber Br. at 10-11 (citing law review articles). What the Chamber fails to inform the Court is that these studies are few, dated, highly contested, and solely about securities class actions. For example, the most famous of these studies, Professor Alexander's 19-year old article,[41] has been severely criticized for relying on a mere six class actions and for ignoring key variables.[42] Moreover, the few studies the Chamber cites all concern only securities class actions, though all commentators, including Professor Alexander, conclude that securities class actions cannot be conflated with consumer class actions.[43]

---

[41] Janet Cooper Alexander, *Do The Merits Matter? A Study of Settlements of Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

[42] *See*, *e.g.*, James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 503 (1997) (questioning whether "it is appropriate . . . to draw such a sweeping conclusion from a sample [so] slender"); 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, 2083-84 (1995) (showing that, after removing industry-wide effects on the six defendants, the settlements ranged from 23.11% to 79.77% of allowable recovery, a far greater range than calculated by Professor Alexander); *see generally* Joel Seligman, *The Merits Do Matter*, 108 HARV. L. REV. 438, 448 (1994) (demonstrating the flaws in several similar studies).

[43] *See* Alexander, *supra* note 41, at 526-28.

In sum, the Center has little proof for the proposition that class actions settle regardless of their merits – and no proof whatsoever from the consumer context.

3. *Class Actions Deter*. The Chamber's argument is that (1) class actions settle (2) regardless of their merits and (3) hence create no deterrent effect. Because the first two premises have been disproved, the third is irrelevant. But it, too, is faulty, inaccurately reporting and incorrectly applying one passage in a theoretical treatise. Chamber Br. at 10 (citing A. MITCHELL POLINSKY & STEVEN SHAVELL, *The Theory Of Public Enforcement of Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 404, 427 (2007)).

Professors Polinsky and Shavell do argue, writing about the criminal context, that both "mistaken convictions" and "mistaken acquittals" reduce deterrence. The Chamber's first problem is equating their image of the class action settlement to a "mistaken conviction." Class action settlements are unlikely to be "mistaken convictions" for the reasons discussed above – empirical evidence demonstrates that the courts sort out many class suits on their merits; the scant evidence to the contrary is solely from the securities field and roundly criticized; and the settlement of a case having a 10% probability of success for 10% of its maximum value is not a "mistaken conviction." As importantly, and more disingenuously, the Chamber conveniently ignores the "mistaken acquittal" side of Professors Polinksy's and Shavell's argument. Unpunished culpable conduct also reduces

deterrence because it encourages parties to engage in socially-undesirable conduct. Eliminating the class action device would vastly increase the risk of such "mistaken acquittals."

That the Chamber's brief misreports the scholarship on which it relies is immaterial, in any event, because without evidence that class action settlements are unrelated to their merits, the "therefore no deterrence" argument is unavailing in any event.

C. The Chamber Fails To Demonstrate That Abandonment Of Arbitration Will Either Occur Or Decrease Deterrence If It Does Occur

The Chamber's third argument is that if corporations cannot ban class action arbitrations, they will abandon arbitration and that this abandonment will harm deterrence efforts. Chamber Br. at 11-20. In support of the abandonment claim, the Chamber offers but one actual example (Comcast). In support of the conclusion that the abandonment of arbitration will harm deterrence efforts, the Chamber offers even less support. As demonstrated above, *see* Part II(B), *supra*, the claiming rates in class actions are generally much higher than the insignificant rate of individual consumer arbitrations. Given that individual arbitration does so little for so few, it is difficult to take seriously the Chamber's argument that corporate abandonment of individual arbitration would result in a significant decrease in deterrence.

In fact, the Chamber's real point here appears to be that class action bans are wise policy because both class action arbitration and class action litigation are rife with inherent and unsolvable problems. Class action arbitration, the Chamber argues, is bad for businesses, Chamber Br. at 12-16, while class action litigation, the Chamber argues, switching focus, is bad for consumers. Chamber Br. at 16-19. Although the specifics of class action arbitration practice are in a state of development in this country, the same cannot be said about class action litigation: it is a well-established part of the American litigation landscape. As set forth in Part I of this Brief, this Court has regularly identified a variety of functions that class action litigation serves. The Chamber's brief acknowledges none of this case law and ignores all of its lessons. No one thinks that the class action is perfect, but most commentators, following this Court's lead, regularly acknowledge its virtues.[44]

* * *

[44] To the extent that there are problems with the class action device, the appropriate response is for Congress to reexamine Rule 23, as it has done many times in the past decades, not to permit defendants to unilaterally write it out of existence. *See Roper*, 445 U.S. at 339 ("That there is a potential for misuse of the class action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries. But the remedy for abuses does not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences.").

The Chamber aims to show that arbitration is a superior deterrent mechanism to the class action but its brief fails to accomplish that task. There can be little doubt that if defendants are able to use adhesion contracts to opt out of class actions, deterrent goals will be seriously frustrated.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decision below.

Respectfully submitted,

WILLIAM B. RUBENSTEIN
HARVARD LAW SCHOOL*
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 496-7320

Counsel of Record and Amicus

KEVIN M. CLERMONT, Robert D. Ziff Professor of Law
CORNELL LAW SCHOOL*

JOHN C. COFFEE, JR., Adolf A. Berle Professor of Law
COLUMBIA LAW SCHOOL*

THEODORE EISENBERG, Henry Allen Mark Professor of Law
CORNELL LAW SCHOOL*

(List of *amici* continued on following page)

HOWARD M. ERICHSON, Professor of Law
FORDHAM LAW SCHOOL*

DEBORAH R. HENSLER, Judge John W. Ford Professor of Dispute Resolution
STANFORD LAW SCHOOL*

JOHN LEUBSDORF, Professor of Law and Judge Frederick B. Lacey Scholar
RUTGERS LAW SCHOOL – NEWARK*

ARTHUR R. MILLER, University Professor
NEW YORK UNIVERSITY SCHOOL OF LAW*

JUDITH RESNIK, Arthur Liman Professor of Law
YALE LAW SCHOOL*

DAVID L. SHAPIRO, William Nelson Cromwell Professor of Law, Emeritus
HARVARD LAW SCHOOL*

CHARLES M. SILVER, Roy W. and Eugenia C. MacDonald Endowed Chair in Civil Procedure
THE UNIVERSITY OF TEXAS SCHOOL OF LAW*

Amici

---

* *Law school affiliations for identification only*

APPENDIX
Selected Bibliography of *Amici*'s Scholarship

This is a selected list of *amici*'s scholarship about class action litigation.

1. Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553 (2008)

2. KEVIN M. CLERMONT ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE (9th ed. 2007)

3. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 (2002)

4. John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288 (2010)

5. John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice,"* 30 CARDOZO L. REV. 407 (2008)

6. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534 (2006)

7. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000)

8. John C. Coffee, Jr., *Conflicts, Consent, and Allocation After* AmChem Products – *Or, Why Attorneys Still Need Consent To Give Away Their Clients' Money*, 84 VA. L. REV. 1541 (1998)

9. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995)

10. John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995)

11. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987)

12. John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625 (1986)

13. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986)

14. John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5 (Summer 1985)

15. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215 (1983)

16. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248 (2010)

17. Theodore Eisenberg et al., *A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions After* Goldberger v. Integrated Resources, Inc., 29 WASH. U. J. & POL'Y 5 (2009)

18. Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303 (2006)

19. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004)

20. Theodore Eisenberg & Geoffrey P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529 (2004)

21. Theodore Eisenberg & Geoffrey P. Miller, *What Is a Reasonable Attorney Fee? An Empirical Study of Class Action Settlements*, 31 CORNELL L. F. 2 (Summer 2004)

22. Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979 (2010)

23. Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593 (2008)

24. Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005)

25. Howard M. Erichson, *Mississippi Class Actions and the Inevitability of Mass Aggregate Litigation*, 24 MISS. C. L. REV. 283 (2005)

26. Howard M. Erichson, *Comments on a Class Action Rule for Mississippi*, 24 MISS. C. L. REV. 309 (2005)

27. Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519

28. Howard M. Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 123 (2001)

29. Howard M. Erichson, *Foreword: Symposium: Multidistrict Litigation and Aggregation Alternatives*, 31 SETON HALL. L. REV. 877 (2001)

30. Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000)

31. Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1 (2000)

32. Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983 (1999)

33. Howard M. Erichson & Mitchell A. Lowenthal, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 FORDHAM L. REV. 989 (1995)

34. Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883 (2007)

35. Deborah R. Hensler, *Bringing* Shutts *into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 U.M.K.C. L. REV. 585 (2006)

36. Deborah R. Hensler & Linda J. Demaine, "*Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55 (Winter 2004)

37. Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179 (2001)

38. 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 (Spring 2001)

39. Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883 (2001)

40. Deborah R. Hensler & Mark Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993)

41. DEBORAH H. HENSLER, ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000)

42. FLEMING JAMES, JR., GEOFFREY HAZARD & JOHN LEUBSDORF, CIVIL PROCEDURE (5th ed. 2001)

43. John Leubsdorf, *Class Actions at the Cloverleaf*, 39 ARIZ. L. REV. 453 (1997)

44. John Leubsdorf, *Co-opting the Class Action*, 80 CORNELL L. REV. 1222 (1995)

45. ARTHUR R. MILLER, *The Class Action – American Style*, in THE CAMBRIDGE LECTURES 192 (1983)

46. Arthur R. Miller, *Reliving and Reflecting on* Shutts, 74 U.M.K.C. L. REV. 505 (2006)

47. Arthur R. Miller & Price Ainsworth, *Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 REV. LITIG. 419 (1991)

48. Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1 (1986)

49. ARTHUR R. MILLER, ATTORNEYS' FEES IN CLASS ACTIONS (1980)

50. Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979)

51. ARTHUR R. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE (1977)

52. Arthur R. Miller, *Problems of Giving Notice in Class Actions*, 58 FED. RULES DECISIONS 313 (1973)

53. Arthur R. Miller, *Problems in Administering Judicial Relief in Class Actions under Federal Rule 23(b)(3)*, 54 FED. RULES DECISIONS 501 (1972)

54. CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE (3d ed. 2005 & Update 2010)

55. Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929 (2008)

56. Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101 (2006)

57. Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000)

58. Judith Resnik & Dennis E. Curtis, *Contingent Fees in Mass Torts: Access, Risk and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425 (1998)

59. Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835 (1997)

60. Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918 (1995)

61. Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (1991)

62. Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996)

63. William B. Rubenstein & Nicholas M. Pace, *How Transparent Are Class Action Outcomes?: Empirical Research on the Availability of Class Action Claims Data*, in CAN INCREASED TRANSPARENCY IMPROVE THE CIVIL JUSTICE SYSTEM? (tentative title) (forthcoming 2011)

64. WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS (4th ed. 2010)

65. William B. Rubenstein, *Finality in Class Action Litigation: Lessons From Habeas*, 82 N.Y.U. L. REV. 791 (2007)

66. William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006)

67. William B. Rubenstein, *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006)

68. William B. Rubenstein, *On What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129 (2004)

69. William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002)

70. William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2000)

71. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997)

72. William B. Rubenstein, *Class Action Practice Today: An Overview*, in ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)

73. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998)

74. Charles M. Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, VAND. L. REV. (forthcoming 2010)

75. Charles M. Silver & Sam Dinkin, *Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions*, 57 DEPAUL L. REV. 471 (2008)

76. Charles M. Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003)

77. Charles M. Silver, *Merging Roles: Mass Tort Lawyers as Agents and Trustees*, 31 PEPP. L. REV. 301 (2003)

78. Charles M. Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 TUL. L. REV. 1809 (2000)

79. Charles M. Silver, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998)

80. Charles M. Silver, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997)

81. Charles M. Silver, *Representative Lawsuits & Class Actions*, in INTERNATIONAL ENCYCLOPEDIA OF LAW AND ECONOMICS (Boudewijn Bouckaert & Gerrit De Geest eds., 1999)

82. Charles M. Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495 (1991)

83. Charles M. Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991)