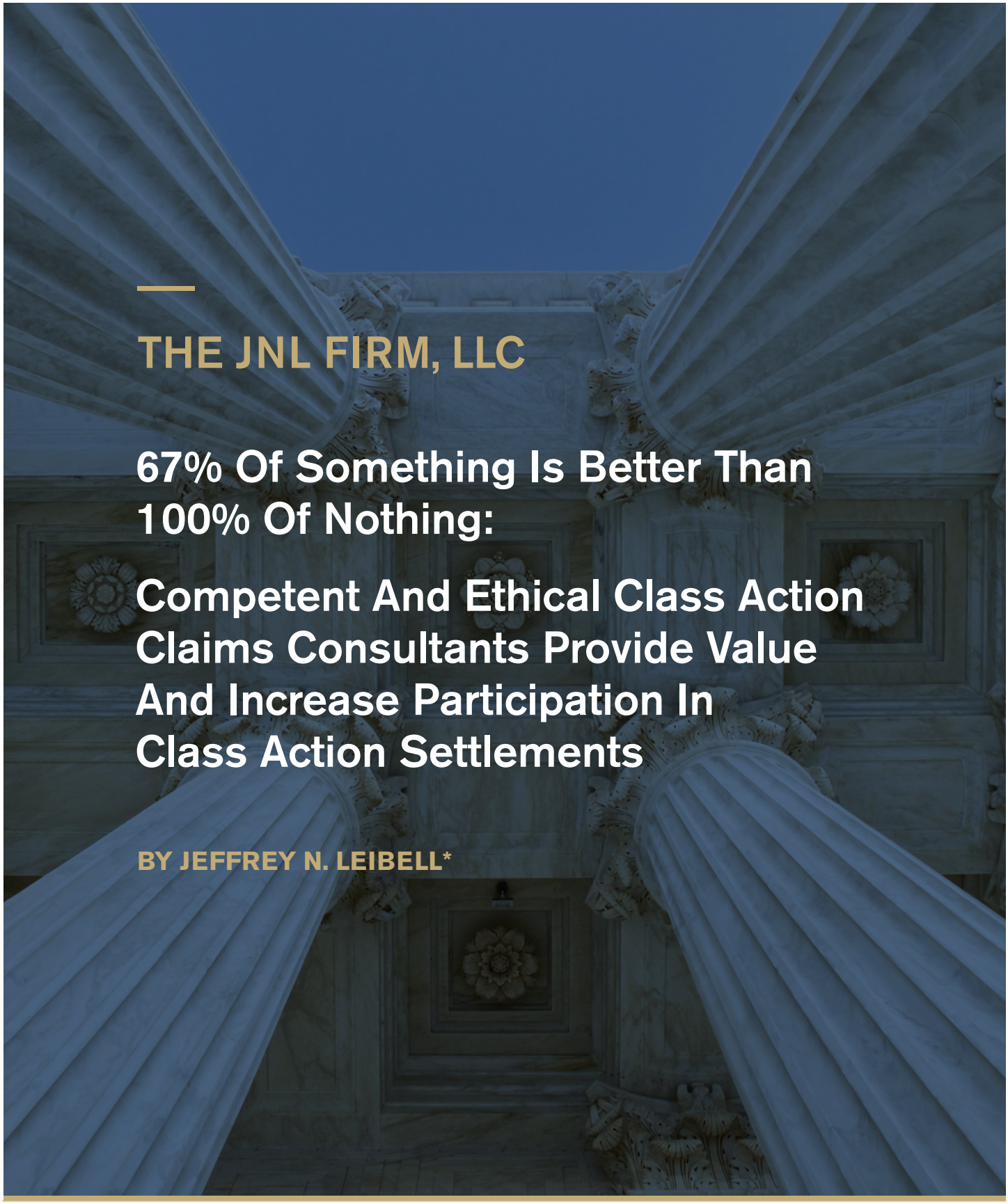

THE JNL FIRM, LLC

67% Of Something Is Better Than 100% Of Nothing:

Competent And Ethical Class Action Claims Consultants Provide Value And Increase Participation In Class Action Settlements

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Love 'em or hate 'em, class action claims consultants, or "CACCs," are here to stay.[1] *Most CACCs provide value to their clients because, without their services, which are provided at a fee often as much as 33%, those class members would not recover anything. Given that the 2018 amendments to Rule 23 (the "2018 Amendments") now require courts, when they evaluate whether a class action settlement is fair, reasonable and adequate, to consider class member participation and recovery, the increased participation that CACCs generate should enhance the likelihood of judicial approval.*

Introduction

The "$64,000 question" presented by this article is as follows:

Why would any class member share with a CACC 33% of its recovery when, to keep 100%, it needs only to prepare and file its own proof of claim?

Class counsel often ask that question, usually when trying to convince class members not to retain CACCs; in class counsel's view, either they or claims administrators will provide for free all the assistance needed to file compliant claims. And at least one federal district court has asked that question to express its view that class members do not obtain sufficient value from CACCs to justify the fee charged.[2] Truth be told, when I first entered the class action plaintiffs' bar in 1996, and then when I joined GCG in 2008, I asked that same question, and I posed it to my clients, some of the largest and most sophisticated entities in the world: I couldn't understand why they and others were willing to pay CACCs substantial portions of their recoveries when all that they had to do to keep it all was to complete what I thought were simple proofs of claim and then submit them together with some rudimentary documents. That one question reduces to its core the issue presented in this article.

But as I learned during a legal career devoted primarily to prosecuting class actions and, in particular, to designing and managing their settlements and distributions, the answer to that very reasonable inquiry is actually quite simple: Clients of CACCs prefer to devote their time to operating their own businesses rather than to something unfamiliar. When the Executive Vice President and General Counsel of one of my clients, a multinational "Fortune" conglomerate, asked me why he should pay FRS for managing his class action claims, I told him straightaway that he didn't have to, but that, had he not retained FRS, he would not have been holding in his hand a check for over $2 million, and that he would need to pay his own personnel to monitor federal and state court dockets across the country (and in certain non-U.S. jurisdictions) for settlements of class and other representative actions, to determine the company's eligibility, and, when those employees believe that the company was eligible, to collect the required data and prepare and manage its claims. And when his colleagues told him that, together, they had spent very little time on the proof of claim that generated the over

$2 million recovery, he thanked me for the check, shook my hand and said, "that makes perfect sense to me. Welcome aboard." The answer to our "$64,000 question," then, assuming a 33% CACC fee, rests in the value maximizing proposition set forth in the title of this article: 67% of something is better than 100% of nothing.

Unfortunately, however, implementation is not quite that simple. While it is indisputable that many class members voluntarily and knowingly engage competent CACCs in exchange for a meaningful proportion of their recoveries, and that, compared to claimants that go it alone, most CACC clients likely will participate in more settlements and recover more from them, it is equally indisputable that, as a group, CACCs have a checkered history. And when those past abuses are considered together with more recent and ongoing chicanery, some class counsel, state attorneys general and courts have become convinced that the services provided by all CACCs are, at best, overpriced, or, at worst, worthless. That negative reputation has often subjected CACCs to significant scrutiny and attempts to bar, or at least discourage, them from retaining clients. To protect unsophisticated class members and also allow ethical CACCs to continue to provide valuable services to class members as well as to entire classes, class counsel should balance those competing interests.

> "Most CACCs provide value to their clients because, without their services, … those class members would not recover anything."

The rest of this article is organized as follows: It begins by explaining that, because many class members either do not submit proofs of claim or, when they do, their claims are undervalued or prepared improperly, the market is ripe for entrepreneurial practitioners – CACCs – to offer to them services that would enable more of them to participate in settlements and to obtain the full measure of their recoveries. I then describe both how some of those entrepreneurs have put their own financial interests ahead of those of their clients, and, as a result, how class counsel and courts alike have taken measures – some extreme – to curtail or eliminate CACCs from representing class members. Next, and to provide appropriate counterbalance, I explain the substantial benefits that ethical and competent CACCs provide directly to their clients and indirectly to entire classes. I conclude by expanding on the following proposed solution: Class counsel should develop scalable procedures to distinguish among CACCs the good, on the one hand, from the bad and the ugly, on the other, so that class members may obtain the benefits provided by ethical and capable CACCs without being taken advantage of by those that are neither. That balancing will increase class member participation – a big plus under the 2018 Amendment's mandate that courts, when determining whether a settlement is fair, reasonable and adequate, consider class member participation[3] – and avoid satellite litigation over interference with the contracts between class members and the CACCs that they knowingly and voluntarily chose to retain.

Class Counsel Should Not Throw the Ethical CACC "Baby" Out With the Unscrupulous CACC "Bathwater"

Class Members That Do Not Submit Claims or That Submit Improperly Prepared Claims Collectively Forfeit Hundreds of Millions of Dollars Annually in Settlement Recoveries

The settlements of class actions result every year in the recovery of tens of billions of dollars earmarked for victims of alleged violations of a variety of federal and state laws. Unfortunately, most eligible class members do not recover from those settlements their fair shares because they are unaware of them or of the need to submit a claim to receive a recovery, because they believe that the time and associated costs of preparing and submitting a claim outweigh the expected recovery, or because their claims were improperly prepared. As a result, those eligible class members collectively forfeit hundreds of millions, if not billions, of dollars annually.

A prime example is provided by the 2003 $3.05 billion Visa Check settlement.[4] In that extremely large and very well-publicized settlement pursuant to which the claims administrator, GCG, disseminated claim forms to 8,100,000 eligible merchants, just 815,000 – or only 10% – of them submitted claims. In other words, some 90% of the merchants entitled to recover – merchants that, because their identities and addresses were provided to class counsel by Visa, Mastercard or other entities, were sent proof of claim forms – did not file one.[5] If that statistic is difficult to believe, consider as well that two-thirds of the disseminated claim forms were prepopulated with the information necessary for merchants to receive a distribution—all they had to do to recover was sign and return the form.[6] And even looking past that 90% apparent "apathy" rate, tens of thousands of submitted claims eventually were rejected, many for reasons that an experienced CACC would successfully have resolved. The final tally: Only 677,000, or just 8.4%, of the 8,100,000 eligible merchants received a recovery.[7]

> "By using their own resources to notify putative class members of settlements, CACCs augment the required notice process."

Lack of class member participation provided opportunities for the innovative and entrepreneurial to offer their services to putative class members that, for one or more of the reasons described above, would not submit properly prepared –or any – proofs of claim. But not all members of the

then-fledgling CACC business sector were as ethical as they should have been. While many of them were ethical – and still are – and work to recover for their clients their full legitimate shares of settlement proceeds—and still do, others took – and still take – advantage of class members and provided—and still provide – inferior services. Combining the prospect of quick and significant returns with an operating environment devoid of regulation or significant oversight often incentivizes the ethically challenged to take advantage. And as described next, that is precisely what occurred.

Unethical CACCs Compel Courts and Class Counsel to Protect Class Members

It should suffice to say that unethical CACC conduct is unacceptable. Nevertheless, state attorneys general and class counsel alike continue to identify unscrupulous CACCs that violate fundamental ethical and, in some cases, legal, standards. Some of the more unsavory practices include CACCs paying themselves from their clients' recoveries while failing for years to notify those clients or to send to them their millions of dollars of recoveries; CACCs falsely representing under oath that they were authorized to file claims for class members even though they had not been retained by, and had not even notified, them; CACCs violating antifraud claim filing requirements, which caused the claims of scores of their clients to be rejected and millions of dollars of their recoveries to be lost; and CACCs filing claims with fabricated (and potentially fraudulent) purchase information, which subjected their clients to unwarranted publicity and judicial scrutiny. The takeaway, unfortunately, is that ethical CACC conduct cannot be taken for granted.

> "Competent and ethical CACCs provide value to class members through a variety of services related to proof of claim preparation, filing and management."

Some class counsel, given their not unjustified concern that certain CACCs are unethical or incompetent—or both, as well as their belief that CACCs as a group do not provide value to putative class members, have actively tried to prevent *all* CACCs from representing class members. While some class counsel have focused mainly on disclosures in class notices, the efforts of others, as well as of state attorneys general, either to discourage all CACCs from participating in a particular settlement or to interfere with the services that CACCs provide, have gone beyond, sometimes way beyond, simple cautionary language in class notices, including, for example, by sending distributions to class members rather than to CACCs, directing claims administrators not to work or communicate with CACCs, imposing only on CACCs and their clients unwarranted and burdensome requirements, and prosecuting CACCs for real or perceived bad conduct.[8] Before continuing, it bears noting that, unless class counsel have evidence of actual CACC malfeasance, this extreme level of interference may expose them to liability for tortious interference.[9]

Ethical and Competent CACCs Provide Value to Clients and Increase Participation in Settlements

Competent and ethical CACCs provide value to class members through a variety of services related to proof of claim preparation, filing and management. Those CACCs, through claim stimulation – causing the putative class members that they directly and indirectly solicit, whether or not they are retained by those class members, to file claims that, but for the CACC solicitations, they would not have filed – also provide benefits to entire classes.

Claim Stimulation

Once a judgment in a class action is no longer appealable, the primary goal – *the only goal* – is as expeditiously and fairly as possible to get all of the distributable settlement proceeds into the hands of approved claimants. However, because of the significant pressure on claims administrators to cut costs and corresponding services, they simply cannot accomplish that task in an economically feasible fashion.[10] As a result, far fewer class members than desired participate in settlements. It would seem rational, therefore, especially given the increased importance that, under the 2018 Amendments, class member participation now has,[11] for class counsel to encourage class members to submit proofs of claim and, in so doing, to take advantage of efforts that are provided without cost to the class or to class counsel.

> "CACCs, through claim stimulation ... also provide benefits to entire classes."

Class counsel are obligated to provide to putative class members notice of class action settlements the contents of which are governed by due process, as well as by federal law and rules.[12] Those notices necessarily are dominated by information that has little to do with generating class member participation. In connection with the original >$6 billion settlement reached in 2012 to resolve all claims alleged in *Payment Card*, for example, putative class members were provided with a 60-page notice package that included a 29-page "Notice of Class Action Settlement," in which "How to File a Claim Form" appeared on pages 11-12; a 16-page "Plan of Administration and Distribution"; and a 15-page "Additional Information Concerning the Plan of Administration and Distribution," all of which were necessary under Rule 23.[13] But, because of the circumstances of that settlement, no proof of claim form was then made available.

Enter CACCs. By using their own resources to notify putative class members of settlements, CACCs augment the required notice process. Depending on the nature of the settlement—that is, its size and the characteristics of putative class members, CACCs will employ social media, post information on

their websites, send "snail" mail and emails to putative class members, and follow up with telephone calls. And those communications, because they are designed solely to encourage class members to retain the CACC, are "short and simple" and only provide information about the benefits of submitting a claim. Thus, even when, as in proportionately most solicitation attempts, class members do not retain the soliciting CACCs, they were provided with information designed solely to convince them to file claims. While it is not possible accurately to quantify the number or proportion of claims that, but for CACCs, class members filed—what is referred to as "claim stimulation," I know that, in connection with the $1.1 billion *LCD Indirect* settlements,[14] the eligible liquid crystal display panel equivalents included in CACC-filed claims comprised over 70% of the total approved panel equivalents.[15] Specific examples of FRS's claim stimulation abound, but, as case studies, I'll describe just two in which I was personally involved.

> "Because courts are now mandated by the 2018 Amendments to consider class member participation, class counsel should take steps to enhance that participation."

LCD Indirect

Upon beginning my employment at FRS in June 2014, I described for a close friend and former colleague who, at that time, was the VP/Controller at a leading "household name" multinational media and Internet conglomerate, what FRS does. I used as an example the then-current *LCD Indirect* settlements. He asked, "Why didn't I know about that settlement?" I pointed out that, as an indirect purchaser, he did not get any notice sent to him, and, therefore, would have had to have seen notices published on the Internet and elsewhere. I also reminded him that no one at his company was responsible for staying abreast of class actions. So, even though his company purchased during the 1999 – 2006 class period over 50,000 eligible computer monitors and hundreds of eligible televisions, they were unaware of the settlement and of their eligibility to recover from it. Although they could not reasonably locate documentation of the purchases that each of their several business units across the U.S. made during the 8-year class period that had begun over fifteen years earlier, I developed a proxy for that documentation; that alternative approach required my friend and his colleagues to spend less than five hours of time among them. Had they not retained FRS, they would have left on the table for other claimants to share the over $2 million they were entitled to – and did – receive.

DRAM

Another longtime friend who, at that time, was a senior vice president at an insurance holding company that is among the largest commercial lines writers in the U.S., had been told by his CTO that, because the company could not locate what he had determined was the documentation required for a claim to be accepted, he had decided not to submit one to recover from the $310 million *DRAM* settlement.[16] Here, too, the CTO spent less than five hours with me to develop the information for the claim.

As described in the two subsections that follow, CACCs also provide value through proof of claim preparation, filing and management services that class counsel and claims administrators, despite their best intentions, are not able to provide.

Claim Preparation, Filing and Management

Competent CACCs assist their clients that, without such assistance and because they had misinterpreted eligibility requirements, either would have excluded from their claims eligible transactions, or would not have filed at all. For example, one FRS client, a world leader in the distribution of chemicals and related products and services, had misinterpreted the requirements to be eligible to recover from the *Vitamin C* settlements;[17] however, FRS corrected that error and, as a result, identified an additional $19 million of eligible purchases, which increased the recovery by over $1.4 million.

Assuring that class members obtain their fair shares of settlement recoveries also requires that their proofs of claim include all eligible transactions that, during the class period, were conducted by their business units (*e.g.*, subsidiaries, divisions and locations), including those that they acquired or divested, but as to which they acquired or retained, and, therefore, owned, the right to recover. Providing that service requires considerable effort, including, among other things, understanding a client's past and present purchasing policies and, based thereon, evaluating whether any of a client's current or former business units may be eligible to recover. For example, in connection with the *LCD Indirect* settlements, an FRS client, a large corporation that was headquartered in a non-repealer state, had, for that reason, incorrectly determined that none of its purchases were eligible; however, FRS discovered that certain business units had made in repealer states their own eligible purchases, which resulted a recovery of over $900,000. Another FRS client, a leading

> "The goal would be to protect class members from unethical or incompetent CACCs, while not undermining the valuable services that ethical and capable CACCs provide."

global insurance organization, had for the same reason undervalued its claim to participate in the *Polyurethane Foam* settlements;[18] FRS, by identifying decentralized eligible purchases, increased the value of the claim from $50 million to $65 million, or by 30%.

When a claim form is sent to just one of many potentially eligible business units, a class member often believes that its only eligible purchases were made by that business unit. This occurred, for example, in connection with the *U.S. Foodservice* settlements,[19] when an FRS client, one of the largest operators of travel centers and travel plazas in North America, received for just a small number of its locations prepopulated claim forms and was prepared to submit only those forms; FRS, by identifying additional locations and by working with the claims administrator to locate data for them, increased that client's claim by over 135%. A similar situation occurred in connection with the *Urethane Dow* settlement,[20] when one of FRS's clients, a global market leader in full-line ingredient and chemical distribution, received a prepopulated claim form that did not include eligible purchases for its acquisitions of regional and local chemical distributors; FRS identified those acquired entities, thus enabling FRS to compel the claims administrator and class counsel to locate defendants' data for them, which resulted in an additional recovery of over $730,000. Similarly, when defendant-provided data is used to prepopulate or evaluate claim forms in connection with the settlements of direct purchaser antitrust class actions, class members may believe that only the business units that were identified by the claims administrator made eligible purchases. That very situation happened in connection with the administration of the *Containerboard* direct purchaser class action settlements,[21] pursuant to which the prepopulated claim forms that were disseminated to FRS's clients included total purchases of $605 million; based FRS's relationship management research procedures, those total purchases were increased to approximately $3 billion, or five times the amount included on the prepopulated claim forms.

> "[E]thical CACC conduct cannot be taken for granted."

As these examples and others demonstrate,[22] ethical and competent CACCs, because they are familiar with claims administration processes in general and with the idiosyncrasies of each settlement in particular, often cause class members that would not have submitted claims to do so, often cause those claims properly to include all eligible transactions, and often successfully advocate to obtain for their clients the recoveries to which, under the terms of the settlements and plans of allocation, they are entitled. While class counsel may in good faith believe that they and claims administrators are able to provide class members with the assistance needed to file compliant proofs of claim, they simply do not, to the same extent as CACCs, have the expertise or resources to do so or to enhance those class members' claims.

Class Counsel and Claims Administrators Are Unable to Provide the Level of Assistance Provided by CACCs

Class counsel, most of whom are extremely experienced and remarkably capable litigators, do not possess the experience in claims preparation and processing necessary to evaluate the issues that are likely to arise, to formulate fair and manageable solutions for them, and to understand the amount of time and effort that will be necessary effectively to do so. Class counsel and courts regularly express the view that class counsel and administrators will provide for free everything that class members need to recover their fair shares of settlements. In my experience, those lawyers and judges, none of whom have *any* experience processing proofs of claim or preparing them, assume that those tasks are routine and simple, and, therefore, that they do not require special skills, specific experience or significant effort to complete in an accurate and timely manner. But as too many administrations to count demonstrate, that position is unsupportable.[23]

> "[S]tate attorneys general and class counsel alike continue to identify unscrupulous CACCs that violate fundamental ethical and, in some cases, legal, standards."

This phenomenon, non-experts in a particular discipline—here, class action lawyers and judges, assessing as low the level of difficulty present in that discipline, is explained by the Dunning-Kruger effect, which, applied in connection with the nature of expertise, is as follows:

> Work on the nature of expertise, for instance, has revealed that novices possess poorer metacognitive skills than do experts. In physics, novices are less accurate than experts in judging the difficulty of physics problems (Chi *et al*., 1982). In chess, novices are less calibrated than experts about how many times they need to see a given chess-board position before they are able to reproduce it correctly (Chi, 1978). In tennis, novices are less likely than experts to successfully gauge whether specific play attempts were successful (McPherson & Thomas, 1989).[24]

Here, class action lawyers and district court judges – "novices" in the fields of class action claims administration, claim preparation and distribution of class action recoveries – are substituting their less informed, and, as explained by the Dunning-Kruger effect, less accurate, judgments for the experienced-based judgments of CACCS that are experts in claims preparation and management, including some that also are experts in claims administration and distribution. Class counsel and courts, neither of whom are likely to have evaluated for themselves the retention of CACCs, also are substituting their judgments for the judgments of the entities with the greatest interest in maximizing value. As set out in the beginning of this article, for example, FRS's clients, even sophisticated

ones, knowingly and voluntarily retain FRS and, in so doing, agree to share a not insubstantial portion of their recoveries, because they recognize that FRS – and, presumably, other competent and ethical CACCs – possesses skills and experience that they do not, but that they recognize are necessary for them to recover their fair shares of settlement funds. If those entities made an informed decision to hire CACCs precisely because of the latters' skills and experience, perhaps class counsel and courts should credit their decisions and recognize the value that ethical and capable CACCs provide; at the least, they should acknowledge that the decision, absent CACC misrepresentation, is for those class members to make.

Competent assistance from experienced CACCs would enhance the accuracy of a settlement administration and facilitate its distribution. FRS, for example, already has devoted substantial resources to the anticipated *Payment Card* claims process so that, once proof of claim forms are disseminated, the burden on FRS's clients will be reduced as much as possible. Specifically, and borne of the experience FRS management acquired from having participated in the *Visa Check* settlements, FRS, at its own expense, retained an interchange fee expert to develop a model that, based on any merchant's revenue or payment card volume during any portion of the class period, will provide a reasonable estimate of its corresponding interchange fees paid during the entire fifteen-year class period. As a result, when FRS receives prepopulated claim forms, FRS may evaluate the amounts and knowledgeably advise its clients; and when FRS receives claim forms that are not prepopulated, FRS may use the model to populate them.

> "Competent CACCs assist their clients that, without such assistance ..., either would have excluded from their claims eligible transactions, or would not have filed at all."

In many class actions, especially those with long class periods that begin many years – some, even decades – before the claims filing deadline, the data necessary to complete the claim form, as well as any documentation that may be required to support those claim forms, may, for one or more legitimate business reasons, be too burdensome or even impossible for class members to obtain. In such circumstances, competent CACCs work with their clients to develop, and then to obtain claims administrator and, if necessary, class counsel and court approval for, alternative approaches to those data and documentation requirements so that, rather than not filing a proof of claim at all, those class members receive their full shares of settlement recoveries. Also, more competent CACCs will appropriately interpret class definitions to determine whether the facts concerning each client's purchases yield transactions that are eligible, and then perform the client-specific research necessary to assure that claims include the eligible transactions of each of a class member's current and former business units. And CACCs will prepare complete and accurate claims that comply with judicially approved requirements.

Properly reacting to address perceived abuses by CACCs is entirely appropriate. But overreacting may result both in competent CACCs declining to represent class members and in some class members declining solicitations that they otherwise may have accepted from ethical CACCs. As a result, class members may not file complete proofs of claim or any at all. Because courts are now mandated by the 2018 Amendments to consider class member participation, class counsel should take steps to enhance that participation. Ethical and competent CACCs provide valuable benefits to their class member-clients, many of which would not otherwise participate in settlements. I elaborate below on a possible solution.

Scaling Class Member Protection Will Allow Full Recoveries, Reduce the Harm Caused by Unethical CACCs, and Reduce Satellite Litigation

It would be advantageous to class members, class counsel, ethical and competent CACCs and courts for class counsel to develop and implement scalable processes to address the participation of CACCs. The goal would be to protect class members from unethical or incompetent CACCs, while not undermining the valuable services that ethical and capable CACCs provide. The efforts undertaken in connection with the *Payment Card* settlement are a good first step. There, at class counsel's request, the court ordered all CACC solicitations to conform to specific requirements "to ensure [that] any solicitation is truthful and accurate."[25] Importantly, the required disclosures permit CACCs to explain the valuable services that they provide that may not be provided by class counsel or by the administrator. Accordingly, CACCs, provided they are truthful, may provide the full picture. The court also ordered class counsel to "provide the Court a report regarding third-party claims filing companies,"[26] which has enabled class counsel to address CACCs that they identify as having violated the court's orders.[27]

> "But not all members of the then-fledgling CACC business sector were as ethical as they should have been."

In considering what steps to take to protect class members, class counsel should be mindful that, as several FRS clients attested in support of FRS's motion to intervene in the *Hitachi parens patriae* action, they make knowing and voluntary decisions when they retain CACCs.[28] In such circumstances, there are limitations on what constraints class counsel or courts may lawfully impose: The communications that they seek to regulate must be demonstrably misleading and thus likely to cause abuse of the class action process.[29] In *Gulf Oil*, the Supreme Court, noting the potential problems inherent in regulating free speech, particularly when it seeks, as it does in connection with CACC solicitations, to "vindicate the legal rights of a class," held as follows:

> [A]n order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. In addition, such a weighing—identifying the potential abuses being addressed—should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.[30]

And in *Community Bank*, in which the district court, without making factual findings or otherwise justifying its actions, entered an order that barred communications with class members unless those communications were first approved by the court, the Third Circuit found an abuse of discretion.[31] The upshot of *Gulf Oil* and its progeny, therefore, is that restrictions on communications with class members must be based on a weighing of the competing interests; they should not be taken lightly, and must be directed only at communications that, because they are improper and misleading, are likely to cause abuse. Class counsel also must be cognizant of the applicability of the freedom of contract doctrine, under which neither class counsel nor the court may impose on class members their own view of which CACC services are necessary or whether they have value: "We start from the premise that commercial parties are free to contract as they desire. Absent illegality, unconscionableness, fraud, duress, or mistake the parties are bound by the terms of their contract."[32]

> "Competent assistance from experienced CACCs would enhance the accuracy of a settlement administration and facilitate its distribution."

Conclusion

These situations and applicable legal precedent militate against efforts to eliminate or unreasonably limit in broad-brush fashion the participation of all CACCs. Instead, they support separating the ethical and competent CACC "wheat" from the unscrupulous and ineffectual CACC "chaff." To do otherwise would cause conflicts that may result in satellite litigation with all the corresponding delays, distractions and costs that such sideshows often entail. Working with, and effectively and reasonably monitoring, ethical and competent CACCs, rather than unduly burdening them or trying to ban them altogether, will enhance class member recoveries and increase class member participation. The result will improve the likelihood that, under the 2018 Amendments, a proposed settlement will obtain judicial approval.

Notes

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1 Class action claims consultants as a group have been referred to by such names as "third-party claims filers" and "claims aggregators." This article, other than in quoted text, will use "CACC."

2 *See In re Payment Card Interch. Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, May 30, 2014 Hr'g Tr. at 13:23-14:3 (E.D.N.Y.) ("[T]he overwhelming majority of merchants are better off not having a claims filing service, getting a hundred percent of what's coming to them than they would by having one and getting anywhere from 65 to 85 percent of what's coming to them.").

3 *See* Jeffrey N. Leibell, *Under Amended Rule 23, Effective Settlement Management Is Not Just a Good Idea, It's the Law* (cited as "*Settlement Management*"), available at www.JNLFirm.com.

4 *In re Visa Check/MasterMoney Antitrust Litig.*, Master File No. 96-CV-5238 (E.D.N.Y.).

5 *Compare Visa Check*, Aff. Neil L. Zola Resp. Mot. ... Mod. Am. Plan Alloc., Doc. 1486, at ¶4 (June 8, 2009) (5.4 million "VM1" claim forms and 2.7 "VM2" claim forms were disseminated) *with* Aff. Neil L. Zola Supp. Mot. Final Check Cashing Deadline ..., Doc. 1601-2, at ¶2 (GCG processed >810,000 claims).

6 *See Visa Check*, 297 F. Supp.2d 503, 519 & n.21 (E.D.N.Y. 2003) ("Class members in the Visa Transaction Database—which includes records for a majority of the Class—do not need to provide any information in order to claim the portion of the Net Settlement Funds ... ."); *Payment Card*, Master File No. 96-CV-5238, 2014 WL 4966072, at *3 (E.D.N.Y. Oct 3. 2014) ("*Payment Card* Inj. Ord.") ("the overwhelming majority of the [*Visa Check*] class—did not need to provide any information to recover a monetary award from the net settlement funds ... .").

7 *Visa Check*, Doc. 1486, at ¶5 & n.2 (a total of 676,951 claimants received a recovery).

8 *See, e.g.*, *In re Urethane* [*Polyether Polyol*] *Antitrust Litig.*, Civil No. 04-MD-1616 (D. Kan.) (attempting *ex post* to send checks to class members); *State of Illinois v. Hitachi, Ltd.*, No. 12 CH 35266 (Ill. Ct. Ch.) (same *ex ante*); *Allen v. Dairy Farmers of Am.*, Inc., No. 5:09-cv-00230 (D. Vt.) (same *ex post*); *Id.* (claims administrator refused to communicate with CACCs); *In re Automotive Parts Antitrust Litig.*, MDL No. 12-2311 (E.D. Mich.) (attempting to require CACCs to indemnify class counsel); *Id.* (*Bearings Cases*) (attempting to require only CACCs to provide notarized affidavits); *In re Mushroom Direct Purch. Antitrust Litig.*, Master File No. 06-cv-0620 (E.D. Pa. Mar. 18, 2020) (refusing to accept client contracts as evidence that CACC was retained to manage claims"); *In re LIBOR-Based Fin. Instru. Antitrust Litig.*, MDL No. 11-md-2262, Case No. 11-cv-5450 (S.D.N.Y.) (prosecuting CACC); *In re Domestic Drywall Antitrust Litig.*, 13-MD-2437, MDL No. 2437 (E.D. Pa.) (threatening to prosecute CACC); *Washington v. AU Optronics Corp.*, No. 10-2-29164 (Wash. Ct. Sup.) (civil investigation of CACC).

9 *See, e.g.*, *DiMaria Const., Inc. v. Interarch*, 799 A.2d 555 (N.J. Ct. App. 2001) ("The tort of interference with a business relation or contract contains four elements: (1) a protected interest; (2) *malice—that is, defendant's intentional interference without justification*; (3) a reasonable likelihood that the interference caused the loss of the prospective gain; and (4) resulting damages.") (emphasis added) (citing *MacDougall v. Weichert*, 677 A.2d 162, 174 (N.J. 1996)), *quoted in Sylvan Dental, P.A. v. Chen*, No. A-4544-18, 2021 WL 3671164, at *8 (N.J. Ct. App. Aug. 19, 2021).

10 *See* Jeffrey N. Leibell, "*Low Cost" Class Action Claims Administrators: What You Don't Know Will Hurt You*, available at www.JNLFirm.com (cited as "*What You Don't Know*").

11 *See Settlement Management*.

12 *See, e.g.*, Fed. R. Civ. P. 23(c)(2)(B); 23(e)(1); 15 U.S.C. §78u-4(a)(7) (PSLRA "Disclosure of settlement terms to class members"); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (To satisfy due process "[t]he notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections[, and it] should describe the action and the plaintiffs' rights in it.'") (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)).

13 *See Payment Card*, No. 05-MD-1720, Def. Settle. Agmt., App. F2, Settle. Class Notice, Doc. 1656-1 (pp. 289-317); Def. Settle. Agmt., App. I, Plan Admin. & Distrib., Doc. 1651-1, (pp.349-364); Add'l Info. Con'g Plan Admin. & Distrib., Doc. 2112-1.

14 *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827 (N.D. Cal.).

15 Document on file with the author.

16 *In re Dynamic Random Memory (DRAM) Antitrust Litig.*, MDL No. 1486 (N.D. Cal.).

17 *In re Vitamin C Antitrust Litig.*, No. 1:06-MD-01738 (E.D.N.Y.).

18 *In re Polyurethane Foam Antitrust Litig.*, 10-MD-2196, MDL No. 2196 (N.D. Ohio).

19 *In re U.S. Foodservice, Inc. Pricing Litig.*, No. 3:07-md-1894 (D. Conn.).

20 *In re Urethane [Polyether Polyol] Antitrust Litig.* Civil No. 04-MD-1616 (D. Kan.).

21 *Kleen Prods. LLC v. Int'l Paper*, Case No. 1:10-cv-05711 (N.D. Ill.).

22 Examples of FRS's successes are presented at https://www.frsco.com/about/success/.

23 *See, e.g., What You Don't Know*.

24 Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, J. Pers. & Soc. Psych. 31 (Jan. 2000).; *see generally*, David Dunning & Geoffrey L. Cohen, *Egocentric Definitions of traits and Abilities in Social Judgment*, J. Pers. & Soc. Psych. 353 (Sept. 1992) ("people judge the performances of others in a self-serving manner").

25 *Payment Card*, Ord. re Misleading Third-Pty. Claims Filing Svces., Doc. 6137, at 1 (Dec. 20, 2013), *as modified by* Ord. Doc. No. 6147 (Dec. 30, 2013).

26 *Payment Card*, Order (Nov. 5, 2014 (dkt. entry only).

27 *See, e.g.*, *Payment Card*, Order, Doc. 7502 (June 26, 2019).

28 No. 12 CH 35266, Ver. Reply Stmt. Jeffrey N. Leibell, at ¶5 & Exs. 1-5 (IL Ch. Ct. Mar. 22, 2018).

29 *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-104 (1981); *In re Comm. Bank of N. Va.*, 418 F.3d 277, 310-12 (3d Cir. 2005) (must specify misleading statements that will lead to abuse); *Domingo v. N.E. Fish Co.*, 727 F.2d 1429, 1440-41 (9th Cir. 1984) ("'[T]he mere possibility of abuses does not justify routine adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Rules.'") (quoting *Gulf Oil*, 452 U.S. at 104).

30 452 U.S. at 99-102.

31 *See* 418 F.3d at 311-12 (footnote omitted; citing *Gulf Oil*, 452 U.S. at 102).

32 *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1009 (3d Cir. 1980); *accord Adobe Sys., Inc. v. Stargate Software Inc.*, 216 F. Supp.2d 1051, 1059 (N.D. Cal. 2002); *Tammac Corp. v. Williams*, No. 92-CV-390S, 1993 WL 330639, at *15 (W.D.N.Y. Aug. 13, 1993) ("[C]ommercial parties are free to contract as they desire and contracts so freely and voluntarily made are sacred and enforced by courts of justice.").