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VINDICATING THE PUBLIC INTEREST?: THE PUBLIC LAW IMPLICATIONS OF ATTORNEYS' FEE RESTRICTIONS IN CLASS ACTIONS

I. INTRODUCTION

The class action is an important weapon in the arsenal of the public interest. In the American consumer economy, where products and services are distributed en masse, corporate wrongdoing can injure thousands, sometimes millions.¹ When individual claims are small, the class action provides the only mechanism by which unjustly enriched defendants can be held accountable for their wrongdoing.² The American system overwhelmingly places the onus on private attorneys to litigate corporate malfeasance.³ Given the expense of litigation, without the potential of an adequate fee award, lawsuits defending the public against corporate misconduct would rarely be initiated.⁴ Whether the public interest will trump private concerns, therefore, turns on when and how attorneys' fees are awarded.⁵

This note examines how attorneys' fees are awarded in class actions and its effect on public law litigation. Part I explains the public law litigation model and sets forth how the class action fits into that model. Part II examines the history of how attorneys' fees have traditionally been awarded and how they have come to be treated in the class action context. Part III explores the role of the private attorney general in public law class actions and describes the Supreme Court's recent formulation of the "prevailing party" rule. Part IV considers "coupon settlements" and how they

¹ See *infra* note 28 (discussing examples of corporate wrongdoing).

² See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (explaining importance of class action when individual claims are small but aggregate damages are high); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) (observing that "[t]he aggregation of individual claims in . . . a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.").

³ See *infra* notes 137-138 and accompanying text (lamenting insufficiency of public funds available to enforce government regulations and emphasizing supplemental role of public law litigation).

⁴ Linda S. Mullenix, *Negative Value Suits*, 3/22/04 Nat'l L.J. 11 (Col. 1) (2004) (reasoning that without possibility of adequate fees, "no rational attorney would agree to represent [a] prospective client because the attorney fee would not justify the attorney's efforts.").

⁵ See *infra* note 43 and accompanying text (discussing role of attorneys' fees in initiation of public interest litigation).

relate to the Class Action Fairness Act. Finally, Part V argues that certain restrictions on attorneys' fee awards in class actions inhibit public law litigation and are detrimental to the public interest.

II. THE CLASS ACTION AS PUBLIC LAW LITIGATION

Practitioners and scholars alike have traditionally regarded the lawsuit as a means of resolving private disputes between private parties.⁶ According to this traditional understanding, litigation is a bipolar enterprise undertaken as a contest between two adverse interests.⁷ Predominantly concerned with past events, the lawsuit's focus is retrospective; it looks chiefly to compensate parties previously harmed.⁸ In this adversarial model, party autonomy—the parties' power to initiate litigation and control its course—holds center stage.⁹ The role of the judge is that of a detached umpire.¹⁰

In 1976, Harvard Law School Professor Abram Chayes observed that the traditional model of litigation failed to account for a sizable portion of the federal trial docket.¹¹ With the move from code to notice pleading and the consolidation of law and equity in the early twentieth century, the rules of joinder were dramatically liberalized.¹² The notion of "transactionalism" embodied in the Federal Rules of Civil Procedure, which were adopted in 1938, made it possible—in some cases mandatory—to join multiple, differently-situated parties.¹³ The 1966 amendments to Rule 23 creating the modern class actions facilitated "[t]he emergence of the group as

⁶ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281-83 (1976) (enumerating features of the traditional theory of litigation).

⁷ *Id.* at 1282.

⁸ *Id.*

⁹ *Id.* at 1283.

¹⁰ *Id.* at 1283.

¹¹ Chayes *supra* note 6, at 1281.

¹² *Id.* at 1289.

¹³ Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1746 (1992) (observing "the transactional approach requires rules that also permit the joinder of other persons affected by the same series of events."). Rather than organizing litigation around the legal theories involved, the transactional approach—or "transactionalism"—shifts the focus onto the "transaction or series of factual events that give rise to the claim(s) of legal entitlement." *Id.* The Federal Rules allow for many non-bipolar litigation structures. *Id.* For example, the rule governing impleader gives the defendant the ability to join third-parties not directly liable to the plaintiff. FED. R. CIV. P. 14. The rule governing interpleader permits a plaintiff to join multiple defendants in certain circumstances where multiple parties have potentially inconsistent claims against the plaintiff. FED. R. CIV. P. 22; see also 28 U.S.C. § 1335 (2006) (granting comparable authority independent from Rule 22 to interplead multiple defendants).

the real subject or object of . . . litigation.”¹⁴ The traditional theory of bipolar dispute resolution, Professor Chayes concluded, cannot easily be squared with a procedural regime that permits “sprawling and amorphous” party structures.¹⁵

Alongside the move away from bipolar litigation, the twentieth century saw courts’ growing willingness to prescribe equitable relief—relief seeking to modify future behavior rather than compensate for past wrongdoing.¹⁶ This shifted the focus of litigation from purely retrospective to increasingly prospective.¹⁷ Along with this shift came an increased role for the judge, whose continued involvement is necessitated by changed circumstances or party noncompliance.¹⁸ As the number of parties to litigation grew, the role of the judge increased, and the scope of relief began to look progressively more toward the future, the line between dispute resolution and crafting public policy blurred.¹⁹ Taken together, these developments suggest a trend away from the traditional model toward what Professor Chayes has called “public law litigation.”²⁰ Unlike the traditional “private” model, public law litigation is characterized by expansive party structures and an increasingly prospective remedial scope.²¹ In addition, public law litigation features remedies that are negotiated among the parties rather than imposed from the bench, a growing role for the judge—both as litigation manager and post-judgment overseer—and predominant questions of public policy rather than private rights.²²

Public law litigation often takes the form of the class action.²³ In particular, one type of class action—called the “negative value” class action—provides the archetypical example of public law litigation.²⁴ The “negative value” suit is litigation in which individual damages are so small and potential for recovery so slight that no rational plaintiff would expend the resources to pursue her claim.²⁵ In other words, the transaction costs to

¹⁴ Chayes, *supra* note 6, at 1291.

¹⁵ *Id.* at 1302.

¹⁶ *Id.* at 1292-94.

¹⁷ *Id.*

¹⁸ See Chayes, *supra* note 6, at 1292-94.

¹⁹ *Id.* at 1297.

²⁰ *Id.* at 1302-04.

²¹ *Id.*

²² *Id.*

²³ See Chayes, *supra* note 6, at 1291.

²⁴ See Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223, 228 (2004) (observing that negative value class action serves to disgorge unlawful profits and deter corporate wrongdoing).

²⁵ See Mullenix, *supra* note 4 (explaining concept of negative value suit).

a plaintiff are prohibitive.²⁶ Moreover, where no rational plaintiff would seek to pursue her claim given the costs of doing so, no rational attorney would agree to represent that plaintiff because any potential fee would not compensate her for her efforts.²⁷

In the context of the American consumer economy, corporate actions have the potential to inflict precisely these types of small individual damages upon a large group of consumers.²⁸ Without a procedural alterna-

²⁶ *Id.*

²⁷ *Id.*

²⁸ Examples of this brand of corporate wrongdoing are legion. In the early to mid 1990s, two shoe manufacturers both engaged in price-fixing. Keds Corporation, a nationwide manufacturer of athletic footwear, artificially inflated the price of six of their most popular styles of women's athletic shoes. *New York v. Keds Corp.* No. 1:93CV06708 (CSH), 1994 WL 97201, *1 (S.D.N.Y. Mar. 24, 1994). The price of each pair of shoes was raised by \$1.00 to \$1.25. *Id.* Over five million pairs were sold at these unlawfully inflated prices, resulting in damages around seven million dollars. *Id.* Around the same time, Reebok was engaging in similar practices. *New York v. Reebok Int'l Ltd.*, 903 F. Supp. 532, 533 (S.D.N.Y. 1995). Reebok colluded to raise the price of two of its most popular shoe brands by just under \$4.00 per pair. *Id.* at 534. With nearly two million pairs sold, Reebok customers overpaid for their shoes by almost six and a half million dollars. *Id.* Earlier, between 1981 and 1986, B. Manischewitz Co. engaged in a comparable price-fixing scheme to overcharge their customers for matzo and matzo products. *In re Kosher Food Prods. Antitrust Litig.*, JCCP No. 2518 (Cal. Sup. Ct. Nov. 22, 1991). Although the overcharges were less than one dollar per product, B. Manischewitz Co. was unjustly enriched by hundreds of thousands of dollars. *Id.*

Other kinds of corporate misdeeds make for similar results. In the late 1980s, popular toy manufacturer and retailer Toys "R" Us allegedly conspired with other toy retailers to restrict sales to so-called "warehouse" wholesalers such as Costco and BJ's Wholesale Club. *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347 (E.D.N.Y. 2000). The results of the conspiracy were to hold the price of defendants' toys at an artificially high price by discouraging competition at the lower-priced warehouse wholesalers. *Id.* Tens of millions of toy purchasers overpaid for toys by a few dollars, unjustly enriching Toys "R" Us and their co-conspirators by upwards of sixty million dollars. *Id.* at 352, 355. In 2000, it was alleged that software giant Microsoft had been using its weight in the market to exclude competition for its operating system. *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 705-08 (D. Md. 2001). Over the course of a decade, Microsoft's anti-competitive activities resulted in overpayments by nearly one hundred million computer and software purchasers. *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519, 523 n.2 (D. Md. 2002). In the end, Microsoft consumers may have overpaid well in excess of one billion dollars. *Id.*

At the same time that Microsoft was overcharging for its operating system, a cabal of vitamin manufacturers in California was working in concert to inflate the prices of their products. *In re Vitamin Cases*, 132 Cal. Rptr. 2d 425, 427-28 (Cal. Ct. App. 2003). From 1988 to the late 1990s, these companies overcharged nearly thirty million consumers by a total of thirty-eight million dollars. *Id.* at 429. A decade earlier, the Phillips Petroleum Company of Delaware engaged in equally noxious business practices. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799 (1985). Phillips Petroleum purchased or produced natural gas from land leased in eleven states. *Id.* Over the course of several years, Phillips Petroleum unlawfully withheld royalties from over thirty-three thousand landowners. *Id.* Although the practice only deprived each landowner of about \$100, in the aggregate Phillips Petroleum saw an unlawful profit of more than three million dollars. *Id.* at 801. Even earlier than Phillips's scheme, Deposit Guaranty National Bank of Mississippi was acting to defraud its debtors. *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*,

tive to an individual lawsuit, corporations unjustly enriched in this fashion would be virtually immune from litigation.²⁹ The negative value class action—or small claims consumer class action—is the procedural solution to the problem posed by this species of corporate misconduct.³⁰ “The policy at the very core of the class action mechanism,” the Supreme Court has observed, “is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”³¹ “A class action solves this problem,” the Court continued, “by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.”³² The negative value class action, therefore, is the quintessential class action.³³

Accordingly, class actions are best understood through the lens of the public law litigation model. When small damages are spread among numerous consumers, many plaintiffs must join together to make litigation feasible.³⁴ Although plaintiffs’ claims for compensatory damages necessitate a retrospective factual inquiry, potential punitive damages serve as a prospective deterrent to the defendant.³⁵ In many cases, such as those involving unsafe products or unfair business practices, the remedy often encompasses not only compensation for past wrongdoing but also includes a directive to improve the safety of the product or reform the business practice in question.³⁶ Because the majority of this type of litigation settles

445 U.S. 326, 326 (1980). Mississippi law sets a maximum interest rate that banks can permissibly charge credit account holders. *Id.* at 329. Nevertheless, Deposit Guaranty’s method of computing monthly interest resulted in approximately ninety thousand of their credit card customers being charged in excess of the legal maximum rate. *Id.* Again, though this scheme overcharged each customer only a little more than \$100, Deposit Guaranty garnered twelve million dollars in unlawful profits. *Id.* at 345 (Powell, J., dissenting).

²⁹ See Sherman, *supra* note 24, at 226 (noting “if a class action can be avoided, a defendant is likely to be relieved of sizeable liabilities . . .”). In the absence of the class action aggregation device, where individual plaintiffs’ transaction costs are prohibitive, suit would likely not be brought and “wrongdoers might never have to answer for their conduct.” *Id.* at 228. “To refuse to permit class actions on the grounds that individual recoveries are small, while ignoring the aggregate amounts involved, would encourage wrongful conduct and largely immunize entities engaged in schemes to steal millions in \$10 increments.” National Association of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375, 379-80 (1997).

³⁰ See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (describing negative value situation as quintessential application of class action).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See Mullenix, *supra* note 4 (stressing importance of class actions when individual damages are small).

³⁵ See Sherman, *supra* note 24, at 228, 233 (explaining that in addition to compensation for past wrongs, risk of damages deters future wrongdoing by defendants).

³⁶ See Thomas R. Grande, *Innovative Class Action Techniques - The Use of Rule 23(B)(2) in*

rather than goes to a jury, the parties often take the lead in negotiating the settlement and crafting the remedy.³⁷ Under Rule 23, however, the judge must approve any settlement reached between the parties.³⁸ In doing so, the judge steps outside her traditional role of disinterested umpire in order to take a more active part in both guiding the litigation and crafting the remedy.³⁹

III. THE AMERICAN RULE AND ATTORNEYS' FEES IN CLASS ACTION LITIGATION

As observed by the Supreme Court, the lynchpin of this type of class action litigation is the aggregation of claims "into something worth someone's (usually an attorney's) labor."⁴⁰ Owing to the size and complexity of most negative value class actions, prosecuting these cases demands a significant investment.⁴¹ Without the prospect of a fee proportionate to that investment, attorneys would have no incentive to assume the burden of litigation.⁴² How attorneys' fees are calculated and awarded in class actions, therefore, often dictates which controversies are litigated and which ones are not.⁴³

Consumer Class Actions, 14 LOY. CONSUMER L. REV. 251, 264 (2002) (observing "[c]onsumer lawyers use [consumer protection] statutes to enjoin wrongful conduct, as well as compensate consumers who have suffered pecuniary injury.").

³⁷ See 4 NEWBERG ON CLASS ACTIONS § 11.1 (4th Ed.) (2006) (observing among certified class actions federal courts certified well over fifty percent for settlement purposes); see also Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74 (1996) (studying class action settlements); Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, 20-FALL Antitrust 26, 26 (2005) (concluding "nearly 90 percent of certified class actions, and perhaps two-thirds of all class actions, including those brought under antitrust laws, settle."); Edward A. Hosp, *Settlements Under the Class Action Fairness Act of 2005*, 67 ALA. LAW. 125, 125 (2005) (observing "[i]t is often said that class action lawsuits are filed in order to be settled, and not to be tried."); 4 NEWBERG ON CLASS ACTIONS § 11.1 (4th Ed.) (2006) (noting "[t]he complexities and uncertainties of class litigation may make settlement attractive to all parties involved in a class suit.").

³⁸ FED. R. CIV. P. 23(e)(1)(A) (requiring court approval for "any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.").

³⁹ See MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.41 (1995) (discussing role of the judge in class action settlement process).

⁴⁰ *Amchem Products*, 521 U.S. at 617 (explaining negative value situation is the quintessential application of the class action).

⁴¹ See *Epifano v. Boardroom Bus. Prods., Inc.*, 130 F.R.D. 295, 299 (S.D.N.Y. 1990) (describing the "complexity . . . and the high cost of litigation . . ." in small claims class action suits).

⁴² See Mullenix, *supra* note 4 (reasoning without possibility of adequate fees, "no rational attorney would agree to represent [a] prospective client because the attorney fee would not justify the attorney's efforts.").

⁴³ Hailyn Chen, Comment, *Attorneys' Fees and Reversionary Fund Settlements in Small*

Under the so-called "American rule," a prevailing party is generally unable to recover attorneys' fees from her opponent.⁴⁴ This rule traces its origins to the English common law, which likewise did not allow the winning party to recover her attorneys' fees.⁴⁵ In England, however, statutes authorizing courts to make fee awards were enacted as early as the late thirteenth century.⁴⁶ When the American legal system parted ways with its English forbearer, the fledgling United States Congress instructed federal courts to observe the practices regarding attorneys' fees of the states in which they sat.⁴⁷ At this time, some states had statutes allowing awards of fees, while others followed the common law rule requiring each party pay its own fees.⁴⁸

By the beginning of the nineteenth century, Congress had either repealed or allowed the statutes to expire, instructing federal courts to look to the states in which they sat for direction on how to compute attorneys' fees.⁴⁹ Nevertheless, for lack of an alternative directive from Congress, until the 1850s federal courts continued to look to the substantive law of their host state to determine if and when to award attorneys' fees to a prevailing party.⁵⁰ Accordingly, the common law presumption that such awards were generally inappropriate remained the norm.⁵¹ "The general practice of the United States is in opposition to [fee awards]," the Supreme Court noted in 1796, "and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute."⁵² In 1853, Congress passed legislation making uniform the manner in which attorneys' fees were to be awarded in federal courts by prescribing a set fee schedule.⁵³ Affirming the common law rule, this legislation allowed

Claims Consumer Class Actions, 50 UCLA L. REV. 879, 892-93 (2003) (explaining that certain "injuries would likely pass undetected and undeterred" without potential fees "creat[ing] an incentive for class counsel to bring such actions").

⁴⁴ See 20 AM. JUR. 2D *Costs* § 55 (2007) (explaining American rule).

⁴⁵ *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975) (examining history of American rule).

⁴⁶ *Id.*

⁴⁷ *Id.* at 247-48. The only exception to this rule was that district courts sitting in admiralty or exercising maritime jurisdiction were to award fees pursuant to a fee schedule determined by Congress. *Id.* at 248.

⁴⁸ David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and the "English Rule,"* 15 IND. INT'L & COMP. L. REV. 583, 584-85 (2005) (examining history of American rule).

⁴⁹ See *Alyeska Pipeline Serv. Co.*, 421 U.S. at 249 (discussing history of American rule).

⁵⁰ *Id.* at 250-51.

⁵¹ *Id.* (citing *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796)).

⁵² *Arcambel*, 3 U.S. (3 Dall.) at 306 (observing how attorneys' fees were awarded in early-American courts).

⁵³ *Alyeska Pipeline Serv. Co.*, 421 U.S. at 251-52.

a prevailing party to collect attorneys' fees only in limited circumstances, and even then only in small amounts.⁵⁴ Since then, the Court has repeatedly "reaffirmed the general rule that, absent statute or enforceable contract, litigants pay their own attorney's fees."⁵⁵

There are nevertheless circumstances where courts do not apply the American rule.⁵⁶ Both the courts and Congress have carved out exceptions to the rule, taking into account situations where it works more harm than good or where there are countervailing factors warranting an award of attorneys' fees.⁵⁷ Where a losing party has acted in bad faith or has been held in contempt, for example, the court may award attorneys' fees to the prevailing party.⁵⁸ This exception proceeds on the theory that the threat of sanction by way of fee award will deter litigant misbehavior.⁵⁹ Another exception is "where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class."⁶⁰ This "common benefit exception"—also known as the "common fund" doc-

⁵⁴ *Id.* at 252.

⁵⁵ *Id.* at 257. Courts have offered many justifications for the American rule. Modern courts often explain it as serving "to avoid stifling legitimate litigation by the threat of the specter of burdensome expenses being imposed on an unsuccessful party." *Tonti v. Akbari*, 553 S.E.2d 769, 771 (Va. 2001) (examining rationale for American rule). "[S]ince litigation is at best uncertain," the Supreme Court explains, "one should not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (explaining various rationales supporting the American rule). Moreover, "the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *Id.* By distributing the risk of litigation on both sides of the "v.," the American rule aims to both discourage frivolous suits by placing the cost of litigation on the unjustifiably litigious, as well as encourage those of lesser means to defend their rights by ensuring that even if unavailing they will not be burdened with the cost of their opponent's attorneys' fees. *Id.*

⁵⁶ See *F. D. Rich Co., Inc. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129-30 (1974) (outlining exceptions to American rule).

⁵⁷ *Id.*

⁵⁸ *Id.* at 129 (noting bad faith exception to American rule); see also *Root*, *supra* note 48, at 586 (stating that bad faith exception "provide[s] compensation to either party when the opposing party has acted inappropriately").

⁵⁹ See *Callow v. Amerace Corp.*, 681 F.2d 1242, 1242 (9th Cir. 1982) (holding in case of bad faith that "award of attorney's fees was an appropriate deterrent to future frivolous suits."); John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 29 (1984) (concluding rationale for bad faith exception is to "deter[] illegitimate behavior in the courtroom, and sometimes outside it.").

⁶⁰ *F. D. Rich Co., Inc.*, 417 U.S. at 129-30 (describing common benefit exception); see also *Hall v. Cole*, 412 U.S. 1, 5-6 (1973) ("Fee shifting is justified in these cases, not because of any 'bad faith' of the defendant but, rather, because to allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.") (citing *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970)) (internal quotations omitted).

trine—operates “to avoid the unjust enrichment of beneficiaries who did not actively prosecute the litigation.”⁶¹ Unlike the bad faith exception where the loser is made to pay the attorneys’ fees of the winner, the common fund doctrine “disburs[es] the litigation costs over the range of beneficiaries not involved in the litigation, but who benefit from the fund”⁶²

Statutory fee-shifting provisions provide further exceptions to the American Rule.⁶³ There are some two hundred federal and almost two thousand state statutes allowing a prevailing party to shift the cost of attorneys’ fees to the losing party.⁶⁴ Many of these statutes focus on areas of the public interest, such as environmental protection, civil rights, and consumer protection.⁶⁵ The reason Congress enacted these provisions is “because they compel a higher public purpose, and therefore successful lobbying litigants should not shoulder the cost of advancing American public policy.”⁶⁶ “Congress’ purpose in adopting fee-shifting provisions,” Justice Blackmun has observed, “was to strengthen the enforcement of selected federal laws by ensuring that private persons seeking to enforce those laws could retain competent counsel.”⁶⁷

Attorneys’ fees in negative value class actions are most often awarded under the common fund doctrine or pursuant to a fee-shifting statute.⁶⁸ Where an attorney’s effort has created a common fund, by way of either settlement or final judgment, the common fund doctrine permits the attorney to be awarded “a reasonable fee . . . taken from the fund.”⁶⁹ In the context of consumer protection litigation, plaintiffs are often able to bring their claims pursuant to statutes that contain fee-shifting provisions.⁷⁰ In

⁶¹ Stuart T. Rossman & Charles Delbaum, *Consumer Class Actions* 225 (6th ed. 2006).

⁶² See Root, *supra* note 48, at 586 (discussing common fund doctrine).

⁶³ See *Alyeska Pipeline Services Co.*, 421 U.S. at 260-62 (examining statutory fee-shifting provisions in relation to the American rule).

⁶⁴ See Root, *supra* note 48, at 588 (discussing statutory fee-shifting provisions).

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ *City of Burlington v. Dague*, 505 U.S. 557, 568 (1992) (Blackmun, J., dissenting) (explaining the Congressional rationale behind fee-shifting provisions); see also *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 483 U.S. 711, 725 (1987) (finding “a fundamental aim of such statutes is to make it possible for those who cannot pay a lawyer for his time and effort to obtain competent counsel, this by providing lawyers with reasonable fees to be paid by the losing defendants.”); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (observing “statutory fees are intended to further a legislative purpose by punishing the nonprevailing party and encouraging private parties to enforce substantive statutory rights.”).

⁶⁸ See 4 NEWBERG ON CLASS ACTIONS § 14.1 (4th Ed.) (2006) (reviewing how courts award attorneys’ fees in class actions).

⁶⁹ *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) (affirming application of the common fund doctrine).

⁷⁰ See Root, *supra* note 48, at 588 (describing consumer protection as one of the four main categories of statutory fee-shifting provisions).

such cases, the statute giving rise to the cause of action also provides an independent ground for an award of attorneys' fees should plaintiffs prevail.⁷¹ Without these two exceptions to the American rule, public law litigation in the form of negative value class actions would be nearly impossible.

IV. PRIVATE ATTORNEYS GENERAL AND THE PREVAILING PARTY RULE

As noted above, the rationale behind statutory fee-shifting provisions is "to provide an incentive for citizens . . . to enforce certain laws as private attorneys general."⁷² The idea of a private attorney general first appeared in 1943 in an opinion by Judge Jerome Frank of the Second Circuit.⁷³ Since its first instance, use of the term has grown steadily in court opinions and the legal literature.⁷⁴ It generally refers to a private attorney who performs the quasi-public function of pursuing litigation to vindicate the public interest.⁷⁵ What is more, because public law litigation focuses principally on protecting public rights, the private attorney general is integral to its success.

Convinced of the value of public law litigation in promoting the public interest, some courts have sought to craft their own private attorney general exceptions to the American rule.⁷⁶ In *Alyeska Pipeline Service Co. v. Wilderness Society*,⁷⁷ the Supreme Court considered whether the Court of Appeals was empowered to award attorneys' fees absent a fee-shifting provision on the theory that plaintiffs' counsel were acting as private attorneys general.⁷⁸ Although the Court acknowledged that fee awards encourage "private enforcement to implement public policy," it nevertheless concluded that Congress, not the courts, should determine when fee-shifting was proper.⁷⁹ "[C]ongressional utilization of the private-attorney-general

⁷¹ See 4 NEWBERG ON CLASS ACTIONS § 14.3 (4th Ed.) (2006) (discussing fee-shifting statutes in context of class action attorneys' fee awards).

⁷² See *id.* (explaining private attorney general rationale for fee-shifting provisions).

⁷³ See *Assoc. Indus. of New York v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) (describing private attorneys empowered by Congress to pursue litigation in the public interest as "private Attorney Generals [sic]."); see also William B. Rubenstein, *On What a "Private Attorney General" Is—And Why it Matters*, 57 VAND. L. REV. 2129, 2133 (2004) (discussing history of the private attorney general concept).

⁷⁴ See Rubenstein, *supra* note 73, at 2134-35.

⁷⁵ See *id.*

⁷⁶ See *Alyeska Pipeline Services Co.*, 421 U.S. at 241.

⁷⁷ 421 U.S. 240 (1975).

⁷⁸ *Id.* at 241 (setting forth issue).

⁷⁹ *Id.* at 263.

concept," the Court held, "can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party"⁸⁰ After *Alyeska Pipeline*, prevailing parties could no longer appeal to the inherent equity powers of the courts for awards of attorneys' fees under a general private attorney general theory.⁸¹ Instead, they would have to rely on the specific terms of a fee-shifting statute enacted by Congress.⁸²

Until recently, many courts frequently allowed plaintiffs to recover attorneys' fees in class actions brought under fee-shifting statutes, even when the parties settled before trial.⁸³ Employing the so-called "catalyst theory," courts reasoned that a settlement favorable to plaintiffs was sufficiently analogous to a judgment favorable to plaintiffs so as to qualify plaintiffs as the "prevailing party" under the terms of fee-shifting statutes.⁸⁴ In other words, the catalyst theory "posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct."⁸⁵

In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,⁸⁶ the Supreme Court considered whether the catalyst theory was an appropriate ground for an award of attorneys' fees in the absence of a final judgment on the merits.⁸⁷ Looking to the meaning of the phrase "prevailing party" as it has been employed in both common usage and case law, the Court concluded that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees."⁸⁸ Accordingly, after *Buckhannon*, a settlement favorable to a plaintiff may no longer qualify that plaintiff as the "prevailing party" for the purposes of fee-shifting statutes.⁸⁹ Although a settlement plainly does not qualify as a judgment on the merits, it is unclear whether certain court-sanctioned settlement agreements qualify as "court

⁸⁰ *Id.*

⁸¹ See *Alyeska Pipeline Serv. Co.*, 421 U.S. at 263-64 (concluding courts cannot award attorneys' fees "whenever [they] deem the public policy furthered by a particular statute important enough to warrant [it].").

⁸² *Id.*

⁸³ See *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 602 (2001) (observing that "most Courts of Appeals recognize the 'catalyst theory'").

⁸⁴ *Id.* at 601 (explaining catalyst theory).

⁸⁵ *Id.* at 598.

⁸⁶ 532 U.S. 598 (2001).

⁸⁷ *Id.* at 600.

⁸⁸ *Id.* at 604 (quoting *Tex. State Teachers Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)).

⁸⁹ *Id.*

ordered consent decree[s].”⁹⁰ The Ninth Circuit has characterized the *Buckhannon* language suggesting that “private settlements” can never make plaintiff a “prevailing party” as dicta.⁹¹ Nevertheless, a majority of courts passing on the question have construed *Buckhannon* to mean that a “private settlement” cannot be the basis for an award of attorneys’ fees.⁹²

V. NONCASH SETTLEMENTS AND THE CLASS ACTION FAIRNESS ACT OF 2005 FEE RESTRICTIONS

In early 2005, Congress enacted the Class Action Fairness Act (“CAFA”).⁹³ Purportedly intended “[t]o amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants,” CAFA seeks to regulate, among other things, how attorneys’ fees are awarded in class action settlements.⁹⁴ As noted above, most class actions settle rather than proceed to final judgment.⁹⁵ CAFA’s fee restrictions therefore have wide-ranging implications for class action practice.⁹⁶

CAFA regulates the award of attorneys’ fees in noncash settlements, also called “coupon settlements.”⁹⁷ There are many types of coupon settlements.⁹⁸ In some cases, the settlement is paid entirely in coupons, while in others a portion is paid in cash and the remainder in coupons.⁹⁹ Generally, these coupons are similar to common promotional coupons.¹⁰⁰

⁹⁰ Compare *Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128, 1134 n.5 (9th Cir. 2002) (characterizing *Buckhannon* “private settlement” language as dicta), *cert. denied*, 537 U.S. 820 (2002), with *Nat’l Coal. for Students with Disabilities v. Bush*, 173 F. Supp. 2d 1272, 1278 (N.D. Fla. 2001) (concluding that *Buckhannon* does not allow attorneys’ fees in “private settlements”).

⁹¹ See *Barrios*, 277 F.3d at 1134 n.5 (describing as dicta *Buckhannon* “private settlement” language).

⁹² See *Nat’l Coal. for Students with Disabilities*, 173 F. Supp. 2d at 1278 (finding *Buckhannon* does not permit attorneys’ fees in “private settlements”).

⁹³ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1711-15 (2005)).

⁹⁴ *Id.*

⁹⁵ See *supra* note 37 and accompanying text (noting high proportion of class actions that settle rather than proceed to trial).

⁹⁶ See Casper, *supra* note 37, at 27-28 (concluding CAFA’s fee restrictions will delay settlement and deter class counsel from pursuing coupon settlements and cy pres relief); Hosp, *supra* note 37, at 125, 129 (reasoning that CAFA’s fee restrictions “make it much more difficult to settle class actions” because they “almost completely remove[] what was arguably a cost-effective method of settling class actions.”).

⁹⁷ 28 U.S.C. § 1712 (2005).

⁹⁸ See Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 GEO. J. LEGAL ETHICS 1395, 1396 (2005) (discussing coupon settlements).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Some offer a stated dollar discount, while others grant a percentage discount off of a retail price.¹⁰¹

There are many advantages to coupon settlements.¹⁰² Where a cash settlement is a zero-sum exchange—the gain by one party is equally offset by the loss to the other—the use of coupons allow for settlements that are more attractive to both parties.¹⁰³ Coupon settlements permit defendants to repay plaintiffs out of future profits instead of their current assets because their products are sold for more than they cost to make.¹⁰⁴ In other words, “[d]efendants accept coupon settlements because they pay only when a sale is made, spreading their liability over time while ridding themselves of risky litigation.”¹⁰⁵ This arrangement is not only attractive from an accounting perspective, but in many instances it can save a troubled company from bankruptcy.¹⁰⁶

Coupon settlements are not without their critics.¹⁰⁷ To the contrary, much ink has been spilt lamenting the potential pitfalls of noncash settlements.¹⁰⁸ In particular, because these settlement arrangements provide the class with discount coupons rather than cash, determining the actual value of the benefit to the class can be difficult.¹⁰⁹ Critics claim that there is often a wide gap between the “cash value” of coupons distributed

¹⁰¹ *Id.*

¹⁰² See Lisa M. Mezzetti & Whitney R. Case, *The Coupon Can be the Ticket: The Use of “Coupon” and Other Non-Monetary Redress in Class Action Settlements*, 18 GEO. J. LEGAL ETHICS 1431, 1433-34 (2005) (describing the virtues of coupon settlements, namely: they “are a useful tool for both sides to create settlements that provide more value than an all-cash settlement.”).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443, 1445 (2005) (examining CAFA’s solution to alleged abuses in class action coupon settlements).

¹⁰⁶ See Mezzetti & Case, *supra* note 102, at 1434.

¹⁰⁷ See Leslie, *supra* note 98, at 1395-98 (examining potential problems with coupon settlements).

¹⁰⁸ See, e.g., *id.* at 1396-97 (concluding coupon settlements do not “provide meaningful compensation to most class members”, frequently “fail to disgorge ill-gotten gains from the defendant,” and often require “class members to do future business with the defendant in order to receive compensation.”); Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor’s Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1352-53 (2005) (describing most coupon settlements as “abusive settlements . . . where the benefit to the plaintiff class is wholly illusory . . .”); John H. Beisner, Matthew Shors, & Jessica Davidson Miller, *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1455 (2005) (suggesting “[s]ettlements that pair huge attorneys’ fees with ‘coupons’ worth pennies or little more for the putative class members are common.”). But see Mezzetti & Case, *supra* note 102, at 1437 (“[N]o one can fairly argue that all coupon settlements are bad.”).

¹⁰⁹ See Leslie, *supra* note 98, at 1398.

to the class and those actually redeemed by class members.¹¹⁰ If attorneys' fees are calculated as a percentage of the total cash value in cases where the redemption rate is low, the attorneys stand to reap large sums while the class itself receives little.¹¹¹ Although anecdotal evidence suggests that redemption rates can be low, no comprehensive studies have been undertaken.¹¹² The potential for abuse alone, however, does not warrant blanket condemnation of coupon settlements; rather, it demands careful scrutiny.¹¹³

The advantages and disadvantages of coupon settlements aside, their prevalence among class action settlements is evident.¹¹⁴ In response to the potential pitfalls outlined above, CAFA attempts to regulate how attorneys' fees are calculated where some or all of a settlement agreement provides for coupons to the class.¹¹⁵ In particular, CAFA provides that "[i]f a proposed settlement in a class action provides for a recovery of coupons . . . the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed."¹¹⁶ In addition, CAFA calls for increased judicial scrutiny of settlements involving coupons.¹¹⁷ After a mandatory fairness hearing, CAFA demands a written judicial finding that the settlement is "fair, reasonable, and adequate"¹¹⁸

CAFA also contains provisions for cy pres relief.¹¹⁹ Where "direct distribution of settlement funds to individual class members is impractical . . . and where important consumer goals, such as disgorgement of ill-gotten gains from and deterrence of future over-pricing and manipulation of market allocation . . . can be achieved," courts have historically employed cy

¹¹⁰ See *id.* at 1397; see also Chen, *supra* note 43, at 881 (observing "[o]ften, because of the high opportunity costs associated with making a claim and the small size of many claims, few class members step forward to claim recovery, and thus the actual payout to the class turns out to be significantly less than the available fund.").

¹¹¹ Chen, *supra* note 43, at 882 (noting potential discrepancy between attorneys' fees and benefit to the class in cases where coupon redemption rates are low).

¹¹² See Leslie, *supra* note 98, at 1395 (calling for comprehensive study of coupon settlements in consumer class actions).

¹¹³ See Mezzetti & Case, *supra* note 102, at 1431, 1441 (arguing existence of some "bad" coupon settlements does not condemn all coupon settlements).

¹¹⁴ See Leslie, *supra* note 98, at 1396 (observing at least "nine percent of the class action settlements . . . resulted in coupon distributions to the class."). Although nine percent may seem small, it must be kept in mind that it represents "[h]undreds of millions of settlement coupons . . . distributed to settle billions of dollars of litigation." *Id.*

¹¹⁵ 28 U.S.C. § 1712 (2006).

¹¹⁶ 28 U.S.C. § 1712(a) (2006).

¹¹⁷ 28 U.S.C. § 1712(e) (2006).

¹¹⁸ *Id.*

¹¹⁹ See *infra* note 130 and accompanying text (discussing provisions of CAFA relating to cy pres relief).

pres remedies.¹²⁰ The equitable doctrine of cy pres originates in the common law of charitable trusts.¹²¹ Where it is impossible to comply with the terms of a charitable trust, the funds are put to the "next best use" as determined by the original charitable purpose of the settlor.¹²² Adapting this doctrine to the class action context, courts employ cy pres remedies in a way such that "funds [are] distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated."¹²³ Although each class member cannot be reimbursed for his exact loss, the doctrine of cy pres allows the court and/or the parties to fashion a remedy that in theory indirectly benefits the class.¹²⁴

Courts also commonly apply the cy pres doctrine when an undistributed remainder exists after all consumer claims have been paid out of a settlement fund.¹²⁵ In most consumer class action settlements, a claims administrator will distribute notice of the settlement to the class, each member of which will then usually need to file a claims form to receive their individual recovery.¹²⁶ Upon receipt of the consumer claims forms, the claims administrator pays the consumer his portion of the settlement

¹²⁰ Boyle v. Giral, 820 A.2d 561, 569 (D.C. Cir. 2003) (describing cy pres relief in the context of consumer class actions).

¹²¹ See *In re Vitamin Cases*, 132 Cal. Rptr. 2d 425, 429 (Cal. Ct. App. 2003) (recounting history of the doctrine of cy pres).

¹²² *Id.*

¹²³ *In re Infant Formula Multidistrict Litig.*, No. 4:91-cv-00878-MP, 2005 WL 2211312, *1-*2 (N.D. Fla. Sep. 8, 2005) (explaining application of cy pres doctrine to class action settlements).

¹²⁴ Courts have approved cy pres remedies in many circumstances. For example, rather than refund what customers overpaid for toys, Toys "R" Us instead agreed to contribute twenty million dollars in cash along with another thirty-six million dollars in toys to assorted children's charities. *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. at 349. Similarly, Microsoft agreed to distribute nearly a billion dollars in coupons and customer rebates instead of mailing out one hundred million checks. *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d at 521. It was similarly infeasible to compensate every consumer who paid too much for Keds athletic shoes. *Keds Corporation*, 1994 WL 97201 at *1. Instead, Keds Corp. donated over five million dollars to charities, including the Women's Sports Foundation, the American Cancer Society, and the American Red Cross. *Id.* In California, where thirty million vitamin product purchasers have been defrauded, defendants distributed the thirty-eight million dollars of aggregate damages "to charitable, governmental and non-profit organizations that promote the health and nutrition of consumer class members or that otherwise further the purposes underlying the lawsuit." *In re Vitamin Cases*, 132 Cal. Rptr. 2d at 428.

¹²⁵ Natalie A. DeJarlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L. J. 729, 729-30 (1987) (advocating use of cy pres doctrine in case of undistributed remainders of class action settlement funds).

¹²⁶ See 4 NEWBERG ON CLASS ACTIONS § 11.33 (4th Ed.) (2006) (discussing administration of class action settlements).

fund either in cash or as a coupon.¹²⁷ In some cases, for example where notice does not reach all class members or where some class members do not submit their claims, a portion of the settlement fund is not disbursed.¹²⁸ This undistributed remainder can sometimes amount to millions of dollars.¹²⁹

Given the potential for large undistributed remainders, CAFA provides for cy pres distribution of otherwise undistributed coupons.¹³⁰ Coupons redeemed in this manner, however, "shall not be used to calculate attorneys' fees."¹³¹ In other words, although undistributed coupons under CAFA may be applied to the indirect benefit of the class, class counsel can receive no compensation as a result.¹³² Several commentators have argued that this result will provide settling attorneys little incentive to utilize cy pres settlement provisions, to the detriment of the class.¹³³

VI. UNDERMINING PUBLIC LAW LITIGATION

In his seminal article originating the theory of public law litigation, Professor Chayes observed that "[t]he class suit is a reflection of our growing awareness that a host of important public and private interactions . . . are conducted on a routine or bureaucratized basis and can no longer be

¹²⁷ 3 NEWBERG ON CLASS ACTIONS § 7.2 at n.6 (4th Ed.) (2006) ("A Rule 23(b)(3) action provides for a mandatory notice of class maintenance . . . and often involves submission of proof of claim forms by class members, to permit distribution of recoveries.").

¹²⁸ 3 NEWBERG ON CLASS ACTIONS § 10.17 (4th Ed.) (2006) ("[A] balance of a class recovery [sometimes] remains following individual distribution.").

¹²⁹ See, e.g., *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1084 (2d Cir. 1971) (twenty-two million dollar undistributed remainder of a one hundred million dollar settlement fund), *cert. denied*, 404 U.S. 871 (1971); *In re Folding Carton Antitrust Litig.*, 557 F. Supp. 1091, 1097 (N.D. Ill. 1983), *aff'd*, 744 F.2d 1252 (7th Cir. 1984) (eight million dollar undistributed remainder of a two hundred -million dollar settlement fund), *cert. dismissed*, 471 U.S. 1113 (1985); *Vasquez v. Avco Fin. Servs. of S. Cal.*, No. NCC 11833B (Los Angeles Super. Ct. Apr. 24, 1984) (one million dollar undistributed remainder).

¹³⁰ 28 U.S.C. § 1712(e) (2006) (providing "[t]he court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties.").

¹³¹ *Id.*

¹³² See *id.*

¹³³ See Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1720 (2006) (arguing not allowing cy pres relief to factor into computation of attorneys' fees "may reduce or eliminate the incentive to bring a lawsuit and thus permit misconduct to go unpunished."); Hosp, *supra* note 37, at 129 (arguing CAFA's coupon settlement provisions, including those relating to cy pres relief, will make cases more difficult to settle).

visualized as bilateral transactions between private individuals.”¹³⁴ Put another way, the growth of the corporate consumer economy has dramatically altered the nature and form of disputes among members of American society.¹³⁵ In twenty-first century America, reports of corporate malfeasance are commonplace.¹³⁶ Although consumers “should be able to rely on public agencies charged with enforcing statutory law . . . in practice, public agencies lack sufficient financial resources to monitor and detect all wrongdoing or to prosecute all legal violations.”¹³⁷ Public law litigation in the form of class actions “serve[s] important public purposes by supplementing the work of government regulators whose budgets are usually quite limited and who are subject to political constraints.”¹³⁸ Without fee incentives, however, there can be no private attorneys general working to vindicate the public interest.¹³⁹

A. Fee-shifting After *Alyeska Pipeline* and *Buckhannon*

In *Alyeska Pipeline*, the Court held that federal courts could not use their general equity powers to award attorneys’ fees on a private attorney general theory.¹⁴⁰ In doing so, the Court removed an important incentive

¹³⁴ Chayes, *supra* note 6, at 1291 (suggesting “the class action responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interests . . .”).

¹³⁵ *See id.*

¹³⁶ *See, e.g.,* Raymond Hernandez, *Countrywide Said to Be Subject of Federal Criminal Inquiry*, N.Y. TIMES, Mar. 9, 2008 at A20 (Countrywide Financial subject to federal criminal inquiry into suspected securities fraud relating to sub-prime mortgage crisis); Andrew Martin, *Slaughterhouse Orders Largest Recall Ever of Ground Beef*, N.Y. TIMES, Feb. 18, 2008, at A10 (largest beef recall in U.S. history on suspicion of contaminated meat); Louise Story, *Mattel in Another Recall, Citing Lead in Toys From China*, N.Y. TIMES, Sep. 5, 2007, at C3 (toy manufacturer Mattel recalled nearly one million toys due to dangerous levels of lead paint); *3 Drug Makers Are Convicted In Reimbursement Overcharges*, N.Y. TIMES, Jun. 22, 2007 at C2 (three leading pharmaceutical manufacturers ordered to pay damages for overcharging Medicare, pension funds, and patients); *see also* Sherman, *supra* note 24, at 233 (observing in recent years “corporate malfeasance has dominated the headlines”).

¹³⁷ RAND Institute for Civil Justice, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 69 (Deborah R. Hensler et al. eds., 2000) (explaining how class actions serve to enforce government regulations and compensate plaintiffs for small losses).

¹³⁸ *Id.* at 8-9 (concluding “class actions . . . play a regulatory enforcement role in the consumer arena.”).

¹³⁹ *See* Mullenix, *supra* note 4 and accompanying text (examining relationship between attorneys’ fees and public interest class actions).

¹⁴⁰ *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 269 (1975) (announcing holding). In the five years prior to *Alyeska*, the federal courts had begun awarding attorneys’ fees in a growing number of cases to encourage private litigation promoting the public interest. *See, e.g.,* Fairley v. Patterson, 493 F.2d 598, 604-06 (5th Cir. 1974) (reapportionment suit under Voting Rights Act of 1965); *Lee v. S. Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971) (housing dis-

for attorneys seeking to vindicate the public interest.¹⁴¹ In the opinion reversed by *Alyeska Pipeline*, the Court of Appeals observed that “[i]f a defendant may feel that the cost of litigation, and, particularly, that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing.”¹⁴² Put differently, defendants would be little deterred from misbehavior provided their actions inflicted only small damages.¹⁴³ Small individual damages in the aggregate, however, can unjustly enrich a manufacturer by millions of dollars.¹⁴⁴ “In such instances,” the Court of Appeals concluded, “public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right.”¹⁴⁵

Reasoning that it was not the province of the judiciary to determine what is or is not in the public interest, the Supreme Court rejected the lower court’s analysis.¹⁴⁶ The Court’s reasoning notwithstanding, it is difficult to imagine a state of affairs less in the public interest than corporate immunity from suit in the negative value litigation scenario.¹⁴⁷ Although fee awards under other theories—specifically the common fund doctrine in the class action context—allay the Court of Appeals’ immediate concerns, the inability to seek attorneys’ fees on a private attorney general theory absent specific statutory authority nevertheless inhibits private litigation to vindi-

crimination action under 42 U.S.C. § 1982 (1970)); *Calnetics Corp. v. Volkswagen of Am., Inc.*, 353 F. Supp. 1219, 1224-25 (C.D. Cal. 1973) (private antitrust suit seeking injunctive relief); *La Raza Unida v. Volpe*, 57 F.R.D. 94, 95 (N.D. Cal. 1972) (environmental protection and relocation of persons displaced by highway project), *aff’d*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). The private attorney general theory originally emerged in *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (*per curiam*), an action under Title II of the Civil Rights Act of 1964, which expressly authorized fee awards.

¹⁴¹ *Alyeska Pipeline Services Co.*, 421 U.S. at 283 (Marshall, J., dissenting) (reasoning “if successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.”) (quoting *Piggie Park Enters., Inc.*, 390 U.S. at 402) (internal quotations omitted).

¹⁴² *Wilderness Soc’y v. Morton*, 495 F.2d 1026, 1030 (D.C. Cir. 1974), *rev’d sub nom Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975).

¹⁴³ *See id.* (observing threat of award of attorneys’ fees tends to deter misconduct).

¹⁴⁴ *See supra* note 28 and accompanying text (enumerating examples where small individual damages amount to large aggregate damages).

¹⁴⁵ *Wilderness Soc’y*, 495 F.2d at 1030.

¹⁴⁶ *Alyeska Pipeline Services Co.*, 421 U.S. at 269. Reasoning that “Congress has reserved for itself” the task of creating exceptions to the American rule, the Court in *Alyeska Pipeline* concluded that it was “not free . . . to pick and choose among plaintiffs . . . depending upon [its] assessment of the importance of the public policies involved in particular cases.” *Id.*

¹⁴⁷ *See supra* note 141 and accompanying text (emphasizing importance of private attorney general to public interest litigation).

cate public rights.¹⁴⁸

Even in cases brought under a specific fee-shifting statutory provision, the Court in *Buckhannon* further restricted the circumstances in which attorneys' fees can be awarded.¹⁴⁹ Citing *Alyeska Pipeline*, the *Buckhannon* Court held invalid the catalyst theory, limiting the application of fee-shifting statutory provisions to cases where plaintiffs obtain either an "enforceable judgment[] on the merits [or a] court-ordered consent decree[]"¹⁵⁰ Given the high percentage of class action lawsuits that settle, *Buckhannon* poses a significant hurdle to plaintiffs' counsel seeking to invoke a fee-shifting statute in pursuit of a fee.¹⁵¹ As observed by Justice Blackmun, the original purpose of fee-shifting statutes was "to strengthen the enforcement of selected federal laws by ensuring that private persons seeking to enforce those laws could retain competent counsel."¹⁵² Reading *Buckhannon* to mean that private settlements can never give rise to fee awards under fee-shifting statutory provisions diminishes the potential impact of class actions as public law litigation.¹⁵³ Unable to retain competent counsel, the negative value litigant would be precluded from vindicating the laws that legislatures intended fee-shifting provisions to enforce.¹⁵⁴

B. CAFA's Fee Restrictions

In most class action litigation, attorneys' fees are awarded either pursuant to a fee-shifting statute or under the common fund doctrine.¹⁵⁵ *Alyeska Pipeline* and *Buckhannon* represent the Court's efforts to curtail the situations in which attorneys' fees can be awarded in the fee-shifting context.¹⁵⁶ In 2005, with the passage of CAFA, Congress moved to limit fee

¹⁴⁸ See *supra* note 29 and accompanying text (explaining importance of fee incentives and resulting deterrent effect).

¹⁴⁹ *Buckhannon*, 532 U.S. at 610 (announcing holding).

¹⁵⁰ *Id.* at 604, 610.

¹⁵¹ See *supra* note 92 and accompanying text (finding most courts hold *Buckhannon* to proscribe fee awards pursuant to fee-shifting statutes in the event of settlement).

¹⁵² *City of Burlington v. Dague*, 505 U.S. 557, 568 (1992) (Blackmun, J., dissenting).

¹⁵³ See *supra* notes 30-34 and accompanying text (discussing negative value class action as quintessential example of public law litigation); *supra* notes 90-92 and accompanying text (comparing different interpretations of *Buckhannon* "private settlement" language).

¹⁵⁴ *Dague*, 505 U.S. at 568 (Blackmun, J., dissenting) (observing link between fee incentives and private enforcement of public policy via the private attorney general); see also *Amchem Prods.*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)) (explaining that without the class action, negative value suits would rarely be litigated).

¹⁵⁵ 4 NEWBERG ON CLASS ACTIONS § 14.1 (4th Ed.) (2006) (examining fees in class actions awarded pursuant to fee-shifting statutes and the common fund doctrine).

¹⁵⁶ See *supra* Part V.A. (analyzing *Alyeska Pipeline* and *Buckhannon*'s impact on public law litigation).

awards under the common fund doctrine.¹⁵⁷ Like *Alyeska Pipeline* and *Buckhannon*, CAFA's fee restrictions discourage public law litigation by diminishing the incentive and limiting the resources of private attorneys general.¹⁵⁸

Coupon settlements represent an important tool in the effort to settle class actions.¹⁵⁹ Courts have long sought to encourage settlements because they often benefit the parties and promote judicial economy.¹⁶⁰ By tying attorney fee awards to the actual number of coupons redeemed, rather than the total value of the coupon fund, CAFA will make class counsel less inclined to reach coupon settlements.¹⁶¹ In certain types of class actions—particularly negative value class actions, where coupons offer the best settlement arrangement—CAFA's fee restrictions will have the effect of deterring settlement entirely.¹⁶² One of the central features of public law litigation is the role of the parties in negotiating the remedy.¹⁶³ By deterring the parties from negotiating coupon settlements, CAFA's fee restrictions cripple the public law function of public interest class actions.¹⁶⁴

In addition to hampering settlement negotiations, CAFA discourages the inclusion of cy pres relief in the event of settlement.¹⁶⁵ In negative value class actions in particular, cy pres relief is an important adjunct to direct payment in the effort to compensate the class.¹⁶⁶ CAFA provides that

¹⁵⁷ See *supra* notes 93-94 and accompanying text (reciting Congress's purported purpose for enacting CAFA).

¹⁵⁸ See Klonoff & Hermann, *supra* note 133, at 1704 (predicting CAFA's fee restrictions will cause "certain socially beneficial class action lawsuits [to] not be filed and misconduct [to] go undeterred."); Hosp, *supra* note 37, at 129 (concluding CAFA's fee restrictions are "likely to make it much more difficult to settle."); Casper, *supra* note 37, at 28 (determining CAFA's fee restrictions "will dissuade class counsel from seeking [cy pres relief.]").

¹⁵⁹ See *supra* notes 102-106 (extolling virtues of coupon settlements).

¹⁶⁰ See, e.g., *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."); *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993) (concluding "[c]ourts should foster settlement in order to advantage the parties and promote great saving in judicial time and services.") (internal citations and quotations omitted).

¹⁶¹ See Hosp, *supra* note 37, at 129 (finding that CAFA's fee restrictions will discourage use of coupon settlements).

¹⁶² *Id.*

¹⁶³ See Chayes, *supra* note 6, at 1302-03 (examining features of public law litigation).

¹⁶⁴ See *supra* note 158 and accompanying text (describing CAFA's oppressive effect on public interest class actions).

¹⁶⁵ See Klonoff & Hermann, *supra* note 133, at 1719-20 (concluding that CAFA's fee provisions will hinder use of cy pres relief in class action settlements).

¹⁶⁶ See *id.*

any coupons redeemed via a cy pres remedy cannot be included in the "redeemed coupons" basis for the fee award.¹⁶⁷ Because a reduction in the potential fee award means a reduction in the likelihood of litigation, in cases where cy pres relief might play an important role in settlement CAFA will reduce the possibility that litigation will arise at all.¹⁶⁸ In other words, CAFA will have the overall effect of discouraging public law litigation.¹⁶⁹

Curiously, one of CAFA's fee restrictions has the opposite implication.¹⁷⁰ By mandating judicial scrutiny of coupon settlement agreements, CAFA has the effect of increasing the role of the judge in the settlement process.¹⁷¹ An increased role for the judge is one of the essential characteristics of public law litigation.¹⁷² Although this provision does not encourage the initiation of public law litigation, it strengthens the public law function of class actions.¹⁷³ It is difficult to reconcile this feature of CAFA, which promotes public law litigation, with those that aim to thwart it.¹⁷⁴ Only on the notion that increased judicial scrutiny of settlement agreements would itself inhibit parties from settling can this aspect of CAFA be made to square with the law's overall contempt for public law litigation.¹⁷⁵

VII. CONCLUSION

Public law litigation describes an important trend in American litigation, but also offers a paradigm for harnessing private enterprise in the service of the public good. The private attorney general, motivated by the potential for a worthwhile fee, is willing to undertake the investment of time and resources necessary to vindicate the public interest. The rules articulated in *Alyeska Pipeline* and *Buckhannon*, alongside CAFA's fee restrictions, represent obstacles to public law litigation. Because attorneys' fees are the catalyst providing private lawyers with the incentive to defend public rights, the weaker that incentive, the less likely the public interest will be defended. In the case of the negative value class action, absent a

¹⁶⁷ See *supra* note 130 (explaining CAFA's cy pres provisions).

¹⁶⁸ See *supra* notes 124, 158 and accompanying text (discussing the importance of cy pres remedies and their role in class action settlements).

¹⁶⁹ See *supra* note 158 and accompanying text (describing CAFA's oppressive effect on public interest class actions).

¹⁷⁰ See *supra* notes 117-118 and accompanying text (discussing relevant portions of CAFA).

¹⁷¹ See *supra* notes 117-118 and accompanying text (discussing relevant portions of CAFA).

¹⁷² See Chayes, *supra* note 6, at 1302-03 (examining the role of the judge in public law litigation).

¹⁷³ *Id.*

¹⁷⁴ See *supra* note 158.

¹⁷⁵ See *supra* note 158.

fee proportionate to the value of aggregate claims no reasonable attorney would bring suit. Taken together, *Alyeska Pipeline*, *Buckhannon*, and CAFA cripple public law litigation's ability to vindicate the public interest, leaving corporate defendants increasingly immune from the consequences of their wrongdoing.

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