



## **Class Actions are a Cornerstone of our Civil Justice System:**

### *A Review of Class Actions Filed in 2009*

February 27, 2015

The National Association of Consumer Advocates (NACA) is a nonprofit association of more than 1,500 consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

As the world's largest trial bar, the American Association for Justice (formerly known as the Association of Trial Lawyers of America) works to make sure people have a fair chance to receive justice through the legal system when they are injured by the negligence or misconduct of others—even when it means taking on the most powerful corporations.

## Executive Summary

The 7th Amendment, which guarantees Americans the right to a jury trial to decide the facts of a civil case in court, is a fundamental principle of our democracy. A vital part of this right is class action litigation: it allows consumers to band together to enforce their rights against large corporate interests. Because consumers often lack the resources to take on a corporation alone, without class actions, many violations of the law would go unchallenged.

Thus, it is no surprise that powerful corporations seek to insulate themselves from liability by chipping away at this powerful tool. They have attacked from every conceivable angle, from advocating for amendments to weaken the procedural rule governing class actions,<sup>1</sup> to pushing Congress to enact laws that serve as hurdles to class formation to expanding the use of class actions bans in consumer and employment contracts.<sup>2</sup>

Corporations often use forced arbitration to avoid liability. Forced arbitration clauses compel Americans to give up the fundamental right to seek justice in favor of a system of private, secret arbitration where the arbitrators and the rules are chosen by the corporation. There are no due process standards, no guarantees that applicable laws will be upheld, and no public records of the proceedings. These clauses often go a step further, forcing Americans to give up even more - buried in the fine print are provisions that prohibit consumers from banding together to seek justice as a class.

Known as “class action waivers,” these provisions prohibit consumers from joining together as a class to take on large and powerful corporations. In the recent past, many class action waivers in forced arbitration clauses were deemed illegal under state laws. That trend ended in 2011 when the Supreme Court held in *AT&T Mobility LLC v. Concepcion* that the Federal Arbitration Act (FAA) trumps the state law that would invalidate these waivers.<sup>3</sup> The Court dramatically expanded the reach of a federal law, wiping out state laws protecting the rights of consumers to participate in a class action.

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<sup>1</sup> In June 2002, the U.S. Judicial Conference's Committee on Rules of Practice and Procedure approved amendments to two subdivisions of Rule 23, as well as the addition of two new subsections. Comm. on Rules of Practice and Procedure, Minutes 10-18 (June 10-11, 2002), available at [www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2002-min.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2002-min.pdf). These amendments took effect on December 1, 2003. See Fed. R. Civ. P. 23.

<sup>2</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. The Class Action Fairness Act (CAFA) of 2005 expanded federal jurisdiction over class action lawsuits in the United States. It gives federal courts jurisdiction over class actions in which (1) the amount in controversy exceeds \$5 million, and (2) any member of a class of plaintiffs is a citizen of a state different from any defendant, unless at least two-thirds of members of all proposed plaintiff classes and the primary defendants are citizens of the state in which the action was originally filed. As a result, meritorious class actions have not been proceeding in federal court. Many federal judges are “hamstrung by the increased attention to state law that these cases require” with no guidance on how to proceed when a case involves multiple state laws. See Testimony of Thomas M. Sobol, Partner, Hagens Berman Sobol Shapiro LLP, Subcommittee on the Constitution of the Committee on the Judiciary, U.S. House of Representatives, “Class Actions Seven Years After the Class Action Fairness Act,” June 1, 2012.

<sup>3</sup> 563 U.S. 321 (2011).

There is hope, however. In the aftermath of the 2008 financial crisis, Congress created the Consumer Financial Protection Bureau (CFPB) to address the need for greater transparency and accountability from America's powerful financial institutions.<sup>4</sup> Recognizing that forced arbitration and class action waivers harm consumers, Congress explicitly empowered the Bureau to ban or limit the use of forced arbitration – including class action waivers – in contracts for financial goods or services.<sup>5</sup> Before it can act, however, the CFPB is required to study the use of forced arbitration in these contracts and report its findings to Congress.<sup>6</sup>

The preliminary results of the CFPB's study, released in December 2013, show that forced arbitration clauses impact tens of millions of consumers and deny relief to consumers harmed by illegal or abusive practices in the financial services industry.<sup>7</sup> The CFPB will release the full study in early 2015 and then may engage in rulemaking to address the issue.

At the same time that the CFPB released its preliminary findings, the U.S. Chamber of Commerce released a purported assessment, or memo, that concluded class actions “provide little or no benefit to consumers.”<sup>8</sup> The memo was authored by the Chamber's lobbyists at law firm Mayer Brown and submitted to the CFPB for consideration as part of the Bureau's study of forced arbitration clauses in consumer financial services contracts.<sup>9</sup>

The memo's methodology was simple – look at class actions filed in 2009 and listed in the *BNA Class Action Litigation Reporter* and the *Mealey's Litigation Class Action Reporter*, choose 148 consumer class actions, and see how they were resolved.<sup>10</sup> From its analysis of these class actions, the Chamber concluded that “the real-world evidence shows that class actions provide little or no benefit, particularly in the consumer context.”<sup>11</sup>

The Chamber represents the world's largest banks and credit card companies who stand to gain the most from the elimination of consumer class actions. It spent a great deal of resources to fight the creation of the CFPB, and continues to try to prevent the Bureau from functioning

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<sup>4</sup>Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, Title X.

<sup>5</sup> *Id.* at Sec. 1028.

<sup>6</sup> *Id.*

<sup>7</sup> Consumer Financial Protection Bureau, Arbitration Study Preliminary Results (Dec. 12, 2013) available at [http://files.consumerfinance.gov/f/201312\\_cfpb\\_arbitration-study-preliminary-results.pdf](http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf).

<sup>8</sup> Letter of David Hirschmann and Lisa Rickard, U.S. Chamber of Commerce, to Monica Jackson, Consumer Financial Protection Bureau, Dec. 11, 2013, p. 5 (“A new empirical assessment of class actions that the Chamber has commissioned demonstrates that the class actions studied provide little or no benefit to consumers.”).

<sup>9</sup> See *supra* note 8.

<sup>10</sup> “Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions,” Memorandum written by Mayer Brown LLP for U.S. Chamber of Commerce, available at <http://blogs.reuters.com/alison-frankel/files/2013/12/mayerbrownclassactionstudy.pdf> at Appendix C.

<sup>11</sup> See *supra* note 9, at 44.

effectively. Thus, it is unsurprising that a Chamber memo would conclude that class actions do not help consumers.<sup>12</sup>

We examined class actions filed in 2009, including the 148 cases the Chamber cited in its memo, and what we found was startling. These class actions often provided enormous benefits to consumers. Here is just a sampling:

- They empowered consumers. When the price of propane shot up in 2008, consumers filed suit against Ferrellgas for allegedly reducing the amount of propane in its tanks without notifying consumers or changing the labels. Through a class action settlement, consumers recovered up to \$25 million for being overcharged.<sup>13</sup>
- They allowed victims of financial fraud to recover. Through a class action, \$219 million was returned to investors whose retirement funds were devastated by Bernie Madoff's colossal Ponzi scheme. The judge in the case praised the equitable settlement, stating that nearly all class members were made whole.<sup>14</sup>
- They restored people's rights. Thousands of disabled residents living in New York City Housing Authority buildings could not go in and out of their housing due to widespread disrepair of elevators. Through a class actions, the residents forced the city to repair the elevators in a timely matter.<sup>15</sup>
- They restored employees' retirement funds. Level 3 Communications employees filed suit against employee retirement plan managers for withholding information about company troubles and continuing to invest in the overvalued company stock while employees lost their retirement funds. It took a class action to restore \$3.2 million in lost retirement funds.<sup>16</sup>
- They addressed health and environmental harms. A dike at a coal plant operated by the Tennessee Valley Authority (TVA) burst, sending more than a billion gallons of highly toxic coal ash slurry into waterways and covering nearly 300 acres with sludge.<sup>17</sup> The coal

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<sup>12</sup> Reuters Legal Reporter Alison Frankel noted, "I would have been shocked if Mayer Brown's new study of 148 federal-court class actions filed in 2009 concluded that the cases are of any real benefit to class members. Mayer Brown Supreme Court litigator Andrew Pincus, remember, is not only frequently counsel to the U.S. Chamber of Commerce, but was also the winner of the U.S. Supreme Court's landmark 2011 endorsement of mandatory arbitration in *AT&T Mobility v. Concepcion*." Alison Frankel, Class action mystery: Where does the money go post-settlement?, Reuters, Dec. 11, 2013, available at <http://blogs.reuters.com/alison-frankel/2013/12/11/class-action-mystery-where-does-the-money-go-post-settlement/>.

<sup>13</sup> *Drucker v. Ferrellgas Partners L.P. et al*, No. 2:09-cv-02305 (D. Kan. 2009).

<sup>14</sup> *Bd. Of Trustees of Buffalo Laborers Security Fund et al v. J.P. Jeanneret Assocs. Inc. et al*, No. 09-cv-08362 (S.D.N.Y. 2009), *In re Beacon Assocs. Litig.*, No. 09-cv-00777 (S.D.N.Y. 2012) and *In Re J.P. Jeanneret Assocs.*, 769 F. Supp. 2d 340 (S.D.N.Y. 2011).

<sup>15</sup> *Brito et al v. New York City Housing Authority, et al*, 09-cv-01621 (E.D.N.Y.).

<sup>16</sup> *Walter v. Level 3 Communications, Inc.*, No. 09-cv-00658 (D. Colo. 2009).

<sup>17</sup> *Blanchard v. Tennessee Valley Authority*, No. 09-cv-00009 (E.D. Tenn. 2009).

ash at this plant was held in earthen dikes rather than lined landfills.<sup>18</sup> Leaks and seepage plagued the dikes at the TVA coal plant for years.<sup>19</sup> According to an inspection report, the TVA knew about leaks at the facility for more than two decades and opted not to pay for long-term solutions to the problem.<sup>20</sup> A class action was brought on behalf of property owners who suffered damages. The district court found in their favor on their claims of negligence, trespass, and private nuisance.<sup>21</sup> The case then went to mediation to determine appropriate damages, and on August 1, 2014, it was announced that TVA had agreed to pay \$27.8 million to settle claims from property owners who suffered damages due to the 2008 spill of coal ash sludge.<sup>22</sup>

Corporations contend that consumers are better served by forced arbitration than class actions. Despite the fact that forced arbitrations clauses are standard in consumer financial products and services contracts however, the CFPB found that very few consumers arbitrate their claims.<sup>23</sup> Alternatively, the CFPB revealed that just 8 class actions yielded \$350 million in payments to more than 13 million consumers.<sup>24</sup>

Class actions are an important — and often the only — path for consumers to access justice.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Consumer Financial Protection Bureau, Arbitration Study Preliminary Results (Dec. 12, 2013) at 80, *available at* [http://files.consumerfinance.gov/f/201312\\_cfpb\\_arbitration-study-preliminary-results.pdf](http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf).

<sup>24</sup> *Id.* at 104.

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## I. CLASS ACTION PRIMER

A class action is a lawsuit that allows people with a common interest to seek justice as a group. It is often the sole means of enabling consumers to remedy injustices committed by powerful corporations. As stated by former U.S. Supreme Court Justice William O. Douglas, "The class action is one of the few legal remedies the small claimant has against those who command the status quo."<sup>25</sup>

Many classes are formed because the cost of individual lawsuits would be far greater than the value of each individual claim. The total value of the class members' claims, however, could be quite large. But for class actions, corporations would have incentive to continue their fraudulent conduct.

When corporations engage in a pattern of wrongdoing, a class action can provide an effective remedy for a group without incurring the costs of thousands of separate lawsuits and risking inconsistent decisions by the courts. State officials have acknowledged that private class action litigation is an important tool for consumers. A recent letter by several state attorneys general to the CFPB states, "In some cases, the aggregation of small consumer claims in the form of private class action lawsuits or at least class action arbitrations affords consumers the only opportunity to seek relief, due to the expense of individually bringing their own case or the inability to procure legal representation."<sup>26</sup> The letter adds that these consumer class actions complement public enforcement work of consumer protection laws. "Based on our experience, such litigation has the capability of providing real and meaningful benefit to harmed consumers and can result in injunctive relief mandating business reforms that are in the public interest. Our offices work together to ensure that such relief and redress are maximized."<sup>27</sup>

Before any class action settlements may occur, the judge presiding over the case must give notice of the settlement to the class, allow all who wish to be heard to state their positions, and approve the settlement, including the attorneys' fees.

Class actions have shaped history for the better:

- ***Brown v. Board of Education of Topeka*** – This class action led the U.S. Supreme Court to unanimously hold that the racial segregation of children in public schools violated the Equal Protection Clause of the Fourteenth Amendment, paving the way for desegregation.<sup>28</sup>
- ***Jenson v. Eveleth Taconite Co.*** – This was the first sexual harassment class action lawsuit in U.S. history. Its outcome not only changed state and federal laws protecting

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<sup>25</sup> *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 186 (1974).

<sup>26</sup> Letter by 16 State Attorneys General to Consumer Financial Protection Bureau, November 19, 2014 regarding a Study Pursuant to Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Page 3. [http://www.attorneygeneral.delaware.gov/documents/20141119-AGs\\_Ltr\\_to\\_CFPB\\_re\\_Arb\\_Clauses\\_Final.pdf](http://www.attorneygeneral.delaware.gov/documents/20141119-AGs_Ltr_to_CFPB_re_Arb_Clauses_Final.pdf)

<sup>27</sup> *Id.* at 3-4.

<sup>28</sup> 347 U.S. 483 (1954).

workers but also set precedence for more class actions demanding an end to harassment and discrimination on the job.<sup>29</sup>

- ***Morgan v. Hennigan*** – This class action took the Boston Public School system to task for allegedly creating de facto segregation through its drawing of school district lines and allocation of resources throughout the city. As a result of the suit, district court ordered the Boston School Committee to desegregate the schools.<sup>30</sup>

Class actions serve as the only means for many consumers to access justice, and they are under attack. In 2005, Congress passed the “Class Action Fairness Act” (CAFA), allowing defendants to “remove” or transfer state class actions into their often-preferred venue - the clogged federal court system. CAFA was supposed to make it easier for cases to proceed in federal court, but it has failed to live up to the promises of the Chamber of Commerce and other large business interests that insisted national class actions belonged in federal court. The reason is that there is no national federal tort law. Instead, federal courts hearing class actions brought under CAFA’s expanded diversity jurisdiction must apply state law to the class members in the case. The courts often deny class certification because they are overburdened and lack resources, or the laws of more than one state apply.

Corporations are including class action waivers in their forced arbitration clauses, and the Supreme Court and several lower courts have chipped away access to this critical tool. In 2011, the Court dismissed a civil rights sex discrimination class action brought on behalf of more than one million female Wal-Mart employees in *Wal-Mart v. Dukes*.<sup>31</sup> Also that year, the Court upheld corporations’ use of class action waivers in forced arbitration clauses in *AT&T v. Concepcion*.<sup>32</sup> In 2013’s *American Express Co. v. Italian Colors Restaurant*, the Court held that a class action waiver is enforceable under the Federal Arbitration Act even if the cost of proving an individual claim in arbitration exceeds the potential recovery.<sup>33</sup>

Injured consumers cannot get relief. It is time to fight back.

## **II. CLASS ACTIONS FILED IN 2009 RESULTED IN ENORMOUS BENEFITS FOR CONSUMERS.**

In its memo, the U.S. Chamber of Commerce looked at 148 class actions from 2009 and concluded that class actions “provide little or no benefit to consumers.”<sup>34</sup> We examined the same 148 cases, and found quite the opposite – class actions filed in 2009 benefitted consumers. Here are some examples:

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<sup>29</sup> 130 F.3d 1287 (8th Cir. 1997).

<sup>30</sup> 379 F. Supp. 410 (D.C. Mass., 1974).

<sup>31</sup> 131 S.Ct. 2541 (2011).

<sup>32</sup> 131 S.Ct. 1740 (2011).

<sup>33</sup> 133 S.Ct. 2304 (2013).

<sup>34</sup> Letter from David Hirschmann and Lisa Rickard, U.S. Chamber of Commerce, to Monica Jackson, Consumer Financial Protection Bureau, Dec. 11, 2013, p. 5 (“A new empirical assessment of class actions that the Chamber has commissioned demonstrates that the class actions studied provide little or no benefit to consumers.”).

### **a. They empowered consumers:**

#### **\$4.8 billion in debt relief went to consumers victimized by a corrupt arbitration company.**

As the largest consumer credit arbitration company in the nation, the National Arbitration Forum (NAF) held itself out to the public, courts and consumers as a neutral third party arbitration service.<sup>35</sup> It assured consumers that they could be confident that their disputes with creditors would be heard fairly, as would be the case if the dispute was resolved by a court of law.<sup>36</sup>

This class action alleged that NAF was anything but neutral, instead misleading consumers for years and conspiring behind the scenes with debt collectors to rig arbitrations against consumers.<sup>37</sup> According to Minnesota Attorney General Lori Swanson, who brought suit on behalf of the citizens of the state, there was no way to hold the company accountable, as it allegedly concealed its link to the credit agencies by making its corporate structuring opaque.<sup>38</sup>

The judge approved a settlement in August 2011 worth more than \$4 billion to class members.<sup>39</sup> The settlement required NAF to dismiss all pending consumer arbitrations (valued at approximately \$1 billion) and cease all collection activities arising out of NAF arbitrations (estimated to be worth about \$3.8 billion to the class).<sup>40</sup>

#### **Johnson & Johnson removed formaldehyde and other carcinogenic chemicals from its baby shampoo.**

Johnson & Johnson marketed its children's bath products as safe and gentle when in fact they contained hazardous chemicals. In March 2009, the Campaign for Safe Cosmetics, a coalition of consumer, health, and environmental groups, issued a report revealing that the corporation's baby shampoo and body-care products contained formaldehyde and 1,4-dioxane, which are allergens and are categorized as "probable human carcinogens" by the Environmental Protection Agency.<sup>41</sup> The Campaign for Safe Cosmetics called for Johnson & Johnson to remove the chemicals from these products.<sup>42</sup>

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<sup>35</sup> Repairing A Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration, F.T.C., July 2010, available at [ftc.gov/os/2010/07/debtcollectionreport.pdf](http://ftc.gov/os/2010/07/debtcollectionreport.pdf).

<sup>36</sup> *Id.*

<sup>37</sup> Complaint at 3, *Anthony Magnone et al v. Accretive LLC et al*, No. 09-cv-06375 (C.D. Cal. 2009).

<sup>38</sup> Complaint at 1-3, *Swanson v. National Arbitration Forum, Inc.*, No. 27-cv-0918550 (D. Minn. 2009).

<sup>39</sup> Final Approval Order at 1-2, *In re: National Arbitration Forum Trade Practices Litigation*, No. 10-md-02122 (D. Minn. 2010)

<sup>40</sup> *Id.*

<sup>41</sup> Heather Sarantis et al., *No More Toxic Tub: Getting Contaminants out of Children's Bath & Personal Care Products*, The Campaign for Safe Cosmetics (2009), at 7, available at [http://safecosmetics.org/downloads/NoMoreToxicTub\\_Mar09Report.pdf](http://safecosmetics.org/downloads/NoMoreToxicTub_Mar09Report.pdf).

<sup>42</sup> Letter from The Campaign for Safe Cosmetics to Johnson & Johnson Company CEO William C. Weldon, May 26, 2009, available at [http://safecosmetics.org/downloads/JNJ-sign-on-letter\\_May09.pdf](http://safecosmetics.org/downloads/JNJ-sign-on-letter_May09.pdf).

The 2009 report from the Campaign for Safe Cosmetics formed the basis for multiple class actions, including this one, which alleged that the products do not live up to the company's baby-safe promises.<sup>43</sup> Initial efforts to dismiss the suits failed.<sup>44</sup> Based on mounting pressure, including this class action, Johnson & Johnson pledged to remove the chemicals at issue.<sup>45</sup>

### **Coca-Cola is addressing its labeling and marketing practices.**

The Coca-Cola Company markets VitaminWater as a healthy alternative to soda by labeling its flavors with such health buzz words as "defense," "rescue," "energy," and "endurance."<sup>46</sup> The corporation makes a wide range of dramatic claims, including that its drinks reduce the risk of chronic disease, reduce the risk of eye disease, promote healthy joints, and support optimal immune function.<sup>47</sup>

Consumer health advocacy group the Center for Science in the Public Interest (CSPI) filed this class action lawsuit against Coca-Cola Company, alleging that the corporation misled consumers about the nutritional benefits of the popular beverages.<sup>48</sup> The CSPI alleged that the corporation promoted the beverage as a health drink despite the fact that it contains 33 grams of sugar — nearly the amount contained in most sodas.<sup>49</sup> Coca-Cola Company, however, claims that consumers should assume that the product is unhealthy, despite its labeling to the contrary, stating that “no consumer could reasonably be misled into thinking VitaminWater was a healthy beverage.”<sup>50</sup>

The lawsuit, still moving forward as a class action, is bringing attention to the issues of deceptive labeling and marketing.

### **Ferrellgas was forced to refund customers for providing less product than the customers purchased.**

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<sup>43</sup> See *Sarjent v. Johnson & Johnson Consumer Companies, Inc. et al.*, No. 09-cv-00343 (S.D. Ind. 2009), *Vercellono v. Gerber Products Co et al.*, No. 09-cv-2350 (D. N.J. 2009), and *Levinson v. Johnson & Johnson Consumer Cos Inc.*, No. 09-cv-3317 (D. N.J. 2009).

<sup>44</sup> Susan Todd, *Lawsuit proceeds on Johnson & Johnson's baby shampoo*, N.J. STAR-LEDGER, Feb. 9, 2010, available at [http://www.nj.com/business/index.ssf/2010/02/lawsuit\\_proceeds\\_on\\_johnson\\_jo.html](http://www.nj.com/business/index.ssf/2010/02/lawsuit_proceeds_on_johnson_jo.html).

<sup>45</sup> Katie Thomas, *The 'No More Tears' Shampoo, Now With No Formaldehyde*, N.Y. TIMES, Jan. 14, 2014 available at <http://www.nytimes.com/2014/01/18/business/johnson-johnson-takes-first-step-in-removal-of-questionable-chemicals-from-products.html?action=click&contentCollection=Television&module=MostEmailed&version=Full&region=Marginalia&src=me&pgtype=article>.

<sup>46</sup> *Coke Sued for Fraudulent Claims on Obesity-Promoting "VitaminWater,"* Center for Science in the Public, Jan. 15, 2009, available at <http://www.cspinet.org/new/200901151.html>.

<sup>47</sup> *Id.*

<sup>48</sup> *Koh v. The Coca Cola Company et al.*, No. 3:09-cv-00182-VRW (N.D. Calif. 2009).

<sup>49</sup> See <http://www.sugarstacks.com/beverages.htm>.

<sup>50</sup> Eric Spitznagel, *Drink Deception and the Legal War on VitaminWater*, BLOOMBERG BUSINESSWEEK, July 26, 2013, available at <http://www.businessweek.com/articles/2013-07-26/drink-deception-and-the-legal-war-on-vitaminwater>.

When energy prices soared in 2008, the price of propane gas skyrocketed. Instead of passing along the price hike to consumers, Ferrellgas simply reduced the amount of propane in its tanks.<sup>51</sup> The corporation allegedly failed to disclose the actual net weight or level of propane in the tanks, and the reduced volume was undetectable to consumers.<sup>52</sup>

This class action alleged that the corporation, which does business as Blue Rhino, deceived and overcharged consumers who bought Blue Rhino 20-pound propane tanks that were filled with only 15 pounds of propane.<sup>53</sup> The settlement provided up to \$25 million for customers who bought certain propane tanks.<sup>54</sup>

### **Amazon was forced to reimburse Kindle owners for deleting digital content from their Kindles.**

Amazon angered customers and drew severe criticism from consumer advocates when it deleted *1984* and George Orwell's other well-known book *Animal Farm* from Kindle e-book readers without notifying their owners.<sup>55</sup> When Amazon deleted those copies, it allegedly also removed one of Kindle's most touted features – consumers' notes that were attached to the text.<sup>56</sup>

The suit, which never reached class action designation, sought to prevent Amazon from again deleting books from Kindles, as well as monetary relief for people who lost work from the incident.<sup>57</sup> The lawsuit alleged that deleting content remotely is a breach of contract and violation of Amazon's terms of service, which says that Kindle users have a right to keep a permanent copy of the digital content they purchase, and view it as many times as they want.<sup>58</sup>

After the lawsuit was filed, the parties reached a settlement. As part of the settlement, the company publicly clarified the policy that will govern any future deletions.<sup>59</sup>

### **b. They allowed those impacted by financial crime to recover:**

**\$219 million was returned to investors and retirement funds ripped off by Bernie Madoff.**

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<sup>51</sup> *Lawsuit claims Ferrellgas shortchanged customers*, KANSAS CITY BUSINESS JOURNAL, June 12, 2009, available at <http://www.bizjournals.com/kansascity/stories/2009/06/08/daily43.html>.

<sup>52</sup> *Id.*

<sup>53</sup> *Drucker v. Ferrellgas Partners L.P. et al*, No. 2:09-cv-02305 (D. Kan. 2009).

<sup>54</sup> Settlement Order at 7, *In re: Pre-Filled Propane Tank Marketing & Sales Practices Litigation*, No. 09-02086-MD-W-GAF (W.D. Mo. 2009).

<sup>55</sup> Antone Gonsalves, *Amazon Kindle E-book Deletion Prompts Lawsuit*, INFORMATIONWEEK, July 31, 2009, available at <http://www.informationweek.com/amazon-kindle-e-book-deletion-prompts-lawsuit-/d/d-id/1081884>

<sup>56</sup> *Id.*

<sup>57</sup> *Gawronski v. Amazon.com*, No. 2:09-cv-01084 (W.D. Wash. 2009).

<sup>58</sup> *Id.*

<sup>59</sup> Mariel L. Belanger, *Amazon.com's Orwellian Gaffe: The Legal Implications of Sending E-Books Down the Memory Hole*, 41 SETON HALL L. REV. 368 (2011).

Bernie Madoff orchestrated the largest Ponzi scheme in history, stealing an estimated \$64.8 billion and leaving more than 10,000 victims in his wake.<sup>60</sup> While he serves a 150-year prison term, those he swindled are fighting back.

Some of those victims were union members who performed the hard, dangerous work that has built our nation's infrastructure. Investment manager John Jeanneret persuaded the Buffalo Laborers Security Fund as well as three dozen other labor funds to invest in Bernie Madoff's hedge fund.<sup>61</sup> These union members lost hundreds of millions of dollars in investments due to Madoff's fraud, and faced the possibility that they would no longer be able to retire with dignity.<sup>62</sup> The Funds sued J.P. Jeanneret Associates, Inc., alleging breach of fiduciary duty and improper investment of monies with Bernard Madoff, causing the Funds substantial losses.<sup>63</sup>

The class action settled, providing more than \$219 million to defrauded investors.<sup>64</sup> The judge praised the result: "The settlement, coupled with the recoveries these investors can anticipate from the bankruptcy estate, is expected to return to the Private Plaintiffs collectively all or nearly all of the money they invested with Madoff...The settlement, taken as a whole, is fair, reasonable, and adequate."<sup>65</sup>

### **Stanford International Bank, Ltd., exposed as one of the most criminal enterprises in history, was held accountable by swindled customers.**

In February 2009, the SEC charged that Sir R. Allen Stanford had been running a giant \$7 billion Ponzi scheme out of the Caribbean island of Antigua.<sup>66</sup> Stanford was convicted of a criminal fraud involving approximately 30,000 investors in 113 countries through fraudulent high-return certificates of deposit (CDs) issued by the Stanford International Bank of Antigua.<sup>67</sup> This fraud was the second largest in history, trailing only Bernie Madoff in size.

The class action was brought on behalf of an estimated 28,000 Stanford International Bank Ltd. depositors and investors from 113 different countries, seeking damages from Antigua for its

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<sup>60</sup> [http://en.wikipedia.org/wiki/Madoff\\_investment\\_scandal](http://en.wikipedia.org/wiki/Madoff_investment_scandal)

<sup>61</sup> Stan Linhorst, *How warning signs eluded Bernard Madoff's man in Syracuse*, SYRACUSE.COM, Mar. 29, 2009, available at [http://www.syracuse.com/news/index.ssf/2009/03/how\\_warning\\_signs\\_eluded\\_berna.html](http://www.syracuse.com/news/index.ssf/2009/03/how_warning_signs_eluded_berna.html).

<sup>62</sup> *Id.*

<sup>63</sup> *Bd. Of Trustees of Buffalo Laborers Security Fund et al v J.P. Jeanneret Associates Inc. et al*, No. 09-08362 (SDNY 2009), *In re Beacon Associates Litigation*, No. 09-cv-0777 (SDNY 2009) and *In re J.P. Jeanneret Associates, Inc. et al.*, No. 09-cv-3907 (SDNY 2009).

<sup>64</sup> Tim Knauss, *Syracuse-area unions to share in \$219 million payout from firm that steered money to Madoff*, SYRACUSE.COM, Nov. 13, 2013, available at [http://www.syracuse.com/news/index.ssf/2012/11/investment\\_firms\\_to\\_pay\\_219\\_mi.html](http://www.syracuse.com/news/index.ssf/2012/11/investment_firms_to_pay_219_mi.html).

<sup>65</sup> Decision and Order Approving Settlement, *In re Beacon Associates Litigation*, No. 09-cv-0777 (SDNY 2013).

<sup>66</sup> Scott Cohn, *Allen Stanford Found Guilty in Ponzi Scheme Case*, CNBC.COM, Mar. 6, 2012, available at <http://www.cnbc.com/id/46630391>.

<sup>67</sup> Clifford Krauss, *Stanford Convicted by Jury in \$7 Billion Ponzi Scheme*, N.Y. TIMES, Mar. 6, 2012, available at <http://www.nytimes.com/2012/03/07/business/jury-convicts-stanford-in-7-billion-ponzi-fraud.html?pagewanted=all& r=0>.

alleged role in the scheme.<sup>68</sup> The class claimed that Stanford's massive fraud would not have been possible without the active and knowing assistance of Antigua – its regulators allegedly failed to conduct audits of the corporation, gave it access to confidential documents, and accepted monetary bribes.<sup>69</sup>

This class action was not dismissed; rather, it was transferred to another jurisdiction and is ongoing.<sup>70</sup>

### **c. They restored lost income, changed employment practices, and enabled mobility:**

#### **\$50 million went to retired football players whose images were allegedly used by NFL Films for years without their permission.**

Retired players allege that the National Football League (NFL) used their names, images, and likenesses to promote the league, generating an estimated \$6.9 billion in 2008 alone.<sup>71</sup> The retired players claim that they neither gave consent nor received compensation.<sup>72</sup> These players played when salaries were much lower than they are today, and because many of them suffer physical ailments or disabilities, they also struggle financially.<sup>73</sup> Fred Dryer and five other former players sued<sup>74</sup> the NFL on behalf of all retired players demanding that they be paid for the use of their images by the league.

The settlement the parties reached established a \$42 million Greater Good Fund for programs and benefits for retired football players, as well as a licensing agency to help former players monetize their names, images, and likenesses.<sup>75</sup> The settlement also created a partnership between the NFL and its former players, giving the retired player community a seat at the table.<sup>76</sup>

The judge who approved the settlement lauded it as “a boon to those thousands upon thousands of former NFL players who can now reap the collective benefit of a large financial payout to a fund organized solely for their benefit, overseen by their comrades-in-arms. That former players will also finally have an avenue to pursue commercial interests in their own images as well as part of their former teams, for the first time in conjunction with the NFL's copyrights and

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<sup>68</sup> *Joan Gale Frank et al v. The Commonwealth of Antigua and Barbuda*, No. 4:09-cv-02217 (S.D. Tex. 2009).

<sup>69</sup> *Id.*

<sup>70</sup> Brent Kendall, *Supreme Court Rules Allen Stanford Ponzi Victims Can Sue Third Parties*, WALL ST. J., Feb. 26, 2014, available at <http://online.wsj.com/news/articles/SB10001424052702304709904579406962894463586>.

<sup>71</sup> Am. Class Action Compl. 1, 8. *Dryer v. Nat'l Football League*, No. 09-cv-02182 (D. Minn. 2010).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 2.

<sup>74</sup> *Dryer v. Nat'l Football League*, No. 09-cv-02182 (D. Minn. 2010).

<sup>75</sup> Press Release, Pro Football Retired Players Assoc., Retired NFL Players Believe Preliminary NFL Publicity Rights Settlement Takes Care of the Greater Good of Retired NFL Players, June 3, 2013, available at <http://www.profootballretiredplayersassociation.com/#!untitled/c1rs2>.

<sup>76</sup> Amy Forliti, *Judge approves \$50M settlement*, AP, Nov. 1, 2013, available at [http://espn.go.com/nfl/story/\\_/id/9913169/judge-approves-50m-settlement-nfl-retiree-case](http://espn.go.com/nfl/story/_/id/9913169/judge-approves-50m-settlement-nfl-retiree-case)

trademarks, is icing on the cake for those players and indeed for all former players.<sup>77</sup> Jim Brown, a Hall of Fame running back, called the deal a “landmark for those who really need it.”<sup>78</sup>

### **3M paid more than \$12 million to older employees it allegedly discriminated against and was forced to change its practices to prevent future employment discrimination.**

According to the Equal Employment Opportunity Commission (EEOC), 3M unlawfully laid off hundreds of employees over the age of 45 during a series of reductions in force for more than three years.<sup>79</sup> The agency alleged that 3M focused on highly paid older employees, among others, to save money.<sup>80</sup> The EEOC also asserted that older employees were laid off to make way for younger leaders.<sup>81</sup>

Harmed employees pushed to hold the corporation accountable. The class action<sup>82</sup>, alleging that 3M's actions violated the Minnesota Human Rights Act, comprised more than 7,000 salaried employees in Minnesota over the age of 45.<sup>83</sup> 3M settled and agreed to pay at least \$12 million to workers.<sup>84</sup> 3M's settlement of the federal suit was contingent on a state suit asserting related claims settling. The state suit settled for \$12 million.<sup>85</sup> 3M later agreed to pay an additional \$3 million to employees as part of a settlement of an EEOC lawsuit regarding the same age discrimination practices.<sup>86</sup>

Following this class action and the EEOC's case, 3M changed its employment practices.

### **New York Housing Authority was forced to repair elevators in public housing building so that disabled and elderly residents could come and go from their homes.**

Thousands of disabled residents living in New York City Housing Authority (NYCHA) building claimed they were denied the basic ability to go in and out of their housing because of widespread disrepair and dysfunction of elevators.<sup>87</sup> They were allegedly confined to their

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<sup>77</sup> Final Approval of Settlement, *Dryer v. Nat'l Football League*, No. 09-cv-02182 (D. Minn. 2013).

<sup>78</sup> Ken Belson, *N.F.L. Deal on Images Divides Retirees*, N.Y. TIMES, June 4, 2013, available at [http://www.nytimes.com/2013/06/05/sports/football/nfl-deal-on-use-of-images-divides-retirees.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/05/sports/football/nfl-deal-on-use-of-images-divides-retirees.html?pagewanted=all&_r=0).

<sup>79</sup> Press Release, EEOC, 3M to Pay \$3 Million to Settle EEOC Age Discrimination Suit, Aug. 22, 2011, available at <http://www.eeoc.gov/eeoc/newsroom/release/8-22-11a.cfm>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Garcia v 3M*, No. 09-01943 (N.D. Cal. 2009). Case was transferred to D. Minn., No. 09-cv-03495-SRN-FLN.

<sup>83</sup> Susan Feyder, *3M may settle age bias suit for \$12 million*, STARTRIBUNE, March 18, 2011, available at <http://www.startribune.com/business/118246714.html>.

<sup>84</sup> Mike Mullen, *3M settles a second class-action lawsuit for age discrimination*, MINNEAPOLIS CITY PAGES, Aug. 22, 2011, available at [http://blogs.citypages.com/blotter/2011/08/3m\\_settles\\_age\\_discrimination\\_lawsuit\\_class\\_action\\_suit.php](http://blogs.citypages.com/blotter/2011/08/3m_settles_age_discrimination_lawsuit_class_action_suit.php).

<sup>85</sup> *Id.*

<sup>86</sup> Press Release, *supra* note 77.

<sup>87</sup> Manny Fernandez, *Suit Says Faulty Elevators in Public Housing Violate Rights of Tenants*, N.Y. TIMES, Apr. 20, 2009, available at [http://www.nytimes.com/2009/04/21/nyregion/21elevators.html?ref=nyregion&\\_r=0](http://www.nytimes.com/2009/04/21/nyregion/21elevators.html?ref=nyregion&_r=0).

apartments for days at a time, forced to hobble down multiple flights of stairs in a leg brace, or stuck for hours in wheelchairs in building lobbies.<sup>88</sup> When elevators malfunctioned, they would often stop above or below floor level, which meant people in wheelchairs could not get out.<sup>89</sup> The class of more than 7,000 people brought suit,<sup>90</sup> asserting that the NYCHA failed to maintain its more than 3,300 elevators in violation of the Americans with Disabilities Act.<sup>91</sup>

The parties agreed to a settlement under which NYCHA had a timeframe to make repairs and is required to conduct “rigorous preventive maintenance” to avoid elevator breakdowns. The Housing Authority also agreed to approve transfer requests from mobility-impaired tenants to lower floors, where they will be less affected by elevator outages.”<sup>92</sup>

A class action suit was the only way residents could hold NYCHA accountable for its failure to act. As one of the attorneys involved said, “Let’s face it. If million-dollar co-ops had these elevator problems, there would be outrage. Because these elevators are in housing for the poorest among us, there’s no action.”<sup>93</sup>

#### **d. They restored retirement funds:**

##### **\$2.5 million in lost retirement funds was restored to employees of Colonial BancGroup.**

Colonial BancGroup executives allegedly mismanaged the company, driving it into bankruptcy. The Alabama company, with 346 branches spread across five southern states, is the sixth largest bank failure in U.S. history and by far the largest failure of 2009.<sup>94</sup> Colonial Bancorp was heavily invested in risky subprime mortgages, a practice that sparked a credit crisis leading to the worst financial meltdown since the Great Depression.<sup>95</sup> Prior to its failure, the bank was under criminal investigation by the U.S. Department of Justice for alleged accounting irregularities at the company's mortgage warehouse lending division.<sup>96</sup>

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<sup>88</sup> Press Release, New York Legal Assistance Group, Sept. 5, 2012, available at <http://nylag.org/press/september-5-2012>.

<sup>89</sup> Compl. at 12, *Brito et al. v New York City Housing Authority, et al*, No. 09-01621 (EDNY 2009).

<sup>90</sup> *Brito et al. v New York City Housing Authority, et al*, 09-01621 (EDNY 2009).

<sup>91</sup> Press Release, New York Legal Assistance Group, Court Approves Settlement Suit to Force Housing Authority to Fix Its Elevators, Sept. 5, 2012, available at <http://nylag.org/news/2012/09/court-approves-settlement-of-suit-to-force-housing-authority-to-fix-its-elevators>.

<sup>92</sup> Press Release, *supra* note 86.

<sup>93</sup> Fernandez, *supra* note 85.

<sup>94</sup> Chris Isadore and Julianne Pepitone, *BB&T buys Colonial bank; 4 other banks fail*, CNN MONEY, Aug. 15, 2009, available at [http://money.cnn.com/2009/08/14/news/companies/colonial\\_bancgroup/?postversion=2009081500](http://money.cnn.com/2009/08/14/news/companies/colonial_bancgroup/?postversion=2009081500).

<sup>95</sup> Binyamin Appelbaum, *Are Subprime Mortgages Coming Back?*, N.Y. TIMES MAGAZINE, Sept. 9, 2014, available at [http://www.nytimes.com/2014/09/14/magazine/are-subprime-mortgages-coming-back.html?\\_r=0](http://www.nytimes.com/2014/09/14/magazine/are-subprime-mortgages-coming-back.html?_r=0).

<sup>96</sup> Bill Donahue, *Colonial Bank Execs Pay \$2.5M To Dodge ERISA Claims*, LAW360, June 18, 2012, available at <http://www.law360.com/articles/350930/colonial-bank-execs-pay-2-5m-to-dodge-erisa-claims>.

During its downfall, it allegedly knowingly put its employees' retirement assets in jeopardy.<sup>97</sup> Even after the housing market cratered and the bank knew its mortgages were worthless, it allegedly continued to direct employee retirement funds into the company stock, violating fiduciary duties under the Employee Retirement Income Security Act (ERISA).<sup>98</sup> Plaintiffs brought this class action lawsuit,<sup>99</sup> charging that because of the fiduciary breach, bank employees lost \$50 million in retirement assets after the bank's stock gave up 99.7% of its value.<sup>100</sup>

The bank's executives settled the suit, likely anxious to keep the facts from seeing the light of day in a courtroom. Law 360 described the settlement as follows: "A group of officers from defunct Colonial BancGroup Inc. cut a \$2.5 million deal Friday to end a consolidated class action accusing them of badly mismanaging the bank's employee retirement plans."<sup>101</sup>

### **\$4.375 million in lost retirement funds was restored to employees of Textron.**

The financial crisis hit Textron, the world's largest corporate jet manufacturer, hard.<sup>102</sup> Prior to the financial crisis, Textron executives allegedly mismanaged a number of contracts and engaged in wrongdoing, causing the company's share price to plummet.<sup>103</sup> For instance, the corporation reported in public statements and SEC filings that its Cessna division was financially strong.<sup>104</sup> However, it was allegedly artificially inflating its backlog by accepting orders from financially distressed companies that did not have the ability pay for them.<sup>105</sup> Eventually, Textron was forced to repeatedly lower its earnings projections as customers cancelled a large number of planes that had been on the backlog.<sup>106</sup>

Textron was also forced to settle a suit with federal securities regulators for \$3.5 million after an executive officer of a Textron subsidiary uncovered fraud on U.S. government contracts.<sup>107</sup> The corporation also lost a \$6.2 billion U.S. Army contract due to scheduling and quality problems and had to agree to a reduced profit on other contracts.<sup>108</sup>

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<sup>97</sup> Compl. at 2, *In Re Colonial Bancgroup, Inc. ERISA Litigation*, No. 2:09-cv-792 (M.D. Ala. 2010).

<sup>98</sup> Fred Schneyer, *Ala. Bank Hit with Stock Drop Charges*, PLANSPONSOR.COM, Sept. 2, 2009, available at <http://www.plansponsor.com/NewsStory.aspx?Id=4294982881>.

<sup>99</sup> *McKay v. Colonial BancGroup Inc.*, No. 09-00806 (M.D. Ala. 2009).

<sup>100</sup> Schneyer, *supra* note 96.

<sup>101</sup> Bill Donahue, *Colonial Bank Execs Pay \$2.5M To Dodge ERISA Claims*, LAW360, June 18, 2012, available at <http://www.law360.com/articles/350930/colonial-bank-execs-pay-2-5m-to-dodge-erisa-claims>.

<sup>102</sup> *Textron shares climb amid takeover chatter*, REUTERS, Apr. 6, 2009, available at <http://www.reuters.com/article/2009/04/06/us-textron-shares-idUSTRE5355Q420090406>.

<sup>103</sup> Jeff Bounds, *Ex-CEO sues Bell over firing*, DALLAS BUS. J., Oct. 22, 2009, available at <http://www.bizjournals.com/dallas/stories/2009/10/26/story3.html?page=all>.

<sup>104</sup> Compl. at 22-23, *In re Textron Litigation*, No. 09-383-ML (D. R.I. 2010).

<sup>105</sup> *Id.* at 21.

<sup>106</sup> *Id.* at 26-27.

<sup>107</sup> Litigation Release, SEC, SEC Files Settled Books and Records and Internal Controls Charges Against Textron Inc. For Improper Payments to Iraq Under the U.N. Oil for Food Program, Aug. 23, 2007, available at <http://www.sec.gov/litigation/litreleases/2007/lr20251.htm>.

<sup>108</sup> Gina Cavallaro, *Armed Reconnaissance Helicopter canceled*, ARMY TIMES, Oct. 16, 2008, available at <http://www.armytimes.com/article/20081016/NEWS/810160324/Armed-Reconnaissance-Helicopter-canceled>.

Based on Textron's reassurances that the corporation was healthy, employees invested their retirement funds in their stock. After the company's alleged mismanagement was discovered, the employees sued, asking the court to determine whether the Employee Retirement Income Security Act (ERISA) required Textron to disclose damaging information about the company in order to warn employees against investing in the shaky stock.<sup>109</sup> The court approved a \$4.375 million cash settlement.<sup>110</sup> No claims process was required, and checks were mailed to plan beneficiaries.<sup>111</sup>

### **\$500,000 in lost retirement funds was restored to employees of International Game Technology.**

Executives of International Game Technology (IGT), a casino supply corporation, invested employees' retirement funds in company stock while allegedly misleading employees about the risk.<sup>112</sup> IGT stock moved from about \$45 in November 2007 to about \$49 in March 2008, tumbling to less than \$8 in November 2008 as sales prospects dimmed due to the recession hitting the gaming industry.<sup>113</sup>

Due to reliance on the integrity of the market, the class alleges that it paid artificially inflated prices for IGT common stock.<sup>114</sup> Further, during this time, company insiders sold shares of their personal IGT stock for nearly \$29 million – at the same time as the retirement plan participants were buying the stock on the company's growth story.<sup>115</sup>

A class of employee retirement plan participants filed suit for violations of the Employee Retirement Income Security Act (ERISA).<sup>116</sup> Due to IGT's failures, the participants alleged that they suffered substantial losses, resulting in the depletion of millions of dollars of the retirement savings and anticipated retirement income of the plan's participants.<sup>117</sup> The court approved a settlement in which the defendants paid \$500,000 back to employees who had lost funds.<sup>118</sup>

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<sup>109</sup> *Sheets v. Textron Inc.*, No. 09-00412 (D. R.I. 2009), *In re Textron, Inc. ERISA Litigation*, No. 09-00383 (D. R.I. 2010).

<sup>110</sup> *Milberg LLP announces a proposed \$4.375 million cash settlement of an ERISA class action on behalf of certain participants in the Textron Savings Plan*, PR NEWswire, Sept. 30, 2013, available at <http://www.prnewswire.com/news-releases/milberg-llp-announces-a-proposed-4375-million-cash-settlement-of-an-erisa-class-action-on-behalf-of-certain-participants-in-the-textron-savings-plan-225814351.html>.

<sup>111</sup> *Id.*

<sup>112</sup> Steve Green, *Suit claims IGT employees harmed by retirement plan*, LAS VEGAS SUN, Oct. 5, 2009, available at <http://www.lasvegassun.com/news/2009/oct/05/suit-claims-igt-employees-harmed-retirement-plan/>.

<sup>113</sup> Steve Green, *Class-action lawsuit filed against IGT*, LAS VEGAS SUN, July 31, 2009, available at <http://www.lasvegassun.com/news/2009/jul/31/class-action-lawsuit-filed-against-igt/>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Carr v Int'l Game Technology*, No. 09-00584 (D. Nev. 2009).

<sup>117</sup> *Id.*

<sup>118</sup> Matthew Loughran, *Court Allows Contract Breach Claims Alleging Failure to Defend Stock-Drop Case*, BLOOMBERG BNA, Sept. 2, 2014, available at <http://www.bna.com/court-allows-contract-n17179894300/>.

### **\$3.2 million in lost retirement funds was restored to employees of Level 3 Communications.**

Level 3 Communications employee retirement plan managers allegedly withheld information about company troubles and breached their fiduciary duty to members by continuing to invest in the overvalued company stock.<sup>119</sup> Plan members brought suit, alleging violations of Employee Retirement Income Security Act (ERISA).<sup>120</sup> Specifically, they alleged that plan managers: (1) allowed participants to continue to elect to invest their retirement monies in Level 3 stock, (2) had the employer matching contribution be in the form of Level 3 stock when it was imprudent to do so, and (3) failed to provide the participants with timely, accurate and complete information concerning the company as required by applicable law.<sup>121</sup>

According to the plan members, investing in Level 3 shares was particularly risky at the time because the company was having trouble integrating the eight smaller telecommunications companies that it had purchased into the company.<sup>122</sup> The plaintiffs claimed that Level 3 concealed the problems and offered misleading information about its ability to successfully manage the new acquisitions, and the stock price plummeted when the problems came to light.<sup>123</sup>

The judge approved a settlement in which the management agreed to pay \$3.2 million to employees who had been harmed.<sup>124</sup>

### **AK Steel Corporation paid employee class members “virtually all the funds” it was accused of shortchanging them in their pensions.**

AK Steel Corp. allegedly shortchanged its union retirees by improperly calculating their pension plan payments, violating the Employee Retirement Income Security Act (ERISA).<sup>125</sup> According to the retirees, the corporation failed to employ a “whipsaw” when calculating the retirees’ lump-sum distributions.<sup>126</sup> ERISA requires use of the “whipsaw” calculation which imposes the plan rate of interest in determining account balances at retirement age and then using a lower rate in reducing the amount to present value.<sup>127</sup> The retirees brought suit.<sup>128</sup>

AK Steel Corp. agreed to pay 42 retirees approximately \$650,000 to make up for the difference between their lump-sum distributions and what they would have been paid had the company used

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<sup>119</sup> Abigail Rubenstein, *Level 3 Strikes \$3.2M Deal to End ERISA Action*, LAW360, Nov. 14, 2011, available at <http://www.law360.com/articles/285665/level-3-strikes-3-2m-deal-to-end-erisa-action>.

<sup>120</sup> *Walter v. Level 3 Communications, Inc.*, No. 09-00658 (D. Colo. 2009).

<sup>121</sup> *Id.*

<sup>122</sup> Rubenstein, *supra* note 117.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Samuel Howard, *AK Steel Settles Class Action Over Pension Payments*, LAW360, Nov. 24, 2010, available at <http://www.law360.com/articles/211337/ak-steel-settles-class-action-over-pension-payments>.

<sup>126</sup> *Id.*

<sup>127</sup> Compl. at 13, *Schmidt v. AK Steel Corp. Pensions Agreement Plan et al*, No. 1:09-cv-00464-SSB-KLL (S.D. Ohio 2009).

<sup>128</sup> *Schmidt v. AK Steel Corp. Pensions Agreement Plan et al*, No. 1:09-cv-00464-SSB-KLL (S.D. Ohio 2009).

the “whipsaw” when calculating the retirees’ payments.<sup>129</sup> Under the settlement, the plaintiffs obtained virtually all of the funds they sought for AK Steel’s alleged failure.<sup>130</sup>

### **e. They addressed health and environmental harms.**

#### **The Tennessee Valley Authority was forced to answer for allegedly failing to maintain a coal ash containment dyke, leading to a massive spill of coal ash sludge.**

According to the Chamber, “Zero cases resulted in a judgment on the merits. Of the 148 cases in our sample set, not one had gone to trial—either before a judge or jury. And, as of the closing date of our study, not one resulted in a judgment for the plaintiffs on the merits...Unlike ordinary (non-class) disputed cases, some of which end with a judgment on the merits in favor of the plaintiffs or defendants, class actions end without any determination of the case’s merits.”<sup>131</sup>

The Chamber was wrong, however. One of the class actions was successfully brought on behalf of property owners who suffered damages from a massive spill of coal ash sludge.<sup>132</sup>

In December 2008, a dike at a coal plant operated by the Tennessee Valley Authority (TVA) burst, sending more than a billion gallons of highly toxic coal ash slurry into waterways and covering nearly 300 acres with sludge.<sup>133</sup> The coal ash was held in earthen dikes rather than lined landfills,<sup>134</sup> and leaks and seepage had plagued the dikes at the TVA coal plant for years.<sup>135</sup> According to a February 2008 inspection report, the TVA knew about leaks for more than two decades and opted against long-term solutions.<sup>136</sup>

In August 2012, a district court found in favor of plaintiffs on their claims of negligence, trespass, and private nuisance.<sup>137</sup> According to the court, “TVA’s conduct in regard to its mandatory policies, procedures, and practices for coal ash management compounded the location, design, and operation causes [for the dike failure] and had TVA followed its own mandatory policies, procedures and practices, the subsurface issues underlying the failure of the North Dike would have been investigated, addressed, and potentially remedied before the

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<sup>129</sup> Howard, *supra* note 123.

<sup>130</sup> *Id.*

<sup>131</sup> “Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions,” Memorandum written by Mayer Brown LLP for U.S. Chamber of Commerce, at p. 3. (emphasis in original).

<sup>132</sup> *Blanchard v. Tennessee Valley Authority*, No. 3:09-cv-00009 (E.D. Tenn. 2009).

<sup>133</sup> TVA Kingston Disaster and Federal Coal Ash Regulations Timeline, p. 1, Earthjustice, available at [http://earthjustice.org/sites/default/files/files/TVA\\_DISASTER\\_COAL\\_ASH\\_TIMELINE\\_2014.pdf](http://earthjustice.org/sites/default/files/files/TVA_DISASTER_COAL_ASH_TIMELINE_2014.pdf).

<sup>134</sup> Shaila Dewan, *Tennessee Ash Flood Larger Than Initial Estimate*, N.Y. TIMES, Dec. 26, 2008, available at [http://www.nytimes.com/2008/12/27/us/27sludge.html?\\_r=0](http://www.nytimes.com/2008/12/27/us/27sludge.html?_r=0).

<sup>135</sup> *Review of the Kingston Fossil Plant Ash Spill Root Cause Study and Observations about Ash Management*, Tenn. Valley Authority Office of the Inspector General Report, No. 2008-12283-02, July 23, 2009, available at <http://oig.tva.gov/PDF/09rpts/2008-12283-02.pdf>.

<sup>136</sup> *Id.* at 18-21.

<sup>137</sup> Andrew M. Ballard, *Federal District Court Rules TVA Liable For Damages in 2008 Coal Ash Slurry Spill*, BLOOMBERG BNA, Aug. 24, 2012, available at <http://www.bna.com/federal-district-court-n12884911399/>.

catastrophic failure of December 22, 2008.”<sup>138</sup> The TVA agreed to pay \$27.8 million to settle claims from property owners who suffered damages due to the 2008 spill of coal ash sludge.<sup>139</sup>

**The Pennsylvania Department of Public Welfare (DPW) was forced to provide timely medical care to thousands of low-income and disabled residents.**

Narcisa Garcia and elderly advocacy groups sued the DPW for allegedly failing to make timely payment of Medicare premiums for thousands of low-income elderly individuals and individuals with disabilities.<sup>140</sup> This caused alleged delays, meaning low-income elderly and disabled people in Pennsylvania had to pay Medicare premiums themselves or go without care they were entitled to receive under the law for months or years.<sup>141</sup> The advocacy groups alleged that these delays by DPW violated the Social Security Act and other federal regulations.<sup>142</sup>

Less than a year later, the case settled. The Judge approved a class of all persons living in Pennsylvania who were eligible to have their Medicare premiums paid but whose benefits were denied or delayed unlawfully by DPW.<sup>143</sup>

DPW agreed to change its practices to provide timely health care to Pennsylvania low income elderly and disabled residents.<sup>144</sup> In particular, it agreed to begin submitting MSP enrollment requests on a daily basis (already happening in other states) and to begin accepting responses to its MSP enrollment requests on a daily basis.<sup>145</sup> It agreed to new protocols and timeframes for case workers to resolve data errors in enrollment submissions.<sup>146</sup> In short, the state revamped the way it enrolls people in Medicare.<sup>147</sup> The Garcia settlement will lower the cost of Medicare and increase access to Medicare-covered services and benefits for low-income older people and people with disabilities in Pennsylvania.<sup>148</sup>

**Kellogg, Brown & Root LLC (KBR) and Halliburton are being forced to answer for operating open air burn pits in Afghanistan and Iraq, jeopardizing the health and safety of thousands of American service members.**

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<sup>138</sup> Elizabeth A. Alexander, *Federal Court Finds TVA Responsible For Nation’s Largest Coal Ash Spill Ever*, MARTINDALE.COM, Aug. 28, 2012, available at [http://www.martindale.com/environmental-law/article\\_Lieff-Cabraser-Heimann-Bernstein-LLP\\_1577322.htm](http://www.martindale.com/environmental-law/article_Lieff-Cabraser-Heimann-Bernstein-LLP_1577322.htm).

<sup>139</sup> Travis Loller, *Utility to Pay Tennessee Coal Ash Victims \$27.8 Million*, AP, Aug. 4, 2014, available at <http://www.memphisdailynews.com/news/2014/aug/4/utility-to-pay-tennessee-coal-ash-victims-278-million/>.

<sup>140</sup> *Garcia v Johnson*, No. 09-01747 (E.D. Pa. 2009).

<sup>141</sup> Compl. at 1-2, *Garcia v Johnson*, No. 09-01747 (E.D. Pa. 2009).

<sup>142</sup> *Id.* at 2.

<sup>143</sup> Press Release, Pennsylvania Lawsuit Increases Access to Medicare for Low-Income Beneficiaries, Center for Medicare Advocacy, Inc., Apr. 29, 2010, available at [http://www.medicareadvocacy.org/InfoByTopic/MedicareSavingsPrograms/10\\_04.29.GarciaSettlement.htm](http://www.medicareadvocacy.org/InfoByTopic/MedicareSavingsPrograms/10_04.29.GarciaSettlement.htm).

<sup>144</sup> *Id.*

<sup>145</sup> Joint Motion for Approval of Settlement Agreement at 2, *Garcia v Johnson*, No. 09-01747 (E.D. Pa. 2009).

<sup>146</sup> Press Release, supra note 141.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

Since the beginning of our military presence in Afghanistan and Iraq, the military has contracted with KBR and Halliburton to provide waste disposal and water treatment services on military bases in the Middle East.<sup>149</sup> The corporation established open air burn pits to dispose of hazardous waste, allegedly exposing service members and civilian workers to smoke, ash and fumes for a prolonged period of time.<sup>150</sup> This exposure allegedly led to chronic ailments including respiratory illnesses and cancer.<sup>151</sup>

Service members filed 58 class action and individual suits, including the suit at issue, alleging that the defendants had a duty to warn U.S. service members and civilians working and living around burn pits of the health and safety issues but failed to do so.<sup>152</sup> The lawsuits, filed across the country, were consolidated in *In re KBR Inc. Burn Pit Litigation*.<sup>153</sup> Most recently, the Court of Appeals for the Fourth Circuit held that the lawsuits can proceed forward.<sup>154</sup>

### III. OUR ANALYSIS DIFFERS GREATLY FROM THAT OF THE U.S. CHAMBER OF COMMERCE

#### a. The Chamber mischaracterized cases in its memorandum.

The Chamber characterized some class actions as providing “little in the way of benefit flows to class members.”<sup>155</sup> Only an intentionally deceptive description of the cases could support such an assertion. In support of its claims, it cited the following cases:

- ***Dryer v. Nat’l Football League***. The Chamber claimed that “Lawyers (as opposed to class members) were the principal beneficiaries of the remaining settlements in our

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<sup>149</sup> Kate Donovan Kurera, *Military Burn Pits in Iraq and Afghanistan: Considerations and Obstacles for Emerging Litigation*, 28 PACE ENVTL. L. REV. 288, 289 (2010).

<sup>150</sup> Compl. at 4-5, *Green v. KBR Inc.*, No. 4:09-cv-00459 (N.D. Okla. 2009).

<sup>151</sup> Ken Bastida, *Veterans Returning Home From Iraq, Afghanistan Point To Open Air Burn Pits As New ‘Agent Orange,’* CBS SAN FRANCISCO, May 20, 2014, available at <http://sanfrancisco.cbslocal.com/2014/05/20/veterans-returning-home-from-foreign-wars-falling-ill-dying-from-new-agent-orange-iraq-afghanistan-war-soldier-soldiers-chemical-cancer-garbage-incinerator-service-va/>.

<sup>152</sup> Patricia Kime, *Federal court allows burn-pit lawsuit to advance*, MILITARY TIMES, Mar. 7, 2014 available at <http://archive.militarytimes.com/article/20140307/BENEFITS06/303070020/Federal-court-allows-burn-pit-lawsuit-advance>.

<sup>153</sup> Andrew Zajac, *KBR, Halliburton Not Immune From Burn-Pit Suits, Court Says (2)*, BLOOMBERG BUSINESSWEEK, March 6, 2014, available at <http://www.businessweek.com/news/2014-03-06/kbr-halliburton-not-immune-from-burn-pit-suits-court-says-1>.

<sup>154</sup> Allissa Wickham, *4<sup>th</sup> Circ. Revives Burn-Pit Suits Against KBR, Halliburton*, LAW360, Mar. 6, 2014, available at <http://www.law360.com/articles/516013/4th-circ-revives-burn-pit-suits-against-kbr-halliburton>.

<sup>155</sup> Letter of David Hirschmann and Lisa Rickard, U.S. Chamber of Commerce, to Monica Jackson, Consumer Financial Protection Bureau, Dec. 11, 2013, p. 5 (“A new empirical assessment of class actions that the Chamber has commissioned demonstrates that the class actions studied provide little or no benefit to consumers.”).

study,” citing this case an example.<sup>156</sup> Yet, the facts lead to a different conclusion. Under the settlement, \$42 million went to retired NFL players whose images were used, while \$7.7 million went to pay the lawyers. In fact, the article cited by Mayer Brown made this explicitly clear.<sup>157</sup>

- o The Chamber criticized the result because “Named plaintiffs object to the settlement.”<sup>158</sup> It failed to note that the judge – whose job it is to look out for the interests of the entire class – expressly addressed those objections and concluded that the settlement was “a boon to those thousands upon thousands of former NFL players who can now reap the collective benefit of a large financial payout to a fund organized solely for their benefit, overseen by their comrades-in-arms.”<sup>159</sup>
- ***McKay v. Colonial BancGroup Inc.*** The Chamber cited this case as an example of a class action in which lawyers (as opposed to class members) were the principal beneficiaries of a settlement.<sup>160</sup> That characterization is wrong.
  - o As described in Section II, Colonial Bank executives allegedly mismanaged the company and drove it into bankruptcy. During its downfall, it put its employees’ retirement assets in jeopardy, continuing to direct employee retirement funds into the company stock.<sup>161</sup> According to the complaint, “Colonial held employee meetings and disseminated internet postings throughout the spring and summer of 2009, telling Plan participants that everything was ‘hunky dory’ at Colonial and that Plan participants should continue to invest in Colonial stock. This message persisted until Friday, August 14, 2009, when the Alabama State Banking Department physically took control of the Bank’s various offices and locked its doors, appointing the Federal Deposit Insurance Corporation as receiver.”<sup>162</sup> Ultimately, the class action succeeded in obtaining from the bank \$2.5 million for employees who had lost their retirement funds.<sup>163</sup>
  - o The class members received 74% of the fund created by the settlement. The plaintiffs’ attorneys received fees amounting to 26% of the fund.
  - o The Chamber report criticizes the settlement because the injured employees recouped only 5% of their losses. To be sure, in a perfect world, the employees would have been made whole. In a more perfect world, company executives

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<sup>156</sup> “Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions,” Memorandum written by Mayer Brown LLP for U.S. Chamber of Commerce, available at <http://blogs.reuters.com/alison-frankel/files/2013/12/mayerbrownclassactionstudy.pdf> at 15-16.

<sup>157</sup> *Id.* at 16.

<sup>158</sup> *Id.*

<sup>159</sup> Order at 2, *Dryer v. Nat’l Football League*, No. 09-cv-02182 (D. Minn. 2010).

<sup>160</sup> Mayer Brown, LLP, *supra* note 154, at 15-17.

<sup>161</sup> Schneyer, *supra* note 96.

<sup>162</sup> Compl. at 3, *McKay v. Colonial BancGroup Inc.*, No. 2:09-cv-00806 (M.D. Ala. 2009).

<sup>163</sup> Donohue, *supra* note 99.

would not have plunged their employees' retirement contributions into worthless stock. But here, because mismanagement had left the company bankrupt, the employees were unlikely to recover more had they proceeded to trial. Furthermore, without the class action, the vast majority of employees would have received nothing.

### **b. Defense counsel often caused the delays criticized by the Chamber.**

The Chamber criticized class actions because “[a]pproximately 14 percent of all class action cases remained pending four years after they were filed.”<sup>164</sup> It is unsurprising that complex litigation involving hundreds of thousands of injured consumers or investors can be a lengthy endeavor, especially when corporate defense strategies involve purposefully delaying the case. And class action litigation is not unique in this regard, as complex civil litigation typically lasts years.

Often, the corporate defendant delays and draws out a class action. For example, filed in 2009, *Samuel Troice, et al v. Proskauer Rose LLP* is a class action regarding the “mini-Madoff” investment fraud scandal in which Allen Stanford and his firm Stanford Financial ran a massive Ponzi scheme, defrauding investors of hundreds of millions of dollars.<sup>165</sup> Lawyers for Stanford Financial allegedly assisted in the scheme by hindering an SEC investigation.<sup>166</sup> The defendants moved to dismiss, claiming that they could not be sued for aiding and abetting securities fraud. They lost before the U.S. 5th Circuit Court of Appeals, pursued the issue to the U.S. Supreme Court, and lost there in 2014.<sup>167</sup> Then, five years after it began, the case returned to the trial court to be litigated.

*Hennigan v General Electric* is a class action involving defective General Electric (GE) microwave ovens that could turn on spontaneously and catch fire.<sup>168</sup> According to the complaint, GE fraudulently concealed this dangerous defect from consumers for almost a decade.<sup>169</sup> The case was profiled in Consumer Reports.<sup>170</sup> GE took many actions to delay the litigation, from filing motions to dismiss to failing to disclose documents until ordered to do so by the court. In fact, the judge found that GE's failure to comply with orders to disclose consumer complaints about burning microwaves so egregious that he ordered GE to pay plaintiffs' attorneys fees and costs for pursuing a motion to compel.<sup>171</sup> The litigation continues.

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<sup>164</sup> Mayer Brown, LLP, *supra* note 154, at 1.

<sup>165</sup> No. 09-cv-01600 (N.D. Tex. 2009).

<sup>166</sup> Murray Waas, *Insight: How Allen Stanford kept the SEC at bay*, REUTERS, Jan. 26, 2012, available at <http://www.reuters.com/article/2012/01/26/us-sec-stanford-idUSTRE80P22R20120126>.

<sup>167</sup> *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014).

<sup>168</sup> No. 2:09-cv-11912 (E.D. Mich. 2009).

<sup>169</sup> Complaint at 5, No. 2:09-cv-11912 (E.D. Mich. 2009).

<sup>170</sup> *Appliance fires: Is your home safe?*, CONSUMER REPORTS MAGAZINE, March 2012, available at <http://www.consumerreports.org/cro/magazine/2012/03/appliance-fires-is-your-home-safe/index.htm>.

<sup>171</sup> Order at 5, *Hennigan v General Electric*, No. 2:09-11912 (E.D. Mich. 2010) “Even giving GE the benefit of the doubt, it offers no legitimate reason for its failure to timely provide the Safety Database documents, which required no search terms and was organized in such a way that GE could have easily produced, in accordance with Judge

### **c. The Chamber's criticism of claims-made settlements is misleading.**

According to the Chamber, "While some may argue that parties should use automatic distribution mechanisms instead of 'claims-made' settlements to resolve class actions, the reality is that automatic distribution is difficult, if not impossible, to achieve in many (perhaps most) consumer class actions."<sup>172</sup>

First, our review of the Chamber's list of cases showed that, among those that settled on a class basis, the cases were about equally divided between those that required class members to send in claim forms and those that did not, with slightly more *not* requiring a claim form. The cases that required no claim ranged from settlements related to retiree pensions, to defrauded investors, to defective automobiles.

More generally, consumer financial services class actions often result in automatic distribution.<sup>173</sup> Indeed, the only consumer financial services class action discussed in the Chamber's memo notes that the payment to class members was made through automatic distribution. Automatic distribution settlements, in which the identity of class members and the value of their claims can be ascertained without a claims notice process, result in recoveries to a high percentage of the class.<sup>174</sup>

The Chamber described the case as follows: "[A] credit-card issuer settled claims that it improperly raised the minimum monthly payment and added new fees in connection with promotional loan offers. The defendant issued class members a flat-rate payment of \$25, plus (for certain customers) a share of the remaining settlement fund calculated by taking into account the ways the class member had used the promotional loan and had been charged fees.<sup>175</sup> The Chamber failed to report the amount of money returned to defrauded consumers – \$100

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Roberts' Order, the narrow category of responsive documents that it has advocated to be the proper scope of discovery in this case."

<sup>172</sup> Mayer Brown, LLP, *supra* note 154, at 11-12.

<sup>173</sup> Consumer Financial Protection Bureau, Arbitration Study Preliminary Results (Dec. 12, 2013) at 107-108, available at [http://files.consumerfinance.gov/f/201312\\_cfpb\\_arbitration-study-preliminary-results.pdf](http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf).

<sup>174</sup> Alison Frankel, *Class actions deliver more money to more people than arbitration: CFPB*, REUTERS, Dec. 12, 2013, available at <http://blogs.reuters.com/alison-frankel/2013/12/12/class-actions-deliver-more-money-to-more-people-than-arbitration-cfpb/>.

<sup>175</sup> Mayer Brown, LLP, *supra* note 154, at 12.

million.<sup>176</sup> In addition, Chase was forced to change its business practices.<sup>177</sup> This settlement provided \$100 million to defrauded credit card customers.<sup>178</sup>

Class actions effectively fight fraud and misconduct committed by large financial institutions for a variety of reasons:

- **They often involve small-dollar harm committed against large groups of people.** For example, millions of people were harmed by the banking industry’s practice of re-ordering checking account transactions so as to maximize overdraft fees. But the typical overdraft fee is only around \$25, far too small an amount to be worth an individual lawsuit. The Supreme Court has noted that it is for precisely this type of harm that the class action device exists: “[A]t the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”<sup>179</sup>
- **It is often easy to determine the amount of the harm.** Because these cases involve banks and their relationships with customers, when there is harm to the customer, the loss suffered is evident from bank records. If the case involves an illegally-assessed fee, for instance, the amount of the fee is known. If the case involves an illegally-high interest rate, it is possible to figure out what the finance charges would have been but for the illegal interest.
- **No claims process is typically required.** Most of these cases involve situations in which class members are in an ongoing relationship with the defendant. Class members may be credit card or checking account holders, or debtors who owe a lender. Accordingly, once a settlement is negotiated, the money can be paid back directly to those harmed. The offending bank can simply mail a check, direct deposit money into class members’ accounts, or eliminate debt. Even when a claims process is required, notice is easier to give because the financial institution has the contact information of the harmed class members.

Two recent cases show – yet again – how class actions hold financial fraudsters accountable:

In December 2013, a judge approved a settlement in *Edwards v. Geneva-Roth Capital Inc.*,<sup>180</sup> a payday loan case in which the lender allegedly violated state lending laws by charging

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<sup>176</sup> Jonathan Stempel, *JPMorgan in \$100 million credit card settlement*, REUTERS, Jul. 24, 2012, available at <http://www.reuters.com/article/2012/07/24/us-jpmorgan-creditcard-settlement-idUSBRE86N13O20120724>.

<sup>177</sup> For those who chose an alternative offer after the minimum monthly increases, such as a higher APR, Chase agreed not to increase their APR. The bank also agreed to maintain the previous 2% minimum monthly payment requirement for class members with alternative offer accounts, so long as the customer does not default. See Settlement Summary, Lief Cabraser Heimann & Bernstein, available at <http://www.lieffcabraser.com/Case-Center/Chase-Check-Loan.shtml>.

<sup>178</sup> *Id.*

<sup>179</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

<sup>180</sup> No. 49C01-1003-PL-013084 (Cir. Ct. Ind. 2013).

sometimes more than 1000% annual interest rate on payday loans to people in severe financial distress.<sup>181</sup> The lender also automatically renewed loans, resulting in thousands of dollars due in just a few months.<sup>182</sup> The lender tried to force the case into individual arbitration.<sup>183</sup> When that motion was denied and affirmed on appeal, the lender exhausted all further avenues of appeal. Once arbitration was denied, the case settled for \$1.35 million in cash and cancellation of over \$5 million in amounts owed on outstanding loans.<sup>184</sup> As a result of the settlement, more than 6,000 class members received relief.<sup>185</sup>

In May 2014, a judge approved a settlement in *Yarger v. ING Bank*.<sup>186</sup> This class action alleged that ING Direct repeatedly failed to honor mortgage financing guarantees it made to tens of thousands of customers.<sup>187</sup> Instead of honoring the guarantees, ING added qualification requirements not described in its advertising.<sup>188</sup> Borrowers suffered damages when they had to pay more than they had been promised.<sup>189</sup> The settlement requires ING to pay \$20,350,000 in cash, plus all costs of notice and claims administration.<sup>190</sup> It will be direct, monetary relief in the form of an automatic cash payment to every member of the class.<sup>191</sup> All class members who do not opt out will receive a check in the mail.<sup>192</sup>

#### **IV. ANALYSIS OF CLASS ACTIONS FILED IN 2009 SHOWS THAT ARBITRATION IS EASILY CORRUPTIBLE AND DENIES ACCESS TO JUSTICE FOR CONSUMERS WITH VALID CLAIMS.**

##### **a. The 2009 class action challenging the corrupt National Arbitration Forum shows that arbitration is fundamentally susceptible to corruption.**

The Chamber introduced its “study” with a claim to objectivity: “Rather than simply relying on anecdotes, this study undertakes an empirical analysis of a neutrally-selected sample set of putative consumer and employee class action lawsuits filed in or removed to federal court in 2009.”<sup>193</sup> Having examined that set of class actions, the Chamber concluded that they “provide

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<sup>181</sup> *Id.*

<sup>182</sup> *Geneva-Roth, Capital, Inc. v. Edwards*, 956 NE 2d 1195, 1197 (Ind. Ct. App. 2011).

<sup>183</sup> *Geneva-Roth, Capital, Inc. v. Edwards*, 956 NE 2d 1195, 1198 (Ind. Ct. App. 2011).

<sup>184</sup> Order Granting Final Approval to Class Action Settlement Agreement, *Edwards v. Geneva-Roth Capital, Inc.*, No. 49C01-1003-PL-013084 (Cir. Ct. Ind. 2013).

<sup>185</sup> *Id.*

<sup>186</sup> No. 11-cv-00154-LPS (D. Del. 2014).

<sup>187</sup> Andrew Scurria, *ING Can't Slip False Ad Suit Over Mortgage Rate Renewals*, LAW360, Sept. 23, 2013, available at <http://www.law360.com/articles/474525/ing-can-t-slip-false-ad-suit-over-mortgage-rate-renewals>.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Settlement Agreement at 55, *Yarger v. ING Bank*, No. 11-cv-00154-LPS (D. Del. 2014).

<sup>191</sup> *Id.* at 52.

<sup>192</sup> *Id.*

<sup>193</sup> Mayer Brown, LLP, *supra* note 154, at 1.

little or no real benefit to consumers.”<sup>194</sup> However, the single largest consumer class action filed in 2009 provided over \$4 billion in financial relief to consumers.<sup>195</sup>

The National Arbitration Forum (NAF), named as the arbitration-administering organization for consumer disputes in tens of millions of credit card agreements nationwide, portrayed itself as independent and neutral when in fact it allegedly worked closely with creditors and debt collectors.<sup>196</sup> Consumers formed a class, seeking to invalidate arbitration awards and obtain disgorgement of all amounts collected from persons against whom NAF issued an arbitration award.<sup>197</sup>

The case was consolidated with others as part of a multidistrict litigation (MDL).<sup>198</sup> The court approved a settlement requiring NAF to dismiss all pending consumer arbitrations (valued at an estimated \$1 billion), and debt collection firm Mann Bracken to cease all collection activities arising out of NAF arbitrations (valued at approximately \$3.8 billion).<sup>199</sup> NAF also agreed to stop handling consumer arbitrations for ten years.<sup>200</sup>

This for-profit arbitrator can no longer harm consumers. However, its legacy likely lives on, in other privately-held corporate arbitration companies that conduct unreviewable arbitrations. Today’s economic uncertainty means that more consumers will have more debt, leading financial giants to seek out arbitrators to act as an arm of the debt collection industry. A situation like the one described above could easily happen again, and it would be difficult to uncover.

## **b. None of the successful class actions chronicled would have been possible under forced arbitration.**

Despite the fact that forced arbitration clauses in consumer financial services contracts govern the rights of tens of millions of consumers, arbitration provides relief to almost no consumers harmed by illegal or abusive practices in the financial services industry.

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<sup>194</sup> Letter of David Hirschmann and Lisa Rickard, U.S. Chamber of Commerce, to Monica Jackson, Consumer Financial Protection Bureau, Dec. 11, 2013, at 45.

<sup>195</sup> *In re: Nat’l. Arb. Forum Trade Practices Litigation*, No.10-md-02122 (Dist. Ct. Minn. 2011).

<sup>196</sup> *Magnone et al. v. Accretive LLC et al.*, No. 09-cv-06375, (C.D. Cal. 2009). The Minnesota Attorney General also sued NAF, alleging in particular that it concealed its financial ties to a New York hedge fund that owned one of the country’s largest debt collection operations, and that nearly 60% of the 214,000 consumer disputes arbitrated by NAF in 2006 were filed by law firms controlled by the hedge fund. According to the Attorney General, NAF generated additional revenue by convincing creditors to place mandatory pre-dispute arbitration clauses in their customer agreements and to appoint NAF as the arbitration administrator for any disputes, soliciting creditors with promises that consumers would be more willing to resolve their debts because they do not know what to expect from arbitration and because creditors retain all the leverage in arbitration.

<sup>197</sup> *Magnone et al. v. Accretive LLC et al.*, No. 09-cv-06375, (C.D. Cal. 2009).

<sup>198</sup> *In re: Nat’l. Arb. Forum Trade Practices Litigation*, No.10-md-02122 (Dist. Ct. Minn. 2011).

<sup>199</sup> Final Settlement Approval at 1, *In re: Nat’l. Arb. Forum Trade Practices Litigation*, No.10-md-02122 (Dist. Ct. Minn. 2011).

<sup>200</sup> Chris Herring, *In Settlement, Arbitration Company Agrees To Largely Step Aside*, WALL ST. J., Jul. 20, 2009, available at <http://blogs.wsj.com/law/2009/07/20/in-settlement-arbitration-company-agrees-to-largely-step-aside/>.

The total number of consumer arbitrations is startlingly small. The CFPB looked for all the credit card, checking, and payday loan disputes filed by consumers with the American Arbitration Association (AAA) over the three year period 2010-2012 and found approximately 900 claims.<sup>201</sup> Despite the pervasiveness of forced arbitration clauses, that means that, across the entire country, only around 300 consumers pursue arbitration against their financial services providers each year. The total amount in dispute in the arbitrations examined was only \$15 million.<sup>202</sup>

In contrast, the CFPB notes that the result of just eight class action litigations was financial relief for more than 13 million people.<sup>203</sup> The Bureau wrote: “More than 13 million class members made claims or received payments under these settlements. Total payments or debt relief to the classes are in excess of \$350 million, exclusive of attorneys’ fees and the value of injunctive relief.”<sup>204</sup>

The study shows that certain types of claims are simply never vindicated in arbitration:

- Virtually no one brings small dollar claims (generally considered less than \$1,000) in arbitration.<sup>205</sup> These are the very types of claims that the U.S. Supreme Court has said are properly suited for class actions, whereby many consumers’ small dollar claims are aggregated.<sup>206</sup>
- Despite widespread abuse by banks in the ordering and timing of overdraft charges, only two people brought arbitration claims for the practice.<sup>207</sup> In contrast, the study showed that just three class actions provided relief to over 6 million people for abuses in the ordering and timing of overdraft charges.<sup>208</sup>
- Despite the fact that payday lenders often charge interest above what is legally allowed, only 11 people brought arbitration claims for charging of interest and fees above a state cap.<sup>209</sup> Were the CFPB to review litigation challenging the charging of such illegal rates, it would likely find class actions that provided relief to thousands.
- Claims under the Equal Credit Opportunity Act (ECOA) are not vindicated in arbitration. Over the entire three-year period examined by the CFPB, only one ECOA claim was brought in arbitration.<sup>210</sup> This suggests that civil rights claims – where a consumer may not know he or she has been discriminated against – are not suitable for arbitration.

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<sup>201</sup> Consumer Financial Protection Bureau, Arbitration Study Preliminary Results (Dec. 12, 2013) at 13, *available at* [http://files.consumerfinance.gov/f/201312\\_cfpb\\_arbitration-study-preliminary-results.pdf](http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf).

<sup>202</sup> *Id.* at 80.

<sup>203</sup> *Id.* at 104.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 82.

<sup>206</sup> *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 186 (1974).

<sup>207</sup> Consumer Financial Protection Bureau, Arbitration Study Preliminary Results (Dec. 12, 2013) at 89-90, *available at* [http://files.consumerfinance.gov/f/201312\\_cfpb\\_arbitration-study-preliminary-results.pdf](http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf).

<sup>208</sup> *Id.* at 108-109.

<sup>209</sup> *Id.* at 91.

<sup>210</sup> *Id.* at 86.

## **V. CONCLUSION**

Class actions are often the sole means of enabling consumers to remedy injustices committed by powerful corporations. When corporations engage in wrongdoing that affects large numbers of people, class actions allow individuals to hold them accountable without incurring the costs of thousands of separate lawsuits. This tool is an essential element of the civil justice system. The simple truth is that class actions work, and they work on behalf of people who are otherwise powerless to hold corporations accountable..