The Limits to “No-Injury” Class Actions and Injunctive-Relief-Only Class Settlements

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There has been a great deal of commentary lately about the rise of illusory, or “no injury” class actions. See generally June 1, 2012 Testimony of Martin Redish Before the Subcommittee on the Constitution of the Committee on the Judiciary of the House of Representatives at 2 (“June 1, 2012 Redish Testimony”), available at http://judiciary.house.gov/hearings/Hearings%202012/Redish%2006012012.pdf (“Redish Testimony”) at 7. Examples of these types of abusive class actions abound, whether it is shareholder class actions seeking to block merger activity, coffee shops being sued because of the space taken up by coffee grounds in French-press coffee, sandwich shops being sued because of variations in the length of their bread, or cosmetics manufacturers and drug companies being sued because it is impossible to get all the product out of a container. The common theme to these actions is creative plaintiffs’ attorneys who rely on broadly worded statutes to devise novel injury theories in order to bring class actions to attack non-controversial—and often even authorized—everyday business practices in the hopes that they can get a class certified and obtain a settlement because the cost of defense is so much higher than the de minimis and even trifling sums allegedly at issue per transaction.

Constitutional Scholar Martin Redish has coined the term “faux class action” to describe such cases:

The faux class action describes those class proceedings in which the claims of the individual absent class members are so small and/or the difficulty in either finding them or distributing the individual awards so great that as a practical matter they will receive no damages, despite a plaintiffs’ victory. Those absent class members, then, are interested parties in name only…. The real parties in interest in these faux class actions are the plaintiffs’ lawyers, who are the ones primarily responsible for bringing this proceeding.

Redish Testimony at 7.

Many such class actions run up against the problem that the law is not intended to deal with trifles. See Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992). “[T]he venerable maxim de minimis non curat lex (“the law cares not for trifles”) is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.” Id. The de minimis maxim exists “to save on judicial resources and prevent the system from getting bogged down with trifling or inconsequential matters.” Jeff Nemerofsky, What is a “Trifle” Anyway?, 37 Gonzaga L. Rev. 315, 324 (2001/02). It prevents “expensive and mischievous litigation, which can result in no real benefit to complainant, but which may occasion delay and injury to other suitors.” Hessel v. O’Hearn; 977 F.2d 303, 307 (7th Cir. 1992) (quoting Schlichtman v. New Jersey Highway Authority, 243 N.J. Super. 472, 579 A.2d 1275, 1279 (1990)). While class actions may in certain instances legitimately exist to allow the aggregation of minor claims, courts and litigants should carefully evaluate them to ensure that the class claims are real and not a mere collection of trifles. Indeed, in some consumer fraud class actions, even trifles are non-existent and absolutely no injury exists at all because the market establishes the proper price at which a transaction occurs. As discussed below, Plaintiffs’ arguments, therefore, are more legitimately understood as “regret” over the terms of the transaction than a legally cognizable basis for class action litigation.

No-injury class actions often end in settlement due to the extortionate cost of defending against the litigation; this creates its own set of problems. As prominent commentators have noted, the Supreme Court has “expressed significant concerns about class cohesiveness and legitimacy in settlement classes, suggesting the need for heightened attention to Rule 23 safeguards ….” Laura J Hines, The Unruly Class Action, 82
The George Washington Law Rev. 718, 765-66 (2014). As Professor Hines points out, settlement is a “towering aim” of class actions. Id. Plaintiffs are aware that no matter how minuscule their claims might be, if they can survive class certification, they can often force a settlement due to the “in terrorem” effect of class certification.

Recently, courts have begun to push back against such abusive forms of class actions. This presentation identifies red flags for identifying faux class actions and illegitimate class settlements, identifies a couple of cases to watch, discusses some recent decisions that class action litigators can employ in defending against illegitimate class actions, and reemphasizes some general litigation strategies.

I. Five Red Flags of Illegitimate Class Action/Settlements

A. Prospective Injunctive Relief Only/No Money to the Class Sought or Obtained

When a class action only seeks, or when a class settlement only or primarily provides, prospective injunctive relief, it is a red flag that there may be no real injury underlying the class claims and therefore heightened review of the settlement terms is warranted. Although some injunctive-relief-only settlements may be entirely legitimate, the point is such settlements are a starting point for questioning whether an illegitimate settlement exists. Injured plaintiffs typically seek damages to compensate them for their injuries, especially in the commercial context. Obviously, prospective injunctive relief may be entirely appropriate in the context of civil rights litigation in which enjoining discriminatory or unconstitutional conduct is a logical and proper remedy. However, in consumer fraud, antitrust, or derivative shareholder suits, a class settlement, which provides no economic benefit to the class and instead relies exclusively on prospective injunctive relief, raises a red flag that the class settlement may exceed a Court's Article III and/or Rule 23(e) authority to approve. Indeed, there might be serious questions about whether the class action is the best method to adjudicate the claims and whether class counsel is acting in the best interest of allegedly injured class members when the class receives no monetary award while the class counsel receive a huge monetary award.

B. Class Actions and/or Class Action Settlements That Use the Judicial Process to Interfere in the Regulatory Process or the Political Arena

A second red flag for an improper class action and/or class action settlement is one that seeks contingent benefits of a political nature. In Amchem Prods, Inc. v. Windsor, 521 U.S. 591 (1997), the Supreme Court disapproved of a class action settlement of asbestos claims, noting that it was essentially a political solution rather than a judicial one: “The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.” Id. at 628-29. The Supreme Court flatly declined to impose such a solution: “Rule 23 … cannot carry the large load CCR, class counsel, and the District Court heaped upon it.” Id. at 629.

In Authors Guild v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011), the Southern District of New York considered a very similar situation in high-profile litigation over Google's attempt to digitize millions of books without the consent of copyright holders. The court there rejected a proposed class settlement precisely because the parties were trying to use the judicial process to impose a “forward-looking business arrangement” that would interfere with Congress' constitutional power to regulate copyrights: “The questions of who should be entrusted with guardianship over orphan books, under what terms, and with what safe-guards are matters more appropriately decided by Congress than through an agreement among private, self-interested parties.” Id. at 677.
Put simply, relief, which is dependent upon the speculative and contingent acts of non-parties, is not redressable with a “favorable judicial decision.” Standing is absent when redress of the alleged injury requires non-party lawmakers to act. See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006); Wyo. Sawmills, Inc. v. U.S. Forest Serv., 383 F.3d 1241, 1248 (10th Cir. 2004); Mount Evans Co. v. Madigan, 14 F.3d 1444, 1451 (10th Cir. 1994).

C. Benefit to Class Requires a Change in the Law

Illustrating that the class action and/or class settlement is more about regulation by litigation and seeks to have the Court make, as opposed to apply, the law. Such “regulation by litigation” type settlements raise separation of powers concerns.

In the Fuel Temperature Sales Practices MDL, the primary relief sought by the class was for the defendants to change their fuel dispensers from volumetric dispensers that measure fuel by volumetric gallons, to so called “automatic temperature compensation dispensers” (“ATC” equipment) that would adjust the price to charge for the amount of fuel that would have been dispensed had the fuel been measured and sold at a particular reference temperature.1 In short, selling fuel by a different unit of measurement would command a different price. Moreover, the use of volumetric dispensers was authorized by law, and importantly, the use of ATC dispensers was prohibited by applicable law, precisely because the weights and measures regulators already had determined that selling by volume rather than by some other method of sale or measurement technique, e.g., by energy content, weight or temperature, was the more fair, honest and accurate method of sale. See Duke v. Flying J, Inc., ___ F. Supp.3d ___, 2016 WL 1425886 at * 5-7 (N.D. Cal. Apr. 11, 2016) (in dismissing all consumer fraud and common law claims that were remanded from the Fuel Temperature MDL, the court stated “the method of sale that plaintiff is seeking to foist upon defendants is itself illegal, as defendants cannot lawfully sell fuel at retail with reference to temperature, and cannot use an ATC device for the retail sale of motor fuel [in the multiple states at issue], without third-party regulators first changing the law to permit ATC and a temperature-referenced method of sale.”).

Accordingly, to circumvent this regulatory regime, the relief proposed by the settlements involved either (1) promises to install ATC dispensers if the states at issue changed their laws to permit them, or (2) funds to be paid to state regulatory bodies if those bodies agreed to adopt new policies to permit ATC.

Where a class action claim (or settlement) seeks to change the law, as occurred in the Fuel Temperature MDL, it is essentially an admission that the underlying claims are meritless. A class action that pursues meritless claims is one that cannot bring benefit to the class and in the words of the Seventh Circuit, ”should be dismissed out of hand.” In re Walgreen Shareholder Litig., 832 F.3d 718 (7th Cir. 2016).

As Justice White famously noted, “under our constitutional system, courts are not roving commissions assigned to pass judgment on the validity of the Nation’s laws.” Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973). Legislative and regulatory solutions are to be enacted by the political branches, not engineered by the courts. See Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2536 (2011) (“AEP”) (“[T]he Court remains mindful that it does not have creative power akin to that vested in Congress.”).

Professor Redish has explained that using class actions as a mechanism for effecting change in the law “unambiguously contravenes the Rules Enabling Act pursuant to which Rule 23 was promulgated; it also threatens core elements of our form of constitutional democracy, in which the authority for promulgation of substantive law is exercised by a representative and accountable legislative body.” June 1, 2012 Redish Testimony at 3.
D. Use of the Judicial Process to Chill Speech and Advocacy

Gag order provisions in settlement agreements/coercive speech—forced funding of political rivals.

Given that faux class actions may involve attempts to change the law, they also may involve efforts to silence the defendants' lobbying activity, which the class counsel may perceive as an impediment to their efforts to change the law. In addition, class counsel may try to even force defendants to fund the class counsel's lobbying campaigns to change the law. In other words, class counsel may try to force defendants to create common funds that pay the defendants' political rivals to lobby regulators to change the law. Such tactics can involve requiring defendants to agree to change their public stance on an issue, or by agreeing to cease their lobbying efforts and fund the opposite lobbying campaign supported by the plaintiffs. These settlements may offend the first amendment and require particularly close scrutiny.

Lawsuits that seek, and settlements that require, defendants to fund speech contrary to a public position that the defendants have previously advanced, are essentially a form of compelled speech. The Supreme Court consistently has condemned “compelled funding of speech.” For example, in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Court considered whether a state could compel non-union employees to subsidize a union's speech on matters of public concern that the person neither wishes to join nor support. The Court confirmed that “compelled funding of the speech” “presents the same dangers as compelled speech.” *Id.* at 2639 (citing *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2288 (2012)). The Court reasoned that “[i]f it] accepted [the state's] argument, we would approve an unprecedented violation of the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.” *Id.* at 2644.

Similarly, in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court struck down a Florida statute requiring newspapers to publish politicians’ “replies” to editorials. The Court emphasized that this would chill political discourse:

> [E]ditors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.

*Government-enforced right of access inescapably dampens the vigor and limits the variety of public debate.*


The compelled speech problem is also directly present whenever a settlement diverts class funds to a lobbying campaign. Absent class members who have different views of the propriety of the lobbying campaign are effectively compelled to fund it. In such circumstances, “[t]he general rule—individuals should not be compelled to subsidize private groups or private speech—should prevail.” *Knox*, 132 S. Ct. at 2295.

More troubling still, are class actions seeking to silence political opponents and settlements that seek to accomplish this with gag orders. It is not hyperbole to note that suppressing political speech undermines the very foundation of the American Republic:

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the **whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.**
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Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961). Although class counsel might argue that such settlements constitute “voluntary agreements” and therefore the silenced political speech is not “compelled”; that blinks reality. The fact is the defendants would not agree to silence their speech but for the coercive and in terrorem effect of the class settlement process. Settlements coerced through class action litigation are not truly voluntary. Bargaining away constitutional rights, especially free speech rights, to prevent hemorrhaging defense costs is not truly a “voluntary” situation. White v. Goodman, 200 F.3d 1016, 1019 (7th Cir. 2000) (discussing “all-too-common abuse of the class action as a device for forcing the settlement of meritless claims.”). Furthermore, were a court required to enforce the agreement, such enforcement is clearly state action. See, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948) (court enforcement of private contracts is “state action”); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (court approval of peremptory juror strikes by a private party is “state action”). The Supreme Court has been critical of forced speech and forced funding of speech. See, e.g., Harris v. Quinn, 134 S. Ct. 2618, 2639 (2014); Knox v. Serv. Employees Int’l Union, 132 S. Ct. 2277, 2295 (2012); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 257 (1974); Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641-42 (1994).

E. Cy Pres Funds Not Limited in Purpose

Another red flag for a potentially illegitimate class settlement is one which contains a cy pres provision that is not limited in purpose. Cy pres provisions are an increasingly prominent feature in class action settlements. Perhaps due to ineffective notice, or a general lack of interest on the part of the absent class members, claims to class action settlement funds rarely lead to the distribution of the funds. Accordingly class settlements often designate a cy pres recipient to receive any funds remaining after the claim process is completed. Cy pres is also seen when a class settlement involves only payments to a third party instead of payments to the class.

The use of cy pres awards has been the subject of criticism. One commentator noted that “in many cases, the primary purpose of cy pres components of class settlements is to justify attorneys’ fees by inflating the size of the ‘class award,’ which includes any cy pres distribution.” June 1, 2012 Testimony of John H. Beisner Before the Subcommittee on the Constitution of the Committee on the Judiciary of the House of Representatives at 17 (citing 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions §§14:5-6 (4th ed. 2002)) (available at http://judiciary.house.gov/hearings/Hearings%202012/Beisner%2006312012.pdf).

Justice Roberts recently explained that the use of cy pres provisions raised fundamental concerns in his statement regarding the denial of certiorari in Marek v. Lane. See 134 S.Ct. 8 (2013):

when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a cy pres remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on.

Id. Justice Roberts explained that the Supreme Court “may need to clarify the limits on the use of such remedies.” Id.

Other courts have also questioned the propriety of cy pres provisions, especially where they are not limited in purpose. The Seventh Circuit has bluntly explained, “[t]here is no indirect benefit to the class from the defendant’s giving the money to someone else.” Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004). The Ninth Circuit agrees: “the cy pres doctrine—unbridled by a driving nexus between the plaintiff class and the cy pres beneficiaries—poles many nascent dangers to the fairness of the distribution process.” Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011) (unpublished). As Professor Redish has explained
class action proceedings are not some sort of “roaming device for doing justice. In reality, it is nothing of the sort. It is, rather, nothing more than a complex procedural joinder device, laid out in Rule 23 of the Federal Rules of Civil Procedure appearing in between Rule 22 (Interpleader) and Rule 24 (Intervention).” Redish Testimony at 2.

For similar reasons, the Justice Department has recently terminated the practice of entering settlement agreements with defendants that require the defendant to make payments to third parties in lieu of fines or payments to the treasury. See DOJ Ends Holder-era “Slush Fund” Payouts to Outside Groups. available at http://www.foxnews.com/politics/2017/06/07/doj-ends-holder-era-slush-fund-payouts-to-outside-groups.html. In a statement, Attorney General Jeff Sessions explained:

When the federal government settles a case against a corporate wrongdoer, any settlement funds should go first to the victims and then to the American people—not to bankroll third-party special interest groups or the political friends of whoever is in power …

Id. Prior to this, the Justice Department had settled a number of cases against corporations for payouts to various organizations providing “housing counseling, foreclosure prevention and community redevelopment assistance” among others. Id. These type of “slush fund” payments present many of the same problems as cy pres distributions under a class action settlement, and it is a positive step that the Justice Department is “ensuring that settlement funds are only used to compensate victims, redress harm, and punish and deter unlawful conduct.” Id. Courts should look to place similar limits on class action settlement funds.

Despite this, cy pres distributions remain a prominent feature of many class action settlements. As Ninth Circuit Judge Andrew Kleinfeld observed:

A defendant may prefer a cy pres award to a damages award, for the public relations benefit. And the larger the cy pres award, the easier it is to justify a larger attorneys’ fees award. The incentive for collusion may be even greater where … there is nothing to stop [the lawyers for both sides] from managing the [cy pres recipient(s)] to serve their interests....

Lane v. Facebook, Inc., 696 F.3d 811, 834 (9th Cir. 2012) (Kleinfeld, J., dissenting). Very recently, in her dissent in Keeptseagle v. Perdue, 2017 WL 2111020 (D.C. Cir. May 16 2017), Judge Janice Rogers Brown observed that “Cy pres distributions, given their range of potential beneficiaries, their attenuated relationships to actual class members, and their focus on fulfilling a general ‘purpose’ rather than remedying monetary damage, resemble legislative appropriation.” Id. at *27. She went on to describe several reasons why “cy pres is problematic for judicial power.” Including that “[a] court risks violating Article III justiciability requirements should it adjudicate disputes” between potential cy pres recipients. Id.

Given the questionable appropriateness of cy pres in class action settlements, a settlement that includes cy pres provisions that are not appropriately limited in purpose should be a red flag that the underlying class action is illegitimate.

II. Cases to Watch

In re Motor Fuel Temperature Sales Practices Litigation: Currently pending before the Tenth Circuit.

The Motor Fuel Temperature Litigation started shortly after a newspaper article ran in the Kansas City Star regarding the fact that gasoline expands and contracts as temperature changes. Plaintiffs promptly filed a number of class actions against various motor fuel retailers and refiners. These cases were consolidated in an MDL in the District of Kansas.
Distilled to its most fundamental level, plaintiffs argued that the thermal expansion of liquids constituted a consumer fraud, despite the fact that the statutes governing the sale required that retail gasoline stations sell fuel by the gallon, a measure of volume. Plaintiffs alleged that selling motor fuel by volume without either disclosures of the fuel’s temperature or use of automatic temperature compensation (“ATC”) equipment violated various state consumer protection statutes.

Ultimately, summary judgment was entered in favor of many defendants but not until years of litigation had ensued, including a bellwether class trial of the Kansas claims, which resulted in a complete defense verdict. There were numerous problems with plaintiffs’ claims, but for purposes of this presentation, the point is the court ultimately concluded that no reasonable consumer could believe she was misled or deceived by how retail fuel is sold. See Duke v. Flying J, Inc., ____ F. Supp.3d ___, 2016 WL 1425886 at * 6 (N.D. Cal. Apr. 11, 2016) (dismissing case remanded from Fuel Temperature MDL in part because any consumer expectation that they would receive temperature compensated fuel [rather than non-temperature compensated fuel] was “facially unreasonable”).

However, after the close of discovery and shortly before the first bellwether trial, several of the Defendants entered into settlements. In some of the settlements the Defendants agreed to install ATC equipment if the states in which they operated changed the law to allow ATC. Other settlements involved the creation of a so called “regulator fund” that would be made available to state weights and measures departments that changed their laws to permit ATC. None of the settlements involved any payment of any money to the class. This was exclusively an injunctive relief consumer fraud class settlement.

Significantly, the settlement agreements implicate all five red flags discussed above.

The District Court approved the settlements over the objections of several consumers and a group of non-settling defendants, who opposed changing the regulatory standards governing the sale of retail motor fuel. After the district court approved the class settlements, the objectors appealed and the case is now pending before the Tenth Circuit.

In re: Subway Footlong Sandwich Marketing and Sales Practices Litigation: Currently pending before the Seventh Circuit.

In re: Subway Footlong Sandwich Marketing and Sales Practices Litigation (aka Subway Foot-Long class action) began when an Australian teenager posted a photo on social media showing a subway foot-long sandwich next to a ruler showing that the sandwich was only 11 inches.
Within a few months, eight different class actions were filed in different federal and state courts alleging consumer fraud in selling “foot-long” sandwiches that were less than a foot. An MDL was created in the Eastern District of Wisconsin and discovery commenced.

Discovery quickly established that foot-long sandwiches contained the same amount of food regardless of the exact length of the bread used to make the sandwich. This was because the dough used to make the sandwiches was measured by weight at the production facility, and then shipped to stores frozen. The stores would then thaw the dough, stretch it, let it rise, and bake it into loaves. The natural variability in how individual loaves of bread rise, could cause some loaves to be thinner and longer than 12 inches, and other loaves to be fatter and shorter than 12 inches. Because all loaves were baked from the same quantity of dough, regardless of the exact shape of the loaf, all contained the same amount of bread. Furthermore, the amount of meat and cheese on the sandwich is standardized so that the shape of the bun would not affect the amount of meat and cheese on the sandwich. The shape of the bun also did not impact the amount of vegetables or other toppings a consumer could receive.

As there was no evidence that the class was injured, this case should have ended in a dismissal. Despite this, Subway decided to settle. Subway agreed to a number of quality control measures with respect to the measurement of the sandwiches. There was no money offered to compensate the plaintiffs. Plaintiffs’ attorneys collected over half a million dollars. The district court approved the settlement over the objection of some absent class members. The absent class members appealed.

The appeal is currently pending before the Seventh Circuit. It is fully briefed and was argued in September before a panel consisting of Judges Sykes, Flaum, and Rovner. The oral argument recording indicates that at least some members of the panel had strong reservations with respect to whether this was an appropriate class action and what the proper role of a federal judge is when it becomes apparent that a class claim is meritless. When the attorney for Subway stated that they had made a decision to settle in the midst of a media frenzy, Judge Sykes responded “What we’re talking about is what the court’s obligation in a situation like this is to avoid abuses of the legal system such as this case represents.”

If the Seventh Circuit holds that a Court is obligated to dismiss such an abusive class action, rather than approve a settlement, when it is apparent that the claims are meritless, it will serve as a shot across the bow for overly aggressive plaintiffs’ class counsel.

III. Recent Key Decisions


In Spokeo v. Robbins, the Supreme Court addressed the validity of a no injury class action based on alleged violations of the Fair Credit Reporting Act. The District Court had dismissed the plaintiffs’ claims because it concluded the named plaintiff had failed to plead an injury in fact. The Ninth Circuit reversed concluding that pleading a statutory violation was sufficient for Article III standing. The Supreme Court, in a 6-2 decision vacated the Ninth Circuit’s decision and remanded for further consideration.

The Court explained that to establish Article III standing a plaintiff must show “an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’ 136 S.Ct. at 1548. The Court explained that the Ninth Circuit’s analysis had failed to adequately consider whether the plaintiff had alleged a concrete injury and had instead conflated the particularization and concreteness inquiries. Id. (“Both of [the Ninth Circuit’s] observations concern particularization, not concreteness. We have made it clear time and time again that an injury in fact must be both concrete and particularized.”)
The Court then explained that “[a] ‘concrete’ injury must be ‘de facto’; that is, it must actually exist. When we have used the adjective ‘concrete,’ we have meant to convey the usual meaning of the term—‘real,’ and not ‘abstract.’” Id. at 1549. (citations omitted). The Court explained that intangible injuries can be concrete and that congress may “identify intangible harms that meet minimum Article III requirements” but that this “does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation.” Id. A “bare procedural violation, divorced from any concrete harm” is not sufficient for standing. Id.

With the increased proliferation of statutes creating private causes of action, Spokeo can assist in refocusing courts on the important question of whether the plaintiffs’ claims are based on a concrete injury, or if uninjured plaintiffs are trying to base a class action on a bare procedural violation.

**Eike, et al., v. Allergan., et al., 850 F.3d 315 (7th Cir. 2017).**

*Eike v. Allergan* is a recent decision by Judge Posner addressing standing and class certification. The plaintiffs claimed that the defendant’s eye drops were unnecessarily large in violation of the Illinois Consumer Fraud Act, 815 ILCS 505/1 et seq, and the Missouri Merchandising Practices Act, Mo. Rev. Stat. §§407.010 et seq. “because each eye drop exceeds 16 microliters” Id. at 316. The class contended that “the optimal size of an eye drop for treatment of glaucoma is 16 microliters, no more.” Id. Plaintiffs argued that “anything larger than 16 microliters is wasteful because,… the additional microliters add no therapeutic value.” Id.

Plaintiffs argued that their damages were “The difference between the price per drop of the eye drops at their present size, and the presumably lower price if the drops were smaller, multiplied by the number of drops that have been bought by the members of the class.” Id. The class also argued that “large eye drops have a higher risk of side effects.” Id. at 317. The United States District Court for the Southern District of Illinois certified eight separate classes, and the Defendants appealed the class certification order to the Seventh Circuit. Id. at 316.

Judge Posner quickly concluded that the class lacked standing. He pointed out that there was no claim that any class members experienced side effects and, accordingly, “the only damages sought are for the "pocketbook" injury of paying what the class contends to be an unnecessarily high price for the defendants' eye drops. Id. at 317. He then explained that “even supposing it were demonstrable that a smaller eye drop would be more effective and cheaper than the ones manufactured by the defendants, the class members would have no cause of action. You cannot sue a company and argue only—“it could do better by us”—which is all they are arguing. In fact, such a suit fails at the threshold, because there is no standing to sue.” Id. at 318. Judge Posner went on to explain that “[t]he fact that a seller does not sell the product that you want, or at the price you’d like to pay, is not an actionable injury; it is just a regret or disappointment—which is all we have here.” Id. (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016); Lujan v. De-fenders of Wildlife, 504 U.S. 555, 560 (1992)).

Judge Posner also noted the role of the FDA: he explained that the FDA had approved the defendants’ eye drops as safe and effective. Id. While Judge Posner suggested that it was possible the FDA might also approve smaller eye drops “might be as or even more effective, and also cheaper” he explained that “those are matters for the class members to take up with the FDA.” Id. The court also explained that while a court can review the FDA’s determination “it cannot bypass the agency and make its own evaluation of the safety and efficacy of an unconventionally sized eye drop.” Id.

*Eike* is a valuable opinion for defendants faced with Faux class actions. It demonstrates the potential strength of strong standing challenges. It shows the potential effectiveness of an interlocutory appeal of class
certification. And it addresses how the Court should respect the role of agencies when plaintiffs seek to abuse class-action litigation to regulate a defendant.

**Ebner v. Fresh, Inc. 838 F.3d 958 (9th Cir. 2016).**

In *Ebner v. Fresh, Inc.* the Ninth Circuit affirmed the dismissal of a class action against a cosmetics manufacturer because the underlying claims (primarily California consumer protection claims) were not cognizable. The plaintiff sued *Fresh Inc.* alleging that its statements about the amount of lip balm contained in each tube of lip balm was deceptive and misleading because the tube was designed with “a screw mechanism that allows only 75% of the product to advance up the tube. A plastic stop device prevents the remaining 25% from advancing past the tube opening.” *Id.* at 961. Plaintiffs also complained that the tube contained a “weighted metal bottom” and was sold in “oversize packaging” which further misled consumers about the amount of product therein. *Id.* It was undisputed that the information on the label about the amount of lip balm was accurate. However, the plaintiff argued that the omission of supplemental statements about the inability to access the full amount of lip balm rendered the labels deceptive.

The District Court had granted Fresh’s Motion to Dismiss for failure to state a claim and the Ninth Circuit affirmed. In doing so, it first explained that neither federal preemption, nor the statutory safe harbor in California’s consumer protection statutes barred a claim seeking supplemental statements. However, it concluded that this claim failed because a reasonable consumer would be familiar with how lip balm and lipstick tubes operate and would understand that some residual product remained inaccessible:

> Although the consumer may not know precisely how much product remains, the consumer’s knowledge that some additional product lies below the tube’s opening is sufficient to dispel any deception; at that point, it is up to the consumer to decide whether it is worth the effort to extract any remaining product with a finger or a small tool. A rational consumer would not simply assume that the tube contains no further product when he or she can plainly see the surface of the bullet. And even if “some consumers might hazard such an assumption,” the Sugar tube is not false and deceptive merely because the remaining product quantity may be “‘unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons ...’” that may purchase the product.

*Id.* at 965-66. The Ninth Circuit then held that the reasonable consumer test also required dismissal of the plaintiff’s claims that the “oversized packaging” and use of a “weighted metal bottom” rendered the packaging deceptive:

> These claims fail for largely the same reasons that the label-based claims fail. As explained above, an accurate net weight label is affixed to every Sugar tube and its accompanying cardboard box. Just as the reasonable consumer understands that additional product may remain in the dispenser tube after the screw mechanism prevents further advancement of the lip bullet, the reasonable consumer also understands that some additional weight at the bottom of the tube—not consisting of product—may be required to keep the tube upright.

*Id.* at 967. The Court then affirmed the district court’s refusal to allow leave to amend concluding that any amendment would be futile. *Id.* at 968.

Since *Ebner* was decided the Ninth Circuit has applied its analysis to affirm the dismissals of other consumer protection class actions. *See, e.g., Cruz v. Anheuser-Busch Companies, LLC, ___ Fed. Appx. ___, 2017 WL 1019084 at * 1 (9th Cir. Mar. 16, 2017) (Affirming dismissal of class action complaint because “no reasonable consumer would be deceived by the label on the carton into thinking that “Bud Light Lime-a-Rita,”*
which the label calls a “Margarita With a Twist,” is a low-calorie, low-carbohydrate beverage or that it contains fewer calories or carbohydrates than a regular beer.”

*In re Walgreen Shareholder Litig.*, 832 F.3d 718 (7th Cir. 2016).

_In re Walgreen Shareholder Litig.*, 832 F.3d 718 (7th Cir. 2016) the Seventh Circuit vacated a settlement of a class action brought by Walgreens shareholders involving the acquisition of a Swiss company Alliance Boots GmbH. The settlement required additional disclosures which the Seventh Circuit described as “only a trivial addition to the extensive disclosures already made in the proxy statement: fewer than 800 new words—resulting in less than a 1% increase—spread over six disclosures.” Id. at 722.

Judge Posner, writing for the court, was highly critical of the misuse of the class action procedure to pursue meritless claims: “The type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end. No class action settlement that yields zero benefits for the class should be approved, and a class action that seeks only worthless benefits for the class should be dismissed out of hand.” Id. at 724 (Citing _Robert F. Booth Trust v. Crowley_, 687 F.3d 314, 319 (7th Cir. 2012). Judge Posner then elaborated on the failings of the class representative and the duty of the court to closely scrutinize the class counsel and class representative:

A class “representative who proposes that high transaction costs (notice and attorneys’ fees) be incurred at the class members’ expense to obtain [no benefit] … is not adequately protecting the class members’ interests.” Courts also have “a continuing duty in a class action case to scrutinize the class attorney to see that he or she is adequately protecting the interests of the class, and if at any time the trial court realizes that class counsel should be disqualified, the court is required to take appropriate action.” Id. at 725-26 (citations omitted). Judge Posner also commented that there was no indication that any of the class has an interest in challenging the reorganization that has created Walgreens Boots Alliance. The only concrete interest suggested by this litigation is an interest in attorneys’ fees, which of course accrue solely to class counsel and not to any class members.” Id. at 726. He explained that on remand the district court “should give serious consideration to either appointing new class counsel, or dismissing the suit.” Id. (citations omitted).

_Walgreens_ is directly applicable to so called “shareholder strike suits” but its general statements about the propriety of no injury class actions/no relief class settlements/and the proper role of the court when faced with such class actions should have a much broader reach. Exactly how far Walgreen’s holding reaches will be clarified soon as the Seventh Circuit is currently wrestling with its application in _In re: Subway Footlong Sandwich Marketing and Sales Practices Litigation_, which is discussed more fully below.

### IV. Defending Against Illusory/No Injury Class Actions

#### A. Motion to Dismiss/Summary Judgment

_Ebner v. Fresh, Inc._ along with Judge Posner’s strong dicta in _Walgreen_ should emphasize the importance of a strong motion to dismiss as the first line of defense when faced with a no injury class action. Motions to dismiss should attack the claims raised, the standing of the class, and the Article III power to adjudicate a true no injury class.

Article III limits the federal “judicial Power” to the resolution of “Cases” or “Controversies.” U.S. Const. art. III, §2; _Flast v. Cohen_, 392 U.S. 83, 94 (1968). The Case-and-Controversy inquiry encompasses concepts not only of standing and separation of powers, but also of mootness and political questions. See _Daim-
In limiting the judicial power to “Cases” and “Controversies,” Article III of the Constitution restricts it to the traditional role of Anglo–American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009) (emphasis added); see also Warth v. Seldin, 422 U.S. 490, 499 (1975) (“The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally.”)

Even in the settlement context, the remedial authority of an Article III court is limited to resolving a justiciable controversy under existing law. Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009); see also Warth v. Seldin, 422 U.S. 490, 499 (1975). Thus a court cannot adopt any settlement based on a belief that it would further the public interest.

B. Class Certification

Class certification is often the key battle in cases involving no injury classes. Class action trials are rare, the vast majority of certified class actions end in settlement. Emery G. Lee III et al., “Impact of the Class Action Fairness Act on the Federal Courts” 2, 11 (Federal Judicial Center 2008) (finding that every class action in federal court that was certified between 2005 and 2007 was settled); see also Eubank v. Pella Corp., 753 F.3d 718 (7th Cir. 2014) (citing Lee for the proposition that “a study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled.”).

The Supreme Court’s decisions in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 (2011) and Comcast Corp. v. Behrend, No. 11–864, 2013 WL 1222646 (U.S. Mar. 27, 2013) provide strong ammunition for opposing certification of no injury classes. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 (2011) includes both Rule 23(a) prerequisites, such as commonality, as well as 23(b) prerequisites, including the requirement that common issues predominate over individual issues. Id. In Comcast, the Supreme Court rejected a class of roughly two million current and former Comcast subscribers who alleged federal antitrust violations, in part because the Court determined the class to be too diverse, stating that “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.” Id, at *5.

Most no injury classes will have problems with commonality and predominance. They will have large numbers of class members who lack standing. Defense counsel should be prepared to aggressively litigate class certification.

C. A Word on Settlement

Many defendants simply want to get rid of class actions as quickly and as inexpensively as possible. Litigating class actions can take time and a lot of money. There is strong desire to put the case behind and change the narrative, particularly when class counsel has heavily publicized the filing of a class action. But settlements often do not always lead to good publicity. News articles often focus on the fact that the defendant has settled, and disclaimers of liability often receive scat mention. The publicity of a settlement can pale in comparison to the value of publicizing a victory:
Would it kill you to say you’re sorry?

The law firm that brought false claims about our product quality and advertising integrity has voluntarily withdrawn their class action suit against Taco Bell.

- No changes to our products or ingredients.
- No changes to our advertising.
- No money exchanged.
- No settlement agreement.

Because we’ve ALWAYS used 100% USDA-inspected premium beef.

Sure, they could have just asked us if our recipe uses real beef. Even easier, they could have gone to our Web site where the ingredients in every one of our products are listed for everyone to see. But that’s not what they chose to do.

Like we’ve been saying all along, we stand behind the quality of every single one of our ingredients, including our seasoned beef. We didn’t change our marketing or product disclosures because we’ve always been completely transparent. Their lawyers may claim otherwise, but make no mistake, that’s just them trying to save a little face.

We were surprised by these allegations, as were our 35 million customers who come into our restaurants every week. We hope the voluntary withdrawal of this lawsuit receives as much public attention as when it was filed.

As for the lawyers who brought this suit: You got it wrong, and you’re probably feeling pretty bad right about now. But you know what always helps? Saying to everyone, “I’m sorry.”

C’mon, you can do it!
Taco Bell ran this full page add in several newspapers after plaintiffs voluntarily dismissed consumer protection class actions alleging that the beef sold in Taco Bell restaurants was not real beef.

At the Subway Foot-long Oral Argument, Judge Rovner seemed surprised that Subway would settle and give up the opportunity to publicize a victory: “What a wonderful opportunity to go on national television and get all that free publicity and say ‘every one of these sandwich eaters got exactly the amount of sandwich that they paid for.’”

Defense counsel should also be aware of the shortcomings various courts have identified in class settlements, so that if their client chooses to pursue settlement, the settlement can be structured in a manner to maximize its ability to survive review.

Endnotes

1 Plaintiffs argued that the reference temperature should be 60 degrees.
2 Plaintiffs ultimately voluntarily dismissed with prejudice their claims against every defendant who did not enter into a settlement.
3 The evidence also established that the vast majority of bread sold in Subway stores measured 12 inches or more, and the majority of loaves that happened to be shorter than 12 inches, were less than ¼ inch shorter.
4 Argument recording on file with Author.