

NIPPING IT IN THE BUD: FIXING THE PRINCIPAL-AGENT PROBLEM IN CLASS ACTIONS BY LOOKING TO QUI TAM LITIGATION

NICHOLAS ALEJANDRO BERGARA*

The principal-agent problem in class actions, which occurs whenever the interests of class counsel (the agent) conflict with those of the class (the principal), has plagued the class action system for decades. When these conflicts of interest arise, they often lead to plaintiff classes receiving lower monetary awards than they otherwise deserve, above-market fees for attorneys, and underenforcement of claims against wrongdoers. Throughout the years, both Congress and scholars alike have tried to address this issue, but it persists. This Note invites Congress and scholars to think differently about potential solutions to a problem that has been around for far too long. It argues that looking to qui tam litigation, specifically, the False Claims Act, provides a unique approach that could help significantly curtail the principal-agent problem. By permitting the government to install itself as lead counsel in class actions involving money damages—when it deems an action to be worthy—the financial incentives between any given class and its respective class counsel are realigned. While private attorneys seek the maximum amount of attorney’s fees, even if it comes at the expense of the client, government lawyers do not have the same motivation. Adding an amendment to Federal Rule of Civil Procedure 23 permitting qui tam litigation would allow the government to act as a gatekeeper for class actions while leaving the option open for private attorneys to bring suit should the government decide not to do so. By providing different channels of enforcement, the amendment offers a promising opportunity to better deter private sector misconduct, discourage frivolous suits, and improve the overall outcomes for plaintiff classes.

INTRODUCTION	276
I. OVERVIEW OF THE PRINCIPAL-AGENT PROBLEM IN CLASS ACTIONS	280
II. CONGRESS’S ATTEMPTS TO RESOLVE THE PRINCIPAL- AGENT PROBLEM IN CLASS ACTIONS	289
III. USING QUI TAM TO REVISE RULE 23	295

* Copyright © 2022 by Nicholas Alejandro Bergara. J.D., 2021, New York University School of Law; B.S., 2014, The University of Scranton. I am very grateful to Judge Jed S. Rakoff for his helpful guidance and feedback during the early stages of this Note. Judge Rakoff’s Class Action Seminar not only inspired this Note, but it also gave me the foundational knowledge needed to complete it. I would also like to thank the editors of the *New York University Law Review*, and in particular David Blitzler, for their diligence in reviewing and editing this Note; my friends and colleagues, specifically Jessica Li, Safeena Mecklai, Adrian Melendez-Cooper, Michael Milov-Cordoba, and Taylor Zarth, who provided critical advice when I was skeptical about continuing this project; and a special thank you to my mother, Veronica Bergara, who has stood by my side throughout this entire endeavor.

A. <i>Introduction to Qui Tam and the FCA</i>	295
B. <i>A Proposal and a Practical Case Study</i>	297
C. <i>Arguments in Favor of the Rule 23 Amendment</i>	304
D. <i>Arguments in Opposition to the Rule 23 Amendment</i>	308
E. <i>The Constitutionality of the Proposed Changes</i>	311
CONCLUSION	314

INTRODUCTION

Imagine you just purchased a brand-new pressure cooker. One day, while making your favorite stew, you check on your food and discover that a defect in the machine's design allows you to open the lid while the built-up pressure remains inside. The heated contents of the feast you were eagerly preparing burst onto your body. Your injuries require you to seek medical attention. You decide to share your story with a law firm. The attorneys inform you that, based on the severity of your injuries, your best bet is to bring a class action lawsuit against the manufacturer; if you file by yourself, you might end up spending more in attorney's fees than your case is worth. The firm is certain there are others who have had similar experiences and assures you that it will find these people for you.

As it turns out, at least 3.2 million individuals have comparable claims, so the firm files a class action against the manufacturer of the pressure cooker on your behalf and on behalf of all those similarly situated. The case passes through the anxiety-inducing motion to dismiss stage and the court ultimately certifies the class action. In settlement negotiations, plaintiffs reject defense counsel's settlement agreement as too low, believing that they have a good chance of winning at trial. On the first day of trial, however, things do not go as planned, and class counsel decide to restart settlement negotiations with the help of a magistrate.

The parties end up settling on the following terms: (1) class members must watch a video that instructs them about the proper way to operate their pressure cookers; (2) once they do so, class members can submit a claim and receive a \$72.50 credit that they can use to purchase one of three of the manufacturer's products; (3) the class members must purchase the product directly from the manufacturer and pay the difference, plus shipping and handling; (4) the credit has to be used within ninety days and it cannot be combined with any other promotions; (5) each class member receives a one-year warranty extension on their pressure cooker, valued at approximately \$5; and

(6) each class member who has not opted out of the action agrees to drop their claim against the manufacturer.

The facts above are based on *Chapman v. Tristar Products, Inc.*¹ And the settlement proposal virtually mirrors the one that the district judge approved in this case,² over the objection of both the United States Department of Justice (DOJ) and eighteen state attorneys general (together, government representatives).³ The government representatives argued that the attorney's fees that class counsel was requesting in this case (\$2,329,861.87), which amounted to about fifty-seven percent of the value of the class's recovery, was too large compared to the purported benefits that the class members were receiving.⁴ The court rejected the government representatives' contention that lower attorney's fees would result in a greater settlement for class members but, for other reasons, reduced the fee to a more modest \$1,980,382.59 (forty-five percent of the class's recovery).⁵

At this point, if you are wondering how these attorneys run off with about two million dollars while the millions of class members who have suffered end up with coupons and a warranty,⁶ you are not alone. *Chapman* illustrates the principal-agent problem in class actions, which numerous scholars have been grappling with for years.⁷

¹ No. 16-CV-1114, 2018 WL 3752228, at *1 (N.D. Ohio Aug. 3, 2018).

² *Id.* at *2, *12.

³ *Id.* at *1, *3; see also *Chapman v. Tristar Prods., Inc.*, 940 F.3d 299, 302 (6th Cir. 2019) (noting that “[t]he Arizona Attorney General believe[d] the plaintiff class got a bad deal in settling this products liability lawsuit over allegedly defective pressure cookers”).

⁴ *Chapman*, 2018 WL 3752228, at *1, *3, *7–8. Class counsel also sought \$240,009.63 in costs. Although the court found that amount to be reasonable, it rejected the request because class counsel failed to provide a breakdown of what the costs actually were. As a result, the judge gave them fourteen days to renew their request, which they did. *Id.* at *11; see Plaintiff's Supplemental Submission for Reimbursement of Costs and Litigation Expenses at 1–2, *Chapman v. Tristar Prods., Inc.*, No. 16-CV-1114 (N.D. Ohio Aug. 8, 2018) (“Class Counsel now supplement their request for reimbursement of their out-of-pocket expenses incurred in prosecuting this action of \$240,009.63. In support of this request, . . . Class Counsel includes a categorical breakdown of expenses incurred during the course of this litigation, as requested by the Court.”).

⁵ *Chapman*, 2018 WL 3752228, at *3, *10.

⁶ See *id.* at *4 (concluding that “although the parties label the proposed \$72.50 per capita relief as a ‘credit,’ this is in fact a coupon settlement”).

⁷ See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 370 (2000) [hereinafter Coffee, *Class Action Accountability*] (arguing for a focus on “client autonomy” because “the class action for money damages is ultimately more an aggregation of individuals than a distinct entity” and suggesting increased “exit” opportunities—the ability to opt out—as a solution to the principal-agent problem); Bruce Hay & David Rosenberg, “*Sweetheart*” and “*Blackmail*” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377 (2000) [hereinafter Hay & Rosenberg, *Reality and Remedy*] (discussing the principal-agent problem in “sweetheart” settlements in which the class's interests are subordinated to those of class counsel); Bruce L. Hay, *The Theory of Fee Regulation in*

This issue tends to arise whenever the interests of class counsel (the agent) conflict with those of the class (the principal).⁸ It has been identified in various kinds of class action litigation, such as mass torts and securities.⁹ It also exists in specific aspects of class actions, such as the selection of lead counsel,¹⁰ payment of attorney's fees,¹¹ and settlement.¹²

In addition to the countless proposals by academics, Congress has enacted various federal statutes to resolve these issues. Nonetheless, most of them only provide piecemeal relief. This is because the very foundation of the class action system generates an inherent conflict of interest between class counsel and class plaintiffs that plague both litigants and courts alike. To mitigate such conflicts, the rule under which the vast majority of class actions are brought, Federal Rule of Civil

Class Action Settlements, 46 AM. U. L. REV. 1429 (1997) [hereinafter Hay, *Fee Regulation in Class Action Settlements*] (arguing that the principal-agent issue is especially acute in settlements); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) [hereinafter Coffee, *Class Wars*] (discussing the principal-agent problems inherent in mass tort actions); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) (criticizing class actions' structure for converting the plaintiff's attorney from the plaintiff's agent into a self-serving entrepreneur); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987) [hereinafter Coffee, *Entrepreneurial Litigation*] (noting class actions deviate from the generally held principle of client control because "entrepreneurial litigation" is inherent to their structure).

⁸ Judge Posner, when describing the "built-in conflict of interest in class action suits[.]" explained "[t]he defendant . . . is interested only in the bottom line: how much the settlement will cost him. And class counsel . . . is interested primarily in the size of the attorney's fees provided for in the settlement, for those are the only money that class counsel . . . get to keep." *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). Although conflicts of interest can occur more generally in class actions, *see, e.g.*, Coffee, *Class Wars*, *supra* note 7, at 1360–63 (noting that a conflict of interest can occur between present-injury claimants and future-injury claimants in mass tort class actions), this Note focuses on the one between class counsel and plaintiff classes.

⁹ *See, e.g.*, Coffee, *Class Wars*, *supra* note 7 (discussing the principal-agent problem in mass tort class actions).

¹⁰ *See, e.g.*, *Iron Workers Loc. No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization, LLC*, 616 F. Supp. 2d 461, 464 (S.D.N.Y. 2009) (finding that an arrangement where a law firm would monitor their client's investment fund for fraud at no charge in exchange for being retained as lead counsel, if fraud was found, created an inherent conflict of interest between the lead plaintiff and the firm); Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 694 (2002) (discussing the conflicts of interest that arise in selecting class counsel when using lead counsel auctions).

¹¹ *See* Coffee, *Entrepreneurial Litigation*, *supra* note 7, at 887–89 (discussing the fee structures for plaintiffs' attorneys and explaining that under the percentage formula and the lodestar formula, the attorney has an incentive to maximize their own profit).

¹² *See generally* Hay & Rosenberg, *Reality and Remedy*, *supra* note 7; Hay, *Fee Regulation in Class Action Settlements*, *supra* note 7.

Procedure 23 (Rule 23),¹³ should be amended. And the concept of qui tam, which has been defined as a “process whereby an individual sues or prosecutes in the name of the government and shares in the proceeds of any successful litigation or settlement[.]”¹⁴ offers a promising framework for doing so.

This Note argues that Congress should consider modifying Rule 23 by providing for a mechanism similar to qui tam litigation under the False Claims Act (FCA),¹⁵ allowing the federal government to take over the role of lead counsel in class actions involving money damages. Attorneys employed by the executive branch, unlike private attorneys, do not have an incentive to maximize their own wealth. As a result, this alteration to Rule 23 would help align the goals of class action plaintiffs, who generally want to obtain the most money for their claims, and government lawyers, who seek to enforce federal law and regulate harmful conduct.¹⁶

While some scholars have alluded to this kind of solution in the past,¹⁷ this Note seeks to bring this conversation to the forefront and set a jumping off point for future academics and legislators. The proposal expounded herein specifies the criteria that executive branch officials should look to when determining whether they will take on a class action and the kinds of arguments that Congress (and scholars) should keep in mind when enacting such legislation.

This Note will proceed in three parts. Part I will introduce some core features of class actions and establish how class members, named plaintiffs, and courts are burdened by the principal-agent problem during the process of settlement as well as the impact it has on attorney’s fees. Part II will discuss how Congress has tried to address

¹³ FED. R. CIV. P. 23.

¹⁴ CHARLES DOYLE, CONG. RSCH. SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 1 (2021).

¹⁵ False Claims Act, 31 U.S.C. §§ 3729–3733 (allowing private citizens to file suits on behalf of the Government against those who have defrauded the Government and then receive a portion of the monetary award if the action is successful); see *infra* Section III.A.

¹⁶ A large part of the DOJ’s mission is: “to enforce the law . . . of the United States . . . ; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.” See *About DOJ*, U.S. DEP’T OF JUST., <https://www.justice.gov/about> [<https://perma.cc/PY6K-C6NQ>].

¹⁷ See, e.g., Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 170 (1997) (suggesting that “by lowering the conceptual barrier between public and private litigation, *qui tam* . . . [could provide] new ways to improve the ability of representative litigation to pursue the dual objectives of victim compensation and deterrence of corporate misconduct”); cf. Bryan T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2047 (2010) (noting that there may be “a better mechanism than class action litigation to deter defendants from causing small-stakes harms—such as, perhaps, qui tam-like proceedings[.]” but dismissing the idea as outside the scope of the Article).

these issues in the past and the reasons it has fallen short. Part III will briefly explain *qui tam* litigation, with a particular focus on the FCA. It will then propose an amendment to Rule 23, explain the benefits and potential drawbacks of this solution, and address whether the proposed modification could withstand constitutional scrutiny.

I

OVERVIEW OF THE PRINCIPAL-AGENT PROBLEM IN CLASS ACTIONS

A few fundamental features of class actions provide a pertinent background for understanding the difficulties of preventing a principal-agent problem. To start, lawyers typically find their clients, rather than the other way around.¹⁸ Sometimes litigants come to attorneys seeking to file class actions on their own, but this is not common.¹⁹ In general, a lawyer looking to get into the business of class actions searches for conduct that causes uniform harm on a large scale.²⁰ They may accomplish this goal by “follow[ing] the news” or “watching for various regulatory changes, corporate disasters, investigative reports of widespread frauds or defective products, government investigations of alleged corporate wrongdoing, or where a company has engaged in a product recall.”²¹ Successfully litigating a class action demands that the lawyer extensively research a claim prior to filing and, ideally, that they even “sketch the contours” of a summary judgment motion before the complaint is filed.²² Preparation requires an

¹⁸ See, e.g., BRIAN ANDERSON & ANDREW TRASK, *CLASS ACTION PLAYBOOK* § 3.01 (2021 ed. 2021); Tyler W. Hill, Note, *Financing the Class: Strengthening the Class Action Through Third-Party Investment*, 125 *YALE L.J.* 484, 487 (2015) (“The viability of class action lawsuits depends on an industry of fee-seeking attorneys to discover, orchestrate, and finance lawsuits.”).

¹⁹ See ANDERSON & TRASK, *supra* note 18, § 3.01 (noting that typically, in class actions, “a lawyer . . . recruits a client and [then] files a lawsuit”).

²⁰ *Id.* § 3.03. Attorneys can also submit their case to websites that help them find class action plaintiffs. See, e.g., CLASS ACTION PLAINTIFF FINDER, <https://classactionplaintiffinder.com> [<https://perma.cc/J7U2-F3RV>] (boasting that this website specializes in finding class actions for firms and has done so since 2013). More controversially, prominent class-action plaintiffs’ firms have actually offered “referral fees” to “politically connected attorneys . . . for introducing and connecting [these] firms with public pension funds and other institutions capable of serving as lead plaintiffs in major class actions.” John C. Coffee, Jr., *The Market for Lead Plaintiffs*, CLS BLUE SKY BLOG (Sept. 24, 2018), <https://clsbluesky.law.columbia.edu/2018/09/24/the-market-for-lead-plaintiffs> [<https://perma.cc/GY7D-ANB9>].

²¹ ANDERSON & TRASK, *supra* note 18, § 3.03.

²² *Id.* “The plaintiff should know specifically what the defendant’s bad conduct was, what effect that conduct had on the class, how to prove causation on a class-wide basis, and how to establish damages on a class-wide basis.” *Id.*

investment of both money and time with no guarantee of recompense.²³

The following traits are central to class actions. First, absent class members have virtually no control over the litigation.²⁴ The interests of absent class members are ostensibly represented by class counsel and lead plaintiffs. Second, named plaintiffs' interests may conflict with the interests of class counsel and, therefore, named plaintiffs do not have unilateral control over the case,²⁵ unlike other types of litigation.²⁶ For instance, the lead plaintiff may "wish to obtain a disproportionate share of the settlement fund . . . [, be] subject to possible influence from defense counsel[,] or . . . might extort benefits from her counsel by threatening to dismiss the[m]." ²⁷ Some courts have even approved class action settlements over the objection of all the lead plaintiffs in the case.²⁸ Third, it is very rare for a class action to go to verdict²⁹: It will either fail at the certification stage or settle once it is certified, as the defendant normally will not want to bet the company (or a large portion of it) at trial.³⁰

The fact that a class action will rarely go to trial highlights how critical it is for attorneys representing a class to ensure that the action will be certified. It also shows that settlements, and the fees that attorneys obtain as a result of settling, tend to play a critical role in plaintiffs' recovery. Likewise, because attorneys representing classes tend

²³ *Id.*

²⁴ Macey & Miller, *supra* note 7, at 27 ("[T]he putative clients in class action and derivative litigation are unable to monitor the activities of their attorneys or to make any of the key litigation decisions."); *see also* Hay, *Fee Regulation in Class Action Settlements*, *supra* note 7, at 1430 ("Class actions have long been thought to raise acute principal-agent issues because the class members may have little control over the actions of their representative in the litigation.").

²⁵ Macey & Miller, *supra* note 7, at 42.

²⁶ *Id.* ("In traditional litigation the issue would be simple. . . . [T]he standard model views the lawyer as agent of the client. The lawyer must defer to the client's wishes or withdraw from the representation.").

²⁷ *Id.*

²⁸ *See, e.g., In re FedEx Ground Package Sys., Inc. Emp. Pracs. Litig.*, Nos. 05-MD-527, 05-CV-595, 2017 WL 632119, at *1, *3 (N.D. Ind. Feb. 14, 2017) (holding that a class action settlement agreement was valid even though all seven of the lead plaintiffs rejected its approval).

²⁹ To be sure, "[t]he overwhelming majority of civil actions certified to proceed on a class-wide basis and not otherwise resolved by dispositive motions result in settlement, not trial." Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1650 (2008) (citing ROBERT H. KLONOFF, EDWARD K.M. BILICH & SUZETTE M. MALVEAUX, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION* 415 (2d ed. 2006) ("Relatively few class actions actually go to trial; most settle, either after the certification decision or as trial approaches.")).

³⁰ *See, e.g., Joshua H. Haffner, When the Class Action Does Not Settle*, PLAINTIFF MAG., Jan. 2015, at 1, 1 (describing a class action that went to verdict as a "rare beast" (quoting *Duran v. U.S. Bank Nat'l. Ass'n*, 325 P.3d 916, 920 (Cal. 2014))).

to get paid either on a contingency fee basis or based on awards from the settlement³¹—especially in suits involving an aggregation of small claims—they are incentivized to solely take on profitable cases. Taken together, these considerations exhibit how atypical a class action is compared to other types of litigation. They also demonstrate how federal courts, which tend to be overworked and under-resourced,³² are often left to monitor and resolve the potential conflicts that can arise when the various actors in the suit—namely, class counsel, the putative class, and the named plaintiffs—do not see eye to eye.

The events that occur between a lawyer deciding to take a class action and when a settlement occurs underscore the principal-agent problem that is seemingly unavoidable when a private attorney seeks to represent a class. Initially, when an attorney is deciding whether to take a case, they have to calculate how much effort they will put into it while still obtaining a profit.³³ The ideal case is one that involves a small amount of work and a large return. Even if a case is a potential winner, counsel are unlikely to take it unless it will ultimately leave them in a better financial position than where they started.³⁴ Consequently, many meritorious class actions never get filed,³⁵ preventing a significant number of litigants from vindicating their smaller claims. These would-be plaintiffs will not want to invest the time and energy to bring a claim on their own, if, in the end, they will only receive a small sum.³⁶ As Judge Posner once put it, “only a lunatic or a fanatic sues for \$30.”³⁷ It simply is not worth going to court in this instance,

³¹ “[C]ontingency fees are arguably the engine that drives much of the noncriminal regulation in the United States” Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 837 (2010); see also Samuel Issacharoff & Thad Eagles, *The Australian Alternative: A View from Abroad of Recent Developments in Securities Class Actions*, 38 U.N.S.W. L.J. 179, 179 (2015) (noting how lawyers in the United States are “almost universally . . . compensated through contingency fees or awards from the court from common funds”).

³² See, e.g., *Federal Judicial Caseload Statistics*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020> [<https://perma.cc/838V-NH28>] (showing how the filings in the federal courts have continued increasing from year to year).

³³ See, e.g., Hill, *supra* note 18, at 487 (making clear that because attorneys in class actions have to front the costs of bringing the claim, it “makes the financial viability of the lawsuit entirely dependent on the financial means and risk appetite of the plaintiffs’ lawyers”).

³⁴ See *id.*

³⁵ See *id.* at 487–88 (underscoring how the economics behind a lawyer’s decision whether to take a class action can lead not only to fewer meritorious class actions, but also to class actions that are not as beneficial for society).

³⁶ See *id.* at 487 (noting that class actions “facilitate[] collective action where individual action would be financially or administratively infeasible”).

³⁷ See *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

and this conflict of interests leads to, among other things, underenforcement.³⁸

Other problems arise when the firm that takes the class action discovers that it underestimated the amount of work that it will take to close the case. At this point, it can continue working towards the best outcome for its client—notwithstanding the profit margin—or it can look for a settlement that will allow it either to retain as much of its expected income as possible or cut its losses and move onto the next case. In these circumstances, the firm “typically has expended nearly all of the time that determines [its] compensation and has no logical reason to accept the risks of going to trial.”³⁹

The fact that most class actions are financed through a contingency-fee arrangement certainly does not help the class in this scenario.⁴⁰ Since class counsel is not prohibited from discussing their attorney’s fee award when negotiating with the defendant,⁴¹ firms are incentivized to settle once a class is certified to avoid litigation costs.⁴² At the same time, defendants have every incentive to settle after the certification stage because it gives them an opportunity to just pay the class’s attorney a sufficient amount to make it all go away.⁴³ A firm that finds itself in this position—often referred to as a sweetheart settlement⁴⁴—surely might be encouraged to accept settlements that, at

³⁸ Cf. Hill, *supra* note 18, at 487–88 (depicting class actions as vital to the United States’s ability to regulate misconduct, especially when the misconduct is engaged in by financially well-off bad actors).

³⁹ Coffee, *Entrepreneurial Litigation*, *supra* note 7, at 888.

⁴⁰ See Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys’ Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. REV. 937, 938 (2017) (explaining how courts determine attorney’s fees in most class actions). This is true regardless of the potential size of the client’s recovery, as it probably will not have a major impact on the attorney’s fees. See Coffee, *Entrepreneurial Litigation*, *supra* note 7, at 888.

⁴¹ See *Evans v. Jeff D.*, 475 U.S. 717, 732 (1986) (“[A] general proscription against negotiated waiver of attorneys’ fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement.”); *Staton v. Boeing Co.*, 327 F.3d 938, 972 (9th Cir. 2003) (holding that parties in a class action are allowed to negotiate and settle the amount of statutory fees under *Evans*).

⁴² See, e.g., *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (observing that class counsel has “every incentive to accept a [six-figure] settlement . . . regardless of how strong the claims for much larger amounts may be . . . [because] a juicy bird in the hand is worth more than the vision of a much larger one in the bush”).

⁴³ See, e.g., *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 753 (7th Cir. 2011) (discussing how the “principal effect of class certification, as the district court recognized, would be to induce the defendants to pay the class’s lawyers enough to make them go away; effectual relief for consumers is unlikely”).

⁴⁴ See Madeleine M. Xu, Note, *Form, Substance, and Rule 23: The Applicability of the Federal Rules of Evidence to Class Certification*, 95 N.Y.U. L. REV. 1561, 1584–87 (2020) (citing *Kirby*, 333 F.2d at 347 (Friendly, J., dissenting)) (explaining that in a “sweetheart settlement,” class counsel is compromising the interests of the absent class members

times, produce fewer benefits for plaintiff classes than they might have obtained at trial.⁴⁵

In a similar vein, the class action system has been flooded with nonpecuniary settlements,⁴⁶ particularly when it comes to actions aggregating small claims. It is not uncommon in the securities and corporate litigation contexts for class counsel to file a suit for money damages on behalf of the class and end up settling for cosmetic relief (e.g., a bylaws amendment).⁴⁷ In the antitrust and mass tort settings, there are often “scrip settlements,” where the class solely receives an opportunity to purchase the defendant’s services or products at a discounted rate (also known as coupon settlements).⁴⁸ This is exemplified by the *Chapman* case presented in the Introduction. Lastly, cy pres settlements, which usually involve defendants “making a payment in kind of goods or services, not to the plaintiff class but to a third party (often a charity) for the indirect benefit of the class,”⁴⁹ albeit limited in use at times,⁵⁰ have also been popular.⁵¹ These non-

because they are aiming to steer clear of protracted litigation and obtain an oversize fee by accepting a reduced settlement amount and waiving their overbroad claims).

⁴⁵ *Id.* at 1585–86 (describing the prominence of contingency-fee arrangements in class actions as one “that incentivizes class counsel to accept a settlement figure at a less-than-optimal amount in order to ensure first-class treatment of attorneys’ fees”).

⁴⁶ See, e.g., Sean J. Griffith, *Class Action Nuisance Suits: Evidence from Frequent Filer Shareholder Plaintiffs* (expressing that merger and acquisition lawsuits tend to settle for nonpecuniary benefits), in *THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS* 39, 39 (Brian T. Fitzpatrick & Randall S. Thomas, eds., 2021); Hannah Oswald, Russell Perdue & Tara Trifon, *Taking Stock of Non-Monetary Settlement Provisions*, *JD SUPRA* (Mar. 16, 2021), <https://www.jdsupra.com/legalnews/taking-stock-of-non-monetary-settlement-4732851> [<https://perma.cc/6X3T-C8M2>] (reporting that an overwhelming majority of cyber or privacy class actions end up settling with no monetary compensation provided to the classes).

⁴⁷ Coffee, *Class Wars*, *supra* note 7, at 1367.

⁴⁸ *Id.* at 1367–68 (“Often, the discount is no greater than what an individual plaintiff could receive for a volume purchase, or for a cash sale, or for using a particular credit card, and typically restrictions are placed on its transferability.”). Importantly, it has been more difficult for courts to approve “coupon settlements,” since the enactment of the Class Actions Fairness Act in 2005. See *infra* Part II.

⁴⁹ Coffee, *Class Wars*, *supra* note 7, at 1368.

⁵⁰ E.g., *Nachsin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011) (explaining that a cy pres distribution is only available when the award “(1) address[es] the objectives of the underlying statutes, (2) target[s] the plaintiff class, or (3) provide[s] reasonable certainty that any member will be benefitted”).

⁵¹ See Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 117 n.88 (2014) (referring to cy pres distributions in class action settlements as prevalent); Coffee, *Class Wars*, *supra* note 7, at 1369 n.96 (citing cases describing increased flexibility in awarding cy pres settlements and describing them as routine). For a more thorough explanation of the intricacies and dangers of cy pres settlements, see generally Wasserman, *supra*. Recently, the Supreme Court was poised to determine if a class action settlement which provides a cy pres award to class members, but no express relief, meets the fair settlement requirements of Federal Rule of Civil Procedure 23(e)(2). Instead, it avoided

pecuniary forms of redress share one characteristic: They require some sort of agreement under which the defendants pay substantially less than they would have—had they settled the claim for the actual amount that it is worth—in exchange for the attorney acquiring an “above market” fee.⁵²

Furthermore, when cases settle, the court may establish a common fund from which class counsel will seek an award of attorney’s fees.⁵³ Irrespective of whether the class receives monetary compensation or a nonpecuniary benefit, the attorney is able to extract revenue from the settlement⁵⁴—as long as the judge holds a hearing and finds that the settlement is “fair, reasonable, and adequate.”⁵⁵ Thus, in these circumstances, class counsel has no incentive to demand the award most beneficial to the plaintiff. But the same is not true for the defendants who prefer to offer nonpecuniary compensation. Providing attorney’s fees out of this kind of fund “always raises concerns that class members, those who theoretically should be benefitting from the settlement, no longer have someone representing their interest.”⁵⁶

Ultimately, if one wishes to understand the burdens that the principal-agent problem places on the legal system, one has to look no further than a few contemporary observations by judges and settlements that have been accepted by various federal courts after Congress’s latest attempt to curb this issue.⁵⁷ Of course, there is the settlement approved in *Chapman* (outlined in the Introduction), but reviewing a handful of other settlements should be sufficient to indicate the gravity of the situation.⁵⁸

the question by remanding the case to the lower courts to decide whether one of the lead plaintiffs had standing. *See Frank v. Gaos*, 139 S. Ct. 1041, 1045–46 (2019).

⁵² Coffee, *Class Wars*, *supra* note 7, at 1367.

⁵³ *See, e.g., Bell v. Dupont Dow Elastomers, LLC*, 640 F. Supp. 2d 890, 894 (W.D. Ky. 2009).

⁵⁴ *See* FED. R. CIV. P. 23(e)(2) (making no mention of a distinction between monetary and nonpecuniary benefits for the purposes of determining attorney fees).

⁵⁵ FED. R. CIV. P. 23(e)(2).

⁵⁶ *Bell*, 640 F. Supp. 2d at 900–01; *see also id.* at 901 (“The interest of class counsel in obtaining fees is adverse to the interest of the class in obtaining recovery because the fees come out of the common fund set up for the benefit of the class.” (quoting *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993))).

⁵⁷ For a short exposition of the legislation passed by Congress to address the principal-agent problem, *see infra* Part II.

⁵⁸ Evidence regarding settlements is difficult to obtain because “key features of class settlements, such as attorney’s fees and the actual compensation rate for the class, [are] generally not included in final orders or opinions (indeed there are few opinions approving class settlements, just uninformative orders).” Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 COLUM. BUS. L. REV. 1, 16 n.36 (2017); *see also*

In 2012, the Ninth Circuit signed off on a settlement in a case where over 3.6 million Facebook users had their personal information exposed without their consent.⁵⁹ The settlement was valued at \$9.5 million, but the class received no damages.⁶⁰ The class did not receive any part of this substantial settlement fund because it was not economically practicable for each class member to receive such a small amount of money with such exorbitant costs of administration.⁶¹ Meanwhile, the attorneys retained \$2,364,973,⁶² and the rest of the money was given to a grant-making entity (the Digital Trust Foundation), created by Facebook, whose board of legal advisors consisted of none other than class counsel and Facebook's attorney.⁶³ To add insult to injury, Facebook's Director of Public Policy was one of the Foundation's directors and,⁶⁴ as such, he would take part in deciding how the remaining funds would be used to educate users about protecting their identities online.⁶⁵ This *cy pres* settlement

Nicholas M. Pace & William B. Rubenstein, *How Transparent are Class Action Outcomes?: Empirical Research on the Availability of Class Action Claims Data*, 1–4 (RAND, Working Paper Series, Working Paper No. WR-599-ICJ, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1206315 [<https://perma.cc/8HZH-QBKX>] (describing class action settlement information as difficult to gather and noting that better transparency is needed in this area). This information is typically found in the court documents attorneys submit when seeking to have their settlement approved by the court, which are not always easily accessible. *See, e.g.*, Pace & Rubenstein, *supra*, at 34 (reporting that “[s]earching the court records of 31 concluded federal class actions yielded usable data in only six cases”); *Id.* at 2 (describing what is later termed “usable data” as data that sufficiently describes whether and how settlement funds were distributed in a given class action). Still, Brian Fitzpatrick and some other researchers have taken on the task of studying class action settlements. *See, e.g.*, Johnston, *supra*, at 15; Fitzpatrick, *supra* note 31. Although Fitzpatrick found that there was not much variation when evaluating attorney's fees in relation to settlements, his study has been criticized for focusing on the amount stated in the agreement rather than on the actual payout to the class. The latter is almost always lower than the former, thus skewing his results. Johnston, *supra*, at 17. With all of that in mind, it is possible that the settlements identified in this Note only represent the tip of the iceberg in terms of how profoundly the principal-agent problem negatively impacts class members. Either way, those settlements that judges decide (or are required) to publish shed a lot of light on how questionable—or broken—the current system is.

⁵⁹ *See Lane v. Facebook, Inc.*, 696 F.3d 811, 818, 820, 825 (9th Cir. 2012).

⁶⁰ *Id.* at 817.

⁶¹ *Id.* at 821; Wasserman, *supra* note 51, at 99 (explaining how “distributing it among the class members would have been economically infeasible given how small their pro rata shares were relative to the costs of administration”). To put administrative fees in perspective, in one class action settlement, it cost approximately \$2.2 million in administrative fees to distribute an award to an estimated five million class members. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 628, 630 (7th Cir. 2014).

⁶² *Lane*, 696 F.3d at 818.

⁶³ *Id.* at 817–18; *see* Wasserman, *supra* note 51, at 99.

⁶⁴ *Lane*, 696 F.3d at 820.

⁶⁵ *Id.* at 817 (stating that the purpose of the foundation was to “fund and sponsor programs designed to educate users, regulators[,] and enterprises regarding critical issues

denotes the way class counsel in this context has no incentive to acquire adequate compensation for the class because they are paid a substantial sum either way.

The next case involves a class of 66,647 plaintiffs who alleged that the manufacturers of the Complete Cookie were defrauding customers by displaying false information on their products' nutritional labels.⁶⁶ Specifically, they contended that the defendant was overstating the protein content and understating the amount of fats, sugars, carbohydrates, and calories that each cookie contained.⁶⁷ In 2019, the parties agreed to settle and the court approved an agreement in which class members received an average of approximately \$13.35 each,⁶⁸ in addition to some free cookies.⁶⁹ For some, this may not sound too bad. But given that the nutritional value of the cookies was the subject of this litigation and, more importantly, that the attorneys here received a total of \$447,500,⁷⁰ which is equal to more than fifty percent of the total cash received by the class members in this case (\$889,867.17),⁷¹ it becomes evident that this settlement disproportionately favored the attorneys.

These controversial settlements are not the only examples of the dangers found in the class action system that stem from the principal-agent problem. Plenty of federal judges have articulated their concerns with respect to this issue. In *Bell v. Dupont Elastomers, LLC*, Judge Heyburn, speaking about the dangers of common fund settlements, declared that “in [these] settlements, class counsel’s role ‘changes from one of a fiduciary for the clients to that of a claimant against the fund created for the clients’ benefit.’”⁷² In 2013, the Third Circuit was asked to affirm a settlement that purported to award a large amount of money to the class.⁷³ The court rejected the settle-

relating to protection of identity and personal information online” (alterations in original)).

⁶⁶ *Cowen v. Lenny & Larry’s, Inc.*, No. 17 CV 1530, 2017 WL 4572201, at *1 (N.D. Ill. Oct. 12, 2017); *Cowen v. Lenny & Larry’s, Inc.*, No. 1:17–CV–01530, 2019 WL 10892150, at *1 (N.D. Ill. May 2, 2019).

⁶⁷ *Cowen*, 2017 WL 4572201, at *1.

⁶⁸ This value is the \$889,867.17 cash settlement divided by the 66,647 claims. See *Cowen*, 2019 WL 10892150, at *1.

⁶⁹ *Id.*

⁷⁰ See *id.* at *2 (granting \$410,101.38 in attorney’s fees, and \$37,398.62 in costs).

⁷¹ See *id.* at *1.

⁷² 640 F. Supp. 2d 890, 901 (W.D. Ky. 2009) (quoting COURT AWARDED ATTORNEY FEES, REPORT OF THE THIRD CIRCUIT TASK FORCE, 108 F.R.D. 237, 255 (1985)).

⁷³ This was a cy pres settlement where a little under two-thirds of the \$35.5 million fund was set aside to be rewarded to the class, with unclaimed money going to cy pres recipients. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169–70 (3d Cir. 2013). Those who submitted the proper documentation would receive the amount they overpaid due to the defendant’s misconduct, but those who could not were awarded \$5. *Id.* at 170–71.

ment because in practice it only awarded \$3 million to the class out of a \$35.5 million settlement fund,⁷⁴ while the attorneys received over \$14 million and the rest went into a cy pres fund. Judge Ambro criticized the lower court for approving the cy pres settlement without the requisite evidence to determine that the settlement was fair to the class.⁷⁵ And he condemned class counsel both for not providing sufficient information to the district court and not having the class's best interests at heart when negotiating the agreement.⁷⁶

By the same token, in *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*,⁷⁷ Judge Wood, when rejecting a settlement that showed “bias toward compensating class members with pre-paid . . . envelopes instead of cash,”⁷⁸ expressed her view that the lower court had completely failed to consider the fairness of the agreement in approving it.⁷⁹ Likewise, in *Redman v. Radioshack Corp.*, Judge Posner—chiding the lower court judge for failing to evaluate the issues adequately in approving a settlement—stressed that “the law quite rightly requires more than a judicial rubber stamp when the lawsuit that the parties have agreed to settle is a class action[, because of] the built-in conflict of interest in class action suits.”⁸⁰

These observations are not all that surprising considering lower court judges have had trouble dealing with the challenges that are presented by the inherent conflict of interests between class counsel and class members. Judge Rakoff, confronted with a case where lead plaintiffs were artificially cobbled together,⁸¹ in part, for purposes of higher attorney's fees,⁸² remarked that “allowing unrelated plaintiffs to band together in order to manufacture a larger financial interest . . . ensures that the lawyers, who are invariably the matchmakers behind such marriages of convenience, are the true drivers of the litigation.”⁸³ In a similar case, Judge Rakoff made clear that the position of lead

⁷⁴ *Id.*

⁷⁵ *See id.* at 175.

⁷⁶ *See id.* at 175–76.

⁷⁷ 463 F.3d 646 (7th Cir. 2006).

⁷⁸ *Id.* at 654.

⁷⁹ *Id.* at 653–54.

⁸⁰ 768 F.3d 622, 629 (7th Cir. 2014) (“The judge asked to approve the settlement of a class action is not to assume the passive role that is appropriate when there is genuine adverseness between the parties rather than the conflict of interest recognized . . . in many previous class action cases.”).

⁸¹ *See In re Petrobras Sec. Litig.*, 104 F. Supp. 3d 618, 622–23 (S.D.N.Y. 2015).

⁸² *Id.* at 622 (noting that the plaintiffs' retainer agreement “permitted its counsel to seek fees approximately double those permitted by the other lead plaintiff candidates in their respective retainer agreements”).

⁸³ *Id.* at 621–22.

plaintiff inevitably carries with it an increased attorney's award that may create perverse incentives.⁸⁴

In short, when a lawyer seeks to become class counsel in any given action for damages, it invariably opens the door for the principal-agent problem to seep in. This possibility presents itself from the time the attorney is deciding whether to take the case all the way through settlement. It is facilitated by the unique properties found in the class action system and is driven predominantly by desire for monetary gain. The existence of such class action settlements and the accompanying concerns of various judges reflect the severity of this issue. Congress has recognized these flaws and has been called upon to cure the defects. The next Part will detail some of Congress's solutions as well as their shortcomings.

II

CONGRESS'S ATTEMPTS TO RESOLVE THE PRINCIPAL-AGENT PROBLEM IN CLASS ACTIONS

Rule 23 has measures both to prevent frivolous lawsuits and to control unfair settlements.⁸⁵ Regarding the former, Rule 23(a) lists the class certification requirements of "numerosity, commonality, typicality, and adequate representation."⁸⁶ When it comes to settlements, a court must approve all proposed settlements by looking to, *inter alia*, "whether: (A) the class counsel and representatives have adequately represented the class; (B) the proposal was negotiated at arm's length; [and] (C) the relief provided for the class is adequate"⁸⁷ However, due to a combination of scarce judicial resources and insurmountable caseloads, federal judges tend not to spend much time reviewing settlements in general,⁸⁸ particularly in class actions comprising small claims.⁸⁹ Also, federal courts may "simply lack information to make an informed evaluation of the fairness of the settlement,"⁹⁰ and few, if any, class members are expected to object.⁹¹

⁸⁴ *Iron Workers Loc. No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization, LLC*, 616 F. Supp. 2d 461, 463–66 (S.D.N.Y. 2009).

⁸⁵ *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (noting that the four requirements "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." (internal quotation marks omitted) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982))).

⁸⁶ *See id.*

⁸⁷ FED. R. CIV. P. 23(e)(2).

⁸⁸ *See Macey & Miller, supra* note 7, at 45 ("[T]he judge herself has a powerful interest in approving the settlement. Judges' calendars are crowded with cases, and despite various reform efforts, the workload only seems to increase." (footnotes omitted)).

⁸⁹ *See Coffee, Class Wars, supra* note 7, at 1370.

⁹⁰ *Macey & Miller, supra* note 7, at 46 ("Typically, . . . the only information available to the judge is found in papers filed in court . . . [and this] evidence is likely to be highly

In addition to amending Rule 23 numerous times throughout the years,⁹² Congress has supplemented it with several statutes as a response to a proliferation of lawyer-driven class actions. In the beginning, Congress's efforts were centered on securities class actions, as these suits tend to not only be the most common but also have the largest financial stakes.⁹³ The first of these statutes was the Private Securities Litigation Reform Act of 1995 (PSLRA),⁹⁴ which required the court to appoint the lead plaintiffs that it determines to be most capable of representing the interests of class members adequately—presumptively, the investor with the largest financial stake in the litigation.⁹⁵ The PSLRA was passed, in part, to prevent securities class actions that “were initiated and controlled by . . . lawyers and appeared to be litigated more for their benefit than for the benefit of the shareholders they ostensibly represented.”⁹⁶

Three years later, after Congress realized that crafty plaintiffs' lawyers were avoiding the reach of the PSLRA by filing securities class actions in state courts,⁹⁷ it enacted the Securities Litigation Uniform Standards Act of 1998 (SLUSA).⁹⁸ SLUSA federalized securities class actions by requiring that any action seeking damages, brought on behalf of more than fifty people, and alleging securities fraud must be brought in federal court.⁹⁹ One of its core objectives was to prevent plaintiffs' attorneys from sidestepping the heightened

incomplete and, in the case of materials submitted to support the proposed settlement, biased in favor of the settlement.”).

⁹¹ *Id.* at 46–47 (“[T]hose who do object are often either disgruntled plaintiffs' attorneys who have fallen out with others in the plaintiffs' consortium, or naïve class members who demonstrate their ignorance of the issues in dispute.”).

⁹² See FED. R. CIV. P. 23.

⁹³ See, e.g., John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1539 (2006) (describing securities class actions as “the 800-pound gorilla that dominates and overshadows other forms of class actions”).

⁹⁴ Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

⁹⁵ See, e.g., *Iron Workers Loc. No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization, LLC*, 616 F. Supp. 2d 461, 463–64 (S.D.N.Y. 2009) (describing the purpose of the lead-plaintiff provision, and the presumption that the largest investor will be appointed lead plaintiff).

⁹⁶ *Id.* at 463 (explaining that the PSLRA was “enacted to address perceived abuses in securities fraud class actions created by lawyer-driven litigation,” and to prevent such litigation (internal quotation marks omitted) (citations omitted)).

⁹⁷ See *In re Herald*, 730 F.3d 112, 118 (2d Cir. 2013) (“[T]o . . . prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA], Congress enacted SLUSA.” (alteration in original) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006))).

⁹⁸ Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227.

⁹⁹ See *id.*; *In re Herald*, 730 F.3d at 118.

pleading standards mandated by the PSLRA in order to prevent frivolous securities class actions.¹⁰⁰

Keeping up with the trend of preventing abuses by class counsel and federalizing class actions, Congress passed the Class Action Fairness Act of 2005 (CAFA).¹⁰¹ CAFA itself acknowledges that “[c]lass members often receive little or no benefit from class actions, and . . . counsel are [sometimes] awarded large fees, while leaving class members with coupons or other awards of little or no value.”¹⁰² Though not stated in the text of the statute, the legislative history demonstrates that another one of CAFA’s objectives was to funnel qualifying class actions into federal courts¹⁰³ through an assortment of jurisdiction-altering provisions.¹⁰⁴ In line with its stated purpose, one of CAFA’s provisions explicitly addresses how courts should handle coupon settlements.¹⁰⁵ But, unfortunately, cases like *Chapman* indicate that this legislation may not be doing much to prevent unfair coupon settlements.¹⁰⁶ It is also worth mentioning that CAFA does

¹⁰⁰ See H.R. 640, 105th Cong. (1998) (summarizing testimony presented before the House, which showed that “since passage of the [PSLRA], plaintiffs’ lawyers have sought to circumvent the Act’s provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none of the [PSLRA’s] procedural or substantive protections against abusive suits are available”).

¹⁰¹ Class Action Fairness Act of 2005, Pub. L. No. 109–2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

¹⁰² *Id.* § 2(a)(3).

¹⁰³ See S. REP. NO. 109-14, at 62–64 (2005) (concluding that federal courts will not “botch these critical choice-of-law issues” like some state courts supposedly had done), *reprinted in* 2005 U.S.C.A.N. 3, 58. See generally Michael D.Y. Sukenik & Adam J. Levitt, *CAFA and Federalized Ambiguity: The Case for Discretion in the Unpredictable Class Action*, 120 YALE L.J. ONLINE 233 (2011), <https://www.yalelawjournal.org/forum/cafa-and-federalized-ambiguity-the-case-for-discretion-in-the-unpredictable-class-action> [<https://perma.cc/9RFF-8YQB>] (outlining how CAFA federalized the vast majority of class actions).

¹⁰⁴ Sukenik & Levitt, *supra* note 103. CAFA’s federalization of class actions then could be seen as a stepping-stone to further federal government control as proposed by this Note’s Rule 23 Amendment. See *infra* Part III.

¹⁰⁵ 28 U.S.C. § 1712.

¹⁰⁶ Some people have also criticized the coupon settlement provision for its lack of direction in helping courts determine how attorney’s fees should be calculated in settlements of this nature. See, e.g., *Redman v. Radioshack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014) (referring to CAFA as poorly drafted); Neil Connolly, Note, *Extreme Couponing: Reforming the Method of Calculating Attorneys’ Fees in Class Action Coupon Settlements*, 102 IOWA L. REV. 1335, 1337 (2017); see also Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1699–702 (2006) (critiquing CAFA’s attempts to limit coupon settlements). Other scholars have taken issue with CAFA’s narrow focus on coupon settlements and argued that Congress should have focused on the complete range of class action settlement issues. See Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 881 (2016).

not effectively limit cy pres settlements.¹⁰⁷ Similarly, in practice, this legislation has failed to sufficiently address the conflict of interests between class counsel and the class found in consumer class actions¹⁰⁸—and those involving classes that have suffered no concrete injury.¹⁰⁹ The latter set includes: (1) “exposure-only” cases where litigants, who have not (yet) suffered any physical ailments or experienced any symptoms, assert exposure to toxins;¹¹⁰ (2) consumer fraud cases, where consumers were “misinformed about purchases” without harm; and (3) consumer privacy cases, where even though litigants’ personal information was used without permission, there is no traceable harm.¹¹¹ The temptation to accept nonpecuniary remedies is higher without a harm to remedy.

More generally, while this cluster of protective statutes has more or less accomplished the purported goal of federalizing class actions,¹¹² there is no indication that they have curbed the principal-agent problem.¹¹³ Instead, these laws appear to have had unintended side effects. Although the PSLRA was aimed at “lawyers who do not represent the general public but represent themselves,”¹¹⁴ the presumption in favor of selecting the most adequate lead plaintiff ended up benefiting the class action firms who could best afford to bring securities actions.¹¹⁵ In other words, the “result [was] a much more concentrated securities plaintiffs’ bar dominated by big firms.”¹¹⁶ Lack of competition has exacerbated the principal-agent problem in

¹⁰⁷ See generally Wasserman, *supra* note 51 (discussing cy pres settlements in class actions and issues they pose).

¹⁰⁸ See Daniel Fisher, *Study Shows Consumer Class-Action Lawyers Earn Millions, Clients Little*, FORBES (Dec. 11, 2013, 8:46 AM), <https://www.forbes.com/sites/danielfisher/2013/12/11/with-consumer-class-actions-lawyers-are-mostly-paid-to-do-nothing> [<https://perma.cc/5E9X-9BWP>] (“Based on [a] study [conducted by Mayer Brown], CAFA didn’t help consumers much.”).

¹⁰⁹ See Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions* 5 (Emory Legal Stud. Rsch. Paper, Paper No. 16-402, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905 [<https://perma.cc/ZKZ9-Z6SX>] (finding that in class actions where plaintiff classes have not suffered a concrete harm, class counsel retains about 37.9% of available funds on average, while the class usually receives under 9% of the total).

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.*

¹¹² See, e.g., Howard M. Erichson, *CAFA’s Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1607 (2008) (“There is little question that CAFA has succeeded in shifting much class action litigation from state court to federal court since it went into effect.”).

¹¹³ See, e.g., *id.* at 1596 (“[D]ata on post-CAFA class action filings suggest that, like the 1995 securities litigation statute, CAFA has shifted class action practice in ways that will strengthen the upper tier of the plaintiffs’ class action bar.”).

¹¹⁴ *Id.* at 1603 (quoting 141 CONG. REC. 35,240 (1995) (statement of Sen. D’Amato)).

¹¹⁵ See *id.* at 1604 (discussing how the PSLRA increased costs for plaintiffs’ lawyers).

¹¹⁶ *Id.* (citations omitted).

litigation involving aggregated claims, such as class actions, because the same plaintiffs' lawyers and the same defendants consistently cut deals to benefit themselves.¹¹⁷ Consequently, no other firm objects or attempts to persuade plaintiffs who have high-value claims to bring their cases individually.¹¹⁸ It is not clear whether SLUSA put a stop to this considering there have been no indications that the plaintiffs' bar is less concentrated now.¹¹⁹ Plus, these aforementioned statutes (PSLRA and SLUSA) only apply to securities class actions, leaving other causes of action unaffected. Thus, at the end of the day, CAFA is the culmination of federal legislative efforts to resolve the principal-agent problem in class actions.

There are few studies regarding post-CAFA effects on lawyer-driven class actions (e.g., impact on the principal-agent problem), but research conducted shortly after CAFA's enactment indicates three inadvertent consequences. First, the vast majority of class actions were being filed in federal court and, accordingly, the plaintiffs' bar was seeking the most liberal fora in which to bring their class actions (i.e., forum shopping).¹²⁰ Second, the kinds of federal claims pursued by

¹¹⁷ Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 86 (2019).

¹¹⁸ *Id.*

¹¹⁹ See CORNERSTONE RSCH., SECURITIES CLASS ACTION FILINGS: 2020 YEAR IN REVIEW 34 (2020), <https://securities.stanford.edu/research-reports/1996-2020/Securities-Class-Action-Filings-2020-Year-in-Review.pdf> [<https://perma.cc/ZR6D-ZHLN>] (finding after extensive study of all federal and state court filings that “[t]hree law firms—The Rosen Law Firm, Pomerantz LLP, and Glancy Prongay & Murray LLP—have been responsible for more than half of first filed securities class action complaints in federal courts since 2015”); see also Morris Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 REV. LITIG. 757, 774–75 (2012) (citations omitted) (concluding that from 2009 to 2010 the same five firms served as lead or co-lead counsel in over sixty percent of securities fraud class actions).

¹²⁰ As established above, CAFA federalized class actions, which caused a shift of class action filings from state courts to federal courts. These statutory changes also made it so that only a limited number of class actions—those that could not have originally been filed under CAFA (or some other applicable federal law)—were safe from removal proceedings when filed in state court. See Erichson, *supra* note 112, at 1598. Class counsel noticed this and started filing directly in federal court to avoid the delays and costs that come with removal, which allowed them to “choose from a number of federal districts.” *Id.* at 1610–12. Attorneys were also filing for class action certification in federal circuits that were known to be less conservative (e.g., the Second and Ninth) than others (e.g., the Fourth and Fifth) in order to have a higher chance of getting their actions certified. See *id.* Attorneys could forum-shop because under CAFA, a district court has original jurisdiction over any class action that involves an aggregate amount in controversy that exceeds five million dollars when “the parties have minimal diversity of citizenship, that is a difference in state citizenship between any member of a class of plaintiffs and any defendant.” Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 595 (2006); see also Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). Furthermore, given that class actions with fewer than twenty

class action lawyers changed.¹²¹ Third, it is sensible to believe that CAFA, like the PSLRA, led to “strengthen[ing] the more powerful class action firms while marginalizing others.”¹²² And, to reiterate, a concentrated plaintiffs’ class action bar aggravates the principal-agent problem in class actions.¹²³

As discussed in Part I, it is apparent that these statutes have failed to stop not only the pursuit, but more importantly, the approval of the types of lawyer-focused settlements they were set out to prevent. In the post-CAFA era, judges are still faced with the same principal-agent issues that scholars were (and still are) complaining about in the years before and after the passing of CAFA.¹²⁴ In the end, one thing remains clear: No matter how many times Congress tries to regulate class actions, with no one to review class action lawsuits at their inception, the plaintiffs’ bar will simply adapt and find new ways to take advantage of the system. At this point, courts can only ineffectively manage manifestations of the principal-agent problem on the back end. Part III thus outlines a way for the govern-

members are usually not certified, while classes with more than forty are (mostly given concerns about joinder in individual cases), typically, at least one of the plaintiffs in any given class action will reside in a different state than one of the defendants. *See, e.g., In re Modafinil Antitrust Litig.*, 837 F.3d 238, 249–50 (3d Cir. 2016) (citing WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 3:12 (5th ed. 2011)). Therefore, anytime a class action alleges damages above the \$5 million threshold, it will typically meet the subject-matter jurisdiction requirements of CAFA and give class counsel an opportunity to pick its desired forum, which includes any forum that has “proper venue and . . . personal jurisdiction over the defendants.” Erichson, *supra* note 112, at 1611.

¹²¹ CAFA caused this by significantly shifting class action litigation to federal court (increasing the amount of federal question cases), which influenced some attorneys—in particular, those who were more cost-conscious—to file class actions that have a higher chance of being certified and ultimately winning in this forum. Stated differently, if specific kinds of class actions are considered to be less sensible to bring in federal court compared to state court, where they would have been filed pre-CAFA, some lawyers may have changed their strategy and started focusing on the types of class actions that have higher success rates in federal court. *See* Erichson, *supra* note 112, at 1619 (“CAFA may have forced some class action lawyers to adapt by shifting their practice into areas that have a greater likelihood of success in federal court.”); *see also id.* at 1615–21 (“[C]lass action lawyers appear[ed] less inclined to pursue personal injury tort claims and increasingly interested in contract, fraud, wage-and-hour, and consumer protection claims.”).

¹²² *Id.* at 1621–24. Five shifts caused by CAFA can be attributed to this result: “the shift from state court to federal court, from rural counties to urban centers, from personal injury to economic injury, from state claims to federal claims, and from multiple lead class counsel to single lead counsel or committee.” *Id.* at 1621.

¹²³ Bradt & Rave, *supra* note 117, at 86; *see also supra* notes 115–18 and accompanying text.

¹²⁴ John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 292 (2010) (acknowledging the benefits of class action litigation and then remarking that the “principal-agent problems . . . remain intractable despite repeated efforts by Congress and the courts to curb highly visible abuses”); *see also supra* Part I; *supra* note 7 and accompanying text.

ment to limit the power of private class counsel and lower the courts' burden by playing the role of gatekeeper.

III

USING QUI TAM TO REVISE RULE 23

While class actions are here to stay, Congress's efforts have failed to diminish the principal-agent problem. Looking outside of the class actions arena could provide some much-needed guidance. Qui tam actions, most commonly associated with the False Claims Act (FCA), present a useful framework for helping Congress abate the principal-agent problem. This Part briefly introduces qui tam as a concept and identifies the relevant aspects of the FCA. It then presents the proposed Rule 23 amendment and distinguishes it from the FCA. It concludes by evaluating its strengths and weaknesses and analyzing possible constitutional concerns.

A. *Introduction to Qui Tam and the FCA*

Qui tam precedes the common law.¹²⁵ In fact, qui tam claims could be brought in American courts as early as 1686.¹²⁶ One of the main purposes of these types of actions is to give members of the public an opportunity to supplement their government's efforts to ferret out crime and regulate wrongful conduct by operating as "private-attorney[s]-general."¹²⁷ When the government is having trouble regulating certain "bad actors," a qui tam statute can incentivize private parties to blow the whistle on specific misconduct outside the government's reach in return for a share of a successful lawsuit's profits. While the Supreme Court of the United States has recognized four modern-day qui tam statutes,¹²⁸ only two are still in force, and the FCA is undeniably the one most frequently employed.¹²⁹

¹²⁵ DOYLE, *supra* note 14, at 1 ("Qui tam comes to us from before the dawn of the common law.").

¹²⁶ See *id.* at 3 n.19 (discussing Colonial Era qui tam statutes).

¹²⁷ See *id.* at 1; see also Deborah R. Hensler, *Can Private Class Actions Enforce Regulations? Do They? Should They?*, in *COMPARATIVE LAW & REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS* 238, 244 n.11 (Francesca Bignami & David Zaring eds. 2016) ("Traditionally, [class actions] have been referred to as 'private attorney[] general' suits." (citing John C. Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983))).

¹²⁸ *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768–69 n.1 (2000) (referring to 31 U.S.C. §§ 3729–3733, 35 U.S.C. § 292, 25 U.S.C. § 81, and 25 U.S.C. § 201).

¹²⁹ See DOYLE, *supra* note 14, at 4.

Under the FCA, when a person wants to file a civil claim, they have to allege that a defendant committed fraud against the government—the plaintiff is known as a whistleblower or “relator.”¹³⁰ The action must be brought in the name of the government on behalf of both the relator and the government.¹³¹ The relator is also responsible for serving all material evidence related to the claim on the government.¹³² Notably, the complaint has to be submitted to the court *in camera* and it is not to be served upon the defendant without the court’s permission.¹³³ Once it is filed, a fundamental feature of the FCA kicks in: no other party except the DOJ can intervene or bring a similar claim.¹³⁴ Further, once these prerequisites are met, the government has sixty days (possibly more if the court grants an extension for good cause) to conduct an investigation and decide whether it wants to take over the case.¹³⁵

On the one hand, if the DOJ decides to proceed, it retains complete control over the suit. This means that the relator’s objections to any actions the government takes, including settlement and dismissal, are immaterial (in effect),¹³⁶ and the government can pursue the case in any way it wants.¹³⁷ This is not to say the relator is totally sidelined, but, simply put, the DOJ gets significant discretion to choose whether it wants to listen to their suggestions as to how the case should progress.¹³⁸ That said, if the relator causes undue delay or interferes with the action in a burdensome way, such as by harassing the defendant, the government may limit the relator’s participation, with court approval.¹³⁹ After the case concludes—assuming the DOJ wins (which

¹³⁰ False Claims Act, 31 U.S.C. §§ 3729, 3730(b)(1). The FCA disallows claims based on a fraud that the DOJ is already aware of. *Id.* § 3730(e)(3). Additionally, a private litigant is barred from bringing a claim of fraud that has already been publicly disclosed, unless they constitute an “original source” of that information. *Id.* § 3730(e)(4).

¹³¹ *Id.* § 3730(b)(1) (“The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.”).

¹³² *Id.* § 3730(b)(2).

¹³³ *Id.*

¹³⁴ *Id.* § 3730(b)(5) (“When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”).

¹³⁵ *Id.* § 3730(b)(3)–(4).

¹³⁶ But note, the plaintiff has a chance to be heard on the dismissal motion and settlements must be approved by the court. *Id.* § 3730(c)(2)(A)–(B).

¹³⁷ *Id.* § 3730(c)(1), (2)(A)–(B) (“If the Government proceeds with the action, it . . . shall not be bound by an act of the person bringing the action.”).

¹³⁸ *Id.* § 3730(c)(1)–(2) (stating that the DOJ “shall have the primary responsibility for prosecuting the action”).

¹³⁹ *Id.* § 3730(c)(2)(C)–(D).

it usually does¹⁴⁰)—the relator receives an award between fifteen and twenty-five percent of the proceeds from the action or settlement, and the government keeps the rest.¹⁴¹

On the other hand, if after the sixty days the DOJ decides not to pursue the claim, the relator has the option to bring the claim on their own.¹⁴² But the government reserves the right to intervene at a later date if it so chooses, as long as the court approves.¹⁴³ Provided that the DOJ does not step in, the relator has the prospect of winning between twenty-five and thirty percent of the proceeds awarded under the action or settlement, but the government still retains the remainder of the funds.¹⁴⁴ One drawback for the relator in this situation, however, is that once the government declines to pursue the case, the chances of victory are slim.¹⁴⁵ This summary of the FCA is a useful framing to keep in mind when contemplating the Rule 23 modification suggested in the next Section.

B. *A Proposal and a Practical Case Study*

This Note proposes a Rule 23 Amendment that would incorporate almost all of the FCA provisions listed above—with distinctions explored below—into actions filed under Rule 23(b)(1) or (b)(3),¹⁴⁶

¹⁴⁰ See, e.g., Steven L. Schooner, *False Claims Act: Greater DOJ Scrutiny of Frivolous Qui Tam Actions* 60 (Geo. Wash. L. Sch. Pub. L. & Legal Theory Working Paper, Paper No. 12, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3152097 [<https://perma.cc/55SE-YMLE>] (“[T]he DOJ boast[s] an extraordinarily high success and recovery rate for [FCA] cases.”).

¹⁴¹ 31 U.S.C. § 3730(d)(1).

¹⁴² *Id.* § 3730(c)(3).

¹⁴³ *Id.*

¹⁴⁴ *Id.* § 3730(d)(2).

¹⁴⁵ See Robert Salcido, *False Claims Act – Year in Review*, JD SUPRA (Jan. 28, 2020), <https://www.jdsupra.com/legalnews/false-claims-act-year-in-review-five-32970> [<https://perma.cc/8BA9-BU8M>] (noting the “relator’s record of very limited success when litigating without the government’s assistance”).

¹⁴⁶ There are various alternatives to my proposal that have been suggested in academic literature to help resolve the principal-agent problem in class actions. For example, some scholars have suggested that the government should take over control of certain areas of class actions completely or at least have greater oversight. See, e.g., Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2176 (2010) (proposing a system under which the SEC is responsible for all securities class actions); see also Fisch, *supra* note 17, at 198–202 (discussing the benefits of providing for greater government oversight of small claims class actions generally); Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1517 (1996) (proposing a scheme for governmental oversight where “[p]laintiffs would . . . be required to give notice of the action to the SEC, which would have the option to take over the action and, in any event, to appear at any settlement hearing”). Some argue, in the context of securities actions, that in order to gain valuable inside information and to “allow[] for government monitoring and control of private actions and for cooperation between public and private regulators,” the FCA’s qui tam model ought to be

the two provisions under which class actions seeking money damages are filed.¹⁴⁷ Before getting into the process, it is worth noting that the Rule 23 Amendment would not extend to claims that are brought strictly under Rule 23(b)(2), given that the principal-agent problem is unlikely to apply in this setting.¹⁴⁸ This is because there is very little, if any, motivation for an attorney to maximize profit when solely seeking an injunction.¹⁴⁹ Not to mention, some jurisdictions do not allow attorneys to bring Rule 23(b)(2) and (b)(3) claims together when a plaintiff class is seeking damages that vary among class members.¹⁵⁰ The Supreme Court—refusing to rule on whether claims involving money damages could ever be brought under 23(b)(2)¹⁵¹—appears to at least tacitly agree with this holding.¹⁵² But even when

expanded to cover the national financial markets. Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 80 (2002). Others have recommended converting class actions into opt-in actions (as opposed to the current system of opt-out). See, e.g., John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903 (2005). In addition, arguments have been made for maintaining the status quo (i.e., completely excluding the government from class actions). See BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS 3–5* (2019) (arguing that America should rely on private, as opposed to government, attorneys for class actions, with some caveats). And one commentator even proposed getting rid of damage class actions—in their current form—entirely. See generally Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399 (2014). However, it is beyond the scope of this Note to consider all of these proposals and establish why the proposal adopted here would be more effective in comparison.

¹⁴⁷ FED. R. CIV. P. 23(b). Rule 23(b)(3) encompasses a wide variety of compensatory actions, whereas Rule 23(b)(1) is most frequently used to bring ERISA claims. See, e.g., *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (“ERISA § 502(a)(2) . . . breach of fiduciary duty claims . . . are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class.”).

¹⁴⁸ FED. R. CIV. P. 23(b)(2).

¹⁴⁹ With respect to certification of claims involving monetary relief under Rule 23(b)(2), the action may not be certified under this provision if the monetary relief is not incidental to injunctive or declaratory relief and each class member would be entitled to an individualized award of monetary damages. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360–61 (2011). Because this bar is so high, class actions for money damages ordinarily have to be brought under one of the other provisions in Rule 23(b). Plus, due to the fee-shifting nature of civil rights statutes, under which many class actions for injunctive relief are sought, attorney’s fees are covered when the plaintiff wins.

¹⁵⁰ See, e.g., *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (“[M]onetary relief predominates in (b)(2) class actions [and is disallowed] unless it is incidental to requested injunctive or declaratory relief [and incidental] mean[s] damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.”); see also *In re Monumental Life Ins. Co.*, 365 F.3d 408, 416 (5th Cir. 2004) (ruling that monetary damages can be awarded to classes bringing actions under Rule 23(b)(2) when the damages are incidental to the relief and computed by objective standards, as opposed to when granting them requires inquiry into individual differences).

¹⁵¹ See *Dukes*, 564 U.S. at 360.

¹⁵² Indeed, the Court discussed the *Allison* court’s approach to incidental monetary relief in Rule 23(b)(2) actions, while declining to decide “whether there are any forms of

class counsel is permitted to bring both claims, under the Rule 23 Amendment, the government would have the option of taking over the case in the manner outlined below, so there are sufficient safeguards in place.¹⁵³

With that in mind, it is helpful to start at the inception of a class action. Ordinarily, class counsel has to review numerous sources to find class action plaintiffs—after all, it is extremely rare for a class of plaintiffs to just walk through the door.¹⁵⁴ After finding a potential plaintiff class, they have to conduct a significant amount of research to prepare the claim. They should also draft a skeletal summary judgment motion before filing the complaint.¹⁵⁵ All of this preparation tends to go uncompensated, since these attorneys work primarily on a contingency-fee basis.¹⁵⁶

With the Rule 23 Amendment, class counsel—who normally bring class actions under Rule 23(b)(1) or (b)(3)—would have to do the same groundwork, but instead of submitting the claim solely on behalf of the class, they would be required to bring it on behalf of the government too. The complaint would be filed *in camera* and class counsel would be responsible for providing the DOJ with all of their research as well as the court documents they prepared relating to the claim against the defendant. Like the FCA, the complaint would not be served upon the defendant without the court's consent, giving the government sufficient time to examine the claim and decide whether it would like to conduct the case. At this point, the DOJ would have a set amount of time, say sixty days (absent a court-approved extension),¹⁵⁷ to decide whether to take over the case.

‘incidental’ monetary relief that are consistent with the interpretation of Rule 23(b)(2).” *Id.* at 365–66; *see also id.* at 360 (“Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.”).

¹⁵³ There may be situations, in a Rule 23(b)(2) context, where class counsel may exaggerate the value of the injunctive relief being sought, in order to increase their fees. *See, e.g.,* *Staton v. Boeing, Co.*, 327 F.3d 938 (9th Cir. 2003) (rejecting settlement awarding class of 15,000 employees injunctive relief and \$7.4 million in damages because attorney’s fee award of \$4.05 million was excessive). However, plaintiffs’ counsel can only aggrandize their own earnings by shrinking the monetary relief available for plaintiffs by bringing a Rule 23(b)(3) claim as well. Although plaintiffs’ counsel could accept inferior injunctive relief to capture higher attorney’s fees in a class action involving only Rule 23(b)(2), such a manifestation of the principal-agent problem is, presumably, rare and beyond the scope of this Note.

¹⁵⁴ *See supra* Part I.

¹⁵⁵ *See supra* Part I.

¹⁵⁶ *See supra* Part I.

¹⁵⁷ Considering the intricacies and complexities of class actions, the DOJ may need more time to make its decision. Congress would be in a much better position to decide the

What follows is a nonexhaustive outline of criteria the government might consider in reaching its conclusion. As the DOJ is instructed to do with FCA cases,¹⁵⁸ one consideration could be the likelihood of success on the merits of the claim. If either the legal theory upon which it is based is inherently weak or it is simply a frivolous claim, it will be tough to persuade the government to pursue it.¹⁵⁹ Accompanying this inquiry, the DOJ could contemplate whether there are legal areas where the level of regulation or enforcement has not been up to par, either by referencing its own internal measures or by looking to the sectors that are not being regulated sufficiently by class actions.¹⁶⁰ By way of example, some have argued that within the last decade or so, the Supreme Court has limited the regulatory potential of all types of class actions, ranging from employment to securities fraud.¹⁶¹ If it is interested in enhanced regulation in these sectors, the DOJ may decide to take over a number of these kinds of cases when assessing class action submissions from private class counsel.

Additionally, if the complaint is associated with a government investigation that is already underway, the government should question whether pursuing the class action will add anything to that endeavor.¹⁶² For example, if the Securities Exchange Commission (SEC) is prosecuting a securities fraud case, and a related securities class action is submitted for the DOJ's review, the SEC matter should be considered. Although neither should be determinative, considering the size of the class and the potential award would also be prudent. The larger the class, the greater impact the DOJ could have (and vice versa). The same goes for the size of the award.

Other criteria to take into account include whether the lead plaintiffs in the case want the DOJ involved and whether class counsel would actually bring the claim if the government decides not to. The

exact length of time the government should receive to bring these actions, but it should keep the interests of class members in mind (e.g., speedy recovery) when making this judgment call.

¹⁵⁸ See Memorandum from Michael D. Granston, Dir., Com. Litig. Branch, Fraud Section to Assistant U.S. Att'ys Handling False Claims Act Cases (Jan. 10, 2018) (on file with author).

¹⁵⁹ See *id.*

¹⁶⁰ In addition to adding a section that includes the case-selection criteria the government is relying upon, either immediately before or after the "DOJ Dismissal of a Civil *Qui Tam* Action" section, the government could include a subsection that mentions the specific kinds of class actions that the DOJ civil division should be focusing on. See 4-4.111 - DOJ Dismissal of a Civil *Qui Tam* Action, U.S. DEP'T OF JUST., JUST. MANUAL, <https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.111> [<https://perma.cc/DUA6-9S9C>] (Oct. 2021).

¹⁶¹ Hensler, *supra* note 127, at 244–45.

¹⁶² *Id.*

former could be especially important because one of the objectives of the Rule 23 Amendment is to put agency back in the hands of the class, and the class representatives may want class counsel to take the lead.¹⁶³ At the same time, the government should be mindful of potentially manipulative attorneys and should fully inform the named plaintiffs about all the relevant aspects of the case and the benefits of the DOJ conducting the case. Additionally, if class counsel informs the government that the costs of bringing the claim on their own outweigh the benefits for their firm (i.e., they merely hope to collect the ten to fifteen percent reward),¹⁶⁴ then assuming the other factors align, this would strongly weigh in favor of taking the case, since it would deter underenforcement.¹⁶⁵

If, after a thoughtful evaluation of the criteria, the government takes the case, then just like under the FCA,¹⁶⁶ the DOJ would have full control. It would not be bound by the acts of class counsel, the class, or the named plaintiff, and no other party would have the right to intervene in the suit or bring an associated class action based on similar underlying facts. The lead plaintiff, like the relator under the FCA,¹⁶⁷ would still help the DOJ with the case, but class counsel would no longer participate in the action. Similarly, the class and the lead plaintiff would retain all of their rights under Rule 23 and otherwise applicable statutes that are not contrary to the Rule 23 Amendment. For instance, the class members would still maintain their ability to opt out of Rule 23(b)(3) suits and object to proposed settlements.¹⁶⁸

¹⁶³ As this Note argues, by taking some power away from class counsel, the Rule 23 Amendment seeks to realign financial incentives between the class and its representatives, which, indirectly, provides class members with more authority because they will have a better opportunity to receive larger awards (i.e., meet their financial goals) than they otherwise would have gotten without the Rule 23 Amendment.

¹⁶⁴ Counsel has nothing to lose by being candid in this scenario. Since they already did the work of bringing the claim, their goal is to achieve some compensation for that work.

¹⁶⁵ See *supra* notes 29–38 and accompanying text (discussing how an attorney confronted with an unprofitable case might completely avoid bringing the class action).

¹⁶⁶ 31 U.S.C. § 3730(c)(1).

¹⁶⁷ *Id.*

¹⁶⁸ FED. R. CIV. P. 23(e)(4)–(5). Although, as discussed above, the Rule 23 Amendment prohibits other parties from intervening in a class action or filing a related class action, after the government takes the case, a class member who opts out of the case can still bring a relevant claim that falls outside the class actions realm. For example, if a class member in the *Chapman* case—possibly one who was severely injured by a faulty pressure cooker and thought they could get more money bringing a suit individually—wanted to opt out before the case was settled and file a traditional products-liability torts claim on their own, that would be perfectly acceptable under the Rule 23 Amendment. Similarly, while class members would be free to object to proposed settlements, under the proposed amendment, the same way they can under Rule 23(e)(5), parties that are not involved in the litigation would not have this option. It is worth noting that it is unlikely that objections

Further, the DOJ would have the ability, as it does under the FCA,¹⁶⁹ to dismiss or settle the case, notwithstanding the objections of the named plaintiff. In contrast to the FCA, though, it does not seem wise for the government to have unfettered discretion to dismiss the suit once it agrees to pursue the action.¹⁷⁰ This is because the government does not have the same interest in the case—there is no direct harm against the government, unlike the fraud in FCA cases—so it would be unjust to permit that much discretion. Limiting dismissal to class actions in which it would place an undue burden on the DOJ to continue the case could be more effective.¹⁷¹

To the extent the lead plaintiff is interfering with the DOJ's litigation, the court may limit their participation upon a showing by the government of such intrusion. This is a valuable tool if, for instance, the named plaintiff is acting contrary to the DOJ's wishes and attempting to take a larger portion of the settlement fund or is harassing the defendant. Ultimately, if the government either wins or settles, class counsel would receive between ten and fifteen percent of the award—unlike the FCA, the exact percentage is to be determined before the DOJ agrees to bring the action—and the rest would go to the class.¹⁷²

Of course, as under the FCA, the DOJ would be free to decline to bring the claim, in which case class counsel would have the option

would get in the way of the government's ability to obtain favorable settlements for the class, given the relatively low frequency of these occurring. See Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (studying 236 class actions and finding that "about 1 percent of class members object[ed] to class-wide settlements"). Finally, it is worth mentioning that because the opt-out right remains virtually unchanged, the Rule 23 Amendment would comply with the due process requirement announced by the Supreme Court in *Phillips Petrol. Co. v. Shutts*. See 472 U.S. 797, 812 (1985) (holding "that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court").

¹⁶⁹ 31 U.S.C. § 3730(c)(2)(A)–(B).

¹⁷⁰ Some courts give the DOJ complete authority over dismissal once it proceeds with a FCA case. See *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003) (ruling that the DOJ has an "unfettered right" to dismiss a FCA action).

¹⁷¹ A standard such as the one promoted by the Ninth Circuit in passing upon FCA dismissals after the government intervenes could be a helpful benchmark for finding the right balance here. That court requires that the DOJ show a valid government purpose that is rationally related to the dismissal. See *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998).

¹⁷² Class counsel may have the option to present documents evincing how much time and resources they invested into preparing the class action when negotiating their prospective reward. It is also possible that the rate would be fixed at a certain percentage in order to prevent negotiation. Congress can craft legislation in multiple ways to optimize the incentives for class counsel, but it should consider higher percentages for attorneys that offer up nonfrivolous cases that otherwise would not have been filed.

to represent the class as usual. However, there are two significant differences between the FCA and the Rule 23 Amendment when this happens. First, the class would keep any award it receives when it wins the case, minus attorney's fees (i.e., no money would go to the government). This seems fair since the attorney would be doing all the work in this case, and the government is not protecting its own interests in the same way it does in an FCA suit.¹⁷³

Second, the DOJ should not be able to reinsert itself into the class action after private class counsel takes back control. A reintervention option would disturb class counsel's wish to carry on the case the way they see fit. For the same reasons that it would be undesirable for the government to dismiss a class action once it decides to take a case (i.e., lack of government interest), it would be imprudent to allow DOJ reintervention. Not to mention, tolerating this interference could lead to double-dipping since the DOJ, under the existing Rule, has the opportunity in many class actions to object to suspicious settlements, as demonstrated in *Chapman*.¹⁷⁴

Chapman is also instructive when it comes to analyzing how the Rule 23 Amendment could temper the principal-agent problem in class actions. In this case, a class of over three million plaintiffs sued the manufacturer of defective pressure cookers and essentially received nothing but a coupon to buy from the same manufacturer, while class counsel received almost two million dollars.¹⁷⁵ To start, it is impossible to apply all the decisionmaking factors above without access to the materials that class counsel prepared before filing the complaint. Still, based on the available information, it is reasonable to presume that the size of the class (over 3.2 million), the financial stakes (estimated at close to \$5 million), and the likelihood of success on the merits (based on the disposition of the case, at least the judge believed the claim had a solid chance) weigh heavily in favor of government intervention. Another supporting factor is that the government has a strong interest in regulating the production of faulty products (here, pressure cookers) that harm consumers.

If it had taken the case, DOJ would have had no reason to negotiate a coupon settlement in these circumstances because it would not be looking for attorney's fees—the Department's lawyers receive their salary irrespective of the particularities of the settlement. Under the Rule 23 Amendment, the government does not get a share of the award, so the class would have had the opportunity to obtain another

¹⁷³ See *infra* Section III.E (discussing how even without this national interest being invoked, the Rule 23 Amendment would still be constitutional).

¹⁷⁴ See *supra* Introduction.

¹⁷⁵ See *supra* Introduction.

\$2 million—as the DOJ had hoped—since private class counsel would be absent. Furthermore, if the DOJ settled this case at \$7 million, class counsel who did nothing more than prepare the case and bring it to the government’s attention would have received between \$700,000 and \$1 million—depending on what rate was negotiated before the government took the case—without expending time or resources to secure the settlement. The class would have received the rest.

This case provides a particularly good illustration because the DOJ was prohibited from intervening when it sensed that the settlement negotiation was going to be detrimental to the class. If the Rule 23 Amendment existed, the DOJ would have had the right to do so from the very beginning. In turn, the class members would have been more adequately compensated, and class counsel could have still been rewarded sufficiently and then moved on to other cases.

This hypothetical shows how the Rule 23 Amendment can realign the incentives of class members and their attorneys. The DOJ would function as a gatekeeper and prevent class counsel from running away with large sums at the expense of the class they are supposed to represent zealously. However, there are other benefits Congress may find persuasive when contemplating such legislation.

C. *Arguments in Favor of the Rule 23 Amendment*

Class actions are directed, at least in part, at preventing harms to society that would otherwise be under-remedied or not remedied at all.¹⁷⁶ Namely, these actions often target industries whose harms do not give rise to economically viable individual claims but, when aggregated together, call for a certain level of deterrence to prevent certain bad actors from continuing to injure the public.¹⁷⁷

Nevertheless, the principal-agent problem, inherent in class actions, is preventing the system from effectively regulating the bad actors involved in these suits¹⁷⁸ and sometimes preventing these actions from being brought in the first place. This is where the Rule 23 Amendment comes in. The Rule 23 Amendment meets the goals of both qui tam and class actions by reducing the harm to society caused

¹⁷⁶ Qui tam facilitates the regulation of misconduct that the government has trouble addressing. See DOYLE, *supra* note 14, at 1.

¹⁷⁷ *E.g.*, *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007) (“[The] Court has long recognized that meritorious private [class] actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought . . . by . . . the [SEC.]”); *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 287 (6th Cir. 2016) (“Consumer class actions . . . have value to society more broadly, both as deterrents to unlawful behavior—particularly when the individual injuries are too small to justify the time and expense of litigation . . .”).

¹⁷⁸ See *supra* Part I.

by private sector misconduct that, as it stands, is out of reach of individual litigants and the government.

First, it does so by allowing attorneys within the class actions sphere to merely prepare a class action—something they already do with no guarantee of recompense—and submit it to the DOJ for review. This practice is likely to be favored among lawyers because bringing a claim on a contingency-fee basis is inherently risky. Having the government evaluate the case at no charge before potentially exposing themselves to loss can be helpful for attorneys—and society—in a couple of ways. This review mechanism incentivizes firms who cannot afford to bring a class action—because it may negatively impact its profit margin—to bring the case to the government instead of dismissing it because they still have the prospect of earning a substantial income. This has the added benefit of reducing under-enforcement since the government can presumably take the case without fear of losing revenue (provided that it meets the selection criteria above). The second look by a neutral actor also helps test the strength of the case and may lead to reconsideration by the attorney if the government declines to accept it,¹⁷⁹ resulting in less frivolous lawsuits being brought on the whole—a positive for the U.S. court system.¹⁸⁰

Relatedly, it is probable that judges will take note of the DOJ performing this gatekeeping function. On the one hand, the government's declining the case could affect certification questions, in the event private class counsel chooses to continue the litigation.¹⁸¹ For instance, a judge facing a class certification question, who knows the DOJ has declined to pursue a class action due to lack of merit, could take this into consideration.¹⁸² On the other hand, at the certification

¹⁷⁹ Although, at least theoretically, the Executive is supposed to be even-handed in its enforcement, it is possible to imagine a scenario where a particular presidential administration does not want to pursue certain class actions for political reasons. But this issue is outside the scope of this Note.

¹⁸⁰ If both private class counsel and the DOJ felt that a claim was not worthwhile, it is probably easier to concede that the plaintiffs do not deserve the court's time.

¹⁸¹ This opens the door to the argument that if the DOJ declines to take on a class action for nonmeritorious reasons, it might have negative downstream effects. Specifically, courts presuming that the DOJ rejected a case based on its merits, when it did not, could lead to situations where courts would be dismissing (or not certifying) claims based on the government's judgment rather than the actual merits of the class action. One simple way to counteract this is to have the DOJ inform the court about whether it declined to proceed due to lack of merit. An explanation requirement is consistent with the proposed Rule 23 Amendment's mandate that the government tell the court if it will proceed with the class action within a set time period. *See supra* Section III.B.

¹⁸² If, under the Rule 23 Amendment, the government decided not to take a case based on its evaluation of the merits, it would be reasonable for a judge to conclude that the case before them may not be the most meritorious. After all, not only would it be unethical for

stage, judges might feel more comfortable deferring to the government's arguments when it brings a class action since it does not have the same economic incentives as private counsel.¹⁸³ In combination, these considerations could, over time, change judges' attitudes as to which class actions they perceive to be frivolous and, in turn, lead to a court system that is more attuned to producing fair settlements and dismissals.

In general, the Rule 23 Amendment most explicitly promotes the values of *qui tam* and class actions when the government decides to bring a claim. One of its primary functions is that it will, theoretically, remove most (if not all) impediments to fair settlements. Again, the DOJ has no reason to settle for nonpecuniary benefits in return for a higher payment of attorney's fees; executive branch officials are paid a salary.¹⁸⁴ After all, since the government is in the business of regulating and enforcing federal law against wrongdoers, it will likely seek a settlement with the maximum potential to accomplish these goals. This process will probably involve a calculation that is contingent on the egregiousness of the defendants' transgressions and exclude nonpecuniary benefits.¹⁸⁵ Notably, because no other party can intervene

the DOJ to lie to the court about its reasoning for not taking the case, but it really has no reason to do so. Moreover, the Supreme Court has already given judges flexibility to inquire into the merits at the certification stage in other contexts, such as when deciding whether a defendant's misrepresentation had a price impact for purposes of a securities fraud class action. *See Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1960–61 (2021) (“In assessing price impact at class certification, courts should be open to *all* probative evidence on that question, . . . even when that requires inquiry into the merits.” (internal quotation marks omitted) (citations omitted)).

¹⁸³ It is plausible that federal judges would suspect when the government is not being genuine in bringing a class action, especially given their familiarity with the DOJ in court proceedings. The DOJ has very little reason to waste its resources just to bring a claim that will harass or embarrass a defendant, unlike a private attorney who can bring a frivolous claim hoping a settlement will be reached due to the defendant being unwilling to risk the possible adverse consequences.

¹⁸⁴ John H. Beisner, Matthew Shors & Jessica Davidson Miller, *Class Action Cops: Public Servants or Private Entrepreneurs*, 57 *STAN. L. REV.* 1441, 1443 (2005) (“A government enforcer is charged with promoting the public good and typically is paid the same modest salary regardless of (1) which alleged wrongdoers he or she chooses to pursue, and (2) the size of any settlement or verdict he or she obtains.”).

¹⁸⁵ It is always possible that certain administrations may find that nonpecuniary benefits are more appropriate in a given case (or category of cases). This internal policy could be at odds with the desires of the class and, in turn, could create a different kind of principal-agent problem. To the extent this is the case, it is reasonable to believe that this situation would occur less frequently than (and would not be as risky as) the alternative where private class counsel is deciding the financial fate of the class while having conflicting monetary incentives virtually every time they take a class action involving money damages. This is supported by the fact that some government agencies, like the SEC, tend to seek monetary remedies in their cases. *See, e.g.*, Steven Peikin, Co-Dir., Div. of Enf't, SEC, *PLI White Collar Crime 2018: Prosecutors and Regulators Speak* (Oct. 3, 2018) (transcript on file with the *New York University Law Review*) (noting that the SEC “seek[s] and obtain[s]

or file a related class action claim under the Rule 23 Amendment once the DOJ takes a case,¹⁸⁶ it is impossible for the defendant to seek more favorable settlement terms through a “reverse auction.”¹⁸⁷

Moreover, as a result of bringing the case to the government, class counsel is limited to a preapproved percentage of the damages, which likely ends up being lower than the amount they would usually get.¹⁸⁸ In general, this means that class members will receive larger payments than they otherwise would have and will not have to pay any contingency fees. Overall, the combination of all these factors enables plaintiff classes to be better compensated—when compared to the results of private class counsel settlements—because the misalignment of financial incentives at the core of the principal-agent problem is removed from the equation.

Finally, some practical benefits come with the Rule 23 Amendment. Provided Congress does not stray too far from the changes outlined above, it should be fairly straightforward for federal judges to continue applying the same precedent when deciding certification questions under Rule 23(a) and Rule 23(b)—the *qui tam* adjustments do not have an impact on those provisions. Relatedly, since the *qui tam* features of the Rule 23 Amendment would, in essence, largely mimic the FCA, the latter could guide the courts when they are confronted with issues concerning how *qui tam* should function in this context.

In sum, the path has already been paved through the federalization of class actions. All that Congress needs to do is put a gatekeeper in place to protect the system’s integrity. The Rule 23 Amendment does just that. It reflects the principles of both *qui tam* and class actions in that it helps better regulate bad conduct and discourages frivolous class actions. Likewise, it gives the class action plaintiffs’ bar a chance to reconsider the strengths and weaknesses of their cases and

some form of monetary relief . . . in most of [its] actions”). And there is no reason to believe the DOJ does not (and would not) follow the same trend. *Cf.* 4-4.120 - *Civil Penalties and Civil Monetary Forfeitures*, U.S. DEP’T OF JUST., JUST. MANUAL, <https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.120> [<https://perma.cc/ZSE7-P2DS>] (Apr. 2018) (making clear that “Congress has provided by statute for a myriad of civil penalties and civil monetary forfeitures”).

¹⁸⁶ See *supra* note 168 and accompanying text.

¹⁸⁷ A “reverse auction” is “a jurisdictional competition among different teams of plaintiffs’ attorneys in different actions that involve the same underlying allegations. The first team to settle with the defendants in effect precludes the others.” Coffee, *Class Wars*, *supra* note 7, at 1370.

¹⁸⁸ See, e.g., *Morgan v. Pub. Storage*, 301 F. Supp. 3d 1237, 1257–58 (S.D. Fla. 2016) (finding that an attorney’s fee award of thirty-three percent was consistent with the average awards lawyers receive for class actions in this Circuit). The Rule 23 Amendment allows for between ten and fifteen percent.

improves the outcomes for plaintiff classes. Still, because most rule changes do not provide a panacea, the potential challenges to the Rule 23 Amendment will be explored below.

D. Arguments in Opposition to the Rule 23 Amendment

To begin, it is important to explain some of the considerations that this Note does not address—at least not fully. The first requires Congress to determine the other incentives that class counsel needs, if any, to bring claims to the government. As it stands, this Note argues that class counsel having their case reviewed at no charge, potentially earning a large fee for doing less work than they normally do, and the fact that the Rule 23 Amendment requires it would motivate class counsel to continue bringing class actions under the new regime. Not to mention, under the new regime, class counsel would still have the chance to bring its own class actions when the government decides not to take a case. Nonetheless, there could be other factors that encourage or discourage counsel from filing class actions. Hence, it is critical that Congress think more profoundly about these incentives.

Further, Congress should ponder the incentives the DOJ should have, if any, to bring class actions under the Rule 23 Amendment. While some are obvious, such as the positive benefit to society and Congress's mandate, there is reason to believe that these would be insufficient. Of course, one potential issue is that, unlike under the FCA, the government is not gaining any profit from taking on these actions, which may deter the DOJ from bringing class actions altogether. On its face, this does not seem like a very serious problem. After all, the government frequently acts on behalf of victims in other contexts without being compensated, such as through the "Fair Fund" provision of the Sarbanes-Oxley Act that provides any civil penalty the SEC receives in these cases to injured investors.¹⁸⁹ Still, it would be prudent for Congress to contemplate whether and how the DOJ could be impacted differently by the Rule 23 Amendment's requirements. Finally, two other potential concerns are (1) deciding whether the Rule 23 Amendment would strip too many cases away from the plaintiffs' class action bar, resulting in unintended consequences;¹⁹⁰

¹⁸⁹ 15 U.S.C. § 7246(a); *see also* SEC, REPORT PURSUANT TO SECTION 308(C) OF THE SARBANES OXLEY ACT OF 2002, at 1 (2003), <https://www.sec.gov/news/studies/sox308creport.pdf> [<https://perma.cc/75YX-KGY9>] ("Section 308(a) of the Sarbanes-Oxley Act ('Fair Fund' provision) . . . should increase the funds available to investors injured as a result of violations of the federal securities laws.").

¹⁹⁰ Some preliminary thoughts on this seem to suggest the answer is no. Some of the cases taken by the DOJ would not have lined class counsels' pockets anyways, since a lot of these cases would not have been brought in the first instance due to the costs outweighing the benefits. Not to mention, the plaintiffs' bar is so saturated in the class action's arena

and (2) confronting whether the government would be able to afford the implementation of the Rule 23 Amendment.¹⁹¹

A critique of the Rule 23 Amendment is that it will not reduce the principal-agent problem in class actions because the government will only take the blockbuster cases. Thus, there is no point in wasting resources on this endeavor if it is unlikely to make a substantial difference. This result is doubtful. The DOJ would be reviewing a similar amount of class action submissions as compared to FCA filings. In 2020, 672 new matters were brought by qui tam relators,¹⁹² while 334 securities class actions were filed in state and federal courts, and 427 in 2019.¹⁹³ Since these are the most frequently filed class actions,¹⁹⁴ it is feasible that—after adding in the other types of class actions that are less common—a similar number of claims would be reviewed and brought by the DOJ in terms of both FCA claims and class actions. There is also very little indication, based on FCA data, that the government is only taking the headline cases. FCA statistics show that in 2019, the government obtained judgments and settlements ranging from \$250,000 to \$1.4 billion.¹⁹⁵ Therefore, it is reasonable to conclude

(with upper-echelon firms dominating the market) that it does not appear to be a situation where the Rule 23 Amendment would have a huge impact on the amount of work that goes around. See Erichson, *supra* note 112, at 1596. Worse comes to worst, class action attorneys could use their expertise and work for the government, which surely would need to create a class actions division to handle these new cases.

¹⁹¹ Answering this question would require an extensive budgetary analysis of the DOJ. While such an analysis will be vital to determining the practicality and scope of this solution, it is beyond the scope of this Note. The reasons Congress should adopt this approach are laid out in this Note, so the notion that the benefits outweigh the costs can be implied. Two other related points are worthy of exploration. First, whether Congress needs to increase the DOJ's budget to handle the potentially increased caseload. Second, Congress's willingness to raise appropriations to fund the implementation of the Rule 23 Amendment. As it stands, this Note proffers that the history of Congress's attempts to mitigate the impact of the principal-agent problem in class actions to no avail, as well as the opportunity to more effectively regulate private sector activity that the government currently has trouble reaching, provide Congress with sufficient motivation to fund the Rule 23 Amendment.

¹⁹² George Breen, Elizabeth Harris & Erica Sibley Bahnsen, *DOJ False Claims Act Statistics 2020: Over 80% of All Recoveries Came from the Health Care Industry*, JD SUPRA (Jan. 22, 2021), <https://www.jdsupra.com/legalnews/doj-false-claims-act-statistics-2020-1898784> [<https://perma.cc/E6QW-2V5Q>].

¹⁹³ Alexander Aganin, *Securities Class Action Filing Activity Falls in 2020 Amid Global Pandemic Decline in Section 11 & M&A Cases Leads to Overall Reduction in Filing Activity, But Dollars at Risk in Litigation Remains Stable*, NAT'L L. REV. (Feb. 8, 2021), <https://www.natlawreview.com/article/securities-class-action-filing-activity-falls-2020-amid-global-pandemic-decline> [<https://perma.cc/5Q6D-W2AP>].

¹⁹⁴ See Coffee, *supra* note 93, at 1539–40.

¹⁹⁵ See Press Release, Dep't of Just., Justice Department Recovers over \$3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019> [<https://perma.cc/W978-XDKZ>].

that dissimilar results, in terms of awards sought, should not be expected. Also, if Congress is seriously concerned about this issue, it could contemplate passing legislation—at the same time as its version of the Rule 23 Amendment—that, in effect, forces the DOJ to take all types of class actions. For example, Congress could create a division that can only take class actions containing claims below a specific amount and another that handles cases above that value.¹⁹⁶

This front-page-cases argument, moreover, discounts the fact that the criteria—set out in Section III.B—that would be used by the DOJ to select claims explicitly calls for all meritorious class actions, including those which would not have otherwise been brought, to get a fair shake. Also, if the government declines to take a case, it is still likely to have an important deterrent effect on frivolous lawsuits.¹⁹⁷ These aspects of the proposal will cause the justice system to improve as a whole. And since any class action that the DOJ takes will probably produce a win for the class—assuming the government’s track record will be like the one it has in FCA cases¹⁹⁸—this could have a long-lasting effect on the federal courts. The DOJ obtaining higher payouts for the classes it represents may influence the way judges think about class settlements. In turn, this could cause judges both to veer towards rejecting nonpecuniary settlements and disapprove of the payment of undeservingly large attorney’s fees when private counsel brings claims.

A similar argument could be made that our current system works for the vast majority of class actions (i.e., is not endangered by the principal-agent problem),¹⁹⁹ so we should not invest capital into this plan. But this raises two questions. First, why would some judges keep approving settlements that benefit the defendants and class counsel disproportionately, and other judges continue commenting on the dif-

¹⁹⁶ See, e.g., 50 U.S.C. § 2401(a) (establishing the National Nuclear Security Administration within the Department of Energy); *Ctr. for Biological Diversity v. Zinke*, 313 F. Supp. 3d 976, 989 (D. Alaska 2018) (“The authority of an executive agency comes from Congress and is subject to modification by Congress.” (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000))); see also J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 *TEX. L. REV.* 1443, 1456 (2003) (indicating that Congress can “circumscribe[] the scope of agency authority, dictate[] agency structure, and establish[] procedural rules with which the agency must comply”). Note, it is likely that establishing a new division—potentially filled, at least in part, by those currently holding private class counsel positions—would be necessary to efficiently handle the DOJ’s increased civil litigation workload that is almost certainly going to occur if the Rule 23 Amendment is enacted.

¹⁹⁷ See *supra* Section III.C.

¹⁹⁸ See Schooner, *supra* note 140, at 60.

¹⁹⁹ Cf. FITZPATRICK, *supra* note 146, at 29 (arguing that private lawyers, as opposed to government lawyers, should continue being the ones who regulate companies through class actions).

facilities this problem raises?²⁰⁰ Second, why would Congress use its valuable time and resources to continue proposing and enacting legislation to prevent the principal-agent problem from tainting class actions?²⁰¹

Additionally, the Rule 23 Amendment does not prevent class counsel from using the existing system. It just adds another layer by giving the DOJ an opportunity to pass judgment on the merits of a case before class counsel is allowed to take it. The primary repercussion seems to be some additional oversight on class actions by an additional actor, which could plausibly lead to the numerous benefits outlined above. So, even if the system is fine as is (which is doubtful), it is difficult to fathom how it could get worse from letting the DOJ have first rights to a class action.

For the aforementioned reasons, the arguments against the Rule 23 Amendment involve some speculation and should not be considered detrimental barriers to enactment, particularly when one accepts the benefits of this proposal. The only question left to consider is whether Congress could constitutionally enact this legislation.

E. The Constitutionality of the Proposed Changes

This Note does not purport to conduct an exacting constitutional analysis of the Rule 23 Amendment, but the subsequent points should be kept in mind in evaluating whether the Rule 23 Amendment is constitutional. For one, it is seldom questioned that Congress has broad power under the Commerce Clause to legislate in the field of class actions,²⁰² particularly since these disputes almost always arise between citizens of multiple states. In fact, CAFA even contains a provision that requires that defendants provide the DOJ with a copy of any proposed class settlement.²⁰³ The government—as it did in *Chapman*—has recently interpreted this provision as an invitation to object to settlement proposals.²⁰⁴ For another, the Supreme Court of

²⁰⁰ See *supra* Part I.

²⁰¹ See H.R. 985, 115th Cong. (2017); *supra* Part II.

²⁰² U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power “to regulate Commerce with foreign Nations, and among the several States”); *cf.* Alexandra D. Lahav, *Are Class Actions Unconstitutional?*, 109 MICH. L. REV. 993, 994 (2011) (reviewing MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE CLASS ACTION LAWSUIT* (2009)) (“[W]ith a few exceptions, those . . . who write about class actions have paid too little attention to the big constitutional . . . issues raised by the class action rule.”).

²⁰³ 28 U.S.C. § 1715(b).

²⁰⁴ Sharyl A. Reisman, Darren Cottriel, Rebekah Byers Kcehowski, Ann T. Rossum & Brianne J. Kendall, *United States: Department of Justice Increasingly Challenges Class Settlements*, MONDAQ (Mar. 29, 2019), <https://www.mondaq.com/unitedstates/class-actions/794224/departement-of-justice-increasingly-challenges-class-settlements> [<https://perma.cc/5QJY-F4F4>].

the United States has ruled that FCA relators have Article III standing under the United States Constitution (i.e., *qui tam* suits meet the Article III “case” or “controversy” requirement).²⁰⁵ These kinds of statutes were legislated by the first few Congresses, which were populated by the Framers.²⁰⁶ Congress’s (and the Executive’s) historical use of the FCA (and *qui tam*) and the Supreme Court’s recognition of the constitutionality of *qui tam* under Article III, combined with the implicit recognition of Rule 23’s constitutionality,²⁰⁷ suggest that the Rule 23 Amendment could withstand constitutional challenges.

At first blush, the Rule 23 Amendment might appear constitutional, but in reality, it differs from the FCA in one potentially important respect. In the latter, the government has a direct stake in the case (because it is being defrauded), while in the former, the government’s interest is arguably more attenuated. Even though class actions could be considered to serve a significant government interest because they help regulate bad conduct on a national scale, it is not clear that this would be enough. In spite of that, it is also not evident that the Executive must be harmed in order for a *qui tam* action to be constitutional. This conclusion is bolstered by the fact that *qui tam* was authorized against various executive branch officials by members of the very first Congress.²⁰⁸ This aligns with a foundational tenet of *qui tam*: an “informer d[oes] not need to allege individualized injury ‘because every Offence, for which such Action is brought, is supposed to be a general Grievance to every Body [sic].’”²⁰⁹ One plausible interpretation of this history is that Congress believed that *qui tam*

²⁰⁵ See, e.g., *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 & n.8 (2000) (concluding that an FCA relator has Article III standing but leaving open the question of whether *qui tam* suits violate the Appointments Clause). The Court noted that “[*q*]ui tam actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution.” *Id.* at 776. It also acknowledged that, during the Fourteenth Century, British Parliament enacted statutes that established two kinds of *qui tam* actions: “those that allowed injured parties to sue in vindication of their own interests (as well as the Crown’s), . . . and . . . those that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves.” *Id.* at 775 (citations omitted).

²⁰⁶ DOYLE, *supra* note 14, at 40–41.

²⁰⁷ See *supra* note 202 and accompanying text.

²⁰⁸ Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1239 (2018) (“It was well established at the time of the framing that a legislature could authorize judicial monitoring of executive conduct at the behest of private informers who lacked any individual injury.”).

²⁰⁹ *Id.* at 1238 (citing 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 267 (London, Eliz. Nutt & R. Gosling 1721)).

could be used against the executive branch to prevent harm against society generally.

So, while most qui tam statutes recognized by the Supreme Court follow the pattern of an informant being provided with a right to sue on behalf of the government,²¹⁰ who, besides the Court, is to say that lead plaintiffs should not just be treated like informants? Further, to the extent that qui tam does not mandate harm to the government but, rather, focuses on some cognizable government interest, then, at least conceptually, the Rule 23 Amendment can and should be treated as akin to other qui tam laws.

Indeed, there is a strong federal interest in having private attorneys general in the field of class actions because, for example, although the SEC attempts to regulate illegal conduct in the financial markets, there is no way it could do it on its own.²¹¹ Class actions were instituted as a device to enable regulation of private entities by those other than the government.²¹² Moreover, some commentators have argued that the private market is failing because of the principal-agent problem and want to empower the government to take over class actions entirely, at least in terms of securities actions.²¹³ The consensus among the academic community seems to suggest that the government could either take over class actions explicitly or delegate power to federal agencies that will provide oversight²¹⁴—in a similar manner to the DOJ under the Rule 23 Amendment.

Based on Congress's expansive power to legislate in the areas of class actions and qui tam, the Rule 23 Amendment's conceptual similarity to other qui tam statutes, and the ample academic literature indicating the plausibility of delegating authority over class actions to the government, it is unlikely that sufficient constitutional limitations exist to stop the government from representing the interests of all consenting plaintiffs in class actions.

²¹⁰ See, e.g., *id.* at 1301 n.423 (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943)).

²¹¹ E.g., *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (noting that the “Court has long recognized that meritorious private [class] actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought . . . by . . . the [SEC]”).

²¹² DOYLE, *supra* note 14, at 1 (“[Q]ui tam has been authorized by legislative bodies when they consider the enforcement of some law beyond the unaided capacity or interest of authorized law enforcement officials.”).

²¹³ See, e.g., Rose, *supra* note 146, at 2176 (arguing that the SEC should have sole power to prosecute securities frauds, including class actions).

²¹⁴ See, e.g., *supra* note 146 and accompanying text.

CONCLUSION

When the financial interests of attorneys and plaintiffs do not align, litigation that tends to be lawyer-driven, such as class actions, presents a huge principal-agent problem. This issue can be found in the form of nonpecuniary settlements where a lawyer gets an exceptional attorney's fee, and the class members they represent get a *de minimis* benefit (e.g., a coupon). It also presents itself when attorneys decide not to take a class action at all because they either believe doing so would not be cost-effective or are planning on accepting a more profitable case. No matter when it occurs, the individuals who tend to suffer are the plaintiffs who have been injured and are now left with less than they deserve. Congress has done much to alleviate these concerns in the past, but it never seems to be quite enough.

The Rule 23 Amendment proposed in this Note draws on *qui tam* litigation to provide a new way of thinking about resolving the principal-agent problem in class actions. By giving the Executive an opportunity to act as a gatekeeper in these suits, while still leaving the option open for class counsel to bring private claims in certain circumstances, this proposal enables Congress to implement a regime where the principal-agent problem has a much less significant impact on the class action system. Further research is necessary to explore the practicality and constitutionality of this proposal. But that is why this Note offers a first draft left to be expanded upon by Congress or the legal academy. In time, however, it has the potential to provide the solution to the principal-agent problem that both Congress and scholars have been pursuing for far too long.