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# The Cost of Suing Business

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## THE COST OF SUING BUSINESS

*Joanna C. Schwartz\**

### INTRODUCTION

To listen to the U.S. Chamber of Commerce, one would think that class actions are the most significant scourge on business ever conjured up by man. In brief after brief to the U.S. Supreme Court, the Chamber of Commerce and other business amici tell the same story: Meritless class actions, filed by rapacious plaintiffs' attorneys for the ostensible benefit of consumers, employees, and shareholders, are so devastatingly expensive to defend against, and threaten such financial devastation if plaintiffs prevail, that corporate defendants cannot help but accept "blackmail settlements" that harm both businesses' bottom lines and society at large.<sup>1</sup>

The Supreme Court appears to have premised several recent civil procedure decisions on this depiction of the costs and burdens of class action litigation. The Court invoked this narrative in *Bell Atlantic Corp. v. Twombly*<sup>2</sup> as justification for the plausibility pleading standard.<sup>3</sup> The Court also invoked this narrative when, in *AT&T Mobility*

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\* Professor of Law, UCLA School of Law. Many thanks to Maureen Carroll, Joseph Doherty, Brian Fitzpatrick, Alexandra Lahav, David Marcus, Eric Orts, Margo Schlanger, Daniel Schwartz, Charles Silver, and Stephen Yeazell for their thoughtful comments on earlier drafts. Thanks also to Thomas Cochrane, Braden Holly, Tommy Huynh, Elyse Meyers, and the expert research staff at UCLA's Hugh & Hazel Darling Law Library for excellent research assistance. Thanks to the editors of the *DePaul Law Review* for their editorial assistance. Finally, thanks to Stephan Landsman for inviting me to participate in the 21st Annual Clifford Symposium on Tort Law and Social Policy: *The Supreme Court, Business and Civil Justice* at DePaul University College of Law, and thanks to Robert Clifford for establishing and supporting such a wonderful event.

1. Although this Article focuses on arguments against class actions, this same rhetoric has been used to critique all types of lawsuits brought by individuals against corporations. See, e.g., Theodore Eisenberg et al., *Litigation as a Measure of Well-Being*, 62 DEPAUL L. REV. 247 (2013) ("[P]ortraying much litigation as pathological is a key component of business lobbying groups' social construction of the legal system. These groups commission and use questionable social science analysis and misleadingly portray highly publicized cases, such as the McDonald's coffee-spill case. They do so to help characterize civil litigation as dominated by lottery-seeking plaintiffs, greedy plaintiffs' lawyers, and state civil justice systems that are overly hostile to business." (footnotes omitted)).

2. 550 U.S. 544 (2007).

3. See *infra* notes 23–26 and accompanying text (discussing the Supreme Court's plausibility requirement in pleading).

*LLC v. Concepcion*,<sup>4</sup> it allowed class action waivers in consumer arbitration agreements.<sup>5</sup> In other decisions—including *Wal-Mart Stores, Inc. v. Dukes*<sup>6</sup> and *Comcast Corp. v. Behrend*,<sup>7</sup> two recent opinions interpreting class certification requirements—the Court did not explicitly invoke this narrative but adopted, in significant measure, the positions advocated by the Chamber of Commerce and other business amici, leaving one with the impression that the Justices in the majority found the amici’s depictions of the dangers of class actions to be compelling.<sup>8</sup>

These arguments do not appear in all class action cases. Instead, they seem to be reserved for what Professor Marc Galanter refers to as “uphill” cases: cases brought by individuals—employees, consumers, and shareholders—against corporations.<sup>9</sup> When the Supreme Court heard *American Express Co. v. Italian Colors Restaurant*,<sup>10</sup> in which a class of small business owners sued American Express for the fees it charged, the Chamber of Commerce filed an amicus brief in support of American Express that raised none of these arguments.<sup>11</sup> The Court’s decision was similarly bereft of any criticism of the merits of the case or the motives of class counsel, and it did not mention the danger of a blackmail settlement. These criticisms of class action litigation appear specifically targeted to class actions brought by groups of individuals against corporations.

In this Article, I examine the empirical support for five interrelated claims about the deleterious effects of uphill class actions: (1) class actions force blackmail settlements; (2) class actions impose catastrophic costs on corporate defendants; (3) class actions are usually meritless; (4) plaintiffs’ class action attorneys are usually unscrupulous; and (5) the costs of class actions harm society at large. There is very little reliable empirical information available about any aspect of modern civil litigation, including class actions.<sup>12</sup> But little more than

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4. 563 U.S. 333 (2011).

5. See *infra* notes 33–38 and accompanying text (discussing the Court’s restrictions on class arbitration). **R**

6. 131 S. Ct. 2541 (2011).

7. 133 S. Ct. 1426 (2013).

8. See also *infra* notes 27–32 and accompanying text (discussing the Court’s restrictions on class action certification). **R**

9. Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want To Know About Contract Litigation*, 2001 WIS. L. REV. 577, 593.

10. 133 S. Ct. 2304 (2013).

11. See Brief of the U.S. Chamber of Commerce et al. as Amici Curiae in Support of Petitioners, *Italian Colors Rest.*, 133 S. Ct. 2304 (No. 12-133), 2012 WL 3766956.

12. In 1993, Marc Galanter observed that “[t]he most basic data about our civil justice system are not collected systematically and cumulatively.” Marc Galanter, *News from Nowhere: The*

anecdote supports these claims, and at least some available evidence undermines these five assertions about the costs and burdens of class action suits.<sup>13</sup> I describe assertions about the costs and burdens of class actions in Part II and then consider each of these claims in turn.<sup>14</sup>

In Part III, I describe evidence suggesting that corporate defendants do not systematically accept blackmail settlements in class actions.<sup>15</sup> One would expect that if defendants were accepting blackmail settlements, they would do so immediately after certification to avoid the costs of discovery. Instead, it appears that defendants generally do not settle soon after certification and often proceed through discovery. Moreover, settlement and trial rates in class actions are comparable to rates in non-class action cases, suggesting that class actions, on the whole, are no more coercive to defendants than any other kind of litigation.

In Part IV, I contend that available evidence undermines assertions that class actions impose debilitating costs on corporate defendants.<sup>16</sup> Although businesses spend a great deal of money on class actions, they appear to spend even more money suing each other. Businesses sue other businesses far more often than classes of plaintiffs sue businesses, and available evidence indicates that non-class, intra-business disputes may be as expensive or, perhaps, more expensive to defend against. One may believe that all litigation is too expensive. But if class actions are no more financially devastating to businesses than non-class, intra-business disputes, there is no basis to single out class actions as particularly deserving of limitation.

In Part V, I consider assertions that class action claims are regularly meritless and plaintiffs' attorneys regularly place their own interests above those of their clients.<sup>17</sup> Although there are examples of these types of claims and attorneys, there is no reason to believe that class

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*Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 99 (1993). Twenty years later, Arthur Miller had the same complaint. See Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 361–63 (2013) (describing the unavailability of information about the frequency with which meritless lawsuits are filed, the frequency of abusive litigation tactics, the frequency of extortionate settlements, and the “economic aspects and behavioral implications of litigation”).

13. This Article does not present original research—instead, it employs what Marc Galanter has called a “*bricolage* strategy” in that it tries to “capture, refine, and juxtapose scattered data already in the public domain, extracting a focused account from bodies of information gathered for other purposes.” Galanter, *supra* note 9, at 577.

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Part IV.

17. See *infra* Part V.

actions are more often frivolous than other types of cases or that plaintiffs' attorneys who bring class actions are any more unscrupulous than other members of the bar. The very businesses that complain about meritless class actions sometimes bring questionable claims against their competitors.<sup>18</sup> And just as plaintiffs' class action attorneys have been criticized for focusing overmuch on lining their own pockets, attorneys who represent corporations have been criticized for valuing their fees above their clients' best interests.

In Part VI, I contend that business amici and the U.S. Supreme Court underestimate the costs of restricting plaintiffs' access to the courts.<sup>19</sup> Closing the courthouse doors limits plaintiffs' abilities to seek redress, prevents public disclosure of information about defendants' misconduct, and even inhibits defendants' abilities to learn about their own behavior from the lawsuits brought against them. Business amici and the Court should, but do not, take account of the individual and societal harms associated with limiting redress for plaintiffs.

For each of these reasons, prevailing depictions of the costs and burdens of class actions appear to be both unfounded and incomplete. I do not, however, mean to suggest that the current state of class action litigation could not be improved. The asymmetries of class actions give both defendants and plaintiffs much to complain about.<sup>20</sup> I also do not offer my own calculations of the precise costs of class actions, the relative costs of class actions and non-class, intra-business disputes, or the value to plaintiffs and society at large of suits that could be barred by recent procedural decisions. These calculations would be impossible because available data on these and many other aspects of modern civil litigation are woefully inadequate.

Instead, I intend to caution the Court against relying on anecdote, exaggeration, and fabrication when interpreting the Federal Rules of Civil Procedure. The Court should not heed advocates' and amici's assertions about the effects of class actions and other procedural features when no empirical evidence is available to support those assertions. Instead, the Court should defer the assessment of these claims to other entities—including Congress and the Judicial Conference—that are better situated to examine the effects of these rules on litigants and adjust procedural rules accordingly. In the alternative, the Court should place more faith in nondispositive procedural tools—

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18. See *infra* note 98 and accompanying text (describing suits by Intel Corp.).

19. See *infra* Part VI.

20. See *infra* notes 90–92, for some of these complaints.

what I have called “pathway” rules<sup>21</sup>—to address concerns about excessive cost, delay, and unjust outcomes without unduly prejudicing plaintiffs. The Court has, in fact, followed both of these approaches in recent decisions.<sup>22</sup> Perhaps closer scrutiny of available evidence regarding the costs of suing business—and fuller acknowledgement of the limits of our knowledge about these costs—would encourage similar decisions in years to come.

## II. THE CASES

The U.S. Supreme Court has justified restrictions on pleading, class action certification, and class arbitrations as a means of protecting business defendants from the costs and burdens of being sued. In both the Court’s decisions and in the briefs submitted to the Court by the Chamber of Commerce and other interested parties, class actions are repeatedly characterized as frivolous, filed by plaintiffs’ attorneys seeking to line their own pockets rather than help their clients, and so devastatingly expensive to defend against that defendants are forced to accept blackmail settlements that harm businesses’ bottom lines and society at large.

### A. Pleading

The Supreme Court’s requirement that plaintiffs plead “plausible” claims before being allowed to proceed to discovery, first announced by the Court in *Twombly*, was prompted by concerns about the costs and burdens of uphill class actions. In their joint amicus brief to the Court, the Chamber of Commerce and other businesses and business associations argued that pleadings in “lawyer-driven class actions, like this case” should be carefully scrutinized “[b]ecause of the risk that massive class actions will be filed solely to pressure defendants to settle rather than endure enormous discovery costs, even though the claims have no merit.”<sup>23</sup>

It is no accident that the pleading question presented here arises in the context of a putative class action brought by a law firm that is part of the organized plaintiffs’ class-action bar. . . .

The impetus for cases like this one is not actual suspicion of wrongdoing, and certainly not the expectation that an actual trial on

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21. See Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652 (2013), for a description of pathway rules and the differences between pathway and gateway rules as I have defined them.

22. See *infra* Part VII for a discussion of these alternatives and recent examples from the Court.

23. Brief of the U.S. Chamber of Commerce et al. as Amici Curiae in Support of Petitioners at 7, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 901172.

the merits will yield success, but the hope that the thinnest of allegations, with the greatest of legal consequences, will survive motions to dismiss and begin to put pressure on defendants to settle complex litigation. Judge Friendly – borrowing a term used earlier by antitrust scholar Milton Handler – termed this the “blackmail settlement.”<sup>24</sup>

Briefs filed by the American Bar Association and the United States echoed these arguments,<sup>25</sup> and the Court then adopted these arguments in its opinion. Writing for the majority, Justice Souter justified the need for plausibility pleading on the grounds that antitrust discovery is expensive and “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment].”<sup>26</sup>

### B. Class Action Certification

The Chamber of Commerce and others have made similar arguments in favor of stricter class action certification requirements. In its amicus brief in *Wal-Mart*, the Chamber of Commerce argued that allowing certification of the class of current and former employees would

dramatically expand the exposure of American businesses to potentially bankrupting class actions . . . . Such a result would erase decades of class-action precedents protecting defendants from unfair trials – and would bury American businesses in abusive class-action lawsuits to the detriment of consumers, the U.S. economy and the judicial system itself.<sup>27</sup>

Similar arguments were made in amicus briefs filed by Intel Corp., the Association of Global Automakers Inc., and DRI—The Voice of the Defense Bar.<sup>28</sup>

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24. *Id.* at 21–22 (footnote omitted) (citations omitted) (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

25. Brief of the Am. Bar Ass’n as Amicus Curiae in Support of Neither Petitioners nor Respondents, *Twombly*, 550 U.S. 544, 2006 WL 2503551; Brief for the U.S. as Amicus Curiae in Support of the Petitioners, *Twombly*, 550 U.S. 544, 2006 WL 2482696.

26. *Twombly*, 550 U.S. at 558–59.

27. Brief of the U.S. Chamber of Commerce as Amicus Curiae in Support of Petitioner at 4–5, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277), 2011 WL 288900.

28. See Brief of the Ass’n of Glob. Automakers, Inc. as Amicus Curiae in Support of Petitioner at 13, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277), 2011 WL 288899 (“Broadening the scope of Rule 23(b)(2) to permit certification of monetary claims that also seek injunctive relief could have disastrous consequences for the automobile industry by unduly magnifying the risks attending substantive claims that present individualized inquiries or have questionable merit.”); Brief of DRI—The Voice of the Def. Bar as Amicus Curiae in Support of Petitioner at 20, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277), 2011 WL 288903 (“The inevitable result [of the U.S. Court of Appeals for the Ninth Circuit’s class certification standard] is to intensify the pressure that a class certification order puts on a defendant to settle, making the class action procedure even

The Chamber of Commerce and other business amici raised these same concerns again in their amicus brief in *Comcast*. Although the Court decided the case on other grounds, it granted certiorari in *Comcast* on the question of whether *Daubert*'s requirements for expert testimony applied to the class certification stage.<sup>29</sup> In their joint amicus brief, the Chamber of Commerce and other business associations predicted that not requiring experts' testimony to satisfy *Daubert* at the certification stage would "lower[ ] the bar for class certification" and thereby "raise the cost of doing business in the wide variety of industries that find themselves perennial targets of the plaintiffs' bar."<sup>30</sup> The brief emphasized that these increased costs arise from largely meritless cases that force costly settlements: "Because of litigation costs and damages exposure, a defendant will only rarely choose to litigate a class action past the threshold stage, even if the underlying claims are meritless. Accordingly, billions of dollars are spent settling class actions every year."<sup>31</sup> The amici argued that "[t]he costs of abusive class actions" not only impact businesses but also "impose a drag on the American economy and are ultimately passed on to consumers, employees, and shareholders."<sup>32</sup>

Although the Supreme Court's majority opinions in *Wal-Mart* and *Comcast* do not explicitly adopt the business amici's reasoning on these points, both opinions adopt the restrictions they encouraged.

### C. Class Arbitration

The Chamber of Commerce and other business amici describe the dangers of aggregation in arbitration in similar terms. In its brief in support of AT&T in *Concepcion*, the Chamber of Commerce argued that businesses must be able to restrict aggregation of claims because

[w]hether the forum is arbitral or judicial, once a class is certified an action that individually might be worth only a few hundred dollars or less can instantly metastasize into a potentially catastrophic judg-

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more attractive for plaintiffs pursuing frivolous claims."); Brief of Intel Corp. as Amicus Curiae in Support of Petitioner at 5, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277), 2011 WL 288897 ("Even a properly certified class action imposes significant—and potentially catastrophic—costs on defendants. Resting thousands or even millions of claims upon a single liability determination transforms ordinary lawsuits into true bet-the-company litigation.").

29. See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1435 (2013) (Ginsburg, J., dissenting) (describing the differences between the question posed by *Comcast* for review and the question certified by the Court for review).

30. Brief for the U.S. Chamber of Commerce et al. as Amici Curiae Supporting Petitioners at 4, *Comcast*, 133 S. Ct. 1426 (No. 11-864), 2012 WL 3643755.

31. *Id.*

32. *Id.*



ment of hundreds of millions or even billions of dollars of damages. Defendants will almost inevitably settle in those circumstances.<sup>33</sup>

The Chamber of Commerce contended that defendants would be forced to settle meritless cases.

Basic mathematics and risk aversion make it so: Attorneys' fees aside, a risk-averse defendant that thinks it has a 90 percent chance of defeating a \$100 million class action is still better off settling for \$9.9 million. The result is an *in terrorem* effect that compels defendants to settle claims that have no merit.<sup>34</sup>

According to the Chamber of Commerce, plaintiffs and their attorneys use these dynamics to their best advantage: "So long as defendants are likely to settle litigation or arbitration whenever a class is certified, plaintiffs' lawyers have an incentive to seek such certification, even if their clients deserve no compensation."<sup>35</sup>

Once again, the Supreme Court accepted as true the concerns raised by the Chamber of Commerce about the dangers of aggregation in arbitration. Writing for the majority, Justice Scalia observed that class arbitration "greatly increases risks to defendants," including the risk that "errors will go uncorrected."<sup>36</sup> Such a risk becomes "unacceptable," according to the majority, when "damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once . . . . [D]efendants will be pressured into settling questionable claims. Other courts have noted the risk of 'in terrorem' settlements that class actions entail, and class arbitration would be no different."<sup>37</sup>

The Court's majority opinions in each of these cases appear to conclude that strengthening what I have called procedural "gateways"<sup>38</sup>—in the form of rigorous pleading and class certification requirements as well as enforcement of arbitration agreements that prohibit aggregate adjudication—is necessary to protect businesses from the financial risks and burdens of aggregation.

### III. THE FREQUENCY OF BLACKMAIL SETTLEMENTS

The Supreme Court has made it more difficult for plaintiffs to get past litigation gateways and has upheld class action waivers in arbitration agreements in partial reliance on the notion that the costs of dis-

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33. Brief of the U.S. Chamber of Commerce as Amicus Curiae in Support of Petitioner at 7, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 3167313.

34. *Id.* at 8.

35. *Id.* at 9.

36. *Concepcion*, 563 U.S. at 350.

37. *Id.* (citation omitted).

38. See Schwartz, *supra* note 21.

covery and threatened costs of any judgment force corporate defendants to settle meritless class actions. Commentators have despaired of blackmail settlements since the Rule 23(b)(3) class was created.<sup>39</sup> Yet, despite its pervasiveness, there appears to be no hard evidence to support the claim.<sup>40</sup> In Parts IV and V, I consider the evidentiary support for assertions that class actions are especially costly and especially likely to involve meritless claims.<sup>41</sup> In this Part, I consider the extent to which class action defendants' settlement behavior suggests that they are being forced to settle meritless claims to avoid the costs of litigation and judgment. The limited evidence available in this area calls into question the blackmail settlement hypothesis in three respects.

First, courts regularly dismiss class action claims they find to be meritless. The Federal Judicial Center's (FJC) 1996 study of class action litigation in four federal districts found that "two out of three cases in each of the four districts had rulings on either a motion to dismiss, a motion for summary judgment, or a sua sponte dismissal order[.]" "three of ten cases in each district were terminated as the direct result of a ruling on a motion to dismiss or for summary judgment," and approximately one-half of the cases "included rulings dismissing all or part of the complaint."<sup>42</sup> A more recent FJC study of 231 diversity class actions filed in federal court reached similar findings: district courts dismissed 29% of cases not remanded to state court.<sup>43</sup> Another recent study of securities class actions also reached similar findings.<sup>44</sup> In other words, in close to one-third of class actions

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39. See David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 599 n.50 (2013).

40. Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1379 (2000) ("[T]he risks of . . . blackmail settlements have been overstated."); Warren F. Schwartz, *Long-Shot Class Actions: Toward a Normative Theory of Legal Uncertainty*, 8 LEGAL THEORY 297, 298 (2002) (arguing that the threat of blackmail settlements is "unsupported on any basis currently articulated in judicial opinions or legal scholarship"); Charles Silver, "We're Scared to Death": Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357, 1357 (2003) (observing that "the charge that class actions subject defendants to excessive settlement pressure" relies on "factual assertions that are questionable or unproven").

41. See *infra* Parts IV and V.

42. THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 8, 33 (1996).

43. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS 6 tbl.6 (2008).

44. Stephen J. Choi et al., *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35, 48 tbl.1 (2009) (reporting that 30.6% of securities class actions studied were dismissed pretrial after the passage of the Private Securities Litigation Reform Act

filed, “judicial rulings on motions terminated the litigation without a settlement, coerced or otherwise.”<sup>45</sup>

Second, when courts grant class certification and deny motions to dismiss in class actions, defendants do not immediately settle to avoid discovery and trial (as one would expect if fears of blackmail settlements were well founded). In their amicus brief in *Comcast*, the Chamber of Commerce and other business associations claimed that “[b]ecause of litigation costs and damages exposure, a defendant will only rarely choose to litigate a class action past the threshold stage, even if the underlying claims are meritless.”<sup>46</sup> Yet, the FJC’s 1996 study found that the majority of certified class actions proceeded through discovery to summary judgment.<sup>47</sup> And, when cases did settle, the FJC found that the timing of those settlements “did not support any inference of a relationship between certification and settlement.”<sup>48</sup> The FJC researchers found no evidence that “the certification decision itself, as opposed to the merits of the underlying claims, coerced settlements with any frequency.”<sup>49</sup>

Third, despite the belief that class actions impose unique burdens on defendants that cause them to settle, studies have found that both class and non-class action cases usually settle.<sup>50</sup> And class actions, like non-class action cases, very rarely go to trial.<sup>51</sup> Settlement and trial rates for class actions and non-class action cases are not precisely the

(PSLRA) and that 21.4% of class actions filed in the pre-PSLRA period were dismissed pretrial).

45. WILLGING ET AL., *supra* note 42, at 34.

46. Brief for the U.S. Chamber of Commerce et al., *supra* note 30, at 4.

47. WILLGING ET AL., *supra* note 42, at 33.

48. *Id.* at 62.

49. *Id.* at 61.

50. See STEVEN K. SMITH ET AL., U.S. DEP’T OF JUSTICE, TORT CASES IN LARGE COUNTIES: CIVIL JUSTICE SURVEY OF STATE COURTS, 1992, at 2 (1995) (finding that 73% of state tort cases settle); Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111 (2009) (finding that 66.9% of all civil claims settle); Silver, *supra* note 40, at 1399 (observing that the FJC study found that certified class actions in four federal districts settled an average of 73% of the time); *id.* at 1399 n.178 (citing other studies that found 78% settlement rates for class actions).

51. Compare WILLGING ET AL., *supra* note 42, at 179 tbl.39 (reporting that the class action trial rate was 8% in one district, 6% in another district, and 0% in two districts), and James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 930–31 (1996) (finding that 3% of securities class actions studied went to trial), and Choi et al., *supra* note 44, at 48 tbl.1 (finding that 3.1% of class actions filed between 1996–2000, before the PSLRA went into effect, went to trial—with all resulting in defense verdicts—and finding no class action trials post-PSLRA), with Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004) (finding that 1.8% of federal civil cases went to trial in 2002), and Silver, *supra* note 40, at 1401–02 (citing studies that found similar trial rates in non-class cases).

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same<sup>52</sup> and appear to be shifting over time.<sup>53</sup> But as Professor Charles Silver concluded after looking at this evidence: “When compared to conventional lawsuits, class actions do not seem exceptionally coercive.”<sup>54</sup>

The Chamber of Commerce and fellow business amici have repeatedly claimed that businesses are regularly forced to accept blackmail settlements in meritless cases to avoid the debilitating costs of discovery and the possibility of gargantuan judgments. Yet available evidence indicates that courts regularly dismiss class actions they find to be without merit, most class actions that are certified do not settle before discovery, the timing of settlements does not suggest that they are coerced by certification decisions, and class actions are settled and tried with approximately the same frequency as cases that are not class actions. This evidence undermines assumptions regarding blackmail settlements underlying the Supreme Court’s recent decisions to make pleading and class certification more onerous and to allow businesses to restrict aggregation through their arbitration agreements.

#### IV. THE COSTS OF CLASS ACTIONS

In briefs advocating for procedural restrictions on class actions, business amici assert that class actions impose massive, catastrophic, and potentially bankrupting financial burdens on corporate defendants.<sup>55</sup> But we do not actually know how much businesses spend on class action litigation. Professor Brian Fitzpatrick found that in 2006 and 2007, businesses paid plaintiffs and their attorneys a total of \$33 billion to resolve class actions pending in federal court.<sup>56</sup> This figure does not include the amounts paid to plaintiffs and their attorneys in state court cases or the fees businesses paid their own counsel, so the

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52. See DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 126 n.52 (2000), for a survey of available evidence about class action and non-class action settlement and trial rates and the difficulties of comparing existing evidence about the two. Different types of class actions also have different trial rates. Although securities class actions appear to go to trial 3% of the time, a FJC study of 231 class actions alleging violations of state law found that none of the cases went to trial. LEE & WILLGING, *supra* note 43, at 6; *see also supra* note 51, and accompanying text.

53. See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1955 (2009); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1256 fig.1, 1257 fig.2, 1257–59 (2005); and Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 633, for evidence of declining trial rates.

54. Silver, *supra* note 40, at 1402.

55. *See supra* notes 23, 27, 33, and accompanying text.

56. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 826, 845 (2010).

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total spent by businesses in class action litigation during those two years was likely significantly higher.

How “massive” and “catastrophic” to corporate America is the \$33 billion spent in federal court class actions over a two-year period? It certainly sounds like a lot of money. Based on these figures, Fitzpatrick estimates that “federal class action settlements involve the same amount of wealth as 10 percent of the entire U.S. tort system.”<sup>57</sup> On the other hand, the federal class action settlement amounts reported by Fitzpatrick amount to less than .2% of the \$20.5 trillion in revenues earned by Fortune 500 companies during the same period.<sup>58</sup> Viewed from this perspective, class action costs seem more modest.

In this Part, I offer another metric by which to assess claims that class action litigation costs are “massive,” “catastrophic,” and “potentially bankrupting”—the other litigation costs borne by corporations. Available evidence offers three related reasons to believe that corporations likely spend as much—or more—money suing each other than they do on class actions: (1) businesses sue each other far more often than classes of plaintiffs sue businesses; (2) businesses appear to spend more money litigating non-class, intra-business legal disputes than they do litigating class actions; and (3) the largest settlements in class actions, although enormous, are no larger than the largest settlements and judgments in intra-business disputes. If non-class, intra-business suits cost corporations as much or more than class actions, it undermines claims by business amici about class actions’ devastating financial effects.

A. *Businesses Sue Each Other Far More Often than Classes of Plaintiffs Sue Businesses*

Although class actions pervade popular commentary about the costs of business litigation, class actions appear to represent a relatively small portion of the lawsuits in which businesses are involved. When Norton Rose Fulbright L.L.P., formerly Fulbright & Jaworski L.L.P., surveyed its clients, it found that although class actions were among businesses’ “top five [litigation] concerns,” class actions were not actually among the businesses’ “five most active areas of litiga-

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57. *Id.* at 830.

58. See *Wal-Mart Sitting Pretty on top of Fortune 500 List*, MARKETINGCHARTS (Apr. 25, 2008), <http://www.marketingcharts.com/traditional/wal-mart-sitting-pretty-on-top-of-fortune-500-list-4364/> (reporting revenues of \$10.6 trillion for the Fortune 500 in 2007, an increase of 7.1% over the 2006 fiscal year).

tion.”<sup>59</sup> Indeed, only 16% of the businesses in the survey had been served with a class action in the prior year.<sup>60</sup>

State and federal dockets tell a similar story. Class actions made up less than .5% of case filings in the busiest California state courts between 2000–2005.<sup>61</sup> Class actions also made up less than 1% of the federal docket in 2000.<sup>62</sup> Although federal class action filings increased by 72% between 2001–2007, following passage of the Class Action Fairness Act of 2005, the absolute numbers of federal filings remained relatively low.<sup>63</sup>

Intra-business litigation makes up a far more significant portion of state and federal dockets. The Bureau of Justice Statistics surveyed state court contract litigation in seventy-five of the largest counties in the country in 1992 and found that 40% of those cases involved intra-business disputes.<sup>64</sup> In her study of federal court litigation, Professor Gillian Hadfield found that in 2000, 22.3% of federal cases involved an organization suing another organization.<sup>65</sup> So, in any given year, businesses likely have many more pending lawsuits brought by (or against) other businesses than they have class actions.

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59. FULBRIGHT & JAWORSKI L.L.P., SECOND ANNUAL LITIGATION TRENDS SURVEY FINDINGS 6 (2005), <http://www.fulbright.com/mediaroom/files/fj0536-us-v13.pdf>.

60. *Id.* at 25. This is an average; some industries are more likely to be served with a class action than others. Fulbright & Jaworski reported that in 2005, 30% of manufacturing companies surveyed had one or more class actions filed against them, whereas 17% of the technology and communications companies surveyed had one or more class actions filed against them. *Id.* at 26. The likelihood that a company will be named a defendant in a class action also depends on the value of the company. Fulbright & Jaworski found that “[o]nly 5% of smaller companies were targeted with class actions in the past year, [while] nearly 40% of companies with revenues of \$1 billion or more were served.” *Id.* at 27.

61. ADMIN. OFFICE OF THE COURTS, FINDINGS OF THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION, 2000–2006, at 4 (Mar. 2009), <http://www.courts.ca.gov/documents/class-action-lit-study.pdf>.

62. Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN L. REV. 1275, 1300 (2005) (“Class actions . . . are rare in federal court: In 2000, among the nonprisoner, non-student loan cases, they account for fewer than one percent of all cases.”).

63. See LEE & WILLGING, *supra* note 43, at 3. In their study of eighty-eight district courts, Lee and Willging found that 2,354 class actions were filed in or removed to federal courts from January through June 2007. *Id.*

64. Galanter, *supra* note 9, at 591 tbl.1 (citing CAROL J. DEFRANCES ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 4 tbl.4 (1995)).

65. Hadfield, *supra* note 62, at 1298 tbl.2.

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B. *Businesses Appear To Spend More Money Litigating Intra-Business Legal Disputes than They do Litigating Class Actions*

Just because there are more intra-business disputes than class actions does not mean that class actions cost businesses less. Indeed, one might expect—based on arguments by the Chamber of Commerce and other business amici—that the costs of defending against class actions dwarf the expenses of all other cases in which businesses are involved. Available evidence suggests, however, that this is not the case.

Businesses—particularly large businesses—appear to spend a great deal on litigation. In one survey, Fortune 500 companies reported that they spend an astonishing one-third of their profits on litigation.<sup>66</sup> In another study, companies in the Fortune 200 reported spending an average of \$115 million in legal fees and costs in 2008.<sup>67</sup> Brian Fitzpatrick offered some sensible reasons why litigation might be so costly for large corporations.

First, corporations are bigger today than they were in the past; they span nations rather than just cities or states. Thus it is more expensive for corporate defendants to find and gather from their operations all information relevant to a piece of litigation. . . .

Second, changes in technology have permitted more people to create, distribute, and store more documents than ever before. . . . These technological advances have significantly increased the discoverable material defendants possess.<sup>68</sup>

Fitzpatrick reasoned that responding to discovery requests could cost millions of dollars because of these changes in the structure and function of corporations. It could cost millions to collect documents, and “[i]t is even more expensive to review the documents once they are collected.”<sup>69</sup>

There is, however, no reason to conclude that class action litigation is more expensive than other types of cases that businesses regularly defend against. There are many examples of exceedingly high litigation costs accrued during litigation between corporations. For example, the patent suit between Apple and Samsung has cost over one

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66. John B. Henry, *Fortune 500: The Total Cost of Litigation Estimated at One-Third Profits*, METRO. CORP. COUNS.: ELAWFORUM, Feb. 2008, at 28, 28, <http://www.metrocorpocounsel.com/pdf/2008/February/28.pdf>.

67. See LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES app. 1, at 7 fig.3 (2010), [http://www.uscourts.gov/file/3448/downloadtoken=6Lz\\_MdxQ](http://www.uscourts.gov/file/3448/downloadtoken=6Lz_MdxQ).

68. Brian T. Fitzpatrick, Twombly and Iqbal Reconsidered, 87 NOTRE DAME L. REV. 1621, 1638–39 (2012) (footnote omitted).

69. *Id.* at 1640.

billion dollars in legal fees.<sup>70</sup> Even less extraordinary patent suits are expensive; one study found that patent suits cost each side between \$500,000 and \$3 million to litigate.<sup>71</sup>

Although discovery in class actions can also be expensive for defendants, the limited available evidence suggests that at least some types of class actions cost less to defend against than some types of non-class, intra-business suits. When the FJC surveyed attorneys of record in federal civil cases, it found that intellectual property cases cost, on average, 2.37 times more to litigate than consumer cases.<sup>72</sup> Although this survey did not directly compare intellectual property cases to consumer class actions, it did control for several variables, including the amount of money at stake, the factual complexity of the case, and the role of electronically stored information in discovery.<sup>73</sup> Consistent with this finding, mid-sized companies surveyed by Fulbright & Jaworski reported that intellectual property cases were the “most expensive on average” to litigate.<sup>74</sup> Regulatory matters were the most expensive on average for the largest companies.<sup>75</sup> Class actions were not identified by any industry surveyed as the most expensive to litigate.<sup>76</sup>

This data is, of course, quite limited, and more research would be necessary to make any rigorous claim about the comparative costs of class actions and non-class, intra-business litigation. Yet the data that is available suggest that very few class actions are filed each year as a proportion of overall litigation, and litigation costs associated with at least some non-class, intra-business disputes are larger than those associated with some class action cases. These two observations taken

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70. Kurt Eichenwald, *The Great Smartphone War*, VANITY FAIR (June 2014), <http://www.vanityfair.com/news/business/2014/06/apple-samsung-smartphone-patent-war>.

71. Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237, 243 (2006) (citing Bronwyn H. Hall et al., *Prospects for Improving U.S. Patent Quality via Post-grant Opposition* 8 (Nat'l Bureau of Econ. Research, Working Paper No. 9731, 2003), <http://papers.nber.org/papers/W9731.pdf>). Another study found that “[m]ean fees for cases that went through trial were \$1.04 million for patentee litigants and \$2.46 million for alleged infringers. For cases that were decided prior to trial, the mean fees were \$950,000 for patentee litigants and \$570,000 for alleged infringers.” James Bessen & Michael J. Meurer, *The Private Costs of Patent Litigation*, 9 J.L. ECON. & POL'Y 59, 80–81 (2012).

72. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS 12–14 tbls. 1 & 2 (2010). Many thanks to Joe Doherty for helping me interpret and understand the significance of the FJC's findings.

73. See *id.*

74. FULBRIGHT & JAWORSKI L.L.P., *supra* note 59, at 16.

75. *Id.*

76. See *id.*



together call into question the assertion that class actions impose uniquely burdensome discovery costs for corporate defendants.

*C. Settlements and Judgments in Both Class Actions and Non-Class, Intra-Business Disputes Can Be Enormous*

The Chamber of Commerce and business amici repeatedly assert that enormous judgments in class actions can bankrupt even large businesses. To be sure, class action settlements can be quite large: the largest securities class action settlements have been several billion dollars apiece,<sup>77</sup> and the average securities class action settlement is close to \$100 million.<sup>78</sup> But other types of class actions result in much smaller payouts: consumer class action settlements average \$18.8 million, employee benefits class action settlements average \$13.9 million, and labor and employment settlements average under \$10 million.<sup>79</sup> The median settlements for each of these types of class actions are far smaller, suggesting that most settlements in each type of class action are more modest.<sup>80</sup>

The focus on the costs of class action settlements also overlooks the fact that settlements and judgments in non-class, intra-business disputes can be huge. The largest settlements—like those in class actions—have cost defendants billions of dollars. In recent years, Bank of America paid Fannie Mae and Freddie Mac \$9.3 billion to settle claims regarding faulty mortgage bonds;<sup>81</sup> Visa and MasterCard paid American Express over \$3.9 billion to settle an antitrust suit;<sup>82</sup> Teva Pharmaceutical and Sun Pharmaceutical, two generic drug manufacturers, paid Pfizer and Takeda Pharmaceutical \$2.15 billion in a case alleging patent infringement;<sup>83</sup> and Volkswagen agreed to purchase at least \$1 billion worth of General Motors (G.M.) auto parts and pay an additional \$100 million to settle claims alleging that Volkswagen stole

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77. See *Top Ten by Largest Settlement*, STAN. L. SCH.: SEC. CLASS ACTION CLEARINGHOUSE, <http://securities.stanford.edu/top-ten.html> (last visited Mar. 10, 2016).

78. Fitzpatrick, *supra* note 56, at 828 tbl.6.

79. *Id.*

80. See *id.* (reporting that during the 2006–2007 study period, the median settlement amount was \$8 million for securities class actions, \$5.3 million for employee benefits class actions, \$2.9 million for consumer class actions, and \$1.8 million for labor and employment class actions).

81. Margaret Chadbourn & Aruna Viswanatha, *Bank of America To Pay \$9.3 Billion To Settle Mortgage Bond Claims*, REUTERS (Mar. 26, 2014, 6:42 PM), <http://www.reuters.com/article/us-bankofamerica-settlement-fhfa-idUSBREA2P23720140326>.

82. Eric Dash, *MasterCard Will Pay \$1.8 Billion to American Express*, N.Y. TIMES, June 26, 2008, <http://www.nytimes.com/2008/06/26/business/26credit.html>.

83. Peter Loftus, *Pfizer, Takeda To Get \$2.15 Billion Settlement*, WALL ST. J., <http://www.wsj.com/articles/SB10001424127887324188604578541080995659790> (last updated June 12, 2013, 2:40 PM).

trade secrets from G.M.<sup>84</sup> Countless other suits have required companies to pay each other tens and hundreds of millions of dollars.

Although available evidence does not allow me to compare the total judgments and settlements in class actions and non-class, intra-business disputes, or to compare the costs incurred in both types of cases by any company in particular, anecdotal evidence suggests that at least some businesses may be crying wolf. In its amicus brief in *Wal-Mart*, Intel Corp. wrote that a grant of class certification “can transform an ordinary lawsuit into ‘bet-the-company’ litigation, even for a company of Intel’s size.”<sup>85</sup> Yet the case that recently required Intel to “bet the firm” was not a class action but, instead, a 2005 antitrust lawsuit brought against Intel by another company, Advanced Micro Devices, Inc. (AMD). Intel reportedly spent \$116 million to defend itself in this case<sup>86</sup> and paid AMD \$1.25 billion to resolve the case.<sup>87</sup> Intel was also investigated and fined for its anticompetitive conduct by the European Commission, South Korean regulators, the U.S. Federal Trade Commission, and the New York Attorney General.<sup>88</sup> In contrast, a decades-long class action against Intel recently settled, resulting in payments of \$15 to each class member; although consumers are still filing claims for proceeds of the class action, the maximum total amount that Intel would be required to pay under the terms of the settlement is just over \$70 million.<sup>89</sup> When the Chamber of Commerce and business amici seek procedural protections from class actions, they suggest that class action payouts dwarf all other types of litigation exposure. But the settlements and attorneys’ fees Intel recently paid to resolve commercial disputes dwarf those it will pay to resolve a decades-long class action.

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84. Robyn Meredith, *VW Agrees To Pay G.M. \$100 Million in Espionage Suit*, N.Y. TIMES, Jan. 10, 1997, <http://www.nytimes.com/1997/01/10/business/vw-agrees-to-pay-gm-100-million-in-espionage-suit.html>.

85. Brief of Intel Corp. as Amicus Curiae in Support of Petitioner, *supra* note 28, at 1.

86. Don Clark, *Intel Sues an Insurer over Litigation Costs*, WALL ST. J., <http://www.wsj.com/articles/SB1235362485937817> (last updated Feb. 2, 2009, 12:01 AM).

87. Steve Lohr & James Kanter, *A.M.D.-Intel Settlement Won’t End Their Woes*, N.Y. TIMES, Nov. 12, 2009, <http://www.nytimes.com/2009/11/13/technology/companies/13chip.html>.

88. Julia Angwin, *A Timeline of Intel and AMD’s Legal Battles*, WALL ST. J.: DIGITS BLOG (Nov. 12, 2009, 10:40 AM), <http://blogs.wsj.com/digits/2009/11/12/a-timeline-of-intel-and-amds-legal-battles/> (reporting that the European Commission and South Korean regulators fined Intel \$1.45 billion and \$25 million, respectively, and that the U.S. Federal Trade Commission and the New York Attorney General commenced an investigation and lawsuit, respectively, against Intel).

89. See Kurt Orzeck, *Intel To Pay Millions To Settle Pentium 4 False Ad Suit*, LAW360 (July 17, 2014, 4:28 PM), <http://www.law360.com/articles/558423/intel-to-pay-millions-to-settle-pentium-4-false-ad-suit> (reporting an estimated class size of “3.3 million to 4.7 million consumers,” which would result in a potential total payout of \$70.5 million).

*D. The Bottom Line on Class Action Costs*

Class actions appear to be brought less frequently than non-class, intra-business disputes and may cost less per case to litigate. Although the largest class action settlements can cost corporations billions of dollars, the largest non-class, intra-business settlements can be just as costly. The focus by business amici and the Court on the allegedly debilitating costs of class actions ignores the significant costs and burdens of non-class, intra-business disputes.

The fact that businesses likely spend more money on non-class, intra-business disputes does not mean that businesses prefer being sued by a class than a corporate rival. I can think of several reasons why a corporation, given the choice, might elect to be sued by another business instead of by a class of consumers, employees, or shareholders. For example, when a business is sued by another business, it can assert counterclaims; if the business defendant prevails on those counterclaims, it might even come out ahead. In contrast, counterclaims are rarely available in class actions. As a result, a corporate defendant sued by a class only stands to lose money; even if the class claim is dismissed, the corporate defendant will still need to pay its attorneys' fees and has no chance of recovering from the other side. In addition, when a business is sued by another business, the parties can subject each other to expensive discovery; if the businesses are comparably sized, these costs should impose equally distributed pressure to reach a mutually agreeable settlement. In contrast, class action defendants generally have the lion's share of relevant documents in their possession and, therefore, presumably bear the brunt of discovery costs.<sup>90</sup>

Plaintiffs and their attorneys tell a very different story about the effects of class action asymmetries. Although the class action bar has become better funded in recent years, corporations generally have far more money than the classes of plaintiffs that sue them.<sup>91</sup> Defendants generally possess the key documents that could prove plaintiffs' claims, allowing them to "obscure key facts through voluminous pro-

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90. See Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 643 (1989) ("Large litigants have files—warehouses full of files. The adversary can demand that they be searched, at great cost; the adversary can notice the depositions of 20 corporate officers."). Of course, businesses can also depose and seek information from class members and representatives.

91. See Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 SEDONA CONF. J. 1, 26 (2011) (describing plaintiffs' attorneys who work together to fund larger cases and "counteract attrition tactics"); see also Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1780–82 (2013) (describing third-party financing).

duction and aggressive use of privilege and work product doctrine arguments.”<sup>92</sup>

My goal is not to investigate the different litigation dynamics in non-class, intra-business disputes and class actions or to assess whether class action litigation imposes harsher burdens on plaintiffs or defendants. Instead, I aim to question the validity of claims about the debilitating costs of class actions made in an effort to restrict plaintiffs’ abilities to bring these types of suits. The Chamber of Commerce decries of “potentially bankrupting class actions” that threaten to “bury American businesses in abusive class-action lawsuits to the detriment of consumers, the U.S. economy and the judicial system itself[.]”<sup>93</sup> but the absolute costs of class action litigation appear comparable to, or smaller than, businesses’ other litigation-related costs. One may believe that all litigation is too expensive. But if class actions are no more financially devastating to businesses than non-class, intra-business disputes, there is no basis to single out class actions as particularly deserving of limitation.

## V. CASE MERITS AND ATTORNEY PRACTICES

The Chamber of Commerce has raised, and the Supreme Court has endorsed, two additional, related critiques of class action litigation; that class action claims are often meritless, and plaintiffs’ class action attorneys bring these meritless claims not to benefit class members but to line their own pockets. There are, to be sure, examples of frivolous class actions suits and unscrupulous plaintiffs’ class action attorneys. Yet similar critiques could be made about all types of litigation, including non-class, intra-business disputes. Businesses sometimes bring meritless suits against each other. And, just as plaintiffs’ class action attorneys have been criticized for focusing overmuch on lining their own pockets, attorneys representing corporations have been criticized for doing work and charging fees against their clients’ best interests.

### A. *Claims in Both Class Actions and Non-Class, Intra-Business Disputes Can Be Frivolous*

There are many high profile examples of seemingly frivolous class actions—take, for example, the suits brought against Subway for false

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<sup>92</sup> J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1733 (2012).

<sup>93</sup> Brief of the U.S. Chamber of Commerce as Amicus Curiae in Support of Petitioner, *supra* note 27, at 5.

advertising because their “footlong” sandwiches are actually ten or eleven inches long,<sup>94</sup> or the suit brought against Sears because the all “stainless steel” drum advertised in one of its clothes dryers contained a small amount of ceramic around the rim.<sup>95</sup> It is these types of suits—when judges certify them as class actions—that presumably force defendants to accept blackmail settlements.

Yet corporations have also been known to file questionable cases against their brethren. Caterpillar Inc. sued the Walt Disney Company to block the direct-to-DVD release of *George of the Jungle 2*, which, according to Caterpillar, damaged the company’s reputation with children by making its Wheel Loaders part of “an ‘evil attacking army’ of industrialists seeking to destroy the jungle.”<sup>96</sup> Johnson & Johnson sued the American Red Cross, demanding that the Red Cross remove its logo on items sold to the public, turn over products with the Red Cross logo to Johnson & Johnson for destruction, and pay punitive damages.<sup>97</sup> Intel, a company that filed an amicus brief in *Wal-Mart*, has been criticized for going into “hyperdrive on trademark enforcement[,]” filing fifteen trademark infringement lawsuits in 2008, including one against an electrician’s one-man business and another against a two-person travel agency.<sup>98</sup>

It is impossible to know how often businesses bring frivolous claims against each other—in no small part because a case’s merits are, at least partially, in the eye of the beholder. But even a cursory review of non-class, intra-business disputes suggests that the class action bar does not have a monopoly on questionable cases. As noted by the American Association for Justice, corporations that support the Chamber of Commerce contend that “businesses are hindered by too

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94. Jacob Gershman, *Disgruntled Plaintiffs to Subway: ‘Show Me the Dough,’* WALL ST. J.: L. BLOG (Jan. 25, 2013, 6:48 PM), <http://blogs.wsj.com/laws/2013/01/25/disgruntled-plaintiffs-to-subway-show-me-the-dough/>.

95. Kurt Orzeck, *Calif. Consumers Denied Class Cert. in Sears Dryers Suit*, LAW360 (Feb. 13, 2014, 4:01 PM), <http://www.law360.com/articles/509849/calif-consumers-denied-class-cert-in-sears-dryers-suit>.

96. *Caterpillar Sues over ‘George 2,’* L.A. TIMES, Oct. 16, 2003, <http://articles.latimes.com/2003/oct/16/news/wk-e10filler16>.

97. David Crary, *Johnson & Johnson Sues Red Cross over Trademark*, WASH. POST, Aug. 9, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/08/AR2007080802244.html>.

98. See Zusha Elinson, *Intel Goes into Hyperdrive on Trademark Enforcement*, RECORDER (Nov. 7, 2008), <http://www.therecorder.com/id=1202425860526/Intel-Goes-Into-Hyperdrive-on-Trademark-Enforcement?slreturn=20160202141115>.

many lawsuits,” but that “these same corporations show no hesitation in liberally using the courthouse themselves.”<sup>99</sup>

*B. Both Plaintiffs’ Class Action Attorneys and Attorneys Representing Corporations Can Be Overcompensated*

Criticisms of class action litigation often focus on the plaintiffs’ attorneys who bring these cases. According to the Chamber of Commerce and other business amici, plaintiffs’ class action attorneys seek to recover astronomical attorneys’ fees on cases of questionable merit for which the class members receive little or no benefit.<sup>100</sup>

There are, certainly, anecdotes consistent with this portrayal of the class action plaintiffs’ bar. Yet it—like the other depictions of class action litigation offered by business amici and accepted by the Court—appears to be overblown. Brian Fitzpatrick examined awards for plaintiffs’ attorneys in federal court class action cases and found that plaintiffs’ attorneys recovered approximately \$2.5 billion each year in fees.<sup>101</sup> Although this may sound like a lot of money, the classes of plaintiffs in these cases recovered approximately \$16 billion per year.<sup>102</sup> Fitzpatrick concluded that “in the aggregate, class action lawyers appear to be taking only 15% of all of the money they recover for class members in federal court”; a percentage “much lower than the typical take of contingency-fee lawyers in individual litigation.”<sup>103</sup> When Fitzpatrick examined awards in individual class action cases, he found that the mean and median payments for attorneys were around 25% of the total recovery, an amount also lower than most contingency fee arrangements would allow.<sup>104</sup> Moreover, in contrast to other types of litigation, the terms of class action settlement agreements—including the plaintiffs’ attorneys’ compensation—are reviewed for fairness by the courts. When attorneys’ fees in class actions are excessive, courts can, and do, refuse to approve settlements.<sup>105</sup>

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99. AM. ASS’N FOR JUSTICE, *DO AS I SAY, NOT AS I SUE: EXPOSING THE LAWSUIT-HAPPY HYPOCRITES OF U.S. CHAMBER’S INSTITUTE FOR LEGAL REFORM* 3 (2011), [https://www.justice.org/sites/default/files/file-uploads/Do\\_As\\_I\\_Say\\_Not\\_As\\_I\\_Sue\\_2011.pdf](https://www.justice.org/sites/default/files/file-uploads/Do_As_I_Say_Not_As_I_Sue_2011.pdf).

100. *See supra* notes 23–24, 28, 35, and accompanying text.

101. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2045 (2010).

102. *Id.*

103. *Id.*

104. *Id.* at 2045–46.

105. *See, e.g.*, Daniel Fisher, *Appeals Court Rejects \$1 Million Fee in Radio Shack Coupon Settlement*, FORBES (Sept. 19, 2014, 4:57 PM), <http://www.forbes.com/sites/danielfisher/2014/09/19/posner-rejects-1-million-fee-in-radio-shack-coupon-settlement/#246188721e07>; *see also* Lynn A. Baker et al., *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*,

Criticisms of the incentives and practices of the plaintiffs' class action bar also overlook similar criticisms that have been made of the incentives and practices of attorneys at large law firms. Most firms charge their corporate clients by the hour, a system that has been found to be less cost-effective for clients than the contingency fee model generally used by plaintiffs' class action attorneys. In attempting to parse out the causes of high litigation costs, an FJC study found that plaintiffs' attorneys who charge their clients by the hour "reported costs almost 25% higher than those using other billing methods (primarily contingency fee)."<sup>106</sup> This makes sense: attorneys relying on contingency fees have strong incentives to win (so that they recover fees) while spending the least amount of time litigating the case (so that they recover the most possible per hour worked). In contrast, attorneys working by the hour will be paid for their work regardless of whether their client wins, and they will be paid more money for more hours worked regardless of whether those additional hours were necessary to prevail.

Large law firms have the resources (from their clients) to engage in "meticulous and exhaustive research, painstaking assembly of data, and generous use of experts."<sup>107</sup> Although these resources give lawyers representing corporations the "latitude to give their technical best to the problems they work on[,] "<sup>108</sup> they also create opportunities for attorneys to perform unnecessary work to drive up their fees. Almost 2,000 years ago, Roman poet Marcus Valerius Martialis complained of the tendency of "expensive lawyers" to do more than is necessary:

There is no poison here, no rape or force—  
a simple case: my neighbor stole my goats.  
But my expensive lawyer will discourse  
on the whole history of law. He quotes  
book, precedent and chapter 'til he's hoarse.  
Fine, noble words! But what about my goats?<sup>109</sup>

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115 COLUM. L. REV. 1371, 1401 (2015) (finding reductions in 15% of securities class action attorney fee applications). *C.f.* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 250 (2010) (finding that courts granted the requested attorneys' fees in more than 70% of cases).

106. LEE & WILLGING, *supra* note 72, at 6.

107. Marc Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 152, 157 (Robert Dingwall & Philip Lewis eds., 1983).

108. GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 152 (1978).

109. Eugene Volokh, "But What About My Goats?": *The Roman Poet Martial on Lawyers*, WASH. POST, Feb. 20, 2015, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/20/what-about-my-goats-the-roman-poet-martial-on-lawyers/> (quoting ROGER DICKINSON-

In a recent case involving a fee dispute between a large law firm, DLA Piper, and one of its clients, discovery revealed that attorneys were intentionally inflating their fees. As one attorney wrote in an e-mail to a colleague: “Now [a lawyer at the firm] has random people working full time on random research projects in standard churn that bill, baby! mode . . . . That bill shall know no limits.”<sup>110</sup>

Although the e-mails uncovered in the DLA Piper litigation may seem extraordinary, many attorneys who charge by the hour have told researchers that they regularly overbill their clients. In a 1995 survey, Professor William Ross polled hundreds of attorneys and found that “more than one-third of outside counsel admitted that the prospect of billing additional hours has at least sometimes influenced their decisions to proceed with work that they otherwise would not have performed.”<sup>111</sup> When Professor Ross asked similar questions in a 2007 survey, he found that 54.6% of respondents “had sometimes performed unnecessary tasks just to bump up their billable output.”<sup>112</sup> Over one-third of the attorneys Ross surveyed in 2007 also admitted that they had double billed—charged two clients for the same time.<sup>113</sup>

The structure of law firms that represent corporations may encourage billing clients for unnecessary work and double billing. The Chamber of Commerce chides the class action plaintiffs’ bar for creating disputes that would otherwise not have been brought, only to cash in on the legal fees associated with those cases. Yet scholars have told a version of this same story about the rise of the large law firm. Before the 1960s, businesses rarely resorted to the courts when they had disputes. During the 1970s, law firms were increasingly willing “to provide managers with opinion letters or other advice that nonperformance of a contract followed by litigation was a legally appropriate course.”<sup>114</sup> This advice led to increased lawsuits, which, in turn, led to increased work (and profits) for firms.

Beginning in the 1970s, law firms dramatically grew their litigation practices to accommodate the rise in contract litigation and then be-

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BROWN, CATULLUS & MARTIAL TRANSLATIONS & IMITATIONS 50 (Roger Dickinson-Brown trans., 2d ed. 2012)).

110. Peter Lattman, *Suit Offers a Peek at the Practice of Inflating a Legal Bill*, N.Y. TIMES, Mar. 25, 2013, <http://dealbook.nytimes.com/2013/03/25/suit-offers-a-peek-at-the-practice-of-padding-a-legal-bill/> (quoting Christopher Thomson, former attorney at DLA Piper).

111. William G. Ross, *The Ethics of Time Based Billing by Attorneys*, 1998 PROF. LAW. 81, 82.

112. Nathan Koppel, *Study Suggests Significant Billing Abuse*, WALL. ST.: J. L. BLOG (May 1, 2007, 9:04 AM), <http://blogs.wsj.com/law/2007/05/01/study-suggests-significant-billing-abuse/>.

113. *Id.*

114. William E. Nelson, *Contract Litigation and the Elite Bar in New York City, 1960-1980*, 39 EMORY L.J. 413, 436 (1990).



gan competing with other large firms for clients.<sup>115</sup> Firms had to be prepared to pursue litigation or risk losing their clients. Professor William Nelson explained this shift as follows:

In the 1960s, the following three things were true: clients loyally gave all their legal work to a single firm; firms lacked substantial litigating capacity; and litigation was thought to be an inappropriate way of settling business disputes. Thus, it was easy for a lawyer to advise a client that litigation was not a viable option. A decade later, however, with a large litigation department at hand and clients prepared to take their cases to another firm, the lawyer faced a different reality: litigation was an available option. The lawyer had to advise the client of this fact, and, if he or she did not want to lose the client to another law firm, the lawyer would also have to inform the client that the firm's litigation department could effectively litigate the dispute.<sup>116</sup>

Attorneys had incentives not only to advise clients of the possibility of litigation but also to encourage their clients to pursue that course. "Once the litigation departments had been built up, they had to be used if they were to remain in existence."<sup>117</sup>

Steep annual billing requirements may also pressure attorneys to perform unnecessary legal work, overbill, and double bill.<sup>118</sup> As Justice Rehnquist once observed, an associate expected to bill more than two thousand hours per year may "favor exhaustive and exhausting research over exercising the judgment necessary to decide whether ten more hours of research will really benefit a client," and she may also be tempted "to exaggerate the hours actually put in."<sup>119</sup>

Corporations accuse plaintiffs' class action attorneys of imposing devastating costs on businesses without acknowledging the high and sometimes unnecessary costs imposed on corporations by their own attorneys. Moreover, large law firms applaud themselves for the kind of aggressive tactics they criticize when taken by the plaintiffs' class action bar. Skadden Arps authored the Chamber of Commerce's amicus brief in *Wal-Mart*, which contended that liberal class certification standards would encourage plaintiffs' attorneys to bring frivolous

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115. *Id.* at 457.

116. *Id.* at 458.

117. *Id.* at 457-58.

118. See Nicki Kuckes, *The Hours: The Short, Unhappy History of How Lawyers Bill Their Clients*, LEGAL AFFAIRS, Sept./Oct. 2002, [http://www.legalaffairs.org/issues/September-October-2002/review\\_kuckes\\_sepoct2002.msp](http://www.legalaffairs.org/issues/September-October-2002/review_kuckes_sepoct2002.msp); Adam Liptak, *On the Job: Stop the Clock? Critics Call the Billable Hour a Legal Fiction*, N.Y. TIMES, Oct. 29, 2002, <http://www.nytimes.com/2002/10/29/jobs/on-the-job-stop-the-clock-critics-call-the-billable-hour-a-legal-fiction.html?pagewanted=all>; and Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 HOFSTRA L. REV. 207 (2000), for discussions of these concerns.

119. William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 153, 155 (1987).

cases that hobble businesses and society at large.<sup>120</sup> Yet, on its website, Skadden Arps congratulates itself on its “[rising] to prominence in the ’60s and ’70s by taking on the proxy fights and hostile tender offers that white-shoe law firms deemed ‘ungentlemanly.’”<sup>121</sup>

The Chamber of Commerce and business amici portray class actions as often meritless and filed by plaintiffs’ attorneys only seeking to line their own pockets. There is, however, no evidence that class action claims and plaintiffs’ class action attorneys are especially blameworthy. And there is evidence that some non-class, intra-business disputes and law firms representing corporations share these flaws.

## VI. THE COSTS OF NOT SUING BUSINESS

Business amici and the Supreme Court have not only miscalculated the costs of suing business—they have also ignored the costs of raising procedural barriers to plaintiffs’ suits. Concerns about the extreme costs of class actions have led to the creation of a series of procedural gateways that make it more difficult for plaintiffs to bring their claims or prevail on the claims they do bring. Without the ability to aggregate claims, plaintiffs with small damages may never sue. With heightened pleading requirements, plaintiffs with claims that cannot be plausibly pled may not be able to find a lawyer willing to represent them or may have their cases dismissed.

Although the Chamber of Commerce argued for these heightened procedural gateways to protect defendants against meritless claims, the Court’s pleading requirements, class certification requirements, and arbitration restrictions may impact plaintiffs’ abilities to bring meritorious claims as well. It makes intuitive sense that a plaintiff may have a valid claim but may nevertheless have her case dismissed because she does not have the facts necessary, pre-discovery, to draft a plausible complaint. Thus far, there is no conclusive evidence that the plausibility pleading standard only filters out meritless cases.<sup>122</sup>

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120. See Brief of the U.S. Chamber of Commerce as Amicus Curiae in Support of Petitioner, *supra* note 27, at 3. Because Skadden penned these words on behalf of a client, it is perhaps unfair to attribute the sentiment to attorneys at the firm. On the other hand, the firm’s attorneys most likely made—or were at least directly involved in—decisions about what arguments to raise and how to frame those arguments.

121. *The Firm*, SKADDEN, <http://www.skadden.com/the-firm> (last visited Feb. 1, 2016). Note that lawsuits played a critical role in the proxy fights and hostile tender offers described by Skadden on their website; they served as “a way for companies or their management to show backbone and to maintain the support of investors, to extend time for negotiation or to develop options, and to accomplish other ends.” LINCOLN CAPLAN, SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE 140 (1993).

122. After examining nearly 2,000 cases, Professor Jonah Gelbach was unable “to clearly determine the quality-filtering effects of [*Twombly* and *Iqbal*].” Jonah B. Gelbach, *Material Facts*

Strict class certification standards and limitations on aggregate arbitration may also prevent potential plaintiffs from filing meritorious cases. As Justice Breyer observed in his dissent in *Concepcion*, restrictions on aggregation “can lead small-dollar claimants to abandon their claims rather than to litigate.”<sup>123</sup> Lawyers are highly unlikely to represent plaintiffs who only have small amounts at stake:

What rational lawyer would have signed on to represent the *Concepcions* in litigation for the possibility of fees stemming from a \$30.22 claim? (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30”).<sup>124</sup>

Consistent with this observation, Professor Judith Resnik found that, on average, just twenty-seven of AT&T’s millions of customers file claims for arbitration each year.<sup>125</sup>

Plaintiffs whose claims are dismissed are most directly affected by heightened procedural gateways, but there are also social costs associated with these procedural barriers unaccounted for by the Court. Lawsuits have unearthed critical information about corporate harms to the public, politicians, and regulators.<sup>126</sup> As Professor Wendy Wagner explained:

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*in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369, 424 (2016). In another study, Professor Alexander Reinert examined a group of complaints filed before *Twombly* and *Iqbal*, identified approximately 100 that he believed would have been dismissed for not satisfying the plausibility standard, and found that more than one-half had resulted in a settlement or plaintiff’s verdict. Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 127 (2011). Reinert’s study focused on cases filed pre-*Twombly* and *Iqbal*, so it did not measure the actual impact of the plausibility standard, and the settlements Reinert identified could, arguably, have been of the “blackmail” variety—forced to avoid the costs of discovery. See Gelbach, *supra* note 122, at 373 n.7. Yet Reinert’s findings offer some reason to believe that *Twombly* and *Iqbal* may well screen out winning cases.

123. AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting).

124. *Id.* (Breyer, J., dissenting) (citation omitted) (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

125. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2812 (2015) (citing *Consumer Arbitration Statistics*, AM. ARB. ASS’N (2015) (examining individual filing rates for the years 2009–2014)). The Consumer Financial Protection Bureau has also found extremely low rates of arbitration filings concerning credit card, checking account, and payday loan disputes. CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS 13 n.25 (2013) (finding that between 2010–2012, there was an annual average of “235 consumer-filed credit card disputes, 20 consumer-filed checking account disputes, and 44 consumer-filed payday loan disputes” in which consumers filed for arbitration and noting that “[n]early all the arbitration clauses studied include provisions stating that arbitration may not proceed on a class basis”).

126. See, e.g., Timothy D. Lytton, *Using Tort Litigation To Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1843–58 (2008) (describing the information revealed in gun litigation and clergy sexual abuse litigation); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 714–27 (2007) (showing

Today we have a much better understanding of the risks of asbestos, tobacco, ultra-absorbent tampons, and the Dalkon Shield, thanks to tort litigation brought against these companies. In each of these cases, the manufacturers resisted disclosing internal, damaging information that was critically important to assessing the safety of their products or activities. It was only as a result of litigation that the extent of their internal knowledge about product risks was uncovered and publicly exposed, revelations that often led to greater regulatory oversight and public condemnation.<sup>127</sup>

During discovery in lawsuits against the makers of Ephedra, Prozac, and Vioxx, plaintiffs uncovered information about the harms of the pills that defendants knew of and failed to disclose.<sup>128</sup> Discovery in the environmental contamination lawsuit against DuPont, depicted in the movie *A Civil Action*, revealed that DuPont had long known of the hazards of chemicals used in making Teflon but failed to report those hazards to regulators.<sup>129</sup> In recent years, several products liability suits and toxic tort cases, among others, have been dismissed for failing to comply with *Iqbal*, *Twombly*, or *Wal-Mart*.<sup>130</sup> What information would have come to light had these cases been allowed to proceed to discovery?

Litigation also sometimes reveals information previously unknown to the very defendants named in the suit.<sup>131</sup> Since the early 2000s, 124 people have died and 275 more have been injured as a result of a

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how gun litigation and breast implant litigation have unearthed previously unknown information and thereby supplemented regulatory efforts).

127. Wagner, *supra* note 126, at 711 (footnotes omitted).

128. *Id.* at 711–12.

129. *See id.* at 712–13.

130. *See* Kevin T. Haroff, *Open or Shut?—Pleading Federal Environmental Claims After Twombly and Iqbal*, ENVTL. LITIG. & TOXIC TORTS COMM. NEWSL., July 2012, at 3, 3, [http://www.americanbar.org/content/dam/aba/publications/nr\\_newsletters/eltt/201207\\_eltt.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/nr_newsletters/eltt/201207_eltt.authcheckdam.pdf) (assessing the impact of *Twombly* and *Iqbal* on environmental litigation and toxic torts); Douglas A. Henderson et al., *Environmental Class Actions After Dukes: Is ‘Rigorous’ Analysis the New Rule of Law?*, BLOOMBERG BNA (Sept. 14, 2014), <http://www.bna.com/environmental-class-actions-after-dukes-is-rigorous-analysis-the-new-rule-of-law/> (examining class certification in environmental actions after *Wal-Mart*); Erick Lasker & Michael Junk, *Holding Pharma Plaintiffs to Their Pleading Burden: Implications of Twombly and Iqbal*, 11 ENGAGE 113, 114–17 (2010), <http://www.hollingsworthllp.com/uploads/23/doc/media.384.pdf> (assessing the impact of *Twombly* and *Iqbal* on pharmaceutical cases); Mark Raffman & Andrew Hudson, *Dukes Provides New Tools To Fight Class Certification in Building Products Cases*, 41 PROD. SAFETY & LIAB. REP. (BNA), No. 277, at 1, (Mar. 4, 2013) <http://www.goodwinprocter.com/~media/474A0C2C1F364493B3C0D0F0FCB28534.pdf> (examining how the holding in *Wal-Mart* can be used to defeat class certification in products liability cases); *see also, e.g.*, *Timmons v. Linvatec Corp.*, 263 F.R.D. 582, 585–86 (C.D. Cal. 2010) (granting the defendants’ motion to dismiss because the plaintiffs could not identify which pharmaceutical defendant was responsible for the drug at issue).

131. *See* Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1056–57 (2015).

defect in a G.M. ignition switch that caused its cars to power off and their airbags not to deploy when involved in a crash.<sup>132</sup> G.M. and the National Highway Traffic Safety Commission investigated but could not determine the cause for the stalls.<sup>133</sup> It was only during the litigation of a case, brought by the family of a woman named Brooke Melton who died in a Chevrolet Cobalt, that the truth came to light.<sup>134</sup> When the plaintiffs' expert disassembled the ignition switch in Melton's car and compared it to that in a later-model Cobalt, he discovered that the design of the switch had been surreptitiously changed to make it more difficult to disable.<sup>135</sup> This discovery "set in motion G.M.'s worldwide recall of 2.6 million Cobalts and other cars, and one of the gravest safety crises in the company's history."<sup>136</sup>

Barriers to suit can prevent this type of critical information from being uncovered. Years before Brooke Melton died, two other young women, Natasha Weigel and Amy Rademaker, died in Wisconsin when the ignition switch shut off in Weigel's Chevrolet Cobalt.<sup>137</sup> Neither woman's parents could find lawyers to take their cases, which was apparently because Wisconsin has a \$350,000 damages cap and it would have been exceedingly expensive to litigate their cases against G.M.<sup>138</sup> Melton's case was brought five years later in Georgia, a state without a damages cap.<sup>139</sup> We do not know how many people died or were injured in accidents tied to the ignition defect in the years between 2005 (when Weigel and Rademaker were killed) and 2012 (when Melton's parents' expert discovered the surreptitious design switch).<sup>140</sup> But, perhaps, as Weigel's stepfather recently observed,

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132. Kirsten Korosec, *Ten Times More Deaths Linked to Faulty Switch than GM First Reported*, FORTUNE (Aug. 24, 2015, 5:38 PM), <http://fortune.com/2015/08/24/feinberg-gm-faulty-ignition-switch/>; see also Barry Meier & Hilary Stout, *Victims of G.M. Deadly Defect Fall Through Legal Cracks*, N.Y. TIMES, Dec. 29, 2014, [http://www.nytimes.com/2014/12/30/of-gm-deadly-defect-fall-through-legal-cracks.html?\\_r=0](http://www.nytimes.com/2014/12/30/of-gm-deadly-defect-fall-through-legal-cracks.html?_r=0).

133. ANTON R. VALUKAS, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 12 (May 29, 2014) (describing the investigation of G.M.'s ignition switch defect by the National Highway Traffic Safety Administration).

134. Bill Vlasic, *An Engineer's Eureka Moment with a G.M. Flaw*, N.Y. TIMES, Mar. 28, 2014, <http://www.nytimes.com/2014/03/29/business-florida-engineer-unlocked-the-mystery-of-gms-ignition-flaw.html>.

135. *Id.*

136. *Id.*

137. Meier & Stout, *supra* note 132.

138. *Id.*

139. *See id.*

140. *See* Vlasic, *supra* note 134. Although I have found no timeline indicating the deaths of people in cars connected to the ignition defect, press reports reflect three deaths between 2005–2012. *See* Danielle Ivory, *G.M.'s Ignition Problem: Who Knew What When*, N.Y. TIMES, <http://www.nytimes.com/interactive/2014/05/18/business/gms-ignition-problem-who-knew-what-when.html> (last updated Sept. 15, 2014) (describing a crash in 2006 that killed Hasaya Chan-

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they “could have saved lives” had they been able to find a lawyer to take their case.<sup>141</sup>

The Chamber of Commerce and other business amici have argued that class actions harm society because they “have the unfortunate effects of ‘jeopardizing jobs and driving up prices for consumers’” and will “often force companies to scale back operations or discontinue certain products or services.”<sup>142</sup> But neither the Chamber of Commerce nor the Supreme Court considers the costs of restricting access to the courts. At this time, it is impossible to calculate the costs of these procedural restrictions on plaintiffs who would have—but did not—sue, or the costs to society of failing to expose wrongdoing. The difficulty of measuring these effects is not, however, a reason to pretend that they do not exist. The Court’s failure to account for the effects of heightened gateways on plaintiffs’ claims prevents it from truly understanding the costs and benefits of the procedural restrictions it imposes.

## VII. RECALIBRATION

The Supreme Court’s recent decisions in *Twombly*, *Wal-Mart*, *Comcast*, and *Concepcion* appear to rely on arguments that overstate the likelihood of blackmail settlements and the costs of class actions to businesses, and ignore the costs of limiting redress not only for plaintiffs but also for defendants and society at large. In this Part, I offer a few suggestions for modifying civil procedure doctrine that could be summed up with an old carpentry proverb: “Measure twice, cut once.” The Court should not heed advocates’ and amici’s assertions about the effects of class actions and other procedural features when no empirical evidence is available to support those assertions. Instead, the Court should defer the assessment of claims about the costs and burdens of class actions to other entities—including Congress and the Judicial Conference—that are better situated to examine the effects of procedural rules on litigants and modify the rules accordingly.<sup>143</sup> And

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suthus); Rebecca R. Ruiz et al., *13 Deaths, Untold Heartache, from G.M. Defect*, N.Y. TIMES, May 26, 2014, <http://www.nytimes.com/2014/05/27/business/13-deaths-untold-heartache-from-gm-defect.html> (describing a crash that killed Esther Matthews and Grace Elliot). Given the finding that 124 people have died as a result of the defective ignition switch, it is highly likely that more than three people died during this seven-year period. See generally Korosec, *supra* note 132.

141. Meier & Stout, *supra* note 132 (quoting Ken Rimer, Natasha Weigel’s stepfather).

142. Brief of the U.S. Chamber of Commerce as Amicus Curiae in Support of Petitioner, *supra* note 27, at 22 (quoting William Branigin, *Congress Changes Class Action Rules*, WASH. POST, Feb. 17, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A32674-2005Feb17.html>).

143. See Schwartz, *supra* note 21, at 1705–06. This does not mean that the Judicial Conference rulemaking procedures are immune from these same critiques. The 2015 amendments to the

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as long as critical facts are not available—as long as the effects of procedural rules are impossible to “measure”—there should be more hesitation to “cut” and a greater inclination toward procedural adjustments that do not so dramatically impair the ability of plaintiffs to file suits.<sup>144</sup>

Prescriptions for reform in law review articles are often so far fetched as to be fairy tales. Yet, in this instance, it appears that the Supreme Court has recently adopted each of these approaches. In *Halliburton Co. v. Erica P. John Fund, Inc.*,<sup>145</sup> Halliburton and amici argued that the Court should create procedural rules that restrict securities class actions for reasons that should sound familiar; because these actions “allow plaintiffs to extort large settlements from defendants for meritless claims; punish innocent shareholders, who end up having to pay settlements and judgments; impose excessive costs on businesses; and consume a disproportionately large share of judicial resources.”<sup>146</sup> Yet in *Halliburton*, unlike the other decisions discussed *supra*, Chief Justice Roberts refused to rely on these arguments, concluding, instead, that “[t]hese concerns are more appropriately addressed to Congress.”<sup>147</sup>

The Supreme Court has also recently used nondispositive measures to address ill incentives in litigation. In his dissent in *Twombly*, Justice Stevens complained that the majority raised pleading standards instead of using less restrictive measures—including discovery management and sanctions—to prevent the harms it was intending to ad-

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Federal Rules of Civil Procedure have been criticized for being unsupported by available evidence and “benefit[ing] large corporate litigants and disadvantag[ing] individual plaintiffs, classes of plaintiffs and groups suing to enforce their civil rights.” Henry J. Kelston, *FRCP Discovery Amendments Prove Highly Controversial*, LAW360 (Feb. 27, 2014, 5:06 PM), <http://www.law360.com/articles/512821/frep-discovery-amendments-prove-highly-controversial>. After reviewing extensive written comments and holding public hearings, the Rules Committee amended some of its proposed modifications. See COMM. ON RULES OF PRACTICE & PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE 14 (Sept. 2014), <http://www.uscourts.gov/file/14523/download-2014.pdf>. See Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015), for further discussion of the political dynamics in rulemaking. Despite the limitations of the rulemaking process, it still purports to collect and assess data regarding the effects of the Rules on litigant behavior. Courts are not well suited to engage in this type of information gathering, commentary, assessment, and modification.

144. See Schwartz, *supra* note 21, at 1697–1708, for these same arguments articulated in more detail.

145. 134 S. Ct. 2398 (2014).

146. *Id.* at 2413 (citing Brief for Petitioners at 39–45, *Halliburton*, 134 S. Ct. 2398 (No. 13-317), 2013 WL 6907610).

147. *Id.*

dress.<sup>148</sup> Stevens's dissent did not, of course, win the day. But, in another context, the Court has recognized the power of pathway tools to curb frivolous suits. In two recent patent cases, *Highmark Inc. v. Allcare Health Management System, Inc.*<sup>149</sup> and *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*,<sup>150</sup> the Court made it easier for prevailing defendants to recover attorneys' fees from the plaintiffs who sue them. These decisions are understood to provide "an additional tool for alleged infringers to fight back against plaintiffs who assert and maintain meritless claims of patent infringement in hopes of a quick payoff."<sup>151</sup> Instead of preventing cases from proceeding past pleading, class certification, and other procedural gateways, the Court should more heavily rely on these types of nondispositive pathway approaches to address litigation's pathologies.

#### VIII. CONCLUSION

In this Article, I have shown that several of the Supreme Court's recent decisions limiting plaintiffs' procedural rights are grounded in empirically unsupported assertions about the debilitating costs and burdens of class actions to businesses and society. The ills I have described are not, however, limited to the cases discussed in this Article.

Courts are not the only entities that appear to protect the interests of businesses over individuals. As Gillian Hadfield has noted, after the attacks on September 11, 2001, Congress almost immediately set out to limit individual plaintiffs' personal injury claims, yet it made no parallel effort to anticipate or address the costs of resulting commercial litigation: "megalawsuits over insurance policies, business interruption claims, property damage claims, *force majeure* clauses, airline bankruptcies, and so on."<sup>152</sup>

And *Twombly*, *Wal-Mart*, *Comcast*, and *Concepcion* are not the only cases in which the Court has assumed the world works in ways that are unsupported by evidence. For example, as I have shown previously, several Supreme Court doctrines rely on the assumption that law enforcement officers are personally responsible for paying settle-

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148. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 593 n.13 (2007) (Stevens, J., dissenting) ("The potential for 'sprawling, costly, and hugely time-consuming' discovery is no reason to throw the baby out with the bathwater. The Court vastly underestimates a district court's case-management arsenal." (citation omitted)).

149. 134 S. Ct. 1749 (2014).

150. 134 S. Ct. 1744 (2014).

151. Bijal Vakileta, *Supreme Court Issues Two "High Octane" Decisions To Address Abusive Patent Litigation*, WHITE & CASE (Apr. 29, 2014), <http://www.whitecase.com/publications/article/supreme-court-issues-two-high-octane-decisions-address-abusive-patent#>.

152. Hadfield, *supra* note 62, at 1291.



ments and judgments awarded against them when nothing could be further from the truth.<sup>153</sup> The Justices have selective blindness in this area; they have, on more than one instance, rejected an argument because it was unsupported by evidence and adopted a contrasting view in the same opinion that was equally without empirical support.<sup>154</sup>

In these areas, and many others as well, a greater inclination to measure—and a greater hesitancy to cut—would be well advised.

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153. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (describing the evidence about near certain and universal indemnification of police officers that undermines the assumptions underlying the qualified immunity, municipal liability, and punitive damages doctrines).

154. Take, for example, the majority decision in *Evans v. Jeff D.*, in which the Court held that defendants could offer settlements in Section 1983 cases conditioned on plaintiffs waiving their entitlement to attorneys' fees. 475 U.S. 717, 743 (1986). The Court reasoned that "a general proscription against negotiated waiver of attorney's 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[.]" but it offered no empirical support for this assertion. *Id.* at 732. Yet the majority rejected as "premature" "the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases[.]" which might, in turn, shrink "the pool of lawyers willing to represent plaintiffs in such cases" because there was no "reason or documentation to support such a concern at the present time." *Id.* at 741 n.34.