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Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions

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INTRODUCTION

The small claims of a dispersed group of consumers injured by a broad range of marketplace abuses were undoubtedly in the minds of the drafters who in 1966 helped shape Rule 23 of the Federal Rules of Civil Procedure, as well as the judges who later interpreted and applied the Rule.[1] As the Supreme Court famously stated in *Amchem Products, Inc. v. Windsor*,

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[2]

Congress has, over time, evinced a similar concern for the rights of small-claims consumers by enacting federal consumer legislation that expressly contemplates class action litigation as a means of redress.

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1. *See* Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1940 (2007) ("As for the focus on the consumer, securities, and antitrust cases, the drafters of Rule 23 assumed that groups of plaintiffs, assisted by lawyers attracted by fees, would enable federal judges to enforce federal regulations aimed at corporate misbehavior.").

2. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)); *see also* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."); *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 345 (S.D. Ga. 1996) (noting that an essential purpose of class actions is "to provide a feasible means for asserting the rights of those who 'would have no realistic day in court if a class action were not available'" (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985))).

The Truth in Lending Act,[3] Fair Credit Reporting Act,[4] and various other federal consumer protection laws[5] specifically envision that collective litigation efforts will comprise a central mechanism of statutory enforcement. In other federal statutory schemes, such as antitrust, courts have observed that private class action enforcement is an indispensable enforcement mechanism.[6] As Mark Budnitz notes, "Recognizing the resource limitations of government agencies, many consumer laws provide a private right of action so individual consumers also can litigate violations of these laws. Many of these laws also provide class actions and statutory damages which encourage consumers to act as 'private attorneys general.'"[7]

Nearly every state also has laws on its books to protect small-claims consumers,[8] and many of these statutes expressly anticipate consumer

3. Truth in Lending Act (TILA), 15 U.S.C. § 1640(a)(2)(B) (2006). TILA regulates the disclosure of credit terms and discrimination in determining credit limits, and it specifically provides that plaintiffs may recover "in the case of a class action, such amount as the court may allow." *Id.*

4. Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681–1681x; *see also* White v. E-Loan, Inc., No. C 05-0280 SI, 2006 WL 2411420, at *9 (N.D. Cal. Aug. 18, 2006) ("[W]ithout class actions, there is unlikely to be any meaningful enforcement of the FCRA by consumers whose rights have been violated.").

5. *See, e.g.*, Consumer Leasing Act of 1976, 15 U.S.C. §§ 1667–1667e (2006); Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2006); Equal Credit Opportunity Act, 15 U.S.C. §§ 1692–1692p (2006); Fair and Accurate Credit Transaction Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (2003).

6. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) ("[P]etitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."); *In re* Am. Express Merchs.' Litig. 554 F.3d 300, 312 (2d Cir. 2009) (recognizing, in the context of an antitrust claim, the "utility of the class action as a vehicle for vindicating statutory rights," especially where "a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action").

7. Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 664 (2008); *see also* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 687 (1941) (early commentators asserting that class actions serve to complement enforcement efforts by public regulatory agencies).

8. *See* William L. Stern, *The Reliance Element in State Consumer-Fraud Class Actions*, 23 REV. BANK. & FIN. SERV., Jan. 2007, at 1, 2. Stern states that

> [a]ll 50 states plus the District of Columbia have enacted some form of [legislation] . . . . which prohibits "unfair or deceptive acts or practices" in commerce. These state laws travel under different names—unfair and deceptive trade practices acts ("UDTPA"), consumer fraud acts, unfair competition laws, etc.—but share common characteristics. They all have broad applicability to consumer transactions and all are designed to prevent consumer deception or false advertising, or both.

class actions as a principal means of enforcement.[9] Enacted by states during the 1970s as part of the emerging consumer rights movement, unfair and deceptive trade practices statutes reach a broad range of consumer transactions. As one pro-defense commentator notes, violations of state unfair practices statutes "have become the most commonly-asserted claims in consumer class action cases, and it is a rare class action nowadays that does not feature" a state consumer protection law cause of action.[10]

Thus, it should be fairly uncontroversial to observe that small-claims consumer cases are a—if not *the*—primary reason why class actions exist, and that without class actions many—if not most—of the wrongs perpetrated upon small-claims consumers would not be capable of redress.[11]

Against that backdrop, it might seem odd if the lower federal courts were to develop a set of doctrines under which the majority of small-claims consumer class actions were deemed ineligible for class treatment.

And yet that is the story of small-claims consumer class litigation over the past decade, as federal district courts have repeatedly declined to certify class actions on grounds that are specific to small-claims consumer cases. Foremost among those grounds is the notion that the federal class action rule carries within it an implicit requirement of "ascertainability." More specifically, courts have held that in order to certify a class, the identity of class members must be sufficiently ascertainable to ensure the efficacy of a subsequent distribution of damages. In practice, what this shadow standard of ascertainability has come to mean is that no matter how clear the evidence of wrongdoing, plaintiffs have no redress in the typical consumer case involving small retail transactions.

The emergence of the ascertainability requirement marks a broader shift in judicial philosophy. As John Coffee recently noted, "[F]or better or worse, it is today clear that the tide has turned against class certification, and new barriers have arisen across a variety of contexts

9. *See, e.g.*, IND. CODE § 24-5-0.5-3 (Supp. 2001) (authorizing class actions in deceptive sales act); FLA. STAT. § 501.201 (2008); N.Y. GEN. BUS. LAW §§ 342-b, 349 (McKinney 2004); WIS. STAT. § 100.20 (2004).

10. Stern, *supra* note 8, at 2.

11. *See* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104 n.5 (2006) (defining small-claims actions as "including virtually all consumer class cases, and many claims arising under banking, insurance, and other laws," but excluding "employment, antitrust, and securities actions, and virtually all mass tort class actions").

where formerly class certification had seemed automatic."[12] In the 1970s and 1980s, courts regularly certified small-claims consumer class actions,[13] even when, as was typical, the identities of most class members were unknowable.[14] Today, this paradigmatic small-claims consumer class action is more often than not uncertifiable.

This Article will examine the doctrinal bases for the increasing hostility to small-claims consumer class actions, with a view towards identifying the perspectival theories that animate these developments. Specifically, it will focus on the emergence of the extra-statutory ascertainability requirement as it has been grafted onto the class certification analysis in recent years. Underlying this doctrinal development, I will assert, is a conservative conception of justice that is generally offended by liberal notions of broad representational standing[15]—a view that is less concerned with vindicating the value of deterrence than it is with fidelity to a traditional paradigm of justice that features a single injured claimant who pursues compensation through litigation.[16]

It is useful to think of these divergent views as, respectively, the private law and the public law conceptions of class actions. The private law conception understands a class action as a collective of one-on-one disputes between private parties. In the classic private law action, the party that suffered injury is the party pressing the action: there is total unity between victim and plaintiff. And the coin of the

12. John C. Coffee & Stefan Paulovic, *Class Certification: Developments over the Last Five Years, 2002–2007*, *in* 8 CLASS ACTION LITIGATION 2008: PROSECUTION AND DEFENSE STRATEGIES 195, 195–96 (2007).

13. *See, e.g.*, Alec Johnson, *Vioxx and Consumer Product Pain Relief: The Policy Implications of Limiting Courts' Regulatory Influence over Mass Consumer Product Claims*, 41 LOY. L.A. L. REV. 1039, 1047 (2008) (observing that beginning in the 1980s and continuing through the early 1990s, "federal courts began to expand the scope of the class action mechanism . . . largely because of the increases in group settlements that accompanied class certification").

14. *See, e.g.*, Vasquez v. Super. Ct. of San Joaquin Valley, 484 P.2d 964, 969–70 (Cal. 1971) (class certified in a fraudulent misrepresentation case involving hundreds of potential class members); Metowski v. Triad Corp., 104 Cal. Rptr. 599, 601–02 (1972) (class certified in a case involving over 100,000 people who had purchased a product, with no clear means of locating most class members); Miner v. Gillette Co., 428 N.E.2d 478, 484 (Ill. 1981) (class of nearly 200,000 consumers certified, despite the inability to locate the majority of the class members); Delgozzo v. Kenny, 628 A.2d 1080 (N.J. Super. Ct. App. Div. 1993) (certifying a class of over 35,000 purchasers of water heaters in twenty-eight states, with purchases dating back over ten years).

15. *See, e.g.*, Myriam E. Gilles, *Representational Standing:* U.S. ex rel. Stevens *and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 367 (2001) (reviewing the historical development of strict standing doctrine and asserting that the "constitutionalization" of the rules governing Article III standing represents the triumph of a conservative vision of rights enforcement).

16. *See* Andrew D. Thibedeau, *Vindicating the Public Interest?: The Public Law Implications of Attorneys' Fee Restrictions in Class Actions*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 231, 232 (2008) (describing traditional litigation as "a bipolar enterprise undertaken as a contest between two adverse interests").

realm is compensation: the private law model is "[p]redominantly concerned with past events [and] looks chiefly to compensate parties previously harmed."[17] This model is not particularly concerned with deterrence, punishment, or the disgorgement of ill-gotten gains. Accordingly, small-claims consumer class actions, in which relatively few of the injured parties stand to reap compensation, are inherently suspect on the private law view, no matter how effective the class vehicle may be at deterring misconduct.

By contrast, the public law conception understands class actions as a means for private citizens to enforce public values. The term "public law" was famously coined by Abram Chayes, who distinguished between a private law model, which is built on disputes "between private parties about private rights," and a public law model, which is characterized by a broad understanding of affected parties and by a managerial judiciary engaged in developing creative remedial schemes.[18] The public law view readily accommodates small-claims consumer class actions, just as it does other forms of representative litigation. Indeed, this view prioritizes the deterrence function of small-claims class actions, and as a consequence, it is highly tolerant of remedies that "may not provide full direct compensation to plaintiffs [but that] can force guilty defendants to disgorge ill-gotten gains."[19]

The emergence of the ascertainability doctrine marks a high water point for the private law conception of the class action device. Part II shows that the ascertainability doctrine is entirely incoherent when viewed from the perch of a public law conception of class actions—or indeed, from any perspective other than one that prizes above all else a total unity of the injured party and the person prosecuting the action.[20]

The price for this orthodoxy is steep. As some district judges have candidly acknowledged, the rigorous application of the ascertainability requirement will often entail impunity for corporate defendants who perpetrate harms in relatively modest increments upon large numbers of consumers.[21] What is not entirely obvious is why courts believe that this is a price worth paying. Part III explores why

17. *Id.*

18. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284, 1295–96 (1976).

19. Kerry Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591, 1593 (1987).

20. *See infra* notes 25–76 and accompanying text.

21. *See, e.g.*, Thompson v. Am. Tobacco Co., 189 F.R.D. 544, 556 (D. Minn. 1999) (stating, where it was alleged that "a class action is the only viable remedy for Plaintiffs given the enormous financial burden of independently pursuing litigation," that "[a]lthough it is difficult to

we are comfortable elsewhere in the law tolerating a significant level of "disunity" between the injured party and the person prosecuting an action.[22] These public law values support practices such as the imposition of punitive damages in private actions[23] and the promulgation of rules that govern standing in antitrust cases.[24]

And yet, in the class action arena, public law values are regarded with tremendous suspicion. A real world by-product of the hegemony of the private law conception is that the classic small-claims consumer class action has become largely uncertifiable. Uneasiness with disunity—with the possibility of compensating uninjured parties—has led courts to abandon the cases at the very core of Rule 23.

II. THE ASCERTAINABILITY DOCTRINE

A number of courts have now found within Rule 23 an "implicit" requirement that plaintiffs, in order to certify a class, must prove that the identities of the members of the class are "ascertainable."[25] There are several reasons courts give for imposing this extra-textual ascertainability requirement: concerns about manageability in the distribution of damages, perceived difficulties in showing proof of injury, and doubts about the effective provision of notice to class members.

At the outset, many courts have held that without reliable proof of purchase or a knowable list of injured plaintiffs at the certification stage, damages cannot reliably be distributed to potential claimants at the subsequent remedial stage of the litigation. Typically, this concern is framed in terms of the "manageability" requirement of Rule 23(b)(3).[26] That is, courts are skeptical that the class device is "man-

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ignore this reality, it is not a sufficient reason to headlong plunge into an unmanageable and interminable litigation process" (quotation marks omitted)). Courts also recognize that

> because of the small amount of individual damages at issue, alternative methods to adjudication by a class may be realistically lacking for individuals without any proof of purchase. However, "the desirability of allowing small claimants a forum to recover for largescale [ ] violations does not eclipse the problem of unmanageability.

In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 620–21 (W.D. Wash. 2003) (quoting *In re* Hotel Tel. Charges, 500 F.2d 86, 90, 92 (9th Cir. 1974)).

22. *See infra* notes 77–106 and accompanying text.

23. *See infra* notes 77–91 and accompanying text.

24. *See infra* notes 92–106 and accompanying text.

25. *See, e.g.*, McBean v. City of New York, 228 F.R.D. 487, 492 (S.D.N.Y. 2005) (describing the implicit but fundamental requirement that "[t]he class that plaintiffs seek to certify must be readily identifiable so that the court can determine who is in the class").

26. *See, e.g.*, *In re PPA*, 214 F.R.D. at 616 ("The manageability determination 'encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit.'" (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974))); City of Philadelphia v. Am. Oil Co., 53 F.R.D. 45, 72 (D.N.J. 1971) ("It is readily apparent that no

ageable" if there is no surefire way to get damages into the hands of the individuals who suffered an injury.

As a corollary, the same basic proof of purchase concern can be reframed as a matter of Rule 23(b)(3) "predominance."[27] When a plaintiff claims to have suffered injury as a result of purchasing the item in question, raising the issue of whether the proffered proof consists of a naked oath or documentary evidence, courts have held that the defendant is entitled to challenge the proof of purchase and "cross-examine each class member[ ] regarding that alleged injury."[28] If a defendant is entitled to cross-examine 1,000 putative class members on their proof of purchase and injury, then a court is likely to find that individual factual questions predominate over common ones.[29]

These concerns appear to have been first articulated, although in reverse order, in a 1981 Seventh Circuit decision:

> Identification of the class serves at least two obvious purposes in the context of certification. First, it alerts the court and parties to the burdens that such a process might entail. In this way the court can decide whether the class device simply would be an inefficient way of trying the lawsuit . . . . Second, identifying the class insures that those actually harmed by defendants' wrongful conduct will be the recipients of the relief eventually provided.[30]

In addition, a number of courts have evinced the distinct concern that the lack of an ascertainable roster of injured parties impedes the provision of constitutionally adequate notice and opportunity to opt

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matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to distribute these sums to their rightful recipients, the class is unmanageable.").

27. See, e.g., *In re PPA*, 214 F.R.D. at 616, which states that

> Rule 23(b)(3) allows for class certification where the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

28. *Id.* at 619.

29. *See, e.g.*, Zinser v. Accufix Res. Inst., Inc., 253 F.3d 1180, 1192 (9th Cir. 2001) ("If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'"); O'Connor v. Boeing N. Am., Inc., 197 F.R.D. 404, 415 (C.D. Cal. 2000) ("[A] class action is improper where an individual class member would be compelled to try numerous and substantial issues to establish his or her right to recover individually, after liability to the class is established."). See also *In re* Teflon Prods. Liab. Litig., 254 F.R.D. 354, 370 (S.D. Iowa 2008), which states that

> [i]n order to recover, each plaintiff may be required to show that he or she purchased [the complained-of product] within the time period allowed under the applicable statute of limitations. Each of these issues will require an individualized inquiry, which the Court believes will render each class action unmanageable.

30. Simer v. Rios, 661 F.2d 655, 670 (7th Cir. 1981).

out of the class action lawsuit.[31] As a matter of doctrinal pigeon-holing, this issue can also be conceptualized as a manageability problem under Rule 23(b)(3) or a free-standing issue of due process.[32]

But whether cast as an issue involving Rule 23's predominance requirement or as a due process notice concern, the core problem the ascertainability doctrine seeks to address is that, in most small-claims consumer class actions, there exist no reliable means of determining the identity of injured class members for purposes of managing and distributing damages to those individuals.

A. Damages Manageability

The clearest manifestation of the ascertainability doctrine is the court's focus on proof of purchase as a means of ensuring that a traditional remedial scheme will be workable down the line. In recent years, district courts have begun to require actual proof of purchase at the class certification stage, by way of receipts, wrappers, box tops, and the like, asserting that this "objective standard" ensures that the class is "capable of ascertainment."[33] This proof requirement presents daunting problems in most small-claims consumer class actions. Who, after all, has proof that they purchased peanut butter, pineapples, or aspirin?

There are a number of recent cases denying class certification on proof-of-purchase and ascertainability grounds, including cases involving purchases of Teflon cookware,[34] Lipitor,[35] peanut butter,[36] and

31. *See, e.g.*, Van West v. Midland Nat'l Life Ins. Co., 199 F.R.D. 448, 451 (D.R.I. 2001) (noting that the ascertainability of class members is important so that a court can decide "who will receive notice, who will share in any recovery, and who will be bound by the judgment").

32. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985) (describing the important constitutional dimensions of class notice for future rights preclusion).

33. *In re Teflon Prods. Liab. Litig.*, 254 F.R.D. at 360; *see also In re* Paxil Litig., 212 F.R.D. 539, 545 (C.D. Cal. 2003) (declining certification where the plaintiff defined the proposed class in such a manner as to make the actual composition of the class only determinable at the conclusion of the proceedings); *In re* PPA Prods. Liab. Litig., 214 F.R.D. 614, 617 (W.D. Wash. 2003) (noting that plaintiff "class members [must] supply either physical proof of purchase and possession, such as the actual product, product packaging, or a receipt, or submit a certified oath or verification attesting to purchase and possession"); *In re* Microsoft Corp. Antitrust Litig., 185 F. Supp. 2d 519, 523 n.2 (D. Md. 2002) (finding it economically unfeasible to distribute the proceeds of a settlement to consumers in part because "many individual consumers would not have retained proof of purchase documents").

34. *See generally In re* Teflon Prods. Liab. Litig., 254 F.R.D. 354 (S.D. Iowa Dec. 5, 2008) (seeking class treatment for personal and economic injury where defendant allegedly made false, misleading, and deceptive representations regarding the safety of its non-stick cookware).

35. *See generally* Dumas v. Albers Med., Inc., No. 03-0640-CV-W-GAF, 2005 U.S. Dist. LEXIS 33482 (W.D. Mo. Sept. 7, 2005) (seeking class treatment for personal and economic injury claims stemming from purchase of counterfeit Lipitor).

common cold remedies.[37] The most thorough exploration of this concept is probably Judge Berman's decision in *In re Fresh Del Monte Pineapples*, which involved claims by pineapple purchasers who were overcharged after the defendant monopolized the market by illegally obtaining a patent.[38]

The *Fresh Del Monte Pineapples* court expressed concern with the ascertainability of the membership of the class. In particular, the court found that the proposed class failed the "manageability" prong of Rule 23(b)(3) because without a reliable means of ascertaining the identity of injured purchasers, there was no way to ensure that the damages would get into the hands of the individuals who suffered an injury.[39]

To address the court's concerns with remedial workability, the plaintiffs' expert proposed three possible modes of distributing relief to the class: "(1) automatic price reductions on Del Monte Gold Pineapples by placing a coupon on the hang tags attached to those pineapples, (2) a formal claims procedure in which class members could obtain coupons or cash relief, and (3) a *cy pres* distribution."[40] An examination of the court's rejection of each of these schemes provides a uniquely illuminating vantage point from which to consider the fundamental normative issues that are at the core of this Article.

1. *Automatic Price Reductions: The Compensating-the-Uninjured Problem*

The court rejected an automatic price reduction system wherein each purchaser of a Fresh Del Monte pineapple would receive a reduction at the cash register on the price of the fruit. According to Judge Berman, this is an imperfect damages delivery mechanism because it creates a disunity between (1) injured parties (i.e., past pineapple purchasers who incurred the overcharge) and (2) the beneficiaries of the price reduction (i.e., future pineapple purchasers). It may stand to reason that yesterday's pineapple purchasers will comprise a significant portion of tomorrow's purchasers—and the plain-

36. *See generally In re* Conagra Peanut Butter Prods. Liab. Litig., 251 F.R.D. 689 (N.D. Ga. 2008) (seeking class treatment for personal and economic injury claims arising from peanut butter contaminated by *Salmonella* bacteria).

37. *See generally In re* PPA Prods. Liab. Litig., 214 F.R.D. 614, 617 (W.D. Wash. 2003) (seeking class treatment for personal and economic injury claims stemming from purchase of medication containing phenylpropanolamine).

38. *See In re* Fresh Del Monte Pineapples Antitrust Litig., No. 1:04-md-1628 (RMB), 2008 U.S. Dist. LEXIS 18388 (S.D.N.Y. Feb. 20, 2008).

39. *See id.*

40. *Id.* at *22.

tiffs purported to present some evidence to that effect[41]—but the court was primarily interested in ensuring that no uninjured parties, in the form of future first-time purchasers, shared in the relief: "The people who are [currently] purchasing for the first time would not have suffered damages but would still get the benefit of the automatic discount."[42] The court was particularly concerned that an advertised automatic price reduction "would attract and benefit new buyers who are not Class Members," creating something of a moral hazard.[43] While this aversion to compensating the uninjured has not hindered certifying courts in the past,[44] Judge Berman took the position that the "automatic price reductions plan is fundamentally flawed because it depends ultimately on the alleged pattern of repeat purchase[s] by a core group of customers."[45]

It is worth pausing to ask what normative theory explains courts' recent concern with compensating the uninjured in small-claims consumer class actions—or, more particularly, why this concern weighs so heavily that courts are willing to deny class certification, thereby precluding *any* injured parties from receiving compensation and, more importantly, thwarting the core value of deterring corporate wrongdoing that is traditionally understood to underlie the class action device.[46]

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41. *Id.* at *25. Specifically, the plaintiffs' expert asserted that an automatic price reduction would primarily benefit injured class members because "approximately 90% of all purchases of Del Monte Gold Pineapples are made by repeat purchasers." *Id.* The district court refused to credit this assertion, finding it was based on unsupported and unreviewed data. *Id.* at 25–26. However, there seems to be a strong argument to be made that Del Monte pineapples are so dominant in the market—due in part to the company's illegal monopolization tactics, Del Monte has more than thirty percent of the market—that any prior or future purchase of a pineapple is likely to have been Del Monte branded. *See* FRESH DEL MONTE PRODUCE INC., 2008 ANNUAL REPORT 2, http://library.corporate-ir.net/library/10/108/108461/items/329184/A23BE1A1-0DB3-4205-BB6A-1C489233B8EC_FDP_AR.pdf.

42. *In re Fresh Del Monte*, 2008 U.S. Dist. LEXIS 18388, at *23 (internal quotation marks omitted); *see also* New York v. Dairylea Coop. Inc., 547 F. Supp. 306, 308 (S.D.N.Y. 1982) ("[T]his [settlement] plan seems unfair to those actually injured for it makes no effort to specifically reimburse those who were allegedly overcharged in the past but in effect is a payout to future milk drinkers in general." (footnotes omitted)).

43. *Id.* at *23.

44. *See, e.g.*, Colson v. Hilton Hotels Corp., 59 F.R.D. 324 (N.D. Ill. 1972) (automatic telephone charge reductions); Daar v. Yellow Cab Co., 433 P.2d 732 (Cal. 1967) (automatic taxicab rate reductions); *see also* Natalie A. DeJarlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729, 753–55 (1987) (listing cases approving class settlements that included automatic price reductions on future purchases of defendants' product).

45. *In re Fresh Del Monte,* 2008 U.S. Dist. LEXIS 18388, at *10 (internal quotation marks omitted).

46. *See* Gilles & Friedman, *supra* note 11, at 105 ("All that matters is whether [class actions] cause[ ] the defendant-wrongdoer to internalize the social costs of its actions.").

One might argue that the "compensating the uninjured" problem has real import because every dollar that goes to an uninjured party is a dollar that is unavailable to compensate an injured class member. But as a *practical* matter, this explanation is wholly unsatisfying. In practice, a very small percentage of eligible consumer claimants make submissions to class action claims administrators.[47] Invariably, in small-claims consumer class actions, less than twenty percent or so of class action damages funds are distributed to plaintiff claimants.[48] That being the case, it is simply not true that compensation of uninjured parties affects the compensation interests of injured class members. On the other hand, it is certainly true that in the absence of class certification, injured consumers are unlikely to receive any compensation, and more significantly, the vast majority of corporate malfeasance goes unchecked.[49]

2. *Formal Claims Procedures: The Undercompensating-the-Injured Problem*

Whereas the rejection of automatic price reductions was driven by a concern with compensating uninjured plaintiffs, the main perceived shortcoming of a traditional claims submission procedure—in which claimants must present proof to a claims administrator that they purchased the product at issue within certain parameters[50]—is that it does a poor job of getting compensation to injured plaintiffs. This is the core holding of *Fresh Del Monte Pineapples*: consumers are unlikely to have the receipts or other qualifying documents that a rigor-

47. *See, e.g.*, Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV. 747, 751 (1988) (reporting that in a class action against Levi Strauss Co., "only 14% to 33% of eligible class members applied for refunds of clothing price overcharges"; that in a real estate antitrust class action, only 10.5% of class members sought settlement funds; and that in a class action against Wells Fargo, "the claims rate for refunds was significantly less than 5%").

48. See Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 120 (2007), stating that

> there are so many examples of shockingly low participation rates that what used to be extreme is becoming ordinary. In one suit against Wells Fargo, less than 5% of the eligible class members bothered to claim their cash refunds under the settlement plan. In extreme cases, the [participation] rate has been less than one percent. In one class action with forty million members, only 228 individuals actually filed claims against the settlement fund.

49. *See, e.g.*, Gilles & Friedman, *supra* note 11, at 106.

50. *See, e.g.*, Strategic Claims Services, http://www.strategicclaims.net (last visited Sept. 19, 2009) (describing the types of case-specific documentation required of claimants, including dates of purchase, point of purchase, and place of residence); A.B. Data, Ltd., Class Action Administration, http://www.abdatalawserve.com (last visited Sept. 19, 2009) (same); *see also* Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 LAW & CONTEMP. PROBS. 79, 98–100 (1990) (describing distribution guidelines established by claims administrators).

ous claims administration process would require, and even if they do, it is unlikely that any given consumer will ever see the notice of settlement.[51] That being the case, the court despairs of meaningfully compensating injured plaintiffs via a traditional claims submission procedure.

There is, to be sure, a sense of realism in the court's treatment of these issues.[52] No one keeps the receipt for a pineapple, and any notice program is unlikely to reach more than a handful of consumers. But if it is realism we are after, why stop there? Even if the consumer is able to obtain proof of purchase (e.g., from a credit card company) and even if she has, against all odds, actually seen the notice of the claims procedure, we can be certain that she will not undertake the time and effort required to comply with a traditional claims submission process.[53] The plain reality is that small-claims consumer class actions are poor vehicles for getting compensation into the hands of injured parties.

To the extent that courts are truly concerned with compensating injured plaintiffs, the rigorous insistence on proof-of-purchase is counterproductive. If one's goal is to ensure that compensation flows to injured parties, the most important step we can take is to relax the filter that prevents uninjured parties from obtaining compensation. Proof-of-purchase requirements may do a good job of keeping damages from the uninjured, but courts' extravagant concern with compensating the uninjured does an equally effective job of keeping damages from the truly injured.

So it appears inarguable that the rigorous insistence on proof-of-purchase directly undercuts both the values of compensating injured

51. *In re* Fresh Del Monte Pineapples Antitrust Litig., No. 1:04-md-1628 (RMB), 2008 U.S. Dist. LEXIS 18388, at *29 (S.D.N.Y. Feb. 20, 2008) ("[N]one of the named Plaintiffs possesses receipts or other proof of purchases made during the Class Period, and Plaintiffs have offered no evidence that other Class Members possess such proof.").

52. Also realistic is the court's assessment that automatic price reductions may undercompensate injured parties because they are underinclusive: "[A] number of retail stores which once purchased Del Monte Gold pineapples no longer buy [them] .... Class members who patronize those stores would not benefit from the automatic discount plan." *Id.* at *24.

53. Even if a claimant were to undertake the time and effort, some courts have held that claims procedures that rely solely on a claimant's own authority are inherently problematic for purposes of certification. *See, e.g.*, *In re* Teflon Prods. Liab. Litig., 254 F.R.D. 354, 363 (S.D. Iowa 2008) ("[T]he proposed representative's own testimony, coupled with the cookware item itself, were the only evidence available to establish membership" in the class and "[n]either have been shown to be particularly reliable"); *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 617 (W.D. Wash. 2003) ("It is unrealistic to suppose that defendants will accept sworn oaths or affidavits under these circumstances."); Ludke v. Philip Morris Cos., Inc., No. MC 00-1954, 2001 WL 1673791, at *3 (D. Minn. Nov. 21, 2001) ("[C]ertification of the proposed class here would be an invitation for fraud.").

plaintiffs and of deterring wrongdoing. And it does so with brutal efficiency by front-loading essentially remedial concerns into the class certification analysis and creating a test that small-claim consumer class actions—almost by definition—cannot meet.

All of this, of course, begs the question of just what value *is* being served by maintaining such a tight filter against compensating the uninjured. A doctrinal response would be to say that construing Rule 23 in a fashion that allows uninjured parties to share in damages violates the Rules Enabling Act.[54] In the *Light Cigarettes* case, the Second Circuit recently held that "[r]oughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability."[55] According to that court, "This kind of disconnect offends the Rules Enabling Act, which provides that federal rules of procedure, such as Rule 23, cannot be used to 'abridge, enlarge, or modify any substantive right.'"[56]

But the Rules Enabling Act argument is reflective of a legal philosophy that fundamentally misapprehends the purpose of class actions. In proof-of-purchase cases such as *Fresh Del Monte Pineapples*, the defendant's aggregate liability is not much in doubt: Judge Berman had no trouble calculating the gross overcharge incurred by all consumers, whoever they may be, due to Fresh Del Monte's illegal conduct. What he could not calculate, because of the proof-of-purchase problem, was *which* consumers were owed damages as a result of the defendant's conduct.

In the context of the Rules Enabling Act, the question on the table is whether a "defendant's substantive rights" are abridged if a class is certified when the defendant's aggregate liability is known, but the identity of injured consumers and the extent to which each consumer was injured are not known. My own view is that the defendant's rights are not abridged in that scenario. My perspective is grounded in the view that class actions are a form of *representative* litigation, quite like *parens patriae* suits brought by state attorneys general to

54. Insofar as "individual" proof of damages is thought to be an essential element of a claim, any perceived lessening of the plaintiff's burden on this point may be said to "eliminat[e] or erod[e]" traditional or statutory requirements thereby altering substantive law in violation of the Rules Enabling Act. *In re* Hotel Tel. Charges, 500 F.2d 86, 90 (9th Cir. 1974); *see also* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1014 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974); Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43, 50 (D. Del 1974)).

55. McLaughlin v. Am. Tobacco Co. (*Light Cigarettes*), 522 F.3d 215, 231 (2d Cir. 2008).

56. *Id.* (quoting 28 U.S.C. § 2072(b)).

vindicate consumer rights.[57] In this public law paradigm, the defendant's rights are not abridged so long as its aggregate liability is fairly established.[58] Difficulties in allocating damages at the individual claimant level do not abridge the defendant's rights. Indeed, on this model, such difficulties are none of the defendant's business.[59] As the leading treatise on class actions asserts,

> Aggregate computation of class monetary relief is lawful and proper. Courts have not required absolute precision as to damages and have allowed damages to be proven by reference to the class as a whole, rather than by reference to each individual class member. Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury rights to contest each member's claim individually, will not withstand analysis.[60]

There is a competing, private law paradigm at work under the surface of cases like the *Light Cigarettes* case and the proof-of-purchase consumer cases. Unlike *parens patriae* or the public law paradigm, this private law view conceptualizes the class action as simply an aggregation of one-on-one lawsuits—as a procedural device, like joinder or consolidation.[61] On this view, the defendant has a right to pay nothing more than it would pay if it were facing individual suits from each potential claimant. On this model, the defendant's aggregate liability should not exceed the sum of liability that would result from a multitude of individual trials—in which the defendant asserts the de-

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57. *Parens patriae* legislation specifically authorizes state attorneys general to sue on behalf of their injured citizens. *See* Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 15c (2006) (permitting *parens patriae* suits under the federal antitrust statutes); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859, 1863 (2000) (noting that in *parens patriae* actions "a state may recover costs or damages incurred because of behavior that threatens the health, safety, and welfare of the state's citizenry").

58. Indeed, some have argued that defendants' aggregate liability should be greater than the total loss suffered by the plaintiffs, as a means of further encouraging defendants to honor their duty of care. *See* A. Mitchell Polinsky & Yeon-Koo Che, *Decoupling Liability: Optimal Incentives for Care and Litigation*, 22 RAND J. ECON. 562, 563 (1991). While I need not take on this argument here, it is worth noting that "decoupling" compensation and deterrence has been an approach that a number of scholars have thoughtfully examined. *See generally, e.g.*, David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002).

59. *See* Barnett, *supra* note 19, at 1595 ("When the court can infer the existence of these injured individuals from the evidence and can calculate the aggregate amount of claims, the class action device ought to permit satisfaction of the claims.").

60. 3 CONTE & NEWBERG, NEWBERG ON CLASS ACTIONS § 10:5 (2002).

61. *See, e.g.*, Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1746 (1992) (observing that "transactionalism," embodied in the Federal Rules of Civil Procedure, made possible "the joinder of other persons affected by the same series of events").

fense of failure to prove injury—against each potential claimant.[62] To illustrate, suppose that a defendant such as Fresh Del Monte went to trial in 1,000,000 separate cases, that the plaintiffs in each case sought damages of $10, and that in 990,000 of those cases, the defendant won because the plaintiff-consumer failed to offer proof of purchase and hence establish injury. In the one-on-one paradigm, Fresh Del Monte's aggregate liability is $100,000 (10,000 victorious plaintiffs multiplied by $10), and it should pay not one dollar more than that amount.[63]

So in the end, doctrinaire references to the Rules Enabling Act do a poor job of explaining the value of rules that so tightly guard against compensating the uninjured at the expense of sacrificing the compensation of the injured and the deterrence of the wrongdoing. Something else is going on—and in my view, that "something else" is fidelity to the private law paradigm.

3. *The* Cy Pres *Muddle*

This same private law conception of the class action suggests that courts would be hostile to the concept of *cy pres* distributions. *Cy pres* is a doctrine borrowed from trust law, where it applies to preserve testamentary charitable gifts that would otherwise fail. If a charitable gift can no longer be carried out as the testator intended, the *cy pres* doctrine allows the "next best" use of the funds to satisfy the testator's intent "as near as possible."[64] In the class action context, *cy pres* refers "to the distribution of unclaimed or unclaimable funds to persons not found to be injured, but who have interests similar to those of the class."[65]

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62. *See* McLaughlin v. Am. Tobacco Co. (*Light Cigarettes*), 522 F.3d 215, 231 (2d Cir. 2008) (stating that an "aggregate determination [of damages] is likely to result in an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants").

63. *See* Barnett, *supra* note 19, at 1608. Barnett asserts that when an argument is based on the Rules Enabling Act, courts must consider "the specific substantive rights of the parties under the statute invoked to determine whether they have been altered by this application of Rule 23." *Id.* Barnett points out that "[w]hen plaintiffs sue under statutes drawn to serve principles of deterrence and disgorgement," it cannot be argued that the remedy has altered the parties' substantive rights, but when "plaintiffs invoke statutes drawn explicitly to provide compensation to a narrow range of injured parties, a conflict may result." *Id.*

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

65. *In re* NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. 493, 525 (S.D.N.Y. 1996). *See generally* Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 LAW & CONTEMP. PROBS. 97, 107 (1997) (providing a broad theoretical framework for evaluating the costs and benefits of various types of nonpecuniary class action settlements, and asserting that cy

Predictably, contemporary courts have aggressively rejected attempts to rely upon the *cy pres* doctrine at the class certification stage. That is, courts have refused to certify classes where plaintiffs try to side step the ascertainability requirement by asserting that, at the subsequent remedial stage, they will seek to distribute damages under *cy pres*. Instead, courts invariably hold that the *cy pres* doctrine "does not circumvent the bedrock principle that members of a class must be identifiable."[66] For example, in *In re PPA*, the district court explicitly rejected *cy pres* as a solution to ascertainability:

> Here, the court's concerns lie in more than simply how to distribute unclaimed damages. Instead, the court faces the daunting task of determining who could claim those damages in the first place. Given plaintiffs' supposition that tens of millions of dollars are at stake, and the incredibly difficult and time consuming process of distributing portions of that amount on an individual basis, at approximately three dollars per product, the adoption of a fluid recovery procedure would not serve to lesson the manageability problems plaguing the proposed class.[67]

Similarly, those courts that have relied on *cy pres* arguments at the certification stage in recent years have been overruled or reversed.[68]

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pres settlements are common where "the class is large, each member has a small claim, and a large fraction of the class either cannot be identified or is unlikely to file a claim even if notified of the lawsuit").

66. *In re* Neurontin Mktg. & Sales Practices Litig., 244 F.R.D. 89, 113 (D. Mass 2007); *accord* Simer v. Rios, 661 F.2d 655, 675–76 (7th Cir. 1981) (declining to certify class and rejecting "any approach which would automatically utilize a fluid recovery mechanism as a procedural alternative to class action disposition"); *In re* Hotel Tel. Charges, 500 F.2d 86, 89–90 (9th Cir. 1974) (rejecting the use of fluid recovery as a means of circumventing proof of individual injury under Rule 23); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974) (finding that the fluid recovery regime established by the district court would have allowed plaintiffs to satisfy the manageability requirements of Rule 23 when they otherwise could not); Dumas v. Albers Med., Inc., No. 03-0640-CV-W-GAF, 2005 U.S. Dist. LEXIS 33482, at *7 (W.D. Mo. Sept. 7, 2005) (stating that fluid recovery "is not appropriate when it is used to assess the damages of the class without proof of damages suffered by individual class members" and class action was otherwise unmanageable).

67. *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 620 (W.D. Wash. 2003).

68. *See, e.g.*, Simer v. Rios, 661 F.2d 655, 675 (7th Cir. 1981).

> Plaintiffs apparently contend that the harmed individuals cannot be identified and therefore a fluid recovery should be utilized. Strictly speaking, plaintiffs' contention proves too much. It sets forth no criteria for determining when class certification is unnecessary and when the requirements of class certification may be restructured. Indeed, to accept plaintiffs' position would be to ignore the requirements of Rule 23, such as whether an identifiable class exists and whether notice to the class can be executed.

Id.; *see also In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 235 F.R.D. 127, 144 (D. Me. 2006) (use of fluid recovery to calculate damages does not defeat class certification), *rev'd*, 522 F.3d 6 (1st Cir. 2008); Schwab v. Philip Morris USA, Inc., No. CV 04-1945 (JBW), 2005 WL 3032556 (E.D.N.Y. Nov. 14, 2005), *rev'd sub nom.* McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008).

None of this is surprising. What is noteworthy is that *cy pres* survives at all. Given the supremacy of the private law conception of class actions, and its core "unity principle," courts' continued receptivity to *cy pres* distributions at the remedial stage is fairly astonishing. After all, the animating theory behind an ascertainability requirement in the first instance is a conservative conception of justice that insists upon precisely the values that *cy pres* flouts: an unremitting identity between injured plaintiffs and the recipients of damages funds.[69]

And yet, in terms that bespeak a decidedly public law orientation to class actions, courts routinely reaffirm the *cy pres* concept, as first endorsed over twenty years ago by the California Supreme Court:

> Fluid recovery may be essential to ensure that the policies of disgorgement or deterrence are realized. Without fluid recovery, defendants may be permitted to retain ill-gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.[70]

This public-private disconnect is striking, as courts affirm *cy pres* at the remedial stage under what can only be a public law rationale, while rejecting it at the certification stage, under what can only be a private law rationale. In a bid to ameliorate the cognitive dissonance of it all, I think many courts have thus stretched to find a private law-friendly justification for the distribution of settlement proceeds via *cy pres*. This is most commonly expressed in the demand for evidence that the requested *cy pres* distributions will benefit current or absent class members.[71] For example, in *State v. Levi Strauss & Co.*, the Cali-

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69. *See* George Krueger & Judd Serotta, Editorial, *Our Class-Action System Is Unconstitutional*, WALL ST. J., Aug. 6, 2008, at A13 (criticizing *cy pres* awards in which courts distribute money "in an ad hoc manner, to people who are not even in the class, who would not have had standing to sue, and who were never even alleged to have been wronged").

70. California v. Levi Strauss & Co., 715 P.2d 564, 570–71 (Cal. 1986) (internal citations omitted); *see also* Boyle v. Giral, 820 A.2d 561, 569 (D.C. Cir. 2003) (finding *cy pres* appropriate when "direct distribution of settlement funds to individual class members is impractical; and where important consumer goals, such as disgorgement of ill-gotten gains from and deterrence of future over-pricing and manipulation of market allocation . . . can be achieved"); Bellows v. NCO Fin. Sys., Inc., No. 3:07-cv-01413-W-AJB, 2009 WL 35466 (S.D. Cal. Jan. 9, 2009) (describing a Special Master's report on the distribution of unclaimed class settlement funds to *cy pres* recipients); Schwartz v. Dallas Cowboys Football Club, Ltd., 362 F. Supp. 2d 574, 577 (E.D. Pa. 2005) (authorizing *cy pres* distribution of settlement funds to NFL Youth Education Town Centers in an antitrust action regarding bundled NFL programming); *In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1395 (N.D. Ga. 2001) (authorizing *cy pres* distribution of settlement funds to nine charities in an action that alleged a conspiracy to fix prices on NASCAR race souvenirs).

71. *See, e.g.*, *In re* Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 684 (8th Cir. 2002) (in the settlement of an antitrust class action suit against various airlines, reversing a district court grant of otherwise undistributable *cy pres* settlement funds to the National Association for Public Interest Law on the grounds that a better recipient of the funds would be travel agencies

fornia court noted that *cy pres* funds should "be used in California for a purpose that is reasonably designed to benefit those persons who would otherwise have received the fund."[72]

Other courts appear more at ease with the public law function of *cy pres* remedies and are therefore more candid in acknowledging that these distributions confer little or no benefit to class members, but rather serve the broader public interests of disgorgement and deterrence.[73] Indeed, some courts have even allowed an entire settlement award—not merely the undistributed residue—to be used for a *cy pres* remedy when individual recoveries would be too small and therefore too costly to distribute.[74] These courts take a purely public law perspective on class actions, wherein *cy pres* is desirable because it forces "[d]isgorgement of illegal gains from wrongdoers" and it "fulfill[s] the deterrence objectives of class actions."[75] Judge Posner put it best in a case upholding a *cy pres* distribution: "There is no indirect benefit to

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indirectly affected by the anticompetitive conduct); Democratic Cent. Comm. v. Wash. Metro. Area Transit Comm'n, 84 F.3d 451, 455 (D.C. Cir. 1996) (noting that the *cy pres* doctrine is based on the premise that the funds should be "distributed to the 'next best' class when the plaintiffs cannot be compensated individually"). One commentator has stated,

> The primary criterion that should govern the appropriateness of a cy pres award, both from the standpoint of its legal permissibility and in choosing between alternative candidates for the award, is that the award should come as close as possible to benefiting the same group of class members to whom it proves impractical to provide direct compensation.

J. Douglas Richards, *What Makes an Antitrust Class Action Remedy Successful?: A Tale of Two Settlements*, 80 TUL. L. REV. 621, 649–50 (2005); *cf.* Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 457 (1972) ("The goal of the cy pres remedy . . . is to effectuate the normal damage distribution to class members as closely as possible, and this should be the purpose of the courts whenever feasible." (footnotes omitted)).

72. Superior Beverage Co. v. Owens-Illinois, Inc., 827 F. Supp. 477, 479 (N.D. Ill. 1993); *see also* Vasquez v. Super. Ct. of San Joaquin Valley, 484 P.2d 964 (Cal. 1971); James R. McCall et al., *Greater Representation for California Consumers—Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 HASTINGS L.J. 797, 799 (1995).

73. *See* Nelson v. Greater Gadsden Hous. Auth., 802 F.2d 405, 409 (11th Cir. 1986) (unclaimed settlement funds to be used by the housing authority to increase energy efficiency in public housing units); *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 209 (D. Me. 2003) ("[M]embers of the public (and thus potentially class members who did not file a claim, as well as those who did) will benefit either in using the CDs themselves or in the general public benefit from recurrent music CD availability."); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 728 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079, 1083 (2d Cir. 1971) (antitrust class action settlement included the creation of a trust fund that would benefit consumers as a whole).

74. *See, e.g.*, Gammon v. GC Servs. Ltd., 162 F.R.D. 313, 321 (N.D. Ill. 1995) (finding that *cy pres* distribution of the entire damage award was authorized in a class action with over four million potential class members, each of whom would be entitled to thirteen cents).

75. *Id.* But see Krueger & Serotta, *supra* note 69, at A13, which states that

> [c]ourts are empowered to resolve . . . specific disputes, and not to transfer a corporate defendant's assets to an outside organization that has not appeared before the court. The Constitution does not give courts the authority to satisfy notions of "deterrence"

the class from the defendant's giving the money to someone else. In such a case the 'cy pres' remedy . . . is purely punitive."[76]

III. THE PRIVATE LAW UNITY PRINCIPLE

As we have seen, the ascertainability requirement is founded upon a perspectival theory that views the class action as simply an aggregation of one-on-one cases in which an injured party seeks compensation from a defendant. *Cy pres*, with its built-in disunity between the plaintiff and the recipient of the damages award, is a perversion of this private law model, which demands—to the extent possible—unity between the injured persons, the prosecutors of the action, and the recipients of damages awards.

The normative underpinnings of the private law model's unity principle are not totally obvious. Certainly, there appears to be a sort of Burkean conservative reverence for history, and particularly, the long experience of the common law with discrete disputes pressed by a concrete claimant demanding to be made whole for a past wrong. Likewise, a mistrust of experimentation and a suspicion of the agendas that may be served by the public law model is quite plausibly at work here. One could also argue that there are instrumental or utilitarian objectives served by insisting upon adherence to the private law model.

Two distinct areas of the law—the imposition of punitive damages and the rules governing standing in antitrust litigation—provide laboratories for stress testing the private law unity principle, and they may enable us to further draw out the normative foundations upon which this principle rests.

A. Accounting for Punitive Damages

The conservative account of the private law unity principle fails to accommodate at least one deeply rooted common law tradition: the law of punitive damages. The conventional understanding provides that punitive and exemplary damages are not meant to compensate the plaintiffs for their injuries.[77] Instead, they are meant to punish

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by giving institutions like legal aid societies or universities windfalls when those entities are not even parties to the lawsuit.

76. Mirfasihi v. Fleet Mortgage Corp., 356 F.3d 781, 784 (7th Cir. 2004).

77. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."). See also *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983), which states that

> [i]t is axiomatic that the purpose of punitive damages is not to compensate plaintiffs for their injury, but to punish defendants for their wrongdoing. In theory, therefore, when

and deter the wrongdoers.[78] As one commentator put it, "[A] punitive damages award is a civil punishment visited upon defendants to vindicate the public interest in deterrence, and to penalize conduct that violates the social contract and injures society."[79]

Disunity is hard-wired into punitive damages. In some jurisdictions, a percentage of the punitive damages award escheats to the state or is otherwise directed to third party beneficiaries.[80] These arrangements institutionalize the disunity that the private law model abhors.[81] But with or without split-recovery schemes, third parties are at the heart of punitive damages. The irreducible core function of punitive or exemplary damages is to exact payment from a defendant that is designed to deter future misconduct *towards others*.[82] There is an important body of literature addressing other values that punitive damages may serve,[83] but I am not aware of any suggestion that the goal is merely to deter future conduct towards the individual plaintiff.

Recent law in this area is characterized by discomfort with the public law underpinnings of punitive damages. For example, in *Philip Morris USA v. Williams*, the U.S. Supreme Court held that as a matter of due process, a punitive damages award may not redress injuries

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a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct.

78. *See, e.g.*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2621 (2008) ("[T]he consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.").

79. Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979, 981 (2001).

80. *See* Paul B. Rietema, Recent Development, *Reconceptualizing Split-Recovery Statutes:* Philip Morris USA v. Williams, *127 S. Ct. 1057 (2007)*, 31 HARV. J.L. & PUB. POL'Y 1159, 1160 & n.6 (2008) (listing the nine states that have "implemented split-recovery statutes" and describing "this framework [as] shift[ing] a portion of the punitive damage award to society").

81. *See* Michael Finch, *Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation?*, 86 MINN. L. REV. 497, 502 (2002) ("[A]n increasing number of states have reaffirmed the penal role of punitive damages by appropriating a share of the plaintiff's punitive award. Such shared recovery laws emphasize that punitive awards now vindicate 'public wrongs,' and so fulfill the historical purpose of penal laws.").

82. Philip Morris USA v. Williams, 549 U.S. 346, 358–59 (2007) (Stevens, J., dissenting) (asserting that while awarding "compensatory damages to remedy . . . third-party harm might well constitute a taking of property from the defendant without due process," punitive damages are specifically awarded to vindicate "the public harm the defendant's conduct has caused or threatened"); *see also* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

83. *See, e.g.*, Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003); Benjamin Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 170 (2005).

that a defendant inflicted upon third parties—at least expressly, that is, as a matter of jury instruction.[84] Indeed, the *Philip Morris* Court asserted that "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation," and it seemed concerned about the same sorts of identification problems that plague the ascertainability doctrine in class action jurisprudence: "How many [third party] victims are there? How seriously were they injured? Under what circumstances did injury occur?"[85] This analysis, I think, reflects an attempt to put the intrinsically square public law peg of punitive damages into the round hole of the private law model—a doctrinal development redolent of the private law approach to class actions.[86]

Even the Court's proportionality analysis of punitive damages awards, developed in a series of cases over the past decade,[87] can be interpreted as a private law intervention into an otherwise public law remedy. As some scholars have observed, "Because punitive damages are designed to serve the public law functions of punishment, deterrence, and retribution, there is no compelling reason why there should be any correlation between compensatory and punitive damages."[88] The idea behind proportionality analysis appears rooted in nothing more than discomfort with the public law model. In my view, courts require a quantitative relationship between compensatory and punitive damages *not* because there is any qualitative relationship between the injury to an individual plaintiff and the amount required to deter

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84. 549 U.S. at 353 ("The Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i. e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."). This decision "clos[es] the door to recovery for harms to nonparties—a door left ajar in *State Farm Automobile Insurance Company v. Campbell.*" Rietema, *supra* note 80, at 1160.

85. *Phillip Morris*, 549 U.S. at 354.

86. See, e.g., Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages As Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 588–589 (2003), asking

> whether it is *ever* permissible, in circumstances in which the defendant's conduct harmed more than one person, to award in a case brought by a single victim punitive damages in an amount that is intended to punish the defendant's entire course of conduct, or whether, instead, the law limits each plaintiff's recovery to the amount necessary to punish the defendant only for the harm done to the individual plaintiff.

87. *See, e.g.*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

88. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 140 n.242 (1993); *see also* Colby, *supra* note 86, at 607 ("[I]f punitive damages were punishment for the full scope of the wrong to society, rather than simply the wrong to the plaintiff, it would make no sense to require a reasonable relationship between the amount of punitive damages and the amount of the individual plaintiff's compensatory damages.").

and punish a defendant. Instead, courts require it because they feel uncomfortable straying from the private law model.

Martin Redish's work highlights this thesis. Professor Redish and his colleague Andre W. Matthews argue that modern punitive damages represent an unconstitutional delegation of state power: "[P]urely public power to punish is being exercised by purely private actors who are naturally . . . focused not necessarily on furthering the public interest but rather . . . on pursuit of their own narrow interests."[89] Redish's discomfort with a public law model is such that he would wipe out all punitive damages jurisprudence as unconstitutional, but he suffers no illusions about the endemic public law function of punitive damages.

The connection of all this to class actions is likewise illustrated by reference to Professor Redish, who has argued that in small-claims class actions, which are necessarily "lawyer-driven," courts are applying Rule 23 procedures to augment a substantive federal statute, effectively grafting a *qui tam* provision onto a law that contains no such remedy.[90] Redish would have courts hold that "Rule 23 may not be applied to lawyer-driven suits, lest it conflict with the remedial scheme of the substantive congressional enactment upon which the suit is based. Alternatively, he would settle for legislation banning the widespread scourge of lawyer-driven class actions."[91] Here again, the discomfort with any public law model is palpable. And here again, we see that real fidelity to the private law model would entail total discontinuation of practices that have undeniable public law underpinnings.

Professor Redish at least recognizes the undeniable, while current doctrine is preoccupied with denying the undeniable. Dressing inherently public law enterprises in the garb of private law models leads to confused policies, both in the punitive damages area and in class action practice. But more to the point here is the sheer pull of the private law model, the powerful drive to conform current doctrine to an idealized form of private law unity.

So to return to the question: what does this brief exploration of punitive damages tell us about *why* courts are driven by the value of adherence to the private law model? Respect for long-established

89. Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1, 2 (2004).

90. Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77–83.

91. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 373 (2005).

common law traditions with which courts have long experience, and a concomitant distrust of experimentation, may have explanatory power in many contexts. But all else being equal, respect for common law traditions provides a singularly bad explanation for eviscerating common law traditions, such as the centuries-old practice of allowing exemplary damages awards in order to deter future injury to third parties.

B. Indirect Purchaser Standing Rules

Searching out the normative underpinnings of the private law model may have some explanatory force. Do courts adhere to the private law unity principle in an effort to build a better mousetrap—that is, are they seeking to make the system work more efficiently and further statutory objectives?

One interesting area to explore in assessing these questions is the *Hanover Shoe-Illinois Brick* doctrine concerning the antitrust standing of so-called "indirect purchasers." In the typical case, indirect purchasers are the ultimate consumers who purchased goods or services from a direct purchaser—often a retailer or wholesaler—who in turn purchased from the antitrust defendant—often a manufacturer. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, the U.S. Supreme Court held that direct purchasers may sue to recover the full amount of an illegal overcharge regardless of whether they recouped their losses by passing the overcharge along to indirect, downstream purchasers.[92] Then, in *Illinois Brick Co. v. Illinois*, the U.S. Supreme Court held that indirect purchasers lack standing to sue under the federal antitrust laws, even if there is evidence that they incurred the overcharge.[93]

Taken together, these decisions explicitly allow for—and in many cases mandate—disunity among the injured party, the prosecutor of the civil action, and the recipient of damages. Direct purchasers maintain the action and receive the damages, notwithstanding the fact that they may have passed the overcharge on to their customers. Meanwhile, indirect purchasers who incurred the injury may not prosecute the action and, of course, do not stand to receive damages.

The *Hanover Shoe-Illinois Brick* doctrine is intrinsically rooted in the public law model.[94] The rationale for the doctrine is that direct purchasers are best situated to prosecute actions against antitrust de-

92. 392 U.S. 481, 493–94 (1968).

93. 431 U.S. 720, 729–33 (1977).

94. *See, e.g.*, Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 74 (2007) ("The Court's

fendants,[95] while the claims of indirect purchasers are beset with the evidentiary problems related to tracing overcharges across multiple layers of distribution and apportioning damages among plaintiffs at multiple levels.[96] The statutory imperative guiding the analysis of the *Illinois Brick* Court was to give full force and effect to the deterrent objectives of the federal antitrust law.[97] Far less important in the public law view is whether the party that bears the injury reaps the damages reward.

The *Illinois Brick* doctrine makes for some strange legal bedfellows. Any catalogue of champions of the public law model would doubtless include the three dissenters in *Illinois Brick*—Justices Brennan, Blackmun, and Marshall—who nonetheless expressed their strong preference for a compensation-based, private law approach to indirect purchaser standing: "[I]n many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers . . . pass on the bulk of their increased costs to consumers farther along the chain of distribution."[98] According to the dissenters, the majority was wrong to sacrifice the value of compensation to the injured consumer in favor of deterrence of future violations.[99]

Justice White, writing for the majority, insisted that compensation was *an* objective of the antitrust laws, but declared that the Court was "unwilling to carry the compensation principle to its logical extreme"

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conclusion [in *Hanover Shoe* and *Illinois Brick*] relied on two functional objectives: avoidance of litigation complexity and deterrence.").

95. *See Illinois Brick*, 431 U.S. at 735 ("[A]ntitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers . . . .").

96. *Id.* at 737 (reasoning that "[h]owever appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness").

97. *See Hanover Shoe*, 392 U.S. at 494 (voicing the concern that "those who violate the antitrust laws . . . would retain the fruits of their illegality because no one was available who would bring suit against them").

98. *Illinois Brick*, 431 U.S. at 764 (Brennan, J., dissenting).

99. Although the dissenting Justices may have aligned themselves with the private law model by championing the rights of indirect purchasers to receive compensation, to be fair, they also expressed this view in terms of deterrence. According to Justice Brennan, giving indirect purchasers standing to sue would ensure that antitrust violations are deterred, while pooling that authority with direct purchasers—who often had ongoing business relations with the defendant—was not a sure deterrence bet. *Id.* at 749–50 (Brennan, J., dissenting). In the years since *Hanover Shoe* and *Illinois Brick*, much of the public and scholarly commentary has favored the dissent's views. *See, e.g.*, Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979) (concurring with the dissent in *Illinois Brick* that both direct and indirect purchasers should have standing to sue, in order to further both the compensatory and deterrent functions of the antitrust statutes).

if it materially impaired the key value of deterrence.[100] As the dissent characterized the majority's position: "[F]rom the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation."[101] The majority further justified its demotion of the compensationalist rationale with the observations that recoveries in antitrust suits "often have failed to compensate the individuals on behalf of whom the suits have been brought,"[102] and that Congress "recognize[d] that rarely, if ever, will all potential claimants actually come forward to secure their share of the recovery."[103]

Meanwhile, Richard Posner and William Landes defended the *Hanover Shoe-Illinois Brick* rule on classically public law grounds, reasoning that direct purchasers have better information than indirect purchasers and are thus more likely to uncover violations and serve as "more accurate and less costly private policemen."[104] Indeed, Posner and Landes fully engage the public law model, asserting that indirect purchasers ultimately receive the benefits from any recovery secured by direct purchasers in the form of lower prices.[105] Sounding not unlike Judge Weinstein advocating *cy pres* distribution in the *Agent Orange* cases, Posner and Landes point to oblique benefits that are expected to flow to injured consumers and affirm the broad, public function of representative litigation.[106] Certainly, their view, like that of the majority in *Illinois Brick*, is wholly unconcerned with the spectacle of disunity among the prosecutors of antitrust actions, the injured parties, and the third-party beneficiaries of any recovery.

IV. CONCLUSION

This Article represents, to my knowledge, the first scholarly effort to examine the ascertainability doctrine that has emerged in recent class action jurisprudence. As I have asserted, many (or even most) small-claims consumer cases are now uncertifiable as class actions under this putatively implicit requirement of Rule 23, which demands

100. *Illinois Brick*, 431 U.S. at 746.

101. *Id.* at 760 (Brennan, J., dissenting).

102. *Id.* at 747 n.31.

103. *Id.* (quoting H.R. REP. No. 94-499, at 16 (1975)).

104. Richman & Murray, *supra* note 94, at 84 (citing William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602, 609 (1979) [hereinafter Landes & Posner, *Economic Analysis*]); *see also* William M. Landes & Richard A. Posner, *The Economics of Passing On: A Reply to Harris and Sullivan*, 128 U. PA. L. REV. 1274, 1279 (1980) ("If all is passed on, the direct purchaser has zero expected damages, and no incentive to sue. If most is passed on, he has small expected damages, and hence little incentive to sue.").

105. *See* Landes & Posner, *Economic Analysis*, *supra* note 104, at 605.

106. *Id.*

that the identity of class members must, to some substantial but as-yet untested degree, be ascertainable in order to certify a class. The primary doctrinal foundation for this requirement is the manageability element of Rule 23(b)(3)(D) as applied to damages classes—that is, the claim that ascertainability is necessary at the class certification stage to ensure the efficacy, or manageability, of a subsequent distribution of damages.

The normative foundation of the ascertainability requirement is another matter. From the discussion in Part II, keying off the *Fresh Del Monte Pineapples* case, I think it is clear that the traditional goals of class actions—deterrence and compensation—cannot plausibly be said to animate the ascertainability requirement. Indeed, the ascertainability requirement readily sacrifices both deterrence and compensation in favor of an alternative value, namely, ensuring that compensation does not flow to uninjured parties.

This, in turn, begs the question of why we are so concerned with ensuring that compensation does not flow to uninjured parties. While some courts have suggested narrow rules-based answers (e.g., the Rules Enabling Act argument discussed above), I think the explanation lies in a conception of class actions that is based on a private law model—that is, a conception that demands unity among the injured parties, the prosecutors of civil actions, and the beneficiaries of remedies. But this only begs another question: what accounts for the power of the private law model? To try and get a handle on that question, I have looked well outside of the class action context to two areas of the law that raise the public law versus private law model issue in different ways: punitive damages and antitrust standing.

Analysis of these areas of the law reveal that (1) at the very least, conservative traditionalism certainly fails to explain insistence on the private law model in any across-the-board way, as demonstrated by the law of punitive damages; and (2) as illustrated in the debate over antitrust standing, the issue of whether to adhere to a private law model turns on instrumentalist policy choices. And indeed, the *Hanover Shoe-Illinois Brick* doctrine rests on a distinctly instrumentalist policy choice to tolerate significant disunity as among the injured parties, the prosecutors of civil actions, and the beneficiaries of remedies.

What follows, then, is that the ascertainability doctrine either rises or falls on policy grounds. There are no grand theoretic imperatives that compel a judge to insist on application of an abstract "unity principle." The ascertainability doctrine makes sense if one favors the results to which it leads, and otherwise it does not. Upon examination, it is apparent that the policy underpinnings of the ascertainability doc-

trine are utterly incoherent. The doctrine flatly exalts the (supposed) value of keeping uninjured parties from receiving compensation over the very real values of deterrence and compensation. Measured against the Supreme Court's unequivocal recognition that "[t]he policy at the very core of the class action mechanism" is to facilitate small claims class actions,[107] it seems clear that the application of an ascertainability filter at the class certification stage is a recipe for making bad law.

107. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997).