

Anatomy of a Madison County (Illinois) Class Action: A Study of Pathology

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ABOUT THE AUTHOR

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He is widely cited in the press and has published "op-eds" in the New York Times, Wall Street Journal, Washington Post, Los Angeles Times, and USA Today. His writings on nonrefundable retainers have been instrumental in the banning of their use by several state supreme courts. A proposal that he co-authored to realign the contingency fee system with its policy roots and ethical underpinnings was the subject of a front page story in the New York Times and has received extensive coverage in both the media and scholarly publications.

He has been a consultant to the U.S. Office of Education, the U.S. Civil Service Commission, National Science Foundation, Ford Foundation, Administrative Conference of the United States, the American Bar Association, the U.S. Office of Legal Services, and others.

EXECUTIVE SUMMARY

If per-capita class action filing rates were the same nationwide as they are in Madison County, Illinois, there would have been over 42,000 class action filings in 2000. One reason for the county's popularity among class action lawyers is its reputation for the propensity of its judges to accommodate class action lawyers' interests.

In this monograph, I focus on a single class action (*Schuppert et al. v. Down et al.*) filed in Madison County on behalf of hundreds of thousands of mostly elderly Americans who were the victims of a vast mass-marketing scheme conducted by James Blair Down ("Down"), a Canadian citizen. Ironically, if not tragically, the elderly victims of the scheme appear poised to become victims a second time—of "class action" justice in Madison County. A provisional settlement agreement is so abusive of the class's rights that it can only gain final judicial approbation from a court oblivious to the need to protect class members from self-interested behavior by its self-appointed class lawyers. Indeed, if there were an award for the most abusive class action settlement of the decade, if not the century, this settlement would be an odds-on favorite to gain the prize. The only possible impediment is a unique confluence of events that is permitting public scrutiny of the settlement—scrutiny that has already had some effect on the judicial proceedings in Madison County.

The Facts

Various of Down's enterprises sold "prize award certificates" and interests in lottery pools, yielding gross receipts of upward of \$150 million. Millions of direct mail solicitations were sent and tens of thousands of phone calls were made from boiler rooms in Barbados and Canada. Hundreds of thousands of victims were tricked into paying amounts up to hundreds of thousands of dollars—in some cases, their entire life savings.

In June 1997, Down was indicted, and in August 1998, he pled guilty to a single count of criminal conspiracy to transport gaming paraphernalia in violation of the laws of the United States. Though he was imprisoned for a term of six months and forfeited \$12 million in partial restitution to victims, he nonetheless struck an excellent bargain, knowing, in the words of a Canadian judge, that he would leave prison as a "very wealthy man." The government's failure to seek higher penalties and greater redress for Down's victims reflected the difficulties it faced in investigating criminal activity intentionally fragmented by Down across national boundaries, the proceeds of which had been concealed in offshore asset-holding structures.

Interclaim

In June 1998, frustrated by its inability to recover even a modest percentage of the amount obtained from the victims, the F.B.I. and the U.S. Attorney's Office in Seattle sought assistance from the Interclaim group of companies, a private asset-recovery group located in the Republic of Ireland, in obtaining fuller relief. Interclaim located over \$100 million of Down's assets scattered all over the world, commenced an intensive set of complex legal proceedings in Canada, obtained a freeze of Down's assets, and incurred several million dollars in costs, which it hoped to recoup by sharing in the proceeds. Initially, it met with success, but when the complexity of the case turned the legal tide against Interclaim in Canada, it sought an American class action law firm to institute proceedings in the U.S.

Ness Motley

In February 2000, Interclaim entered into an agreement with the Charleston, South Carolina, law firm of Ness, Motley, Loadholt, Richardson & Poole ("Ness Motley") to bring a class action proceeding on behalf of the victims of Down's enterprises. Interclaim was instrumental in providing Ness Motley with essential information. Ness Motley selected Madison County to bring the action seeking certification of a nationwide class consisting of the victims of Down's enterprises. Shortly afterward, Down initiated settlement negotiations but made it a condition of any talks that Interclaim, and the victims who had been working with Interclaim in an attempt to

recover their losses, be excluded from the negotiations and from benefiting from any ensuing settlement. Although Ness Motley owed a fiduciary obligation to Interclaim and to the specific victims Interclaim had been working with, it agreed to Down's conditions and reached a settlement with Down.

The Settlement

The settlement purports to amount to \$6 million for the victims, a lawyers' fee of \$2 million, plus approximately \$2 million in notice and administration costs—totaling approximately \$10 million. This announced amount is woefully inadequate, given the compelling case against Down: his guilty plea, numerous cease-and-desist orders issued by U.S. Postal authorities, and the freezing of \$100 million of his assets so that they could be reached by judicial process. The case had all the appearances of a “slam dunk.”

Beyond “woefully inadequate,” the settlement is intentionally misleading as to the amount to be paid to victims of Down's enterprises. In fact, instead of paying \$6 million plus expenses, Down can actually expect to pay only a small fraction of that sum because of the way in which Ness Motley and Down structured the settlement.

The Plan of Notice

The provisionally approved plan to notify victims of the settlement is an elaborate ruse. It deliberately rejects using existing computerized lists containing the names and addresses of hundreds of thousands of “customers” who sent money to Down's enterprises, including the amounts sent to directly notify victims by mail. Instead, the Plan of Notice provides for the use of newspaper and television advertising that, according to empirical evidence, few victims have seen.

The Proof of Claim Form

The Proof of Claim Form contained in the settlement is simply a compendium of one onerous requirement piled on top of another, apparently for the purpose of further minimizing the number of successful claims. To successfully assert a claim, Down's mostly elderly victims are required to provide credit-card receipts, money orders, postal receipts, or canceled checks in support of their claim. But how many of the hundreds of thousands of mostly elderly victims who actually become aware of the settlement and take steps to obtain a claim form are likely to have retained receipts for transactions that took place five to ten years earlier? In addition, those who sent money to Down on multiple occasions, as many did, are required to correctly list each amount sent and the date of each such “purchase.” If a claimant correctly identifies four “purchases” but errs as to a fifth, his entire claim is subject to rejection. Also, claimants have to correctly identify the exact name of the lottery company or puzzle contest to which they sent money. Down had used 57 different company and trade names to do his dirty work. Once again, a mistake as to a single name could invalidate an entire claim, even if all the other names were correctly listed. It is hard to imagine a claiming process more deliberately designed to prevent filing of claims than this one.

The Secret Letter Agreement

The settlement includes a secret “Letter Agreement” that has been filed “under seal,” which allows for Down to defer paying valid claims for three years or more without having to provide any security. This bizarre and unique feature of the settlement appears designed to allow Down to avoid payment of most of the announced amount of the settlement.

Ness Motley's Fee

The secret Letter Agreement also includes another unique feature: that Down does not have to pay Ness Motley's \$2 million fee (assuming court approval) upon conclusion of the settlement. Instead, Down can pay at some future unspecified time. And if Down fails to pay, Ness Motley would then have to bring an action against Down. To enforce that judgment, it would have to locate Down's assets—seemingly reposed in complex structures in many countries. Anyone

who really believes that Ness Motley accepted a class action settlement in which payment of its fee could be delayed three years or more—and that requires it to rely on the unsecured promise of someone well versed in concealing his assets after he has obtained the benefit of a full release of liability from the underlying class—has obviously been standing out in the Madison County sun for too long. Whatever the reality is with regard to payment of Ness Motley’s fee, it is highly improbable that it is that which is set forth in the Letter Agreement.

Right to Object to the Settlement

As is typical in class action settlements, members of the settlement class are permitted to appear at the “fairness hearing” and object to the settlement and/or the application for legal fees. However, unlike in other class action settlements, in this class action, that right to object is conditioned on the prior provision of the very documentary evidence required for submission of a claim. In “Catch-22” fashion, class members who do not have such documentation and who wish to object to the requirement that to submit a claim, they have to produce one of the listed documents, are excluded from objecting to the settlement and fee request.

Schuppert v. Down: A Case in Progress

Madison County Judge Nicholas Byron’s preliminary approvals of the settlement have recently been the subject of critical media attention. Even though the media attention was modest, it was also unprecedented, and it apparently subjected the local class action bar and the court to unwanted scrutiny. Judge Byron thereafter ordered that, in addition to the newspaper and TV advertising, a postcard be mailed, using one of the lists of Down’s victims, to provide additional notice. In addition, new deadlines and dates have been set as follows for *Schuppert v. Down*: 1) class members objecting to the settlement must file notice with the court by August 2, 2002; 2) class members seeking to opt out of the settlement must so notice the court by August 2, 2002; 3) class members filing claims must submit them by September 6, 2002; and, most critically, 4) the fairness hearing originally scheduled for June 7, 2002, has been rescheduled to August 14, 2002.

On that date, August 14, 2002, approval by Judge Byron will cast the settlement, including the Plan of Notice, in concrete. It will be impervious to attack—except to direct appeal by an objecting class member to Illinois appellate courts, which have never heretofore disturbed a Madison County class action proceeding.

Conclusion

This monograph begins with a reference to the role of the “rule of law” in our economic system and concludes with the observation that in Madison County, the rule of law has been displaced by the “rule of class action lawyers.”

Even more disturbing than the use of Plan of Notice and Proof of Claim processes designed to minimize the number and amount of claims is the fact that the settlement was agreed to by one of the leading class action law firms, apparently acting in full confidence that it owes no fiduciary obligation to the class members it has undertaken to represent. Moreover, Ness Motley’s filing of the action in Madison County appears to be an expression of confidence that the courts in that county will summarily approve a grossly abusive settlement and fee request, paying only lip service, at best, to the mantra that the court must be the guardian of the interests of class members. While the glare of publicity may subvert the subjecting of the elderly victims of Down’s mass-marketing schemes to a second victimhood—though that remains to be seen—such publicity rarely attends even the most abusive of class action settlements.

Any solution to the lack of due process in state court class action claiming necessarily includes a facilitated process for removing class actions filed in state courts to federal courts. The analysis of the settlement in this monograph adds to the already substantial evidence that respect for the “rule of law” requires that defendants have the opportunity to bypass Madison County and other “class action magnet courts” that stand, like speed traps, astride the nation’s litigation highways.

ANATOMY OF A MADISON COUNTY (ILLINOIS) CLASS ACTION: A STUDY OF PATHOLOGY

I. INTRODUCTION

The American market-based economy is the engine that powers the world's economic progress. All successful market-based economies are underpinned by a "rule of law," that is, a civil justice system that provides for a means of enforcement of certain investment-backed expectations.¹ We depend upon maintenance of a "rule of law" for our prosperity. We rely on the courts and the legal professionals to sustain it. The very essence of the "rule of law" is being undermined today by abusive class action litigation. Class actions are a phenomenon with which most Americans have some familiarity. Indeed, most everyone in the United States has been a member of a class action lawsuit. Indeed, virtually everyone who has flown commercially, used long-distance services or a cell phone, or purchased securities, insurance, car repair, or any of hundreds of other goods and services has been inducted into a class action. Class action settlements have generated billions of dollars in payments and fees for lawyers—and enormous controversy as to their social utility.

Class action claiming presents unique opportunities for lawyers to engage in self-interested actions, motivated in part by the practice of "courts routinely overcompensat[ing] attorneys in class actions."² One consequence of that overcompensation is that much class action litigation is purely fee-driven. While ostensibly seeking to capture ill-gotten gains and compensate large numbers of victims, in reality, claims of wrongful conduct may often be pretextual and simply the vehicle for extracting a substantial wealth transfer.

Certification of a class action by a court usually generates enormous pressures on defendants to settle, even if the class includes large numbers of claimants and even if the claims are of dubious merit. Moreover, class action settlements often reflect self-interested behavior on the part of the class lawyers at the expense of the class, particularly in so-called coupon settlements, as well as in settlements where onerous claim procedures are selected, thereby generating "unclaimed funds" that revert to the defendant (so-called reversionary settlements).

Though class action filings have increased substantially in recent years, they are not evenly distributed throughout the country. Instead, class action claiming activity tends to center in a small number of jurisdictions. While some large population centers, such as Los Angeles County (California), Cook County (Illinois), and Dade County (Florida), are the locus for disproportionate numbers of class action filings, other much smaller population centers have relatively higher volumes of class actions filings, including Madison County, Illinois; Jefferson County, Texas (comprising the cities of Beaumont and Port Arthur); and Palm Beach County, Florida (West Palm Beach, Boca Raton). Class action filings in these three counties increased sharply and disproportionately in recent years and were the subject of a study recently published by the Center for Legal Policy of

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1. "There can be no doubt that all of the prosperous economies [in the world] are market economies, and those who understand these economies know that the market is, at the least, a major source of their prosperity....To realize all the gains from trade...there has to be a legal system and political order that enforces contracts, protects property rights, carries out mortgage agreements, provides for limited liability corporations, and facilitates a lasting and widely used capital market that makes the investments and loans more liquid than they would otherwise be." Mancur Olson, *POWER & PROSPERITY* (2000), at 173.
 2. *In re Synthroid Marketing Litigation*, 201 F. Supp. 2d 861, 872 n.6 (U.S.D.C. N.D. Ill. 2002).

the Manhattan Institute³ (“the Study”). Of these three counties, Madison County, bordering the Mississippi River in southwest Illinois, is the leading locus for class action filings in the United States on a population-equivalent basis.⁴

Madison County’s reputation for being disproportionately receptive to class action filings is well-deserved—50 were filed there in 2001 versus 39 in 2000, about 20 times the national average on a per capita basis⁵. Moreover, no class action in recent memory has ever gone to trial.⁶ One reason for the county’s popularity among class action lawyers is its reputation for the propensity of its judges to accommodate class action lawyers’ interests. The importance of such an accommodating stance cannot be overstated. Lawyers who are denied class action status in one jurisdiction can, under our federalist system, simply try again and again to find a receptive judge in another jurisdiction. One judge in a jurisdiction such as Madison County can thus, in effect, “overrule” the decisions of numerous other judges throughout the country to deny certification of a suit seeking class action status.⁷ No study of the class action phenomenon can therefore ignore the jurisdictions that have experienced extremely high rates of successful filings. Indeed, no better candidate for study exists than Madison County.

The Center for Legal Policy study focused on a number of class actions pending in Madison County, including those brought against such well-known businesses as Sears, MCI WorldCom, Sprint, Roto-Rooter, State Farm, Prudential, Mattel, Atlantic Richfield, Exxon, Mobil, and Chevron. While these actions involved tens of millions of consumers, only a tiny fraction were residents of Madison County.⁸ In criticizing the filing of class actions intended to have nationwide effect in state courts instead of in federal courts, the Study noted that “some state courts have...shown a tendency to approve settlements that generously compensate the class counsel while giving little or nothing to the people on whose behalf the action supposedly was brought—the unnamed class members.”⁹

This monograph seeks to supplement the Study by focusing on a single class action filed in Madison County on behalf of several hundred thousand mostly elderly Americans who were the victims of a vast mass-marketing scheme that yielded gross receipts of upward of \$150 million. The swindle has been featured on CBS’s *60 Minutes*,¹⁰ yet the case and the perpetrator of the criminal activity at the heart of it, James Blair Down, have received only modest media scrutiny. Ironically, if not tragically, the elderly victims of the scheme appear poised to become victims a second time of “class action” justice in Madison County.

A settlement agreement has been entered into, ostensibly setting aside \$10 million to reimburse victims and pay expenses. In reality, however, few are likely to receive any funds. The principal beneficiaries of the settlement agreement appear to be the law firm representing the class and

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3. The “Study” referenced here is by John H. Beisner and Jessica Davidson Miller, “They’re Making a Federal Case Out of It...in State Court,” Civil Justice Report, Center for Legal Policy at the Manhattan Institute (Sept. 2001). A follow-up study has been done, updating the Madison County class action filings. See John H. Beisner and Jessica Davidson Miller, “Class Action Magnet Courts: The Allure Intensifies,” Civil Justice Report, Center for Legal Policy at the Manhattan Institute (June 2002).
 4. The Study, *id.* at 7. The principal towns in Madison County are Granite City, population 31,301; and Alton, population 30,446. *Id.* at 12.
 5. Noam Neusner, “The Judges of Madison County,” U.S. NEWS & WORLD REPORT, Dec. 17, 2001, at 39.
 6. *Id.*
 7. “Consider the case of *Strasen v. Allstate Insurance*. The case alleges that Allstate uses a faulty database to decide appropriate medical treatment and payment for certain kinds of claims. Similar cases have been filed across the country, all seeking nationwide class action status. None succeeded before, but in Madison [County], one did.” *Id.*
 8. The Study, *supra* n. 3 at 12–19.
 9. *Id.* at 5.
 10. *60 Minutes* segment entitled “Con Man,” by correspondent Mike Wallace, broadcast Nov. 7, 1999, on CBS.

the defendant, Mr. Down. The principal losers appear to be the victims of Down's enterprises and an Ireland-based entrepreneurial asset-recovery firm, which set in motion the wheels of justice by expending considerable resources to locate Down's assets and begin the invocation of legal process on behalf of the victims, first in Canada and later in the U.S. When the wheels reached Madison County, however, they went off the track.

Since only a tiny fraction of the victims of Down's enterprises lived in Madison County, selecting it as the venue for a class action would, at first blush, appear to be incongruous. However, as the Study illustrates, this is characteristic of most class action claiming in Madison County: very few persons who are included in the class action actually live there.

No doubt, plaintiff lawyers, who basically have a choice of filing a class action in virtually any jurisdiction in the U.S., select Madison County and other preferred venues because they anticipate receiving favorable treatment from local judges with regard to certification of the class and, if they ever do go to trial, from local juries as well. Even by that standard, however, selection of Madison County would still appear to have been a strange choice. As will be seen, the case against Down was compelling. He had pled guilty to engaging in an enterprise that violated federal criminal law; as part of that illegal scheme, he appeared to have swindled hundreds of thousands of victims of tens of millions of dollars. In addition, he had been the subject of numerous cease-and-desist orders.¹¹ The major issue to be adjudicated in the class action would have been the amount of damages to be assessed. An additional concern—whether Down's extensively laundered assets could be located and preserved by means of judicial process—had been resolved by the efforts of the asset-recovery firm. The case had all the appearances of a "slam dunk."

However apparently unnecessary it may have appeared to select Madison County as the locus for this class action, the decision to bring the action there instead of in a venue where large numbers of victims resided may prove highly rewarding to the law firm representing the class. This is so because the settlement agreement that has been entered into provisionally is so abusive of the class's rights that it could only gain final judicial approbation from a court oblivious to the need to protect class members from self-interested behavior by its self-appointed class lawyers.

One feature of class action claiming that both promotes abuse and is protective of lawyers' interests is the low visibility of most class action litigation. For each class action that gains press coverage, we have good reason to suspect that there may be many other class actions essentially hidden from view, in which collusive settlements that provide, at best, modest—if not mainly illusory—relief for class members are rubber-stamped by compliant, if not complicit, judges. The Down settlement, negotiated by a major class action law firm, fits that mold. But there is one critical difference: A unique confluence of events is permitting intensive public scrutiny of a settlement with terms so bizarre that if there were an award for the most abusive class action settlement of the decade, if not the century, this settlement would be an odds-on favorite to gain the prize. Such unprecedented and unwanted scrutiny has already had an effect on the judicial proceedings in Madison County by influencing the court to reconsider an earlier decision to certify the use of one of the least effective means possible for providing notice of the settlement to class members. This monograph is thus the result of an unparalleled opportunity to pluck an aggressively abusive settlement from its intended obscurity and fully expose it to public view.

To set the stage for this up-close examination, this monograph will briefly survey the class action phenomenon, the potential coercive effects of such litigation, the perverse incentives it creates, and the incidence of forum shopping as a core feature of class action claiming. Attention will then shift to the specific facts underlying the class action brought in Madison County: how the mass-marketing schemes were carried on; the efforts of an Irish company to recover some of the victims'

11. Affidavit of Douglas O. Pulling, U.S. Postal Inspector, in *U.S. v. All Funds...at Smith Barney et al.*, U.S. District Court, Western Dist., Washington, No. C97-093, May 30, 1997, filed with the court on June 6, 1997 (hereinafter, "Pulling Affidavit").

money by bringing several complex legal actions in Canadian courts, where much of the property belonging to Down had been located; events leading up to the filing of a class action in Madison County, Illinois; the settlement of that action; and an intensive dissection of that settlement.

II. THE CLASS ACTION PHENOMENON

Class action claiming has increased dramatically over the past two decades. Most of the increases have taken place in state courts.¹² Despite the fact that hundreds and perhaps thousands of civil actions seeking class action status are brought every year, we lack knowledge of how many actions are filed, where they are filed, the number of persons asserted to be members of the class, the number of persons ultimately determined to be eligible to receive benefits, the number who actually receive benefits, the quantum of the value of wealth transferred, the fees sought and the amounts approved, the number of hours of work for which class counsel claim compensation, the effective hourly rates being awarded by the courts, the amounts of money or other benefits that are ostensibly generated for class members, the quantum of the value actually received by class members, what proportionate share these amounts constitute of the amounts of damages initially claimed, and the proportion that the attorneys' fees awarded represent of the value of the benefits actually received by the class. What we do know is that it is in the interests of those who generate substantial fees by filing class actions that as little information as possible be available for public scrutiny. While our dearth of knowledge is a function of inadequate state record keeping, it is not surprising that this gross imperfection in record keeping remains unremedied. Nothing short of federal action mandating uniform record keeping will succeed in closing this critical information gap.

Adding to the effect of this enormous gap in our knowledge of the quantity of class actions is the fact that while it is readily apparent that tens of millions of claimants are inducted annually, for purposes of counting the number of tort actions filed annually in the United States, a certified class action, where there may be 50,000 or even 5 million or more class members, counts as one or two tort actions.¹³ This misleading counting system is an essential feature of the empirically based argument advanced by the opponents of tort reform, that there is no ongoing litigation explosion. If the number of class members inducted each year into the civil litigation system were to be counted in the annual totals of tort claims filed, then the use of the term "litigation explosion"¹⁴ would significantly understate the dimensions of the increases in tort claiming that have occurred in the past two decades.

III. CLASS ACTIONS: USES AND ABUSES

Class actions today may be likened to the little girl in the Longfellow poem who "when she was good, was very good indeed, but when she was bad she was horrid."¹⁵ When properly

12. A survey done by the Federalist Society found that between 1988 and 1998, class action filings increased by 338 percent in federal courts, while the increase in state courts was more than 1,000 percent. See "Analysis: Class Action Litigation, a Federalist Society Survey," *CLASS ACTION WATCH* (Federalist Society for Law & Public Policy Studies, Washington, D.C.) 1, no. 1 (1999), at 3.

13. One reason that class action filings are counted as only one or two civil cases when, in fact, the putative class consists of thousands and even millions of individuals is that, in most states, a filing fee must be paid for each civil case filing. Payment of the fee determines the number of civil case filings for statistical purposes. Plaintiffs' class action attorneys typically pay filing fees only for each named plaintiff. Accordingly, the class action counts for statistical purposes as one or perhaps two or three civil actions. In addition, most states do not count a civil action as filed until a jury or first witness is sworn at the commencement of a trial—events that very rarely occur in class actions.

14. See, generally, Walter Olson, *THE LITIGATION EXPLOSION* (1991).

15. *There was a little girl/Who had a little curl/Right in the middle of her forehead/When she was good/She was very*

done, class actions—one of several forms of aggregative litigation¹⁶ that provide economies of scale that can improve judicial efficiency by reducing repetitive litigation—perform a useful, if not essential, public purpose, including supplementing the law-enforcement efforts of the public sector.¹⁷ However, certification of a class can also result in the sacrifice of both procedural and substantive fairness. Moreover, all too often, abusive practices deprive class members of their rights and generate a horridly negative image not only of the legal profession but also of legal institutions. Public confidence in the legal profession is exceedingly low—at or near the bottom in most surveys, not least because too many lawyers are perceived as greedy and as acting in their own self-interest at the expense of their clients.¹⁸ Opinion surveys focusing on class actions indicate that the public believes that class members are, at best, incidental beneficiaries of class actions and that, overwhelmingly, the principal beneficiaries are class lawyers; the second most benefited category, according to an opinion survey, are lawyers who represent the defendant!¹⁹ Widespread class action abuses are destroying public respect for the legal system. It is essential for the integrity of the legal profession and for public confidence in the civil justice system that the abusive practices be identified and rooted out by judicial and legislative action.

Federal Rule of Civil Procedure 23²⁰ provides that civil actions can be certified as class actions if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the named plaintiffs are typical of those of the class, and (4) the named plaintiffs will fairly and adequately protect the interests of the class.²¹ Prior to 1966, those seeking to be a part of a class action had to affirmatively opt-in to do so. In 1966, however, Rule 23 was amended to allow lawyers to seek certification of a

good indeed/But when she was bad she was horrid.—Henry Wadsworth Longfellow

16. For an analysis of aggregative litigation, see Lester Brickman, “Lawyers’ Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation,” 26 WM. & MARY ENVTL. L. & POL. REV. (2001), at 243 (hereinafter, Brickman, “Aggregative Litigation”).
17. See Deborah R. Hensler et al., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000), at 71.
18. In a recent survey of public confidence in various institutions, including the medical profession, the executive branch, the U.S. Supreme Court, lower federal courts, judges and the judiciary, and the Congress, the category of “legal profession/lawyers” placed second-lowest, with only 19 percent indicating that they were “extremely” or “very” confident in the profession. Only the news media placed lower, with 16 percent confidence. “Public Perceptions of Lawyers: Consumer Research Findings,” ABA Sec. of Litigation, Apr. 2002, at 6. In that same survey, 57 percent indicated that “lawyers are more concerned with their own self-promotion than their client’s best interests.” Id. at 7. “[T]he greatest number of complaints arise around lawyers’ fees....Consumers say that lawyers charge too much.” Id. at 14. A U.S. News poll found that “69 percent of Americans believe lawyers are only sometimes honest or not usually honest and 56 percent say lawyers use the system to...enrich themselves.” Stephen Budiensky, “How Lawyers Abuse the Law,” U.S. NEWS & WORLD REPORT, Jan. 30, 1995, at 50, 51.
19. Class Action System Survey, U.S. Chamber of Commerce, Institute for Legal Reform, poll conducted on May 11–12, 2002. See www.litigationfairness.org, last consulted on June 27, 2002. In response to the question of who benefits most from the current class action lawsuit system, 45 percent answered, the lawyers who represent the alleged victims; 28 percent, the lawyers who represent the companies being sued; and only 5 percent answered, people who are part of the class action lawsuits. Id. at 4. The survey also asked: Who benefits least from the current class action system? The results were: 38 percent answered, consumers who buy the company’s products; and 30 percent answered, the people who are part of class action lawsuits. Id. at 5. Of the 45 percent who had received notices in the mail that they may be eligible to share in a class action settlement, 50 percent thought that the notice was unclear, and 69 percent said that they had not bothered to take steps required by the notice to share in the settlement; of those who did take such steps, 67 percent answered that they had not received something of meaningful value to them, considering their effort to comply with the notices. Id. at 3.
20. FED. R. CIV. P. 23.
21. FED. R. CIV. P. 23 (a).

class of claimants whose rights are then determined by the outcome of the litigation if the court certifies the class, unless they affirmatively choose to opt-out. This change has yielded profound—and, at least, as applicable to mass tort litigation—unintended consequences.²² Most consumers who receive notices that they have been conscripted into a class action have only a slight awareness of the nature of the proceedings. This is so because (1) the notices are written in unintelligible legalese and often omit precisely the kind of information that class members who are concerned that class actions are an abuse might find most objectionable; and (2) most of the conscriptees have only a very small stake in the litigation, and therefore fail to give the notices serious consideration.²³ For these reasons, few people exercise their right to opt-out. Thus, the inherent inertial influences of the opt-out procedure strongly favor the interests of class action lawyers seeking to maximize the size of class memberships. Having very large numbers of claimants included in a class gives the lawyers who organize the class and obtain certification enormous leverage to compel defendants to settle claims, irrespective of their merits.

Even if a defendant perceives that it has a substantial likelihood of prevailing, if the size of the class is large enough, a corporate CEO, motivated by the short-term consideration of avoiding bankruptcy, will often agree to settle such claims even if they have little merit and the long-term interests of the corporation are to litigate them fully. These considerations prevail when the aggregated claims, which usually include a demand for punitive damages, potentially exceed the combined assets of the corporation and any available insurance. The resulting “bet-the-company” scenario is accentuated by the fact that if the claims are tried to verdict and yield a huge judgment, they become, in reality, essentially unappealable because of the typical requirement of having to post a cash bond of at least the amount of the verdict in order to stay execution of the judgment during appeal. Few companies, on short notice, have the liquidity to be able to write a check for a few billion dollars. Thus, plaintiff lawyers have an incentive to generate a number of claims sufficient to achieve a bet-the-company threat level that will compel settlement. This is often done by including, in the putative class, persons without any demonstrable injury or loss.

Only relatively recently have many courts begun to comprehend the extortive effects of class action certification. In *In re Rhone-Poulenc Rorer, Inc.*²⁴ and *Szabo v. Bridgeport Machines, Inc.*,²⁵ Seventh Circuit Court of Appeals Judges Richard Posner and Frank Easterbrook, respectively, recognized that class certification creates a bet-the-company scenario that compels settlement, thus depriving defendants of the rights to contest a claim on its merits and of appealing the outcome of the litigation to an appellate court.

Other jurists have also come to realize that certifying class actions, especially in the area of mass tort litigation, is often a perverse solution to crowded dockets in that it simply generates enormous financial incentives for plaintiffs’ lawyers to seek out new possibilities for class action claiming and engage in new recruitment efforts to seek out claimants. As a consequence, the propensity of federal court judges to certify class actions has considerably diminished in recent years. Plaintiffs’ lawyers have countered this tendency, however, by forum shopping, that is, by filing their would-be class actions in state court jurisdictions where judges are known or believed to be likely to act favorably toward plaintiffs’ counsel and where juries have a high propensity for

22. For a history of the 1966 amendment and an analysis of its effects, intended and unintended, see Brickman, “Aggregative Litigation,” *supra* n. 16 at appendix (at 310).

23. See *Reynolds v. Beneficial National Bank et al.*, 288 F. 3d 277 (2002), describing a notice of settlement sent to 17 million persons, “most of whom ignored them.” *Id.* at 282.

24. 51 F. 3d 1293 (7th Cir. 1995). For a discussion of the implications of Rhone-Poulenc, see Lester Brickman, “Class Action Reform: Beyond Rhone-Poulenc Rorer,” Research Memorandum 10, Manhattan Institute (Oct. 1995).

25. 249 F. 3d 672 (7th Cir. 2001).

favoring claimants over out-of-state “big business” defendants.²⁶ While states’ venue laws typically limit the bringing of civil actions in that state to the county where either the plaintiff or defendant resides or where the event giving rise to the cause of action arose, under federalized class action law, plaintiffs’ lawyers have the almost unfettered right to select any of the thousands of jurisdictions in the country in which to file an action against a major corporation. All that is required is that the lawyer locate a single resident of the chosen county who is a member of the putative class. The incentives to resort to such forum shopping are inordinately high, because no matter how many state or federal court judges have previously rejected plaintiffs’ lawyers’ attempts to seek class action status, a single state court judge, even one located in a county with a population only a small fraction of the size of the putative class, can, in effect, overrule all the other judges and certify a nationwide class action.²⁷

State court class action claiming also benefits from a core feature of our constitutional scheme: that actions brought in one state’s courts must be given “full faith and credit” by the courts of other states. The underlying purpose of the requirement that each state must enforce the laws and judgments rendered by other states is to tie the states together into a federal entity while, at the same time, ensuring that each state shall be the master of its own policies and laws. This fundamental right of the states that was carefully protected in our Constitution is often degraded, if not utterly vitiated, by class action law. Under prevailing U.S. Supreme Court doctrine, a class action brought in one state court can have nationwide effect so long as there is an opt-out right, however chimerical in reality.²⁸ Plaintiffs’ lawyers have availed themselves of this opportunity to bring class actions in one state based upon that state’s laws, which has the effect of nullifying the laws of other states pertaining to such issues as standards for fraud, choice of law, and punitive damages, applicable to the citizens of these other states swept up in the nationwide class. Thus, instead of allowing each state to decide upon its own laws and policies, a nationwide state court class action displaces the laws of many states and substitutes a uniformity of law in the same manner as if the Congress had enacted legislation to that effect with the intent of preempting state law. Consider, for example, the case of *Avery v. State Farm Mutual Automobile Ins. Co.*,²⁹ which effectively ordered State Farm to pay for original equipment manufacturer (OEM) replacement auto parts for its insureds involved in auto accidents, overruling State Farm’s implementation of the language in its policies to provide replacement parts “of like kind and quality,” by limiting payment usually to less expensive auto parts manufactured by non-original equipment manufacturers (non-OEM). While Congress has the authority to so require, it has not chosen to do so. Each state legislature and state insurance commission also has the

26. See Brickman, “Aggregative Litigation,” *supra* n. 16 at 258–65.

27. State courts often certify class actions where federal courts, upon identical facts, have refused to do so. See *in re Masonite Corp. Hardboard Siding Products Liability Litigation*, 170 F.R.D. 417 (E.D. La. 1997) and *Naef v. Masonite Corp.*, No. CV-94-4033 (Cir. Ct., Mobile County, Ala.) (denial, and grant, of certification of identical nationwide classes of purchasers of allegedly defective home siding). Some state courts aid class action lawyers by certifying nationwide classes before the defendant is even served with process—so-called drive-by certification. See Brickman, “Aggregative Litigation,” *supra* n. 16 at 260; Linda S. Mullenix, “Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?” 74 TUL. L. REV. (2000), at 1709, 1716; see also *Sweet v. Ford Motor Co.*, No. L-10463 (Cir. Ct., Blount County, Tenn.), order dated July 10, 1996; *Davidson v. Bridgestone/Firestone, Inc.*, No. 00C2298 (8th Cir. Ct., 20th Jud. Dist. Nashville, Tenn.), order dated Aug. 18, 2000; *Farkas v. Bridgestone/Firestone, Inc.*, No. 00-CI-5263 (Cir. Ct., Jefferson County, Ky.), order dated Aug. 18, 2000.

28. *Matsushita Electric Industrial Co., Ltd. v. Epstein*, 616 U.S. 367, 116 S. Ct. 873 (1996).

29. 321 Ill. App. 3d 269, 746 N.E. 2d 1242 (Ill. App. 5 Dist. 2001).

authority to do so with regard to insureds residing in that state. None has so mandated.³⁰ Indeed, some states specifically allow or even require that insurance companies mainly use non-OEM parts,³¹ because use of OEM parts increases the cost of accidents and therefore of auto insurance without any commensurate gain with regard to safety. For these reasons, most state legislatures and insurance regulators have largely consigned the issue of OEM versus non-OEM auto parts replacement to the highly competitive marketplace for auto insurance. Nonetheless, in *Avery*, a jury in a rural area of Illinois has displaced both the market and the laws and policies of all other states,³² including Illinois, by mandating the use of OEM auto parts. Such attempts to, in effect, federalize tort law through the use of nationwide class actions are being rejected when brought in federal court,³³ but find fertile soil in many state courts.

Paradoxically, even as plaintiffs' lawyers have succeeded in many instances in thus effectively federalizing state tort law through forum shopping and the use of nationwide class actions, attempts to counter such abusive class action claiming through congressional legislation have been resisted on the grounds that such attempts would federalize state tort law.

The ability of class action lawyers to forum-shop is materially augmented by several systemic abuses of federal civil procedure. Under the federal constitution, the judicial power of the federal courts extends to all cases in which there is a controversy "between citizens of different states";³⁴ this is referred to as "diversity of citizenship." This provision recognizes that litigants sued in one state who are domiciled in another state may be subjected to prejudicial treatment in the away-from-home state court. Federal law implementing this constitutional provision permits the removal of a case filed in state court to federal court on the grounds of diversity of citizenship, but only if the parties are "completely" diverse, that is, where each and every defendant is not a citizen of the same state as one of the plaintiffs. In addition, for removal on the basis of diversity of citizenship, each plaintiff's claim must be reasonably substantial; currently, that requirement is that it be in excess of \$75,000.³⁵

30. According to the court, "[f]ormer and current representatives of state insurance commissioners testified that the laws in many...states permit and in some cases encourage the use of non-OEM parts as an effort to encourage competitive price control." *Id.* at 1254. The court, however, dismissed this evidence on the basis that the local jury had found that "inferior" aftermarket replacement parts had been used and that no state had sanctioned the use of "inferior" parts. *Id.* However, the court appears to be using "inferior" to mean "non-original equipment manufacturer parts" that therefore were not of "like kind and quality" as State Farm had promised in its contracts of insurance. *Id.* at 1247. Accordingly, on the basis of this tautological legerdemain, use of non-OEM parts was, by definition, the use of "inferior" parts.

31. See Matthew J. Wald, "Suit Against Auto Insurer Could Affect Nearly All Drivers," *New York Times*, Sept. 27, 1998, §1, at 29.

32. The court argued that, since the "of like kind and quality" language appeared in most of State Farm's contracts nationwide, its interpretation of this contractual language was therefore consistent with the laws of all the states. The argument fails, however. The interpretation of a contract of insurance is a matter of state law. States interpreting the identical language in a contract and even in a statute can and do differ as to the meaning or effect of the words. It is also of note that a Maryland state court refused to certify a nearly identical class action brought against the Geico Corporation. See *Snell et al. v. the Geico Corp. et al.*, 2001 WL 1085237 (Md. Cir. Ct., Aug. 14, 2001). Plaintiffs argued that the case they were bringing "is on all fours with [*Avery*]," *id.* at 7. The court basically concurred but found that certifying a nationwide class action could result in nullification of the laws and policies of other states with regard to the use of non-OEM parts. The court also rejected the *Avery* court's reasoning set forth in *supra* n. 30. *Id.* at 10.

33. See the Matter of Bridgestone/Firestone, Inc. et al., Westlaw (7th Cir. May 2, 2002), at 9 ("Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court"); see also *BMW v. Gore*, 517 U.S. 559, 568-73 (1996), *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001); *Spence v. Glock, GmbH*, 227 F.3d 308 (5th Cir. 2000).

34. U.S. Const., Art. III, § 2.

35. 28 U.S.C. § 1332.

To thwart removal of a class action filed in state court to federal court, which is often a critical factor in the ability of the plaintiff lawyer to succeed in the litigation,³⁶ class action lawyers use a number of strategies. One is to add a codefendant who is a citizen of the state in which the action is filed, thus destroying “complete” diversity. That codefendant can be, for example, a doctor or a pharmacy (in a suit against a drug company) or a local hardware store or other local retailer (in a suit against a product manufacturer).³⁷ After the expiration of the one-year time limit on removal to federal court,³⁸ that codefendant, who was never an intended target of the litigation, is dropped.

Another device to preclude removal is to plead that each class member’s damages are \$75,000 or less. Under the statute regulating removal, even if there is complete diversity of citizenship and the total amount of damages sought in the class action is in the billions of dollars, the case is not removable from state court unless damages sought are in excess of \$75,000 per class member.³⁹ Moreover, if the complaint states that the damages sought for each class member is \$75,000 or under and the class lawyers intend to later amend their pleadings to increase the damages claimed, after the expiration of the one-year period for removal to federal court—and actually do so—then that class action cannot thereafter be removed to federal court.⁴⁰

In addition to the foregoing systemic abuses, class action claiming has created a new set of client abuses that current ethical rules are ill-equipped to address.⁴¹ Many of these abuses are a function of the financial incentives that motivate the litigation.⁴² For example, plaintiffs’ counsel have intrinsic incentives to seek excessive fees and at the time of settlement to compromise the interests of the class in exchange for a defendant’s agreement to support (or not to oppose) such a

36. The importance to plaintiff’s counsel of keeping a class action bottled up in state court is illustrated by the following litigation: plaintiff, seeking to institute a commercial litigation against a major international company, interviewed a number of law firms and selected one on the basis of that firm’s reputation and its claimed ability to file the action in a small-county state court in one of the magnet states that attracts high numbers of class action filings. A complaint was filed, and the defendant removed the matter to federal district court. Plaintiff then withdrew its complaint. The same process was replicated a second time and a third time, each time with the same result. On the fourth try, plaintiff was able to get the federal district court to deny removal and to remand the case to state court. Once defendant faced the prospect of trying the case in a state court selected by plaintiff’s counsel, it sued for surrender. Shortly thereafter, a settlement was negotiated in which defendant agreed to provide plaintiff with very substantial compensation. It appears reasonably apparent that the key to plaintiff’s victory was its ability to have the suit tried in state court rather than in federal court. (I was retained as an expert witness in this litigation, which is subject to an order of confidentiality.)

37. Among class actions currently being litigated in Madison County are four alleging that standard form contracts used by auto manufacturers offering extended warranty protection plans violate state consumer-fraud laws because the contracts do not make clear that the dealer receives compensation for selling the plan. To ensure that defendants cannot remove these cases to federal court, the class lawyers have included one Illinois car dealer in each case as a defendant. See Beisner and Miller, “Class Action Magnet Courts,” *supra* n. 3 at 4.

38. 28 U.S.C. § 1446 (b).

39. See, e.g., *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F. 3d 792, 793–94 (11 Cir. 1999); *Farkas v. Bridgestone/Firestone, Inc.*, 113 F. Supp. 2d 1107, 1112 (W.D. Ky. 2000).

40. See, e.g., *Gilmer v. Walt Disney Co.*, 915 F. Supp. 1001, 1011 (W.D. Ark. 1996); *Dupraz v. Aventis CropScience USA Holding, Inc.*, 153 F. Supp. 2d 1102, 1105 (D.S.D. 2001).

41. See Carrie Menkel-Meadow, “Ethics and the Settlements of Mass Torts: When the Rules Meet the Road,” 80 CORNELL L. REV. (1995), at 1159, 1189–90.

42. In class actions and other aggregative forms of litigation, there is a conflict between the financial interests of the lawyers and the class they represent. MANUAL FOR COMPLEX LITIGATION (3d) (1995), § 23.24; Judith Resnick et al., “Individuals Within the Aggregate: Relationships, Representation and Fees,” 71 N.Y.U. L. REV. (1996), at 296, 300 (the economic benefits to lawyers of large-scale litigation are well documented); see also Charles C. Wolfram, “Mass Torts—Messy Ethics,” 80 CORNELL L. REV. (1995), at 1228, 1231 (stating “the class-action plaintiffs’ bar is driven by...easy money—a great deal of it”).

fee request.⁴³ Lawyers may also structure a class action settlement in order to maximize their fees.⁴⁴ Or they may seek to avoid the even meager quantum of attorneys' fee superintendence, often provided by courts in class actions, by aggregating hundreds and even thousands of individual cases into a single proceeding and then settling those claims *en masse*. Lawyers are then able to charge retail prices—standard contingency fees of 33–40 percent and higher—against wholesale settlements, insulated from any ethical oversight.⁴⁵

In addition to promoting systemic abuses and self-interested behavior, class actions invite large-scale deviations from the standards of care and conduct owed by the lawyer to the client, such as breaches of ethical duties,⁴⁶ breaches of fiduciary obligation—including the duty not to represent clients with conflicting interests,⁴⁷ and engaging in conduct that constitutes malpractice. While individual clients have the right to seek redress from their attorneys for such breaches, in class actions where the lawyer conscripts the client, such client rights have been effectively eviscerated.⁴⁸ Even class lawyers who engage in clear self-dealing at their clients' expense are virtually immune from the traditional disciplinary systems.⁴⁹ This is so because “[c]ourt approval of a settlement...insulates class counsel from collateral attack by clients aggrieved by an apparent sell-out of their claims by lawyers laden with conflicts of interest.”⁵⁰ Clients who have had their pockets picked by their lawyers are thus denied the right, for example, to seek redress by invoking the same tort system that their ostensible lawyers are invoking to generate multimillion-dollar fees for themselves.

The principal impetus for lawyers to bring actions seeking class certification and to engage in these various abuses are the fees.⁵¹ While courts have the duty to protect class members

43. See Jack B. Weinstein, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995), at 74–76 (stating that “plaintiffs’ attorneys in class and derivative cases...operate with nearly total freedom from traditional forms of client monitoring”).

44. See Sarah A. Toops, “Ethically Representing Thousands of Plaintiffs: Conflict Problems in Mass Toxic Harm Cases,” 67 *DEF. COUN. J.* (2000), at 462, 465–66.

45. See *in re Polybutylene Plumbing Litig.*, 23 S.W. 3d 428 (Tex. App. 2000), where the appellate court gave its blessing to the enforcement of 37,100 individual fee contracts, most of them providing for a 40 percent contingency fee, totaling \$88.8 million in attorneys’ fees, and reversing the district court’s treatment of the case as, in effect, a class action. The lower court also had reduced the fee total to 20 percent for the cases that did not go to trial, and awarded a total fee of \$33.1 million (a \$55.7 million reduction).

46. For a discussion of ethical issues raised by mass tort litigation, see, generally, Toops, *supra* n. 44.

47. For an example of concurrent conflicts of interest in class action claiming, see *infra* n. 102.

48. “We agree with those who argue that lawyer abuse in class actions is rampant and that the current system, far from keeping this abuse in check, is set up to shield lawyers from the consequences of their misdeeds.” Susan P. Koniak and George M. Cohen, “Under Cloak of Settlement,” 82 *VA. L. REV.* (1996), at 1051, 1056.

49. See Wolfram, *supra* n. 42, at 1228, 1233 (arguing that class action lawyers are beyond reform, especially given the lack of policing methods and stating that “[w]hat is badly broken, and what badly needs mending, is the basic class action and mass-litigation system of litigation. The only effective way to rid the judicial system of Willie Suttons is to take the profit out of robbing banks.”).

50. Paul C. Carrington and Derek P. Apanovitch, “The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass Tort Settlements Negotiated Under Federal Rule 23,” 39 *ARIZ. L. REV.* (1997), at 461, 469. See *Kamilewicz v. Bank of Boston Corp.*, 92 F. 3d 506 (7th Cir. 1996), reh’g denied, 100 F. 3d 1348, cert. denied, 520 U.S. 1204 (1997); *Epstein v. MCA, Inc.* 179 F. 3d 641 (9th Cir. 1999); *Thomas v. Albright*, 77 F. Supp. 2d 114 (D.D.C. 1999); see also Brickman, “Aggregative Litigation,” *supra* n. 16 at 298–300.

51. “[F]ee awards are one of the engines driving mass-tort litigation.” See *ADVISORY COMM. ON CIVIL RULES & WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION* (Feb. 15, 1999), at 30.

from lawyers who put their pecuniary self-interest ahead of the interests of the class,⁵² in reality, they often fail to fulfill their self-imposed duty to act as fiduciary for the class with regard to approval of both the settlement and the class lawyers' fee request.⁵³ Instead, plaintiffs' lawyers, charging contingency fees, are routinely overcompensated by courts⁵⁴ and are often able to obtain substantial—indeed, enormous—fees, sometimes a product of inflating the number of hours claimed,⁵⁵ which are rarely commensurate with the effort required, the risks assumed,⁵⁶ or ethical limitations on the reasonableness of fees. These fees frequently amount to tens of thousands of dollars an hour and can be as much as hundreds of thousands of dollars an hour.⁵⁷ Judges justify the fees awarded by noting that attorneys must be provided with sufficient compensation to yield the necessary incentives to undertake the risk of litigation in order to effectuate client rights in an era when legislatures are stymied by special interests and administrative agencies are shackled by budgetary constraints. Even if all elements of that proposition were accepted, the differences between actual compensation and “sufficient compensation” remain disturbingly high. A principal

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52. “[Courts have a] judicial duty to protect the members of a class in a class action from lawyers for the class who may, in derogation of their professional and fiduciary obligation, place their pecuniary self-interest ahead of that of the class.” *Reynolds et al. v. Beneficial National Bank*, 288 F. 3d 277, 279 (2002). “[I]nflated attorneys’ fees are an endemic problem in class action litigation.” *Id.* at 286. See also *Culver v. City of Milwaukee*, 277 F. 3d 908, 910 (7th Cir. 2002); *Greisz v. Household Bank (Illinois)*, N.A., 176 F. 3d 1012, 1013 (7th Cir. 1999); *Rand v. Monsanto Co.*, 926 F. 2d 596, 599 (7th Cir. 1991); *Duhaime v. John Hancock Mutual Life Ins. Co.*, 183 F. 3d 1, 7 (1st Cir. 1999); John C. Coffee, Jr., “Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation,” 100 COLUM. L. REV. (2000), at 370, 385–93; David L. Shapiro, “Class Actions: The Class as Party and Client,” 73 NOTRE DAME L. REV. (1998), at 913, 958–60 and n. 132. See also *infra* nn. 112–13.
53. See, generally, Susan P. Koniak and George M. Cohen, “In Hell There Will Be Lawyers Without Clients or Law,” 30 HOFSTRA L. REV. (2001), at 129. A particularly egregious example is *Kamilewicz v. Bank of Boston Corp.*, No. 91-1880 (Ala. Cir. Ct., Jan. 24, 1994), where the court approved a method of calculating the class lawyers’ fees that was designed to and did defraud class members. For further discussion of this case, see Brickman, “Aggregative Litigation,” *supra* n. 16 at 298–303. See also *Reynolds et al. v. Beneficial National Bank*, 288 F. 3d 277 (2002), where the appellate court overturned the lower court’s approval of both the class settlement and the fee. With regard to the latter, the appellate court stated: “[T]he district judge encouraged the...[lawyers] to submit their fee applications in camera, lest the paucity of the time they had devoted to the case (for which the judge awarded them more than \$2 million in attorneys’ fees) be used as ammunition by objectors to the adequacy of the representation of the class. There was no sound basis for sealing the fee applications, let alone for sealing the number of hours each of the settlement class counsel had devoted to the case. The applications are not in the appellate record and we do not know what the total number of hours devoted by the class counsel to this litigation was, but apparently it was a small number. This is not surprising, since the lawyers’ efforts between the filing of the complaint and the settlement negotiations were singularly feeble, illustrated by their responding to the...defendants’ motion to dismiss for lack of personal jurisdiction with a voluntary dismissal of the claims against those defendants.” *Id.* at 284.
54. See *supra* n. 2; see also Robert G. Bone and David S. Evans, “Class Certification and the Substantive Merits,” 51 DUKE L.J. (2002), at 1179 (“Even in relatively routine cases, class action attorneys earn hundreds of thousands, and frequently millions, of dollars in fees.”). *Id.* at 1262.
55. See Brickman, “Aggregative Litigation,” *supra* n. 16 at 306–7.
56. The thesis that very high fees are being routinely obtained in contingency-fee cases without meaningful risk, yielding what I have termed “windfall fees,” is one that I have previously advanced. See Brickman, “Aggregative Litigation,” *supra* n. 16 at 245; see also Lester Brickman, “ABA Regulation of Contingency Fees: Money Talks, Ethics Walks,” 65 FORDHAM L. REV. 1179 (1996), at 1179; Lester Brickman, “Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?” 37 UCLA L. REV. (1989), at 29, 92–93.
57. Cf. Bone and Evans, *supra* n. 54 at 1262.

consequence of such overcompensation is the proliferation of class action litigation, often irrespective of merit and yielding net subtractions from social welfare.⁵⁸

One of the more pernicious fee-setting devices that courts have permitted is the basing of the class action fee as a percentage of an artificially inflated settlement value when the reality is that the actual payments to the class will be a small fraction of the “announced” settlement value. This is what frequently occurs in the reversionary settlement (as opposed to the pro-rata), where, as noted earlier, any funds unclaimed by the class revert to the defendant. This provides an incentive to class counsel and defendant to act collusively to raise the stated amount of the settlement; the fee, which is usually a percentage of that amount, is thereby increased, thus paying off class counsel. In exchange, class counsel agrees to an especially arduous claiming process for class members in order to minimize the actual number of claims asserted against the notional value of the settlement fund, thereby maximizing the amount that will revert to the defendant.⁵⁹ In such cases, class counsels’ fees can easily amount to 200 percent or more of the amount actually paid to class members.⁶⁰

IV. DOWN’S ENTERPRISES

Beginning at least as early as 1989 and continuing to about March 1998, James Blair Down (“Down”), a Canadian citizen, conducted numerous mass-marketing schemes from Canada and Barbados, aimed principally at swindling elderly American citizens.⁶¹ Using many different direct

58. See *Fruchler v. Florida Progress Corp. et al.*, No. 99-6167C1-20 (Cir. Ct., Pinellas Cty., Fla.), March 20, 2002 (striking down a proposed settlement of a class action because it “provides nothing for the class members, while assuring Class Counsel of an unopposed opportunity to seek substantial fees”). *Id.* at 13. “This action appears to be the class action litigation equivalent of the ‘Squeegee boys’ who used to frequent major urban intersections and who would run up to a stopped car, splash soapy water on its perfectly clear windshield and expect payment for the unwanted service of wiping it off.” *Id.* at 15.

59. The reversionary nature of the settlement in the class action that is the subject of this monograph is discussed at Part VIII (B) *infra*.

60. See Motion for Leave to File Amici Curiae and Brief Amici Curiae in Support of Petition, *Int’l Precious Metals Corp. v. Waters*, 530 U.S. 1223 (2000) (in support of petition for certiorari, June 5, 2000). This was likely the case in *Waters*, where there was a \$40 million reversionary fund settlement that provided that any amount of the fund not claimed by class members and not paid out as attorneys’ fees and expenses was to be returned to defendants. This agreement resulted in awarding class counsel \$13,333,333 (one-third of the reversionary fund), whereas the distribution to the class plaintiffs only amounted to \$6,485,362.15. In other words, the fee award allowed by the district court was more than twice the amount of the class’s recovery. *Int’l Precious Metals*, 530 U.S. 1223 (2000). Although the Court dismissed the petition for certiorari seeking to challenge the fee award, Justice Sandra Day O’Connor filed a concurring opinion, explaining her reason for denying the petition for a writ of certiorari. Justice O’Connor agreed that as a result of utilizing the reversionary settlement method, the award of attorneys’ fees was “extraordinary.” *Id.* at 1223. She also recognized that these settlements “potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class [and]...encourage the filing of needless lawsuits.” *Id.* However, Justice O’Connor asserted that rehearing of this case did not provide a fitting opportunity to redress this injustice because of the existence of a “clear sailing” agreement, which provided that the petitioners would not, “directly or indirectly, oppose [respondents’] application for fees.” *Id.* Indeed, “as a result of...[these ‘clear sailing’ agreements], courts often lack the information necessary to protect the interests of the class against the conflicts inherent in the settlement process.” Brief of Amici Curiae, *id.* at 9–10, *Waters*. Justice O’Connor’s shot across the bow, however, lands far short of doing damage to abusive reversionary settlements. So long as class counsel insist on “clear sailing” provisions, there may never be an opportunity, per Justice O’Connor’s condition, for the court to eliminate this clear abuse.

61. Unless otherwise indicated, the details and characterizations of Down’s enterprises are taken primarily

mail solicitation companies that he controlled and multiple names, Down targeted the elderly and other vulnerable groups with direct mail solicitations in the form of prize-award notices, sometimes coupled with “puzzle contests,” designed to convince the addressees that they were entitled to receive a \$10,000 prize, provided they sent in \$5–20 as “administrative fees” for judging the puzzles. In fact, the mailings were misleading and deceptive; no such entitlements actually existed, and little money was ever received by those who responded.⁶² Instead, consumers who responded were inundated with more mailings, promising larger prizes and soliciting additional amounts of money. Several of those solicited who responded positively became frequent targets, sending in dozens of checks amounting to hundreds of dollars.

In addition to the “puzzle contest” enterprises, Down sold interests in “lottery pools” in Canadian and Australian lotteries, in contravention of U.S. law prohibiting the use of the mails to promote or market lotteries⁶³ and anti-racketeering laws related to gambling.⁶⁴ Down’s agents represented to potential customers that by participating in such pools, they would be receiving chances in foreign lotteries; moreover, by virtue of Down’s expertise in picking “special numbers” and the opportunity afforded to Down’s “customers” to buy larger shares in the pools, they were assured of a significant win. In fact, these claims were either misleading or false.⁶⁵ The chance of winning any sum of money was very remote, and the chance of winning any large sum—as claimed in the marketing campaigns—was virtually nil.⁶⁶ The lottery enterprise generated huge profits for Down because the prices charged to consumers greatly exceeded the actual costs of any lottery tickets purchased. The United States attempted to stop this activity by seizing the solicitations and other lottery materials. Down responded by frequently changing the names of his promotions, shifting part of his business from Canada to Barbados, disguising his mailings, and expanding his operations. In furtherance of his enterprise, Down sent out hundreds of mailings from various locations throughout the world, each consisting of 5,000 to 300,000 individual mail solicitations.

In addition to mail solicitations, Down also undertook a deceptive and predatory telemarketing scheme to sell lottery participations to targeted victims and gain access to their credit-card numbers. Millions of letters were sent and thousands of calls were made to U.S. residents from boiler rooms manned by approximately 500 telemarketers. The phone callers were insistent and persistent, gaining the confidence of the elderly victims by befriending them and calling again and again to procure additional checks and credit-card charges. Thousands of individuals, many of them elderly,⁶⁷ were tricked into paying out amounts ranging from hundreds of dollars to several hundred thousand dollars. In many cases, these sums represented the victims’

from three sources: (a) Pulling Affidavit, *supra* n. 11; (b) Affidavit of Joseph L. Byers, U.S. Postal Inspector, in *U.S. Postal Service and United States of America v. BAJ Marketing, Inc.* [Civil Action No. 98-880, U.S.D.C., District of New Jersey, Feb. 26, 1998; and (c) Plea Agreement between the United States of America and Down, Aug. 19, 1998. Although Down used scores of different names by which to market his enterprises, for the purpose of this narrative description, both the “puzzle” and “lottery” enterprises, described *infra*, will be referred to as “Down’s enterprises.”

62. Affidavit of Robert B. Cialdini, Regent Professor of Psychology at Arizona State University, filed Dec. 15, 1998, in the Matter of the Bankruptcies of James Blair Down, Supreme Court of British Columbia in Bankruptcy, Vancouver Registry Action Nos. 188266VA98, 188277VA98, and 182268VA98 (hereinafter, “Cialdini Affidavit”).

63. Title 18, U.S. Code §§ 1301–2.

64. Title 18, U.S. Code §§ 1952–53, 1084.

65. See affidavit of Mark A. Cohen, formerly Economist and Statistician on Crime, Division of Consumer Protection, U.S. Federal Trade Commission (and now Professor of Economics, Vanderbilt University), filed Dec. 22, 1998, at 8, in the Matter of the Bankruptcies of James Blair Down et al., Supreme Court of British Columbia in Bankruptcy, *supra* n. 62.

66. *Id.*

67. See Cialdini Affidavit, *supra* n. 62 at ¶ 9.

entire life savings. Among one group of 192 victims whose losses exceeded \$10,000 each, the average loss was over \$50,000; one individual lost \$329,000.⁶⁸ Major victims, characterized as “VIP customers” by Down’s enterprises, were mollified by personal visits designed to demonstrate Down’s concern for their plight. These visits included presenting victims who had spent large sums of money (usually more than \$100,000) with \$5,000 in traveler’s checks or cash to reduce the likelihood that they would report the scheme to authorities.

A. Cease-and-Desist Orders

Between 1992 and 1996, Down’s enterprises were the subject of at least 22 different U.S. Postal Inspection Service enforcement proceedings.⁶⁹ These enforcement efforts resulted in three agreements between Down and the postal authorities whereby Down agreed to “cease and desist” engaging in his lottery promotion enterprises.⁷⁰ In one such consent order involving the lottery enterprises, Down, on behalf of himself and his marketing companies, agreed “to cease and desist immediately from falsely representing, directly or indirectly, in substance and effect, whether by affirmative statements, implications or omissions, that:

- (1) a lottery winning system has been devised;
- (2) an individual will win lotteries and become wealthy by using a lottery winning system;
- (3) individuals have become wealthy (e.g., millionaires) by using a lottery winning system;
- (4) an entity provides numbers of a combination of numbers that will win lotteries;
- (5) numbers or a combination of numbers were specially selected for an individual and/or will win the lottery for the individual;
- (6) an individual has won something of value;
- (7) an entity is in possession of something of value (i.e., lottery entries) on behalf of an individual;
- (8) an individual was especially selected to receive something of value;
- (9) an entity will obtain, process and validate lottery tickets for the consumer for free;
- (10) a fee solicited from consumers is merely an administrative fee to cover the costs of validation and processing; [and]
- (11) any fee solicited from consumers is not the purchase price of the product.

Respondents are further ordered to cease and desist immediately from obtaining money or property through the mail for the purposes of conducting or participating in a lottery.”⁷¹

In addition, between April 1991 and September 1993, the U.S. Customs Service effected ten seizures of lottery tickets and other illegal material that Down caused to be mailed into the United States. Down’s “response to this enforcement activity was to continue and expand his illegal operations by changing the names of his promotions and operating companies, by shifting the operation of

68. See Pulling Affidavit, *supra* n. 11 at ¶ 72.

69. *Matter of the Bankruptcies of James Blair Down et al.*, 178 D.R.L (4th) 294, 66 B.C.L.R. (3d) 392 (1999), Slip Op. at ¶ 10.

70. See, e.g., the *Matter of the Complaint Against Universal Network, Inc.*, P.S. Docket No. 39/56, Oct. 30, 1992; the *Matter of the Complaint Against Universal Network, Inc.*, P.S. Docket No. 40/130, Apr. 12, 1993; the *Matter of the Complaint Against Universal Network et al.*, P.S. Docket No. 40/130, Apr. 6, 1993.

71. In the *Matter of the Complaint Against Universal Network, Inc. et al.*, Order, P.S. Docket No. 40/130, Apr. 12, 1993.

part of his business from Canada to Barbados, by disguising his mailings or using alternative couriers to avoid detection and by relying increasingly on telemarketing to avoid detection.”⁷²

In 1998, Down was prosecuted by the U.S. Attorney and the U.S. Postal Service in a civil fraud action in New Jersey for operating an illegal direct mail marketing business that solicited money mainly from elderly Americans.⁷³ The New Jersey civil proceedings were settled in December 1998 with a consent judgment compelling Down to forfeit \$400,000 to repay victims of his enterprises.

One of Down’s Barbados companies was also the subject of a consumer fraud complaint filed in 1997 by the Attorney General of Illinois, alleging that it had violated the Illinois Consumer Fraud and Deceptive Practices Act.⁷⁴ This resulted in a consent judgment in which Down’s company agreed to permanently discontinue its “prize” marketing scheme.⁷⁵

B. The Criminal Prosecution

In early 1992, the U.S. Attorney’s Office in Seattle, Washington, the U.S. Postal Inspection Service, and the U.S. Customs Office started a joint investigation into Down’s enterprises. In June 1997, Down was indicted by the United States for using the mails and other facilities in interstate and foreign commerce to illegally sell chances in lotteries and to carry on an unlawful business enterprise involving gambling. In the indictment, it was alleged that \$118,640,327 had been collected from victims and sent to Down in Canada.⁷⁶ A more detailed and fuller estimate of the aggregate value of the proceeds of Down’s criminal enterprises pegs the total receipts from the puzzle contests and lottery sales between 1989 and 1998 as in excess of \$150 million.⁷⁷ On August 19, 1998, Down pled guilty to a single count of criminal conspiracy to transport gaming paraphernalia in violation of the laws of the United States.⁷⁸ As part of the Plea Agreement, Down admitted that he established, controlled, and directed entities forming the enterprise and that his criminal activity was the cause of the victims’ delivery of monies to his agents. He further agreed to forfeit any interest in funds that had been seized as part of the prosecution amounting to over \$12 million, to be used primarily to make partial restitution to victims. Finally, Down agreed to incarceration and was imprisoned in Oregon for a term of six months.

72. Pulling Affidavit, *supra* n. 11 at 3.

73. *U.S. Postal Service v. BAJ Mktg., Inc.*, *supra* n. 61.

74. *People of Illinois v. Triple Eight Int’l Services, Inc.*, No. 97 CH 04123, Complaint for Injunctive and Other Relief (Cir. Ct., Cook Cty., Ill.), Apr. 3, 1997.

75. *People of Illinois v. Triple Eight Int’l Services, Inc.*, Consent Judgment, Cir. Ct., Cook Cty., No. 97 CH 04123, Nov. 9, 1998.

76. *U.S. v. James Blair Down et al.*, Second Superseding Indictment, No. CR97-199R, U.S. D.C., West. Dist. Washington, Oct. 17, 1997, p. 61, lines 9–13.

77. In addition to a total of \$118 million generated by the lottery scam as stated in the indictment, Interclaim possesses a list of puzzle victims who remitted in excess of \$28.5 million to Down, for a total of at least \$147.5 million. See *infra* n. 83. There is evidence upon which to base a conclusion that the proceeds of Down’s illegal enterprises actually exceeded \$200 million. In 1993, Down received \$27 million in lottery sales; in 1994, \$54 million was received, and in 1995, \$70 million. Pulling Affidavit, *supra* n. 11 at ¶ 96. Adding the \$28.5 million from the Merkle list of puzzle victims for the period 1997–98 brings the total to \$180 million. This does not include the revenue received for the period 1989–92. In the Pulling Affidavit, Down’s income statement for the 12-month period ending May 1995 is summarized, indicating gross receipts of \$70 million. *Id.* at ¶ 196. (Down continued to engage in the lottery marketing business until 1996.) Based upon that income statement, the monthly gross “take” was approximately \$5.83 million. As Down continued to operate between the months of June and December, 1995, in that period an estimated \$32.08 million was generated. Added to the \$180 million already calculated, gross revenues of at least \$212.5 million are apparent.

78. *United States of America v. James Blair Down*, No. 97-199R, U.S.D.C., West. Dist. Wash., Plea Agreement [hereinafter, “Plea Agreement”], Aug. 19, 1998.

Nonetheless, Down struck an excellent bargain, knowing that, in the words of a Canadian judge, he would leave prison as a “very wealthy man.”⁷⁹ He avoided up to 20 years incarceration under U.S. Bureau of Prison minimum mandatory sentencing guidelines and was forced to disgorge a very small percentage of the gross “take” of his criminal enterprises. The agreement by the U.S. government to settle for six months in a minimum-security prison and the forfeiture of \$12 million reflected the difficulties faced by the government in investigating criminal activity intentionally fragmented by Down across national boundaries, the proceeds of which had been concealed in offshore asset holding structures. Frustrated by its inability to recover even a modest percentage of the amount obtained from the victims, in June 1998, representatives of the F.B.I. and the U.S. Attorney’s Office in Seattle sought assistance from the Interclaim group of companies, including Interclaim Holdings Limited, located in the Republic of Ireland, in obtaining fuller relief for Down’s victims.

V. THE INTERCLAIM GROUP

The Interclaim group (“Interclaim”) formed in 1996, consists of several related companies that are in the business of contracting with financial institutions, sovereign governments, and individuals to locate illegally obtained or laundered assets worldwide and to acquire and enforce complex, multi-jurisdictional judgments, claims, and debts.⁸⁰

Interclaim receives either fixed fees for its efforts or enters into contingency-fee agreements with the institutions or others that hired it to recover assets. Where it is impractical for Interclaim to enter into recovery agreements with each claim holder because of numerosity or the limited amount of individual claims, Interclaim makes innovative use of legal process to seek the recovery of assets.

In response to the request from the F.B.I. and the U.S. Attorney’s Office, Interclaim, upon investigation, concluded that the \$12 million that Down paid in restitution as part of the Plea Agreement represented only a small fraction of the proceeds of Down’s enterprises. It further

79. *Re Down*, 178 D.L.R. (4th) 294, 66 B.C.L.R. (3d) 392 (1999), at ¶ 14.

80. The Interclaim group (“Interclaim”) consists of Interclaim Holdings Limited (“IHL”), an Irish company that holds title to claims that another subsidiary of the corporate group enforces. It is a wholly owned subsidiary of Interclaim (Bermuda) Ltd. and sibling to Interclaim Recovery Limited, the corporate subsidiary that enforces claims that IHL acquires an interest in. Interclaim describes the services on its website as follows: “Interclaim identifies claims, judgments, or debts which have been abandoned by their owners, or which have not been enforced because their owners lack the financial or human capital necessary to conduct effective enforcement proceedings in multiple jurisdictions at the same time. Interclaim takes on the financial risks of claim enforcement by either purchasing such claims or establishing joint ventures with the claim owners.”

Generally, Interclaim acquires claims by either outright purchase or joint venture. It describes the methods on its website as follows: “In an outright purchase, 100% of the title to particular claim is acquired in return for payment to the claim owner of either (a) cash or (b) a contingent payment payable upon the successful enforcement of the claim. When a claim is acquired through joint venture, Interclaim contributes all human and financial capital necessary to enforce the claim, while the claim owner contributes only the title to the claim. In large-scale government corruption or cases where there are multiple, unrelated and/or undercapitalized victims, Interclaim seeks a mandate to recover assets world-wide in return for the payment of a contingent fee. Such fee is often adjusted on a sliding scale.”

As quoted in the *Matter of the Bankruptcies of James Blair Down et al.*, 178 D.L.R. (4th) 294, 66 B.C.L.R. (3d) 392 (1999), Supreme Court of British Columbia (Canada) in *Bankruptcy*, Reasons for Judgment of the Honorable Mr. Justice Brenner at 4 (hereinafter, “*Bankruptcy Proceeding*”). On Nov. 7, 2001, Interclaim Recovery Ltd. was placed into voluntary liquidation in Ireland.

concluded that it could profitably participate in securing additional redress for Down's victims and, to that end, devised an entrepreneurial strategy to intervene on behalf of the victims. Interclaim, with the help of the U.S. Attorney's Office,⁸¹ which introduced Interclaim to 18 victims who had expressed interest in having Interclaim help them recover their loss, devised a plan to locate and recover Down's concealed assets. As a part of this plan, Interclaim sought to gain a legal basis to participate in several judicial proceedings that it contemplated instituting. It did so by entering into written agreements with 15 of the lottery-ticket purchasers, paying each between \$2,500 and \$5,000 from its own funds as a nonrefundable advance against any monies that Interclaim would recover from Down, in exchange for which these victims appointed Interclaim to be their attorney in fact to prosecute their claims against Down.

To give it a further legally cognizable interest in pursuing Down, Interclaim bought up approximately \$670,000 of outstanding trade debts of Down-owned enterprises, paying approximately \$87,500 to a printer, a data processor and mailer, and a telephone company that Down acquired services from in furtherance of his schemes but for which he had failed to pay.⁸² In the process, Interclaim acquired a list of 418,846 names and addresses of individuals who paid approximately \$28.5 million with regard to the "puzzle business" swindle operated by Down.⁸³

81. In response to the invitation to assist the victims, after investigation, Interclaim wrote to the U.S. Attorney's Office in Seattle on Aug. 20, 1998:

"I hope you may be in a position to provide me with the names and contact details of victims whom you may have possibly interviewed and who may be willing to cooperate with Interclaim towards effecting a global recovery of assets currently under the control of Mr. Down (or his related entities and/or associates)...[M]y primary objective is to make contact with victims who may be willing to sell, at face value, their claim against Mr. Blair Down and his corporate structure. The acquisition of, say, two or more such claims would provide us with the requisite legal platform from which to launch our plan of multi-jurisdictional claim enforcement and recovery."

Bankruptcy Proceeding, *id.* at 11. A U.S. Attorney then "attached this letter to a letter sent to a number of the potential claimants for the \$12 million restitution fund resulting from the plea agreement. He provided a form to be ticked and returned if the potential claimant wanted to be contacted by Interclaim." *Id.* The letter included the following:

"We have received a letter from a company named "Interclaim" located in Dublin, Ireland, which describes its business as "multi-jurisdictional claim acquisition and enforcement." This company has expressed an interest in purchasing the claims of several of the victims of the Down companies. Apparently, this company is considering instituting international litigation against Mr. Down and/or his companies and states it is interested in acquiring certain claims against him 'at face value' in order to provide a legal basis to pursue such litigation."

Bankruptcy Proceeding, *id.*

82. *Id.* at 15-17.

83. The list of 418,846 consisted of names and addresses of individuals who had paid money to Down's enterprises between May 1996 and June 1998, in response to the puzzle enterprises. The list was purchased from Merkle Data Processing, Inc., which acted in that time period as the sole electronic data processor and principal mailer for Down's enterprises conducted from Barbados.

"The Merkle list sets forth (a) the names and addresses of certain persons who remitted value to the enterprise at least once during the last 6 months of the approximate May 1996 to June 1998—apparent life cycle of the Puzzle Business; (b) an indication of the amount conveyed by each person thus listed, totaling approximately US\$28,512,837 in aggregate value; (c) the date that each amount was paid; (d) the method of payment; and (e) a code indicating the identity of the apparently deceptive solicitation that formed the reason for the sending of a particular sum of value."

Retainer Agreement between Ness, Motley, Loadholt, Richardson & Poole and Interclaim, Recital at 10, Feb. 14, 2000.

Many, if not most, of these puzzle-contest participants were also solicited by Down's lottery enterprises and sent in monies to the latter.⁸⁴

VI. THE CANADIAN LITIGATIONS

A. *The Bankruptcy Action*

Employing a novel and complex legal strategy, on December 22, 1998, Interclaim commenced a bankruptcy proceeding against Down in the Supreme Court of British Columbia, in its own name (as owner of Down-related trade debt) and in the names of 15 lottery-ticket purchasers as co-petitioners. Down's liability was premised on the theory that, as the operator of an illegal enterprise (whose business was ostensibly involved in the unlawful resale of foreign lottery tickets), Down was not legally entitled to keep the proceeds of what were hundreds of thousands of illegal contracts. Accordingly, each and every one of Down's "customers" or contractual counterparties was a creditor entitled to the return of whatever monies Down received from them. As such, Down was a debtor to each of these creditors in an amount equal to the liquidated sum received from his victims. Interclaim further alleged that: (a) Down had attempted to secrete his assets with the intent to defeat his creditors (Interclaim and the lottery-ticket purchasers); (b) Down was insolvent because his debts exceeded his assets, thus creating a need for a process of ratably distributing his assets among the creditors; and (c) these facts and circumstances constituted acts of bankruptcy under Canadian law.

However, merely petitioning Down into involuntary bankruptcy proceedings was in no way sufficient to ensure that Down's creditors would be compensated. As a result of many years of evading and avoiding criminal prosecution from various law-enforcement agencies in the United States, Down had placed his assets beyond traditional means of recovery available to ordinary creditors, through the creation of complex asset protection mechanisms across multiple jurisdictions.⁸⁵ Accordingly, merely placing Down into involuntary bankruptcy would not result in compensation to creditors. Rather,

84. In June 1999, Interclaim sent a questionnaire to 10,000 individuals randomly selected from the Merkle list. Approximately 82 percent of the 667 who responded indicated that in addition to the puzzle business, they had sent money to the lottery and telemarketing enterprises. Affidavit of Dr. Mark A. Cohen, filed Feb. 17, 2000, in the Matter of the Bankruptcies of James Blair Down et al., Supreme Court of British Columbia in Bankruptcy. The 7.1 percent response rate based upon delivered pieces of mail is "indicative of a significant population of customers who believe they have a valid claim." *Id.* at 10. Moreover, because many of the recipients of the survey may have had difficulty in understanding it or did not believe that they could adequately document any losses and therefore did not respond, "the response rate is likely to considerably underestimate the true percentage of the 10,000 surveyed or in the database of 418,846 that believe they have a legitimate claim. Given the fact that the average age of respondents was significantly lower than the average age of individuals in the database, customers who did not respond to the survey but believe they have legitimate claims (or have subsequently passed away) are likely to be older (on average) than age 64.8 years [the average age of the respondents]." *Id.* at 8.

85. For example, according to the Court of Appeal for Alberta, Interclaim established a strong *prima facie* case that Down owned 26 office buildings and other commercial properties in Alberta, Canada, of an estimated value of CAD\$100 million through 26 Alberta numbered companies; the cash equity and subordinated debt, all having derived from a Netherlands holding company, which, in turn, was wholly owned by a holding company domiciled in the Netherlands Antilles that was owned by Down. Each of the 26 numbered Alberta corporations, which held the title to the Alberta real estate, purported to be controlled and owned by Down's brother and sister-in-law. Down owned a home on St. James Beach in Barbados that was listed by him for sale with Sotheby's for \$17.5 million, through a BVI international business corporation secretly controlled by a Channel Islands trust. Down had a secret Swiss bank account containing \$4.5 million. Down also held a \$5 million investment in a timber concession in Papua New Guinea through a Guernsey trust. See First Report of the Interim Receiver (Arthur Andersen, Inc.), in the Matter of the Bankruptcies of James Blair Down et al., Supreme Court of British Columbia in

Down's laundering of the proceeds of his crime would merely frustrate those seeking restitution, as one could not expect Down to be forthright in the disclosure of his worldwide assets. To deal with the complexity of the issue, Interclaim conceived of a plan to allow for the orderly compensation of Down's victims while at the same time earning a profit for itself. The plan was to: (1) locate Down's assets; (2) collect evidence of the manner and means of ownership of those assets; (3) collect the evidence necessary to convince a court that these assets were truly owned by Down and that unless these assets were placed under the control of the court, they would be dissipated in order to frustrate creditors; and (4) simultaneously petition Down into involuntary bankruptcy and have the bankruptcy court appoint an interim receiver to seize Down's assets, pending resolution of the issue of whether Down was a "debtor" and his victims "creditors" within the meaning of the Canadian Bankruptcy and Insolvency Act and, therefore, should be adjudicated a bankrupt.

In furtherance of its plan, Interclaim had entered into an agreement with Arthur Andersen, Inc., whereby Andersen would, if appointed by the court, serve as interim receiver ("Interim Receiver") of Down's assets and of the assets of two of Down's former senior executives. In addition, Interclaim was authorized thereunder to search out Down's assets and provide up to CAD\$3 million of its own funds to do so, including posting any security for cross-undertakings in costs or damages required to preemptively freeze Down's assets. Finally, the agreement provided that Interclaim was entitled to recover its outlays and 50 percent of any proved claims realized in bankruptcy.⁸⁶

Bankruptcy, Feb. 11, 1999 (hereinafter, "First Report of Interim Receiver"); Second Report of the Interim Receiver (Arthur Andersen, Inc.), March 30, 1999 (hereinafter, "Second Report of Interim Receiver"). The U.S. government in 1997 seized \$12.3 million of Down's cash held by two Cayman Islands companies, which were further held by two Cayman Islands Trusts. See Plea Agreement, supra n. 78, supporting documents attached.

86. Bankruptcy Proceedings, id. at 12-15. As described by Interclaim (referring to itself as IHL): "Moving forward with its efforts to secure restitution for the hundreds of thousands of victims of the criminal enterprise, and acting under the power of attorney agreements, IHL retained Canadian law firms to commence involuntary bankruptcy proceedings in Vancouver, British Columbia against the Down group, and a 'representative proceeding' (i.e., class action) in Calgary, Alberta on behalf of both [the] fifteen...individuals and all other victims of the criminal enterprise....[T]hese fifteen individual victims, who had executed power of attorney agreements with IHL, were potentially liable on CAD\$4 million of bonds posted to facilitate the issuance of asset preservation orders associated with the proceedings in Alberta, as well as further potential (or contingent) adverse costs and damages liability to the Down group. On Dec. 22, 1998, IHL and the fifteen co-petitioners...commenced involuntary bankruptcy proceedings against Down and two of his co-conspirators in their home city of Vancouver, British Columbia. At Interclaim's request, the bankruptcy court provisionally appointed Arthur Andersen, Inc. as Interim Receiver and approved an International Claims Enforcement Agreement ("ICEA") between IRL and the Interim Receiver. Under that agreement, IRL was to (1) fund the operations of the Interim Receiver with up to CAD\$3 million of cash and bonds and (2) provide the Interim Receiver with expert and specialized services in identifying, locating and recovering the illicit proceeds worldwide. In return, IRL was to receive a return of its direct costs of up to \$2 million, plus 50% of any assets recovered in the bankruptcy up to a maximum of 50% of the proven claims of creditors. Between Dec. 22, 1998, and Jan. 29, 1999, the Interim Receiver, with...[Interclaim's] assistance, instituted *ex parte* concealed asset discovery and preservation proceedings in seven jurisdictions, namely, (a) Alberta, (b) the British Virgin Islands, (c) Barbados, (d) the Bailiwick of Guernsey in the Channel Islands, (e) the Bailiwick of Jersey, (f) the U.S. Bankruptcy Court (Seattle), and (g) British Columbia, to attach and recover assets derived from the criminal enterprise. [Interclaim,] as the Interim Receiver's agent, posted security for these proceedings in the aggregate amount of CAD\$3.5 million. Through these efforts, [Interclaim] and the Interim Receiver preserved approximately CAD\$100 million of the Down group's assets worldwide (inclusive of the value of third-party mortgages). Such assets have an estimated net equity value of Can\$50-60 million...." *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, Amended Complaint, U.S. D.C. N.D. Ill., E. Div., May 23, 2001, at ¶¶ 12-14 (5-6).

At an *ex parte* hearing on December 18, 1998, the Bankruptcy Court approved the appointment of the Interim Receiver and the marketing of an International Claims Enforcement Agreement between it and Interclaim, authorizing Interclaim to support the Interim Receiver's efforts to locate and preserve assets of Down, in exchange for receiving payment of certain expenses plus a 50 percent share of the net proceeds of any recovery as its total compensation for its efforts. Interclaim then set about the task of assisting the Interim Receiver to commence extensive proceedings to locate and preserve assets acquired with the proceeds of Down's enterprises, in bank accounts and investments in Switzerland, the Cayman Islands, the United States, the Bailiwicks of Jersey and Guernsey in the Channel Islands, the British Virgin Islands, Barbados, Papua New Guinea, and Canada.

Acting as agent for the Interim Receiver, Interclaim located and assisted the Interim Receiver in preserving approximately CAD\$100 million of assets throughout the world that were beneficially owned by Down, of which it projected that \$50–60 million would be recoverable under the bankruptcy proceeding.

After extensive proceedings before the Canadian Bankruptcy Court, the judge, on August 4, 1999, expressed great sympathy for the victims of Down's enterprises but held that Interclaim's arrangements with the trade creditors and the 15 lottery victims violated the ancient proscription against champerty. Champerty occurs when one undertakes to carry on a litigation to which he is not a party, in exchange for a share of the proceeds of the litigation.⁸⁷ The laws regarding champerty in the United States vary widely: some states never adopted the common law doctrine; some that did have repealed those laws; others that did have created specific exceptions such as for lawyers' contingency fees, which are, by definition, champertous; and some few still maintain prohibitions against champerty.⁸⁸ On the basis of that holding, Justice Brenner dismissed the bankruptcy petition on August 4, 1999.⁸⁹

Justice Brenner's conclusion that Interclaim's agreements with the 15 lottery victims were champertous was wrong, both under American⁹⁰ and Canadian law. In January 2001, the Court of Appeal for British Columbia overturned Justice Brenner's dismissal based upon champerty (calling the issue a "red herring"), reinstated the bankruptcy petitions, and instructed the bankruptcy court to dispositively rule on the principal issue in the case—whether the liquidated claims of restitution of the victims of Down's enterprises were "debts" under the Canadian Bankruptcy and Insolvency Act. The other issues before the bankruptcy court (with respect to Down's interlocutory application to set aside the appointment of the Interim Receiver) had not been ruled upon in consequence of Justice Brenner's August 4, 1999, finding of champerty.⁹¹

87. *Black's Law Dictionary* (4th ed., 1957), at 292.

88. I was retained by Interclaim to provide written testimony on the issue of champerty under American law. See in the Court of Queen's Bench of Alberta, Judicial Centre of Calgary, between Interclaim Holdings et al. and Down et al., Action No. 9901-10422, Affidavit of Professor Lester Brickman, Oct. 27, 1999 (hereinafter, "Brickman Affidavit").

89. Bankruptcy Proceedings, *id.* at 38. The judge, concerned about the plight of the victims, invited the appellate court to create an exception to the rules regarding champerty so that the action could proceed. *Id.* at 38–39.

90. See Brickman Affidavit, *supra* n. 88, in which I examined the laws of the states of the 15 co-plaintiffs and concluded that since there had been no assignment of any legal or beneficial right of the co-plaintiff's ownership of their respective claims to Interclaim, these agreements were not champertous. *Id.* at ¶¶s 28–98. See also ¶¶s 99–121 for a discussion of the applicability of the doctrine of maintenance.

91. *Interclaim Holdings Ltd. v. Down*, 2001 BCCA 65, 196 D.L.R. (4th) 114, 84 B.C.L.R. (3d) 1 (Ct. App. for British Columbia, Jan. 31, 2001). Previously, the Court of Appeal, in Dec. 1999, had directed the Bankruptcy Court to rule on the remaining interlocutory issues related to Down's attack on the *ex parte* interim receivership order of Dec. 18, 1998. Chief Justice Brenner (as he had become), thus issued his supplemental findings on the remaining asset-preservation part of the case on July 28, 2000. These are discussed, *infra*, in Part VI (C), "The Asset Freezes."

B. The Alberta Representative Action

Shortly after the December 15, 1998, institution of the bankruptcy proceedings in Vancouver, British Columbia, Interclaim and the 15 individual co-petitioners to the bankruptcy proceeding commenced the Canadian form of a class action, known as a “representative action” in Calgary, Alberta, where much of Down’s wealth was held in the name of Down’s sister-in-law. This somewhat duplicative action appears to have been motivated by a concern that the Alberta court might otherwise have some reluctance to “freeze” *ex parte* approximately 30 commercial properties located in Calgary that were on their face owned by corporations under the control of Down’s sister-in-law, who was not a debtor in the British Columbia bankruptcy proceedings. The commencement and prosecution of the representative action against Down and his brother and sister-in-law, as co-conspirators, gave the Alberta court a second and more “local” basis for “freezing” the title to these properties. Shortly after these assets were frozen by *ex parte* order on January 29, 1999,⁹² and after a fiercely contested hearing to dislodge the freeze order, the interim receivership was substantially maintained in Alberta, and that court ordered Interclaim to post bonds totaling Can\$4 million to secure the payment of Down’s costs and damages, if any.⁹³

In November 1999, the Alberta court struck the class action portion of Interclaim’s representative proceeding.⁹⁴ Though the court allowed the claim of the 16 co-plaintiffs to go forward, it declined to allow them to act as representatives on behalf of an estimated 800,000 to 1 million victims of Down’s criminal enterprises, holding that “Alberta does not have modern class action legislation.”⁹⁵ The Alberta court’s November 23, 1999, decision in the Interclaim case is on appeal to the Court of Appeal for Alberta.⁹⁶

C. The Asset Freezes

From the very outset of its efforts to secure redress from Down’s victims and compensation for its efforts if successful, Interclaim understood that, even if it won the litigation battles, it would still lose the war unless it could locate Down’s assets and prevent him from selling off those assets and putting the proceeds beyond reach. Accordingly, Interclaim devoted substantial resources and efforts first to locate and then to judicially enjoin Down and all relevant third parties from disposing of those assets.

Initially, the efforts to “arrest, preserve, and protect” Down’s assets were undertaken under the terms of the agreement appointing Interclaim as agent of the Interim Receiver, as approved by the British Columbia Bankruptcy Court in December 1998. Assets belonging to Down, including over 200 bank accounts and 150 “shell” entities, were located in Switzerland, Jersey, Guernsey, Barbados, the British Virgin Islands, and Canada.⁹⁷ Using the authority vested in the Interim Receiver by the court, a number of these properties were made subject to the court’s jurisdiction. In

92. The Alberta “freeze” order thus resulted in the “double freezing” of the properties.

93. In addition to the CAD\$4 million, Interclaim also was responsible for posting bonds of a value of \$450,000 in Barbados and \$200,000 in the British Virgin Islands.

94. *Re Down*, Court of Queen’s Bench of Alberta, 1999 ABQB, Nov. 23, 1999, Reasons for Judgment of the Honorable Madam Justice Kent.

95. *Id.* at 3. The court also found that for purposes of Rule 42 of the Rules of Court, a class of victims could not be defined, common issues of fact and law were not present, and the requirements of finality were not met.

96. The Supreme Court of Canada has since issued a decision in *Western Canadian Shopping Centres, Inc. v. Dutton et al.* (July 13, 2001), [2000] S.C.J. No. 63 (S.C.J.), holding that Alberta courts must fashion a class action rule that is akin to the modern class action legislation now extant in Ontario and British Columbia, thereby imposing a requirement for the reform of the law in Alberta, accordingly.

97. First Report of the Interim Receiver, *supra* n. 85.

subsequent months, additional orders of protection were enforced against other properties that had been located.⁹⁸ In March 1999, Down moved to set aside the various *ex parte* orders. Justice Brenner ordered Interclaim Holdings Limited, to either post a bond of CAD\$400,000 or to deliver the undertaking of its corporate parent, Interclaim (Bermuda) Ltd., to guarantee payment of any adverse costs or damage awards. Interclaim elected to do the latter.

On January 29, 1999, the Interim Receiver, with the assistance of Interclaim, froze over \$100 million of Down's assets located in eight jurisdictions. On April 1, 1999, Madam Justice Adel Kent of the Court of Queen's Bench of Alberta held that 27 of 29 commercial properties previously frozen *ex parte* by Justice Hawco of the same court on January 29, 1999, were to remain frozen.⁹⁹ However, after determining on November 23, 1999, that the representative action could not go forward, Justice Kent effectively released 27 of the 29 properties from the clutches of the Alberta representative action freeze order. Immediately thereafter, the Alberta Court of Appeal issued an order that 26 of the referenced 27 Alberta properties were to remain frozen, pending the outcome of the British Columbia bankruptcy proceeding and the representative action.

On July 28, 2000, as directed to do so by the Court of Appeal, the British Columbia Bankruptcy Court issued supplementary interlocutory rulings on issues raised by Down regarding the December 18, 1988, *ex parte* interim receivership freeze order. Interclaim prevailed on all the material issues save one, but it was a crucial issue. The court ruled that since the litigants' expert witnesses disagreed about a critical question of foreign law (i.e., the legal consequences to Down and the victims of his enterprises of the illegality of each of the contracts between them under U.S. law), the court could not conclude that the bankruptcy petitioners had made out a "strong *prima facie*" case that Down was a "debtor" and the victims of his enterprises, "creditors," under the Canadian Bankruptcy Act. As a consequence, the chief justice ruled that the Interim Receivership should be dissolved and the assets unfrozen. In August 2000, the Court of Appeal refused to stay the bankruptcy judge's order dissolving the asset freeze, pending hearing of the consolidated "champertry/debt" appeal in November 2000.

The dissolution of most of the asset freezes posed a mortal danger to Interclaim's strategy. Even if Interclaim on behalf of itself and its 29 represented victims were to prevail in the appeals in Canada, the victory would be a pyrrhic one. Assets with which to pay the claims would not be available. Indeed, it was a reasonable certainty that Down would take advantage of the unfreezing of his assets to reconceal them in ways that would render them unreachable.

Interclaim therefore had to explore new avenues to effect recovery against the Down group on behalf of Interclaim, Interclaim's 29 represented victims, and the victim class generally by, in particular, preserving or reinstating asset freezes. Accordingly, Interclaim decided to retain counsel to commence class action proceedings in the United States with the goal of getting a judgment from an American court, filing it with the British Columbia bankruptcy court as an enforceable debt, facilitating the liquidation of Down's assets for the benefit of the bankruptcy estate, securing the victim class members' share by way of a "dividend" from the bankruptcy court, and returning this dividend to the American court to disburse the available funds to the victim class. As will be related below, an asset freeze was obtained from a U.S. court on August 7, 2000, prior to the dissolution of the Canadian asset freezes. But would that be in time and sufficient to allow payment of the victims' claims?

98. Second Report of the Interim Receiver, *supra* n. 85.

99. Mr. Justice Hawco's Jan. 29, 1999, *ex parte* freeze was based upon a double-barreled foundation, inasmuch as the 29 referenced properties were frozen on the basis of (a) a Request for Judicial Assistance from the Bankruptcy Court in British Columbia to Alberta courts to recognize the Interim Receiver's asset preservation powers, and (b) the court's jurisdiction to preserve assets in support of the independent Alberta representative action claim. See *supra* n. 92.

VII. THE ACTION MOVES TO THE UNITED STATES

As noted, while the Canadian proceedings were ongoing and after Interclaim perceived its strategy to be in jeopardy, in December 1999, Interclaim opened discussions with, and on February 14, 2000, entered into an agreement with, the Charleston, South Carolina, law firm of Ness, Motley, Loadholt, Richardson & Poole (“Ness Motley”) to bring a class action proceeding on behalf of the victims of the criminal enterprise. Ness Motley has attained great fame and fortune, first in asbestos litigation and later as the lead law firm in the multistate actions against the tobacco industry. Its fees for the latter approximate \$2 billion over a 25-year period.¹⁰⁰ The firm has attained enormous political power and has used its dominance in asbestos litigation coupled with its political power to block proposed congressional legislation that would create an administrative alternative to asbestos litigation and limit compensation to only those who have suffered actual injury.¹⁰¹ In carrying on its activities, the firm has sometimes engaged in ethically dubious practices. For example, its role as class counsel in two of the largest asbestos litigation settlements and its representation in individual and state tobacco litigations have exhibited a clear disregard for ethical rules governing concurrent conflicts of interests.¹⁰²

100. See *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 2002 U.S. Dist. LEXIS 4257 at *3.

101. For a description of Ness Motley’s role in turning back an effort to legislate an administrative solution for asbestos litigation, see Brickman, “Aggregative Litigation,” supra n. 16 at 246 n. 13.

102. Model Rule 1.7(b) of the Model Rules of Professional Conduct provide that “[a] lawyer shall not represent a client if the representation of the client may be materially limited by the lawyer’s responsibilities to another client... unless (1) the lawyer reasonably believes the representation will not be adversely affected.” Ness Motley was class counsel in two of the largest asbestos litigation settlements. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Supreme Court held that conflicts internal to a class consisting of currently injured persons and persons exposed to asbestos in the workplace for whom injury had not yet manifested, the so-called futures, required rejection of class certification. In *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999), decided two years later, the Supreme Court again rejected a massive settlement of asbestos claims because of the concurrent conflicts of interest created by class counsel’s settlement of present claims (“inventory claims”) on different terms from those provided for with regard to future claimants. These decisions implicitly hold that the firm engaged in simultaneous representation of clients with differing interests and that this conflict impaired the firm’s representation of future claimants. See Roger Cramton, “Lawyer Conduct in the ‘Tobacco Wars,’ ” 51 DEPAUL L. REV. (2001), at 435, 445–46.

“Concurrent conflicts of interest continued once these plaintiffs’ lawyers moved into the tobacco field. First, they undertook to represent some individual smoking victims who were seeking compensatory and punitive damages against the tobacco companies. Second, after a failed effort to certify a class including all smoking victims nationwide they brought a number of cases involving statewide classes. These cases also sought both compensatory and punitive damages for smoking victims. Then the plaintiffs’ lawyers agreed to represent Mississippi and Florida in reimbursement actions brought by those states against the tobacco companies. These actions, later expanded to include 22 states, were settled in a June 1997 agreement that capped the liability of the tobacco companies to smoking victims and, when implemented by Congress, prohibited punitive damages. The lawyers abandoned the relief that they were claiming on behalf of individual claimants in negotiating the global settlement on behalf of the states. A lawyer violates the concurrent representation conflict of interest rules when the claims of some clients (smoking victims) are subordinated to those of other clients (the states).” *Id.* at 446 (footnote omitted).

An example of the conflict of interest generated by the representation of an individual smoking victim and the statewide tobacco class actions brought is Ness Motley’s representation of the widow of a barber who died of lung cancer. See *Estate of Butler v. Philip Morris, Inc.*, 94-5-53 (Miss. Cir. Ct., Jones Cty.). See also Milo Geyelin, “Tobacco Plaintiff Files Suit Against Her Ex-Attorney,” *Wall Street Journal*, Aug. 4, 1997, at B8; Bob Van Voris, “Tobacco Negotiations Created Sharp Client Conflicts,” *NAT’L L.J.*, Aug. 4, 1997, at A8-A9. A subsequent story indicated that Ness Motley entered into a confidential settlement after Ms. Butler brought a \$1.5 million damage action against the firm, alleging conflict-of-interest violations. She alleged that the firm did not inform her of the conflicting interests, and she did not consent to them. See *NAT’L L.J.*, Sept. 22, 1997, at A5.

A. The Interclaim–Ness Motley Retainer Agreement

The retainer agreement entered into in February 2000 with Ness Motley provided that:

- (1) Interclaim retained Ness Motley as attorney on its behalf and on behalf of the 29 specific victims who had entered into power-of-attorney agreements with Interclaim;
- (2) Ness Motley was to commence and prosecute to “final end,” legal proceedings against Down and others in whatever U.S. jurisdiction it considered appropriate to recover the damages suffered by the victims of Down’s criminal enterprise including the Interclaim victims;
- (3) Ness Motley was to advance costs of the litigation that it would seek to recover as part of the proceedings. Ness Motley estimated that the cost of mailing notices to the class of victims, which it undertook to pay for, would approximate \$1 million;
- (4) In addition to whatever compensation Ness Motley would be awarded by a U.S. court, Interclaim would pay Ness Motley a fee equal to 25 percent of the net compensation that Interclaim received after expenses under the terms of the agreement with the Interim Receiver that the Canadian Bankruptcy Court had approved;
- (5) Prior to the payment of any compensation to either Ness Motley or Interclaim, independent counsel for the U.S. class of Down victims would be retained to evaluate the reasonableness of the compensation agreement between Interclaim and the Interim Receiver; and
- (6) Ness Motley agreed to keep all documents and information provided to it by Interclaim confidential except as required to be disclosed as part of the legal proceedings to be commenced.¹⁰³

B. How Madison County Was Selected

Under the terms of the retainer agreement, Ness Motley was to select the venue in which to bring the class action. Ness Motley asked Interclaim to identify potential class representatives for three jurisdictions: Madison County (Illinois), Brooklyn (New York), and Huntington (West Virginia).¹⁰⁴ Ness Motley thereafter decided to file the class action in Madison County and asked Interclaim to provide the names and addresses of victims who resided in specific Madison County zip codes.¹⁰⁵ Ness Motley then contacted those listed to enlist them as named plaintiffs in the class action it would bring. One such encounter is described in a news article as follows:

Foster Frederick...was at home [in Madison County] watching TV one afternoon when a lawyer came from the city to see him. “He said I’d been cheated,” said Frederick, a retired Granite City steelworker. “I didn’t even know it until he told me.” Now Frederick is among the name plaintiffs in a lawsuit against a lottery company....The 2-year-old case is still pending, court records show, but Frederick didn’t know that. “I haven’t heard a word since that lawyer came over,” he said.¹⁰⁶

103. Retainer Agreement between Ness Motley and Interclaim, Feb. 14, 2000.

104. Interclaim, utilizing the mailing list of 418,846 persons who had responded to puzzle-contest solicitations (see supra n. 83), was able to identify 72 of these individuals residing in Huntington, 2,239 in Brooklyn, and 334 in Madison County. Fax transmissions from Interclaim to a law firm affiliated with Ness Motley, March 2, 1999, and Dec. 2, 1999 (on file with the author).

105. Fax transmission from Interclaim to Ness Motley, Feb. 2, 2000 (on file with the author).

106. Christi Parsons, “Downstate County Is ‘Plaintiffs’ Paradise,” *Chicago Tribune*, June 17, 2002, at 1.

On March 10, 2000, after having obtained the agreement of two others on the Interclaim list to serve as named plaintiffs, Ness Motley filed a class action complaint in Madison County on behalf of all persons residing in the United States who had sent money to one of Down's enterprises, listing three of the Madison County victims as lead plaintiffs.¹⁰⁷ The complaint alleged that Down and others had unlawfully solicited monies as part of a deceptive scheme intended to defraud plaintiffs, in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act.¹⁰⁸

C. The Temporary Restraining Order and the Initiation of Settlement Negotiations

As previously indicated, on July 28, 2000, the British Columbia bankruptcy court set aside its December 18, 1998, *ex parte* appointment of the Interim Receiver. This order was provisionally stayed, pending review by the Court of Appeal for British Columbia later during the month of August 2000. Given the very real possibility that the Court of Appeal might lift the provisional stay and thereby release the frozen Down group assets worldwide, on August 4, 2000, Interclaim and Ness Motley moved on an emergency basis in the Madison County court to secure those same assets through entry of a temporary restraining order (the "TRO") against certain members of the Down group. The TRO sought was intended to enjoin Down and others listed, in part, as controllers of properties he owned from directly or indirectly transferring any interest in the assets previously frozen in connection with the Canadian bankruptcy proceedings. Based substantially on information and evidence provided by Interclaim to Ness Motley, Madison County Circuit Court Judge Nicholas Byron entered an order on August 7, 2000, directing Down and three others not to directly or indirectly dispose of or transfer any interests they had in the assets previously frozen by the Interim Receiver in connection with the Canadian bankruptcy proceeding.¹⁰⁹ That TRO was in place before the Canadian asset freeze was set aside. A hearing was scheduled for August 18, 2000, before Judge Byron to extend the August 7, 2000, TRO by converting it into a preliminary injunction, thereby extending the freeze to the trial of the matter.

Interclaim, on behalf of the class, intended to present expert testimony on Down's efforts to launder and conceal the proceeds of his criminal enterprises and thus support the assertion that, in the absence of a preliminary injunction continuing the asset freeze, there existed a high risk that Down would secrete his assets to make them unavailable to satisfy any judgment. At that point, the litigation took an unexpected turn, at least from Interclaim's perspective. En route to the hearing, Interclaim learned on August 16, 2000, that Ness Motley and Down had postponed the preliminary injunction hearing. Upon inquiry, Interclaim learned that Down had initiated settlement negotiations with Ness Motley at some earlier period. On August 17, 2000, Down made it a condition of any further negotiations that Interclaim not only be excluded from the negotiations but from access to knowledge of the substance of the negotiations as well. Ness Motley agreed to

107. *Schuppert et al. v. Down et al.*, Class Action Complaint, 3d Judicial Cir., Madison Cty., Ill., No. 00-L-223 (March 10, 2000) (hereinafter, "*Schuppert v. Down*"). This was later superseded by Plaintiffs' First Amended Class Action Complaint, filed June 19, 2001.

108. 815 Ill. C.S. 505/1 et seq.

109. *Schuppert v. Down*, Order of Aug. 7, 2001.

Down's conditions.¹¹⁰ These negotiations culminated in a settlement that will be analyzed in detail in Part VIII, *infra*. Before doing so, however, the Interclaim-Down relationship needs to be set out as necessary context.

D. Settlement Context: The Interclaim-Down Relationship

Most class actions are entrepreneurial undertakings by lawyers seeking substantial fees. Because of this intrinsic quality, opportunities for self-interested behavior in class actions abound. In particular, class counsel have substantial incentives to sell out the interests of the class by adopting a settlement strategy more consistent with their own financial self-interest than with that of the class.¹¹¹ To counter these incentives, judges in class actions serve as fiduciaries to absent class members¹¹² and, in theory, reject proposed settlements unless they are "fair, adequate and reasonable and...[are] not the product of collusion between the parties."¹¹³ In fact, however, on the whole, the judiciary has failed to fulfill its role as fiduciary to the class.¹¹⁴ Thus, courts routinely approve fee requests that

110. This account of the actions of Interclaim and Ness Motley is drawn largely from *Interclaim et al. v. Ness, Motley, Loadholt, Richardson & Poole*, U.S. D.C., N.D. Ill. East. Div. No. 00C7620 (filed Dec. 4, 2000), Amended Complaint, filed May 23, 2001 (hereinafter, "Interclaim Amended Complaint"). The facts alleged in the Interclaim Amended Complaint were adopted for purposes of denying, in its entirety, Ness Motley's motion to dismiss Interclaim's suit for breach of fiduciary duty, misappropriation of confidential information, and breach of the retainer agreement. See *Interclaim v. Ness Motley*, U.S. Dist. Ct., N.D. Ill., East Div. No. 00C7620, Memorandum Opinion and Order, Oct. 29, 2001 (Hon. Rebecca R. Pallmeyer). In the Complaint, Interclaim alleged that, despite having entered secret negotiations with Down, Ness Motley continued to meet with Interclaim to obtain confidential information based on Interclaim's unique knowledge of the concealed ownership, locations, and movement of Down's assets, even as Ness Motley was deliberately withholding from Interclaim information about the settlement negotiations. As related by Interclaim:

"Interclaim provided Ness Motley with summary and analytical materials it has generated regarding the Down group's lottery sales and money laundering activities. The materials included a chart identifying the financial institutions used by the Down group as well as known account and transaction information specific to each institution. The materials also included a table of the Down group's known assets (including a separate table setting out leads to other Down assets) and a chart tracking the global movement of moneys flowing from Down-operated businesses in the United States, Canada, and Barbados to and through numerous accounts around the world. Moreover, Interclaim produced confidential written work product from its firm of forensic accountants in Calgary, Alberta [namely, the firm of Allen & Taylor,] who had analyzed thousands of documents pertaining to the ownership and finance of the Down group's vast Alberta real estate holdings. Without these materials, Ness Motley lacked the detailed factual basis on which to conduct meaningful settlement talks."

Interclaim Amended Complaint, *id.* at ¶ 31. Interclaim maintains that by hiding its intent to exclude Interclaim from the settlement negotiations, Ness Motley exploited its privileged relationship with Interclaim in order to obtain information with which to respond to various of Down's assertions, including that he was an "owner" of only a small portion of the frozen assets. Interclaim Amended Complaint, *id.* at ¶ 31.

111. MANUAL FOR COMPLEX LITIGATION (3d) (1995), 23.24.

112. See *United States v. City of Miami*, 614 F. 2d 1322, 1331 (5th Cir. 1980); *Int'l Union of Elec. Workers v. Unisys Corp.*, 858 F. Supp. 1243, 1264 (E.D.N.Y. 1994), stating that the court "has the fiduciary responsibility of ensuring that the settlement is fair and not a product of collusion, and that the class members' interests [are] represented adequately" (quoting in re Warner Communications Secs. Litig., 798 F. 2d 35, 37 [2d Cir. 1986]). See also *supra* n. 52.

113. *Cotton v. Hinton*, 559 F. 2d 1326, 1330 (5th Cir. 1977).

114. See, generally, Koniak and Cohen, *supra* n. 53.

substantially overcompensate lawyers,¹¹⁵ allowing them to appropriate to themselves more than a rightful and efficient share of the common fund, thus reducing the compensation provided to the class and the deterrence effect of the litigation. Other examples of such failures abound.¹¹⁶ In recent years, even as many federal courts have begun to more fully assume their statutory and fiduciary obligations, many state courts remain unduly receptive to class lawyers' interests.

While the incentive for plaintiffs' lawyers to collude with defendants and their counsel exists in virtually all class actions, in the Madison County proceeding under review, there were additional incentives that need to be exposed to properly comprehend the resulting settlement agreement. In particular, Down's motivations at the time of the August 7, 2000, class action TRO asset freeze need to be illuminated.

It is not unusual for defendants in class actions to dispute the allegations of wrongful conduct; so, too, in this proceeding. But that hardly captures Down's position. Over the course of ten years, Down had successfully amassed proceeds of \$150 million or more by engaging in enterprises directed against elderly Americans—enterprises that U.S. officials have labeled deceitful and fraudulent. In the process, Down repeatedly ignored consent orders he entered into to cease and desist from such activity. He did have to give up more than \$12 million of his ill-gotten gains and serve six months in a federal minimum-security prison, but that appeared to be the maximum price he had to pay for becoming a centi-millionaire. The day following his first night in prison, Down awakened to find that approximately \$100 million of his assets located in Switzerland, Barbados, the British Virgin Islands, the Channel Islands, Papua New Guinea, Canada, and the United States had been frozen by *ex parte* court orders at the behest of an entrepreneurial asset recovery firm, Interclaim. Prior to that point, he was probably unaware of Interclaim's existence. Thereafter, Interclaim conducted vigorous litigation against Down in Canadian courts, at substantial expense to both Down and Interclaim. Interclaim, motivated by the prospect of sharing in a substantial recovery, may well have seen itself as the victims' avenging angel. To Down, however, Interclaim must have appeared to be the devil incarnate.

115. In re Synthroid Marketing Litigation, 201 F. Supp. 2d 861, 872 n.6 (U.S.D.C. N.D. Ill., 2002) (stating that there is data suggesting that "courts routinely overcompensate attorneys in class actions").

116. Most "coupon" settlements fall into this category. In a coupon settlement, class members receive a right to purchase defendant's products or services at a discount while the class attorneys' fees are to be paid in coin of the realm, not coupons. See, generally, Christopher R. Leslie, "A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation," 49 UCLA L. REV. (2002), at 991. Usually, in such settlements, the notional value of the settlement vastly exceeds the aggregate fair market value of the discount right "coupons." Moreover, where the coupon needs to be applied for by class members by filing a claim, the number of coupons projected to be issued as part of the settlement administration process typically is far in excess of the actual number applied for because many, if not most, class members do not consider it worth their while to submit completed claim forms in order to obtain the coupons. See, e.g., Coordinated Class Action Lawsuits of *Naevus Int'l, Inc. et al. v. AT&T Corp. and AT&T Wireless Services Inc.*, Notice of Proposed Settlement, Supreme Court, N.Y. Cty. (June 3, 2002), in which the allegation was that AT&T Wireless provided an inferior level of service to its customers than that promised in its advertisements. The proposed settlement provided for 80 minutes of additional air time to those having an active account with the company, and a calling card with 240 pre-paid minutes or an entitlement to a 24 percent discount on wireless telephone equipment accessories for those not having an active account. The proposed fee, which the company agreed not to contest, was \$5 million.

A simple, if not elegant, resolution of the particular abuses that permeate coupon settlements would be to require that class counsel receive payment in the form of coupons that they can then market in order to monetize the coupons. Ironically, it appears that the principal reason that courts do not adopt such a strategy, apart from the strong opposition from class counsel, is that it is often exceedingly difficult to calculate the value of the coupons. At the same time, of course, courts are awarding class counsel substantial fees based upon class counsel's claims as to the value of the coupons.

Even as the tide of litigation turned in Down's favor, merely prevailing would likely have seemed to be insufficient. Under Canadian "loser pays" rules, if Down ultimately prevails in the Canadian litigations, he will no doubt seek reimbursement of attorney costs of several million dollars.¹¹⁷ In addition, he will likely seek payment from the approximately \$3.5 million of bonds that Interclaim posted with regard to the frozen assets. To maximize his likelihood of prevailing in the Canadian litigations and imposing substantial costs on Interclaim, however, Down will have to resolve the Madison County class action in a manner not only consistent with his interests but so as not to represent an economic gain for Interclaim. Minimizing any payment to the class and also maximizing the infliction of harm on Interclaim, however, would be the diametric opposite of the objective of any U.S. lawyer that had entered into the Interclaim-Down retainer agreement¹¹⁸ to represent Interclaim and Down's victims. That lawyer's obligation would be to maximize the class's recovery and, consistent therewith, fully protect the interests of its client, Interclaim.

E. The Settlement: An Abbreviated Version

The settlement between Ness Motley and Down ("the Settlement") provided that Down would potentially make available a total of at least \$6 million to pay compensation to victims of his enterprises who filed valid claims; \$2 million to Ness Motley as an attorneys' fee; and \$2 million to pay the cost of notifying the victims of the Settlement. The Settlement specifically excluded Interclaim and the 29 victims who had entered into power-of-attorney relationships with Interclaim from the class, thereby excluding them from any recovery under the terms of the Settlement. The Settlement also detailed how, and in what form, notice was to be given to the victims of Down's enterprises as well as the proof-of-claim form that they would have to file.

A more detailed discussion of the Settlement is set forth in Part VIII infra.

F. The Form of the Settlement: A Settlement Class Action

In proceeding to seek approval of their settlement, Ness Motley and Down decided to forgo a full evidentiary hearing regarding the class certification issue and to use instead the "settlement class action" method. Here, the parties stipulate to a temporary settlement class to facilitate settlement¹¹⁹ as a prelude to seeking certification of the class and settlement approval simultaneously. The class so formulated may not necessarily meet the requirements for certification of a class and is recognized solely for the purpose of concluding a settlement.

In furtherance of that strategy, the parties agreed to a settlement and stipulated to a temporary settlement class on June 19, 2001.¹²⁰ They then sought and obtained the conditional certification of a settlement class from the Madison County court.¹²¹ The parties amended that

117. In fact, on Sept. 18, 2001, Chief Justice Brenner of the Supreme Court of British Columbia, in Bankruptcy, ordered Interclaim to pay approximately CAD\$1.8 million in costs awarded to Down for his having successfully set aside the interim receivership order. Interclaim posted CAD\$400,000 as security required to perfect its appeal of this costs award. The costs appeal is scheduled to be heard in Sept. 2002. On July 10, 2002, Chief Justice Brenner stayed Interclaim's bankruptcy petition.

118. See supra Part VII (A).

119. Temporary settlement classes are generally used to facilitate settlement and avoid expenses attendant to a full evidentiary hearing regarding the class certification issue. See, e.g., in re Beef Industry Antitrust Litigation, 607 F. 2d 167 (5th Cir. 1979); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

120. Stipulation and Agreement of Settlement, June 19, 2001, *Schuppert et al. v. Down et al.*, No. 00-L-223, Cir. Ct., 3d Judicial Cir. of Ill., Madison Cty.

121. Order of Preliminary Approval, *Schuppert v. Down*, June 19, 2001.

stipulation and agreement in November 2001¹²² and jointly moved for preliminary approval, including a request for conditional certification of a settlement class. Judge Byron approved the motion,¹²³ holding:

In determining whether a settlement class should be conditionally certified for purposes of settlement only, and whether the terms of the Settlement are fair, adequate, and reasonable...the Court has fully considered the comprehensive terms of the Settlement, the statements of counsel, and all other matters of record brought to the Court's attention. Based thereon, the Court concludes that there is probable cause to believe that the Settlement is fair, adequate, and reasonable and that it falls within the range of possible approval. It is, therefore, Ordered as follows:

1. This court for settlement purposes only and based upon the well-pleaded facts, has jurisdiction over this case for purposes of settlement. The settlement is properly before this Court for preliminary approval...and preliminary approval is hereby GRANTED.¹²⁴

In thus granting preliminary approval for both the constitution of the class and the terms of the settlement, Judge Byron gave his approbation to the various exclusions from the class of Interclaim and all those it represented as well as to the form of the proposed Notice of Settlement, the Proof of Claim, and the Plan of Notice that were part of the settlement. Pursuant thereto, he ordered that all members of the settlement class seeking to receive a distribution of funds had to provide their name and address to the Settlement Administrator on or before April 12, 2002, and had to return the Proof of Claim Form and other required documentation postmarked by June 28, 2002. Anyone included in the class wishing to object at the final settlement hearing had to file a notice with the clerk of the court on or before May 3, 2002.¹²⁵ Finally, in November 2001, the settlement hearing to consider final approval was scheduled for June 6, 2002. (These dates have been superseded by later events.)¹²⁶

The creation of a temporary settlement class by stipulated order does not relieve the court of its ultimate responsibility of determining the appropriateness of certifying the class and the choice of class representative according to the requirements set forth under Illinois law that parallel those set out in Federal Rule 23. Indeed, because the approval is sought jointly, the dynamics of adversarial litigation are absent at that point. Therefore, in a stipulated settlement class context, the court is required to take a more active role as the guardian of the interests of absent class members¹²⁷ and to examine, with "undiluted, even heightened attention," compliance with the certification rules.¹²⁸

G. The Motion to Intervene

After informing Interclaim in August 2000 that it had entered settlement negotiations with Down, Ness Motley excluded Interclaim from being present at the talks, at the insistence of Down.

122. Amended Stipulation and Agreement of Settlement, Nov. 20, 2001, *Schuppert v. Down*.

123. Second Order of Preliminary Approval, *Schuppert v. Down*, Nov. 2001.

124. *Id.*

125. *Id.* Only one victim of Down's enterprises filed a Notice of Objection by this deadline. See *infra* n. 184. He is represented by counsel and has set out multiple grounds of objection to the terms of the proposed settlement.

126. See *infra* Part IX.

127. See John Macey and Geoffrey Miller, "The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform," 58 U. CHI. L. REV. (winter 1991), at 1.

128. *Amchem*, 521 U.S. at 620.

Thereafter, Ness Motley appraised Interclaim of the broad parameters of the proposed settlement. Interclaim objected to the terms of the proposed settlement as being grossly unfair to the class and to Interclaim. Ness Motley also indicated that as a condition of the settlement, it had agreed that Interclaim would be excluded from recovering any portion of the proposed settlement and that it would withhold the substance of any of the settlement discussions from Interclaim. One month later, on September 19, 2000, Ness Motley wrote Interclaim to formally withdraw from representation of Interclaim.¹²⁹

On September 29, 2000, Ness Motley agreed to dismiss with prejudice one of the named defendants in the Madison County proceeding who was the nominal owner or controller of many of the Down group's assets.¹³⁰ In the estimation of Interclaim, that dismissal was likely to have vitiated the effect of the TRO preserving Down's assets previously entered by the Madison County court.¹³¹ Alarmed by these events and upon learning that a hearing was scheduled before the Madison County court to certify the class and preliminarily approve the settlement,¹³² Interclaim, in March 2001, on behalf of itself and the 29 victims of Down's enterprises specifically excluded from the class under the terms of the Settlement, filed a motion to intervene in the class action proceeding, claiming that Ness Motley had not adequately represented their interests.¹³³ Interclaim further alleged in its supporting memorandum that, by agreeing to dismiss claims against one of the Down defendants who was the nominal owner of properties that had been the subject of asset freezes and the TRO, and by virtue of the fact that several of those properties had recently been sold with the proceeds therefore no longer accessible to the class, the interests of all class members were being adversely affected. Illinois law provides for intervention as of right in the circumstances set forth in Interclaim's motion;¹³⁴ nonetheless, Judge Byron denied the motion to intervene on the grounds that Interclaim would, the court concluded, be "disruptive" to the proceedings.¹³⁵ Shortly thereafter, concerned about the ongoing dissipation of assets, Interclaim,

129. In the letter, Ness Motley stated that it felt compelled to do so "even if to the detriment of Interclaim."

Letter from Ness Motley to Interclaim, dated Sept. 18, 2000 (on file with the author). The letter attributed Ness Motley's withdrawal to the advice of ethics experts whom Ness Motley had consulted.

130. Interclaim Amended Complaint, *id.* at ¶ 41.

131. Indeed, by approximately March 29, 2001, six of the 12 remaining Down "frozen" commercial real-estate assets in Alberta, worth in excess of CAD\$10 million, had been sold in apparent violation of the Madison County TRO. This appeared to have been facilitated by the dismissal of one of the named defendants. *Id.*

132. After Ness Motley formally withdrew from its representation of Interclaim, Interclaim hired local counsel in Madison County to monitor the proceedings. A weekly examination of the case file disclosed that a hearing was scheduled for March 2001, to preliminarily approve the settlement and provisionally certify the class. Interclaim then made a motion to intervene in the proceedings and requested that it be heard at the time scheduled for the preliminary approval of the settlement. Interclaim's motion to intervene was heard and denied in March 2001, as detailed above in the text. Ness Motley and Down decided not to proceed with the hearing to preliminarily approve the settlement and certify the class while Interclaim's counsel was present. That hearing did take place on June 19, 2001, at which Judge Byron preliminarily approved the settlement and certified the class. No notice was provided to Interclaim, which was not present at the June 19, 2001, hearing. Moreover, nothing appeared in the record of the case in the relevant time period to alert Interclaim or anyone else of the fact that such a hearing would take place on June 19, 2001.

133. Motion of Interclaim to Intervene, March 27, 2001, *Schuppert v. Down*.

134. Illinois law provides for intervention in a judicial proceeding as of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." 735 Ill. C.S. § 5/2-408 (a)(2). That statute also provides for intervention as of right where the movants are "so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or a court officer." § 2-408(a)(3).

135. *Schuppert v. Down*, Order of Apr. 3, 2001. The court did not explain how making Interclaim a party would be "disruptive."

on behalf of itself and the 29 putative class members who were excluded from the Settlement, requested the court to permit an expedited appeal of the order denying intervention.¹³⁶ This was denied, without comment, on July 6, 2001.¹³⁷

Interclaim has brought suit against Ness Motley in U.S. District Court in Chicago, claiming breach of fiduciary duty, misappropriation of confidential information, and breach of contract.¹³⁸ Ness Motley moved to dismiss the complaint, and a U.S. District Court, after extensively reviewing the facts pled, denied Ness Motley's motion on October 29, 2001.¹³⁹

H. The Effect of the Negotiation of the Settlement on Ness Motley's Fiduciary Obligation to Interclaim

As indicated,¹⁴⁰ on December 4, 2000, Interclaim sued Ness Motley in U.S. District Court, claiming breach of fiduciary obligation, breach of contract, and misappropriation of confidential information. While that suit, which is ongoing, is not a subject of this article, elements of that litigation are germane to a discussion of the issues raised by the terms of the Settlement agreement. Moreover, the effect of the negotiation of the Settlement upon Ness Motley's fiduciary obligation to Interclaim may be seen as relevant to an analysis of whether Ness Motley additionally breached its fiduciary obligation to its conscripted clients: the victims of Down's enterprises.

When Ness Motley and Down initiated settlement negotiations and Ness Motley acceded to Down's demands that Interclaim be excluded from the negotiations, a conflict of interest arose between Ness Motley and Interclaim. Ness Motley sought to unburden itself of that conflict by terminating Interclaim as its client on September 18, 2000.

Ness Motley contends that this action was not only justified but mandatory. In its view, when Down offered a fair settlement to the putative class but with the condition that Interclaim be excluded, that created a conflict of interest between Ness Motley and Interclaim. Ness Motley contends that it had the obligation to the putative class to consider the settlement on the basis of the class's best interests and to withdraw from its representation of Interclaim.¹⁴¹ A brief examination of the relevant rules of professional ethics and fiduciary obligation is therefore in order.

When Ness Motley entered into an agreement with Interclaim to represent Interclaim and the victims of Down's enterprises, it was governed by the following rules of professional ethics:

Rule 1.7(a):

A lawyer shall not represent a client if the representation of the client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation

136. *Schuppert v. Down*, Intervenors' Consolidated Motion for Entry of an Appealability Finding and Memorandum in Support, May 3, 2001. Under Illinois law, an appeal of an order denying intervention can only take place after a final judgment is entered in the class action. However, under Illinois Supreme Court Rule 304(a), a court may make a special finding that there is no just reason for delaying an Intervenor's appeal, allowing for immediate appeal therefore from the court's order of Apr. 3, 2001, denying its Motion to Intervene.

137. *Schuppert v. Down*, Order of July 6, 2001.

138. See Interclaim Amended Complaint, *id.*

139. Memorandum Opinion and Order, *supra* n. 110. While that litigation, which is ongoing in U.S. District Court in Northern Illinois, is not a subject of this article, the pleadings have provided some information that has been incorporated into this monograph.

140. See *supra* nn. 110, 138.

141. See *supra* n. 129.

will not adversely affect the relationship with the other client; and (2) each client consents after disclosure.¹⁴²

Rule 1.7(b):

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person by the lawyer's own interests unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after disclosure.¹⁴³

When Down demanded that Interclaim be excluded from settlement negotiations, Ness Motley was obligated to determine whether such exclusion was in the interests of its clients. If it concluded, as it reasonably must have, that excluding Interclaim was adverse to the interests of Interclaim, it was obligated to secure Interclaim's consent before proceeding. Even if Ness Motley concluded, in the face of the evidence discussed in this monograph, that excluding Interclaim was in the interests of the class¹⁴⁴ that it was seeking to represent, it still had, under the rules set forth above, fiduciary and ethical obligations to Interclaim. If Interclaim had refused to waive its rights, Ness Motley would have had to reject the demand as adverse to the interests of the client, Interclaim. If Ness Motley believed that by rejecting the demand, it was injuring the interests of the class, then it had an obligation to withdraw from representing the class and to seek the appointment of other counsel to represent the class. What it could not do in apparent violation of Rule 1.7 is what it did do: withdraw from representing Interclaim and continue to represent the class.

Once Ness Motley withdrew from representing Interclaim, Interclaim became a "former client" and therefore an additional ethical rule applied:

Rule 1.9(a):

A lawyer who has formerly represented a client in a matter shall not thereafter: (1) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after disclosure.¹⁴⁵

After terminating its representation of Interclaim—and Interclaim having thus ascended to the rank of "former client"—Ness Motley's continued representation of the class in the same matter became materially adverse to the interests of its former client. By failing to either obtain Interclaim's approval or to withdraw from representing the class, Ness Motley appears to have therefore also violated Rule 1.9(a).

142. Illinois Rules of Professional Conduct, Rule 1.7(a); see also South Carolina Rules of Professional Conduct, Rule 1.7(a), setting forth virtually the same requirement. The retainer agreement with Ness Motley provided that the laws of South Carolina would govern the interpretation of the agreement. Because the alleged unethical conduct took place in Illinois, however, both Illinois' and South Carolina's rules of ethics may apply. For purposes of this brief analysis of the applicable rules of ethics, the ethics rules of both states will be considered.

143. Illinois Rules of Professional Conduct, Rule 1.7(b). Again, the South Carolina Rules are substantially identical.

144. Germane to the issue of whether excluding Interclaim was in the interest of the class is the conclusion of the ethics expert whom Ness Motley consulted at the time of the drafting of the retainer agreement with Interclaim, that Interclaim "seems clearly entitled to reasonable compensation since, but for its efforts, the class takes not a dime." See letter from John P. Freeman, Esq., to Ness Motley, Jan. 11, 2000 (on file with the author).

145. Illinois Rules of Professional Conduct, Rule 1.9(a); South Carolina Rule 1.9(a) is virtually identical.

VIII. THE SETTLEMENT AGREEMENT: IN DETAIL

Under the terms of the settlement agreement,¹⁴⁶ Down agreed to create two pools of money to compensate the victims: the first pool was \$5.5 million; the second pool, \$500,000. In addition, he agreed to pay Ness Motley \$2 million plus expenses and to pay the costs of notifying class members.

The first pool, \$5.5 million, would be paid to claimants who could produce credit-card receipts, a money order, or canceled checks as evidence of payments to any of Down's enterprises and who could otherwise satisfy the onerous claim qualification procedure. Any monies not claimed under these terms would not be paid out by Down. In the event that valid proofs of claim were filed exceeding \$5.5 million but not exceeding \$10 million, the \$5.5 million would be shared ratably by the claimants. If the total of the valid proofs of claim exceeded \$10 million, Down had the right either to pay \$10 million and thereby satisfy all valid claims to the first pool, irrespective of the amount claimed in excess of \$10 million, or to terminate the stipulation of settlement.

The second pool, \$500,000, was to be paid to claimants who submitted claims but did not provide the documents required to make a claim against the first pool. Any funds not paid out to claimants would be available to those claiming against the first pool and, if not successfully claimed, would revert to Down.

Excluded from the class were the 29 victims who had entered power-of-attorney agreements with Interclaim, those victims who had claimed compensation from the funds seized by the U.S. government in connection with the prosecution of Down in Seattle, Washington (including those whose compensation did not fully reimburse them for their losses), Interclaim, and any person who had at any time entered into any contractual relationship with Interclaim for the collection or recovery of funds on account of having been a victim of Down's criminal enterprises.

With regard to the deposit of funds with the court for payment to claimants, the agreement provided: "Pursuant to the Letter Agreement the defendant shall use its best efforts to liquidate real estate to pay the obligations under the Stipulation as soon as reasonably practicable, however, the Defendant shall have up to three years following the Final Judgment to fund his obligations under the Stipulation. Interest shall accrue on obligations arising under the Stipulation after January 1, 2001 at the rate of 8% per annum."¹⁴⁷

Class members were to be notified of the terms of the settlement by ads appearing in newspapers and on television that read:

ATTENTION

All persons who purchased Lottery or Puzzle Products on the telephone or through the mail.

This Notice May Affect Your Legal Rights. Please Read It Carefully.

You may be a potential class member in a settlement of a class action if you purchased a lottery, sweepstakes or puzzle game ticket for certain contests under various names including B.L.C. Services, Inc., BAJ Marketing, Inc., Marketing Inc. Winners [listing seven other names used by Down]....

IN ORDER TO PARTICIPATE IN THE SETTLEMENT, YOU MUST HAVE PROOF OF PAYMENT.¹⁴⁸

146. See Amended Stipulation and Agreement of Settlement, *Schuppert v. Down*, dated Nov. 20, 2001, filed with the court on Nov. 29, 2001 (hereinafter, "Amended Stipulation").

147. *Id.* at ¶26.

148. *Id.* at Summary Notice of Settlement, Exhibit G, Amended Stipulation (emphasis in original).

Down was to pay the expenses of notifying the settlement class, thus relieving Ness Motley of having to pay approximately \$1 million for notice costs, which it had undertaken to do in the retainer agreement with Interclaim.

The date for class members opting out or objecting to the settlement was set as May 3, 2002, and the fairness hearing, to give final approval to the settlement and the fee, was originally scheduled for June 7, 2002. As previously noted, these dates have been changed.¹⁴⁹

Down was released from all liability. Any class member who did not affirmatively respond by opting out of the class would be bound by the settlement and would be unable to make claims against Down based upon participation in one of his enterprises.

Ness Motley would apply to the court for an award of attorneys' fees and reimbursement of costs. Down agreed to pay up to \$2 million as a fee to Ness Motley plus expenses and agreed not to challenge such a fee request.

A. The Adequacy of the Settlement

The settlement purports to amount to \$6 million for the victims, a lawyers' fee of \$2 million, plus approximately \$2 million in notice and administration costs—totaling approximately \$10 million. Given the raw materials with which Ness Motley had to work, the \$10 million (which, as will be indicated, is in reality only a fraction of that amount) was, at best, woefully inadequate.

Down has pled guilty to conspiracy to soliciting monies through illegal activity using mass solicitations promoted through the use of fictitious names, and he agreed to provide a relatively small amount of restitution to the victims.¹⁵⁰ As summarized by the Canadian bankruptcy judge: "The Down Organization particularly preyed on elderly Americans, many of whom were apparently so swayed by the promises of congenial telemarketers and convincing mailings that they paid thousands of dollars, sometimes their life savings, to the Down Organization."¹⁵¹

To be sure, Down had not been charged with nor had he pled guilty to fraud. Therefore, it would have been necessary to prove that the operative provisions of the Illinois Consumer Fraud and Deceptive Practices Act, upon which the class action complaint was founded, prohibiting the use of any "deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact...in the conduct of any trade or commerce...[which results in persons being] misled, deceived or damaged thereby,"¹⁵² had been violated. However, a review of Down's Plea Agreement, the Plea Hearing Transcript, and the Superseding Information giving rise to the plea leads to the conclusion that certain facts and issues relating to the criminal conspiracy to which Mr. Down pled guilty were both stipulated to and judicially accepted after a full and fair hearing.¹⁵³ Accordingly, the effect of the plea agree-

149. See *infra* Part IX.

150. See *supra* Part IV (B).

151. Bankruptcy Proceeding, *supra* n. 80.

152. 815 Ill. C.S. 505/2.

153. See Affidavit of Gary Klein, sworn to on Sept. 21, 1999, in *Interclaim et al. v. Down et al.*, Action No. 9901-01422 in the Court of Queens Bench, Alberta, Canada. Mr. Klein states that Down's plea agreement results in the following facts being conclusively established as a matter of law:

"(a) That "beginning at least as early as 1990, and continuing through on or about January, 1996," James Blair Down knowingly and willfully conspired with others...to commit offenses against the United States by conducting an unlawful lottery marketing business from Canada and Barbados and knowingly and willfully agreeing, among other things, to solicit remittances of monies from United States residents for the purchase of chances, shares and interests in lotteries;

ment in a civil action brought by victims of Mr. Down's illegal conduct would be to preclude Mr. Down from re-litigating any of these facts or issues.¹⁵⁴ While Down could certainly argue to the contrary,¹⁵⁵ on the basis of the foregoing, it is nonetheless at least likely that Down's illegal

(b) That in furtherance of the unlawful conspiracy, James Blair Down and his conspirators, acting from Canada, Barbados and elsewhere, individually and through the various business entities created by James Blair Down for such purposes,...all of which were under the direction of, and responsible to, James Blair Down, caused such unlawful solicitations to be sent by mass mailings signed and promoted through fictitious names, and seeking money from United States residents for participation in such lotteries;

(c) That in furtherance of the unlawful conspiracy, James Blair Down, aided by his co-conspirators, also operated telephone rooms in Vancouver, British Columbia, Kelowna British Columbia, and Toronto, Ontario, from which telemarketers, many of whom used fictitious names, unlawfully solicited and obtained payment by United States residents for the purchase of, inter alia such chances and interests in lotteries conducted in Canada, Australia, Spain, Ireland and various States within the United States;

(d) That it was a further part of the unlawful conspiracy that various trade names were established and used by the co-conspirators to promote and market the sale of lottery interests to United States residents, including the trade names "Lottery Connections," "Winners," "New Eagle Network," "International Fortune Bureau" and "Project Rainbow";

(e) That it was also part of the unlawful conspiracy that James Blair Down and his co-conspirators, among other things, received remittances in Canada from United States residents for the purchase of interests in lotteries, despite being contacted by law enforcement agencies in the United States as early as 1992, and being advised that the use of the mails and facilities of interstate and foreign commerce to market and sell interests in such lotteries to United States residents and to receive remittances from United States residents, violated United States law, and furthermore despite receiving multiple notices from the United States Customs Service and the United States Postal Service that these activities violated United States law;

(f) That it was a further part of the unlawful conspiracy that James Blair Down established, operated, controlled and directed the various entities listed above in these unlawful activities, as part of his role in this criminal enterprise, and that he employed and paid his co-conspirators and directed their actions in identifying customers and unlawfully marketing lottery interests; and

(g) That it was a further part of the unlawful conspiracy that James Blair Down and all of his co-conspirators, acting from Canada and Barbados, engaged in activities designed to induce and cause United States residents to remit monies to them in Canada and elsewhere for the purchase of chances, shares and interests in lotteries in violation of United States law."

¶ 35, pp. 28-30.

154. See Affidavit of Richard W. Brewster, former chief of the Criminal Division of the U.S. Attorney's Office in the Eastern District of N.Y., Dec. 16, 1998, filed in the Matter of the Bankruptcy of James Blair Down, Supreme Court of British Columbia in Bankruptcy, asserting that the Canadian court "ought to find that [Down's] guilty plea to be dispositive of...[certain] facts, thus precluding any attempt by the defendant to deny these same facts." *Id.* at ¶ 30, including that as "part of the unlawful conspiracy that...Down and all of his co-conspirators, acting from Canada and Barbados, engaged in activities designed to induce and cause United States residents to remit monies to them in Canada and elsewhere for the purchase of chances, shares and interests in lotteries in violation of United States law." *Id.* at ¶ 33(g).

155. Based upon his Canadian litigation posture, Down could argue that his Plea Agreement did not constitute an admission of violation of the Illinois Act. A principal premise for such an argument could be that all the victims of Down's enterprises would need to have their narrative assessed on an individual basis before the court could conclude that when they sent money to Down's enterprises, they were relying upon false or misleading statements made by those enterprises. However, the Illinois Act does not require a showing that each victim relied upon a false statement by Down's enterprises in choosing to send money to that enterprise.

conduct would be found to constitute a violation of the Illinois Consumer Fraud and Deceptive Practices Act.¹⁵⁶

It is of further note that one of Down's enterprises, Triple Eight International Services, a Barbados company, had been the subject of a complaint for injunctive relief brought by the Illinois Attorney General's Office in 1997.¹⁵⁷ This complaint was settled by a consent order in which Down's enterprise, "without trial or adjudication of any issue of fact or law, and without admission of any of the violations of the [Illinois Consumer Fraud and Deceptive Business Practices] Act alleged in the complaint, agreed to be permanently enjoined from engaging in his 'prize' enterprises in Illinois and to rescind all prior sales."¹⁵⁸ It is not known whether Down continued to market his enterprises in Illinois subsequent to entering into the consent order. If it was determined that he did so, that would be a violation of the Illinois Act. Assuming the contrary, then, though the consent judgment would have been admissible in the class action proceeding, it would not, in and of itself, be an acknowledgment of the commission of predicate acts that violated the Illinois Consumer Fraud and Deceptive Practices Act. Other evidence, however, existed that was strongly supportive of violations of the Illinois Act. For example, the affidavits of the two U.S. Postal Inspectors, previously referred to,¹⁵⁹ extensively detail acts of "deception, fraud, false pretense, false promise [and] misrepresentation," that resulted in great damage to tens of thousands of participants in Down's enterprises. In addition, the exhibits attached to one of the two affidavits provide substantial documentary evidence of deceptive practices and false promises that would appear to have resulted in documented losses of at least \$28.5 million.

Additional evidence in support of a violation of the Illinois Act would have been available in the form of the other cease-and-desist orders that Down had ignored and evidence of Down's worldwide asset secretion efforts. In addition, the Madison County court had issued an order that Down turn over his business records and make himself immediately available for a deposition. Had Down been compelled to turn over his records, such as the various mailing lists he used,¹⁶⁰ mail contact with the victims of his enterprises could have been established—a frightening prospect for Down, the significance of which will be further analyzed below in Part (C)(3), "Notice to the Class." Had Down not provided his records or submitted to discovery, he could have faced a default judgment. Finally, in granting a TRO, Judge Byron had held that "a strong *prima facie* case

156. The plea and conviction also establish the legal conclusion that, in violation of United States criminal law, Down committed the offense of unlawfully, knowingly, and willfully conspiring to violate the provisions of 18 U.S.C. § 1953 with respect to the interstate transportation of gambling paraphernalia. Furthermore, these facts and conclusions could have been used offensively by the plaintiffs to prosecute a civil action on the following legal claims: (a) a common law action for "unjust enrichment"; and (b) a common law claim for "monies had and received." Moreover, to the extent that plaintiffs remitted money to Down for the purpose of purchasing a share or chance in a lottery, such payments were made in accordance with the terms of a contract. Such contracts were "illegal on the ground that the acts of solicitation, formation and performance associated with each of them were contrary to U.S. law." Affidavit of Anthony Cabot, ¶ 59, Jan. 19, 2000, filed in the Matter of the Bankruptcies of James Blair Down et al., Supreme Court of British Columbia in Bankruptcy. On the assumption that the statutory scheme that rendered all of Down's contracts with his "customers" illegal was enacted to afford protection to such class of persons, the plaintiffs would be entitled to restitution of their funds to the extent they have not been returned, and in order to obtain restitution, the court could impose a constructive trust on property held by third parties that can be traced to the schemes operated by Mr. Down and his co-conspirators. See *id.* at ¶¶ 60, 61, 64.

157. *People v. Triple Eight Int'l Services, Inc.*, No. 97-CH 04123, Cir. Ct., Cook Cty., Apr., 3, 1997.

158. *Illinois v. Triple Eight Int'l Services, Inc.*, No. 97-CH 04123, Consent judgment, Cir. Ct., Cook Cty., Nov. 9, 1998.

159. See *supra* nn. 11, 61.

160. See *infra* n. 184.

exists that the Defendants are indebted to the Plaintiffs and putative class members as a result of Defendants' illegal activities" and that Plaintiff had "demonstrated a likelihood of success on the merits of its claims, both on the law and the facts."¹⁶¹

For these reasons, it would have been highly unlikely that *Schuppert et al. v. Down et al.* would become the first class action lawsuit in living memory to have actually gone to trial in Madison County.¹⁶² Adding to the compelling circumstances of the action was the great likelihood of a huge verdict against Down if the case did go to trial. Consider the impact of elderly Americans testifying that they had been duped by boiler-room operations into paying over their entire life savings to Down, including such sums as \$50,000, \$100,000, \$200,000, and more, leaving them bereft of assets and unable to pay their bills—and that many of the victims had been hit time and time again in a relentless assault that emptied their bank accounts and left some of them indebted for the rest of their lives.

Of this scenario, plaintiff lawyers' dreams are made. Had the right to bring the lawsuit and collect the proceeds been auctioned off to class action lawyers, and had the TRO remained in place freezing Down's assets, a winning bid of at least \$15 million seems not unlikely based upon a projection—reasonable in light of the evidence, circumstances, and amount of assets frozen—of obtaining a settlement or a jury verdict ranging from \$50 million to \$500 million.

B. The Reality of the Settlement

The settlement was not simply woefully inadequate; it was intentionally misleading as to the amount to be paid to victims of Down's enterprises. In fact, instead of paying \$6 million plus expenses, Down can actually expect to pay only a small fraction of that sum. The reasons for this discrepancy between the amount of the settlement as stated and the actual amount expected to be paid out is a function of the reversionary nature of the settlement.

Generally, class action monetary settlements are of two types: pro-rata and reversionary. In a pro-rata settlement, any amount of the settlement not claimed by class members is redistributed to the class members who file qualifying claims. As indicated above, however, in a reversionary settlement, any amount of a settlement not claimed by class members reverts to the defendant.¹⁶³ The reversionary settlement is a technique employed by class action lawyers to obtain higher fees at the direct expense of class members and with the collusion of the defendant. Here, then, is how it works.

Assume a class action lawyer and a defendant have come to a general agreement to settle the action for \$20 million, and that this amounts to five cents on the dollar as a percentage of either class member losses or the value of their injuries. Out of this sum, the lawyer may anticipate that the court will allow him a fee of 25 percent of the recovery, or, as in this illustration, \$5 million. Any settlement amounts not claimed will be paid out to remaining claimants, who then would end up with perhaps seven cents on the dollar instead of five. By colluding at the class's expense, both the class lawyer and the defendant can improve their respective positions.

Instead of a \$20 million pro-rata settlement, the parties agree to a \$40 million reversionary settlement. The lawyer thus increases his anticipated 25 percent fee to \$10 million. To make it palatable to defendant, the defendant must be reasonably assured that in addition to paying the \$10 million fee, he will not only *not* pay out an additional \$30 million but, in fact, far less than \$10

161. *Schuppert v. Down*, Order (Granting TRO), Aug. 7, 2000.

162. See *supra* n. 6.

163. For a discussion of the legal and policy issues raised by the reversionary settlement, see Motions for Leave to File Amici Curiae and Brief Amici Curiae in Support of Petition, *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223 (2000) (in support of Petition for Certiorari, June 5, 2000), *supra* n. 60.

million, so that his total payment will fall well below the \$20 million pro-rata settlement. Because the class lawyer now has a significant financial incentive to self-deal at the class's expense, he agrees to structure the notice process so that far fewer class members are put on actual notice of the settlement than would otherwise be the case. More important, he agrees to claim-filing requirements that are so onerous that few will be able to file a claim or have the incentive to do so. So structured, it then becomes reasonably predictable that, at most, 20 percent of the claimants will actually file claims—a number consistent with the reality of many reversionary settlements. Therefore, of the \$30 million available for payment to class members after a deduction for the lawyers' fee (and ignoring expenses for purposes of this illustration), \$6 million will actually be paid out to class members, for a total payment of \$16 million. This constitutes a 25 percent savings for the defendant when compared with the cost of a pro-rata settlement, and a fee for the lawyer amounting to over 167 percent of the class's actual recovery.¹⁶⁴

Even this explanation, however, does not fully capture the effects of the Down settlement.

C. ANALYSIS OF THE SETTLEMENT

1. Proof of Claim: The Documentary Requirement

The Proof of Claim Form¹⁶⁵ contained in the Settlement is simply a compendium of one onerous requirement piled on top of another, apparently for the purpose of minimizing the number of successful claims. To begin, the form requires that evidence of the purchase of either Lottery Products or Puzzle Products had to be included “in the form of either [*sic*] credit card receipts, money orders or postal receipts, [or] canceled checks.”¹⁶⁶ Failure to attach such evidence “may result in disallowance of this Proof of Claim.”¹⁶⁷

The form further requires that the exact amount of each element of the claim be set out; if there is any error, the claim “may be disallowed in whole or in part.”¹⁶⁸ It also requires that the claimant has to submit the actual and complete name of the lottery company or puzzle company to which he sent his money. Down had used 57 different company and trade names in pursuit of his enterprises.¹⁶⁹ Once again, failure to do so may result in disallowance of the claim.¹⁷⁰ Even more onerously, if claims were included with respect to lottery products sold by non-Down corporations or “names,” then this could result in the disallowance of the entire claim, including claims for other purchases that were correctly listed on the form.¹⁷¹ And still more onerously, if Puzzle Product claims were included that were not one of the Puzzle Companies set forth in the Stipulated Settlement,¹⁷² then that *would* result in the disallowance of the entire claim.¹⁷³

164. In the *Int'l Precision Metals Corp.* case, *id.*, the fee was \$13.3 million, one-third of the \$40 million reversionary settlement, and class members received \$6.5 million; so the lawyers' fee was over 200 percent of the class's recovery.

165. See Proof of Claim Form, Exhibit E, Amended Stipulation.

166. *Id.* at ¶¶ 3.5, 3.8.

167. *Id.*

168. *Id.* at ¶ 3.4.

169. See Lottery Companies, Puzzle Companies, and Trade Names, Exhibit K, Amended Stipulation.

170. *Id.* at ¶ 3.6. “(Note: Ensure the complete name of the Lottery Company is used otherwise this Proof of Claim may be disallowed)” (emphasis in original).

171. “(Note: The inclusion of claims in respect of Lottery Products sold by corporations which are not specified Lottery Companies or Puzzle Companies may result in the disallowance of the Proof of Claim in its entirety.)” *Id.* at ¶ 3.6 (emphasis in original).

172. See Exhibit K, *supra* n. 169.

173. *Id.* at ¶ 3.9.

Finally, a claimant who may have made multiple purchases is required to list each purchase separately, including the date of each purchase and the amount purchased on each such occasion. Any error in a listing submitted by a claimant is cause for disallowing the entire claim, including claims for which the purchase information is correctly listed.¹⁷⁴

One additional feature of the claiming process bears mention. In order to submit the Proof of Claim Form that accompanied the Notice of Settlement, the form has to be notarized. Under Illinois law, class members can verify their claims by signing the claim form under penalty of perjury, thus having the same legal effect as if the form were notarized;¹⁷⁵ indeed, the Proof of Claim Form so provided.¹⁷⁶ The requirement of notarization is not one typically imposed on class members submitting proofs of claim. Its appearance here, especially in view of Illinois law and the extensive contemporaneous documentary evidence required for submitting a claim, appears to be to pose just one more barrier to successful claim filing.

2. The Proof of Claim Form in Context

As noted, the Settlement primarily consists of two pools of money (in addition to Ness Motley's fee): the first of \$5.5 million; and the second, \$500,000. In order to obtain payment from the first pool, the claimant would have to become aware of the Settlement, send for a claim form, fill it out, and include with it the required documents described above in order to obtain payment. Recall that Down's lottery enterprises were conducted in the period from 1989 to about January 1996 and that many, if not most, of the victims were of advanced age. In the year 2002, five to ten years after having been defrauded, some out of their life savings, how many of the hundreds of thousands of victims who actually became aware of the settlement¹⁷⁷ and took steps to obtain a claim form would be likely to have retained a credit-card statement, money-order receipt, or canceled check? It is simply inconceivable that a lawyer representing the class of Down's victims, given the circumstances here, would agree to such an onerous claim-submission procedure. The fact that any part of the \$5.5 million left unclaimed would revert to Down, however, may be instructive in explaining why, in this case, such a procedure was agreed to.

It may be thought that even if the first pool of money was constituted to be mostly unreachable, at least the second pool, though grossly inadequate—consisting of only \$500,000—would at least be available to the class. Think again. The second pool is designated as being for payment to those who submitted claims but failed to supply the required documentation. However, the notice published in various newspapers in large bold type—indeed, the largest type in the ad—stated: **“IN ORDER TO PARTICIPATE IN THE SETTLEMENT, YOU MUST HAVE PROOF OF PAYMENT.”**¹⁷⁸

Accordingly, anyone who was able to learn of the Settlement and who had not retained contemporaneous credit-card, canceled-check, or postal money-order records that went back five to ten years would not likely have sought the detailed Notice of Settlement from the claims administrator.¹⁷⁹ Here, again, it is simply inconceivable that a lawyer exercising his fiduciary obligation

174. See Proof of Claim Form, *supra* n. 165 at ¶ 3.6.

175. Sec.1-109, Ill. Code of Civil Procedure.

176. See Proof of Claim Form, Exhibit E, *supra* n. 165.

177. Empirical evidence exists that the actual number is minuscule. See *infra* n. 187.

178. See Abbreviated Notice of Settlement, Exhibit G, Amended Stipulation.

179. Had victims of Down's enterprises seen, recognized, and responded to one of the ads—which only listed nine of Down's 57 companies and trade names and did not list Down's name—and obtained the six-page Notice of Settlement, written in dense legalese and small print, and been able to decipher it, they would have been able to learn that even if they did not have the required documentary evidence, they could still submit a claim against the second pool.

to the class would agree to so restrictive a claiming process with regard to the second pool. The only reasonable conclusion to be drawn from the Proof of Claim Form requirement is that it was constructed to minimize the number of claims that would be eligible for payment.

3. Notice to the Class

The use of a reversionary settlement and an onerous “Proof of Claim” process hardly exhausts the myriad ways in which the Ness Motley–Down Settlement is intended to minimize recovery by class members. Another elaborate ruse is the Plan of Notice.¹⁸⁰ On its face, the Plan of Notice appears intended to promote the widest possible dissemination of notice of the Settlement, by providing for widespread advertising of a Summary Notice of Settlement previously described.¹⁸¹ Were there more effective means of notice? Recall that when Interclaim purchased certain trade debts of Down’s enterprises, it acquired a mailing list of 418,846 “Puzzle Contest” victims who had sent money to Down (the “Merkle” list).¹⁸² As previously indicated, a sampling of the list appeared to suggest that approximately 50 percent of the Puzzle Contest victims had also been victimized by the Lottery enterprises.¹⁸³ In addition to the Merkle list, Down’s enterprises kept detailed, computerized records that contained the names, addresses, account numbers, phone numbers, order numbers, transaction dates, purchase amounts, and other contemporaneous data with regard to purchases from Down’s enterprises.¹⁸⁴ Confirmation of the existence of such lists is contained in the Plan of Notice, which rejects the use of such lists (called “the data base in the possession of the Lottery Companies”) for the reasons set out below.

Thus, by use either of the Merkle list or the apparently more complete lists that Down had in his possession or otherwise had access to, it would have been possible to mail actual notice of the settlement directly to a large percentage of the victims of Down’s enterprises. This strategy was specifically rejected in the Ness Motley–Down Settlement. As described in the Plan of Notice:

The Settling Parties developed an approach designed to communicate the best notice practicable under all circumstances, having regard to a number of factors which included the following:

- (a) the fact that the data base in the possession of the Lottery Companies is said to be more than five years old and is unreliable to the extent that it has never been updated and obviously will contain incorrect addresses for anyone who has moved;
- (b) the data bases themselves were reportedly culled and therefore may reflect only a portion of the Members of the Settlement Class;
- (c) that the cost of direct notification and administration of claims of substantial numbers of the Members of the Settlement Class will likely be greater than the value of the purchase of the Lottery and Puzzle Product and as such it is not economically rational to incur notice costs greater than the amount of the claim;
- (d) the fact that a fund of almost \$12,000,000.00 previously made available to persons who purchased lottery tickets from the Lottery Companies was not fully drawn

180. See Plan of Notice, Exhibit I, Amended Stipulation.

181. See *supra* n. 179.

182. See *supra* n. 83.

183. See *supra* n. 84.

184. See Notice of Intention to Appear, Proof of Class Membership, and Statement of Objections of John F. Holguin, a class member objector to the proposed settlement, May 3, 2002, filed in *Schuppert v. Down*, including Exhibit A, which contains supporting documentary evidence.

- down by claims notwithstanding notification of same and as such, and for other reasons known to the Settling Parties, it is arguable that there is disinterest in potential Members of the Settlement Class to try to obtain any compensation;
- (e) the fact that the vast majority of the purchases of Lottery and Puzzle Products were for amounts of less than \$75.00 and there is evidence to suggest that purchasers of the Lottery and Puzzle Products were aware of the nature of the purchases they were making and the risks associated with the purchase of such products; and
 - (f) the fact that there is not an unlimited budget available for notification and it is in the interests of the Members of the Settlement Class, and the primary object of this settlement, that resources be applied to satisfaction of claims being advanced by Members of the Settlement Class as opposed to finding every person who could advance a claim no matter how trivial.¹⁸⁵

The assertion in paragraph (c) above that direct notification “is not economically rational” because notice costs would exceed the amount of the claim is unsustainable. Notice costs using either the Merkle list or Down’s lists would approximate one dollar per name. The smallest documented loss in the Merkle list was five dollars. Individual lottery losses were substantially higher, and, in any event, none appear to be less than the lowest amount lost in the Puzzle Prize contests. Finally, the Merkle list and Down’s lists could have been utilized in such a manner as to send direct notice only to those whose losses exceeded a certain sum, e.g., ten dollars.

The assertion that the age of the database (“more than five years old”) made it unreliable is refuted in an affidavit from the head of two direct marketing services companies, who stated:

Since every year in America millions of people move to another address or die, keeping current name and address files is a constant challenge. The direct marketing industry, cataloguers, retailers and others who sell products and services to the public by mail and telephone have developed computerized databases and techniques to deal with the problem. The government, the U.S. Postal Service and numerous companies have developed resources that make it possible to determine whether an address currently receives mail delivered by the U.S. Postal Service, whether an occupant has moved from one address and whether a person is now deceased.

Every day, the United States Postal Service receives Change of Address (COA) data filed by relocating postal customers. These COAs submitted from individuals, families, businesses, and postal carriers are the source of the National Change of Address (NCOA) database and are transmitted daily from Computerized Forwarding Systems across the United States to the U.S. Postal Service National Customer Support Center (NCSC) in Memphis, Tennessee.

Approximately 40 million of these COAs are filed annually. Records are retained on the NCOA file for a three-year period from the customer’s move-effective date, and on average, the NCOA file contains approximately 110 million permanent change-of-address (COA) records filed with the U.S. Postal Service. The NCOA database is updated every week.

185. Plan of Notice, Exhibit I, Amended Stipulation.

Several private firms provide additional matching services against proprietary Change of Address files in cooperation with magazine publishers, catalog companies, insurance companies and others which can match postal customer moves for five years or more. Files of deceased individuals are also often available from the same sources. Also there are specialized “skip chasing” services offering to track down debtors who have moved to avoid creditors which can be used [*sic*] find others who cannot be otherwise located.

It is my belief based on my experience and knowledge of the list maintenance techniques in common use in the direct marketing industry that a name and address file compiled in 1998 may be updated such that a majority and perhaps substantially higher percentage of the names and addresses may be contacted by mail. Further, it is my professional opinion that businesses in the ordinary course would rely [*sic*] such an updated list for commercial purposes.¹⁸⁶

The conclusion is therefore inescapable that, though actual notice was quite feasible, it was rejected because it would have been too effective. In order to secure the objectives of the reversionary Settlement, it was necessary to use the *least* effective means of notice¹⁸⁷ and the *most* arduous claim process.¹⁸⁸

Judge Byron’s preliminary approvals of the Stipulation and Agreement of Settlement on June 19, 2001, and Amended Stipulation and Agreement of Settlement in November 2001 (including the Plan of Notice and the rejection of the use of actual mailing lists in favor of newspaper and TV advertisements) have recently been the subject of critical media attention.¹⁸⁹ Even though the media attention was modest, it was also unprecedented, and it apparently subjected the local class action bar and the court to unwanted scrutiny. On May 24, 2002, Judge Byron ordered Ness Motley’s local counsel to review Interclaim’s Merkle list and report back to the court.¹⁹⁰ On June 7, 2002, at a hearing before Judge Byron, local counsel reported that it had performed a statistical analysis

186. Declaration of John M. Simms, June 6, 2002, filed in *Schuppert v. Down*.

187. The Down–Ness Motley strategy of using the least effective means of notice is proving highly effective. During the last week of May 2002, Interclaim sent out a postcard to approximately 20,000 puzzle players residing in Illinois and Missouri from its Merkle list of Down victims. The postcard notified the recipient of the impending settlement in Madison County and asked the recipient to phone a toll-free number to obtain more information. As of one week after the mailing was sent, 138 individuals responded. Telephone interviews with the responders indicate that: (1) only one had seen any advertisements about the settlement; (2) virtually none had retained receipts for money remitted to Down; (3) of the 82 responders able to estimate their loss to a Down organization, their claims total approximately \$294,000, for an average loss of \$3,586; and (4) the remaining 56 responders could not estimate the amount they sent to Down’s enterprises (though, as indicated [see *supra* n. 184], Down has lists containing just such information). See memo from Irving Cohen of Interclaim to Lester Brickman, July 12, 2002 (on file with the author).

188. Quite apart from omitting the various requirements that were apparently included to make the claim process as arduous as possible, a far more expeditious claim process was available. Since Down’s own lists contained all the information needed for a claimant to establish a claim (see *supra* n. 184), claimants contacted by direct mail who responded could have had their claims presented and certified by the claims administrator, using Down’s own computerized records. Under such a process, claimants would only have to supply their names in order to have their claims processed.

189. See Pamela Sherrid, “Class Action Crumbs,” U.S. NEWS & WORLD REPORT, March 25, 2002, at 24–26 (noting that “two [lists of potential claimants] exists [but] they aren’t being used”); Brian Brueggman, “Settlement Proposal in Madison County, Ill., Fraud Lawsuit Draws Criticism,” *Belleville (Ill.) News-Democrat*, May 26, 2002; also see Parsons, *supra* n. 106.

190. See Brueggman, *id.*

on the Merkle list, using a sample size indicating a confidence level of 95 percent, with the result that “68.7 percent of the addresses were still viable addresses....If you remove the impact of...deceased individuals from the analysis, the viable address percentage increased to 80.8 percent.”¹⁹¹ On the basis of local counsel’s report, Judge Byron ordered that a postcard be mailed to those listed in the Merkle list, summarizing the summary notice and listing a toll-free number to phone to obtain a complete notice from the claims administrator.¹⁹² Judge Byron also postponed the Settlement Fairness Hearing scheduled for June 7, 2002, until August 14, 2002. Local counsel for Ness Motley, apparently concerned that the media focus on *Schuppert* could pose a danger to the entire Madison County class action enterprise, was quoted as saying, “[I]f the settlement doesn’t look fair, he won’t ask the judge to approve it—even if that means disagreeing with the attorney who retained him on behalf of Ness Motley.”¹⁹³

4. Limitations on the Class

As noted, the Settlement Agreement excluded from the class: (1) the 15 victims who had granted Interclaim a power of attorney to pursue their claims and who were co-petitioners with Interclaim in the Canadian proceedings; (2) any other victims who had at any time formed a contractual relation with Interclaim for the pursuit of claims against Down; (3) all victims who had made claims against the fund created as part of the plea agreement entered into by Down in the civil and criminal proceedings brought in Seattle, Washington, irrespective of whether the amounts they obtained from the fund fully reimbursed their losses; and (4) Interclaim.

By agreeing to exclude groups of victims without any apparent justification except that Down apparently so demanded, Ness Motley breached its fiduciary duty to those excluded class members, including the 29 victims specifically excluded who had suffered a net loss of \$660,964 and who had specifically retained Ness Motley, through Interclaim, in the February 14, 2000, Retainer Agreement.¹⁹⁴ Moreover, once it became known to Ness Motley that Down was insisting on excluding groups of victims without any substantive justification, it became incumbent on Ness Motley to inform the court and request the appointment of separate counsel to represent the interests of those class members.¹⁹⁵ The failure to have done so would appear to invalidate the Settlement under recent U.S. Supreme Court rulings.¹⁹⁶

5. The Letter Agreement

As a part of the initial Stipulated Settlement¹⁹⁷ entered into on June 19, 2001, Down agreed to pay the notional settlement amount (the two pools amounting to \$6 million) and Ness Motley’s fees and expenses of administering the claim process, in accordance with the terms of the Settlement and “[s]ubject to the terms of the Letter Agreement.”¹⁹⁸ The Letter Agreement is defined as

191. Transcript of Hearing before Hon. Nicholas G. Bryon, June 7, 2002, in *Schuppert et al. v. Down et al.* at 3 (statement of Mr. Tillery).

192. *Id.* at 16–17.

193. See Brueggman, *supra* n. 189.

194. See *Interclaim et al. v. Ness Motley*, USDC N.D. Ill., Amended Complaint, filed May 23, 2001, Exhibit A, indicating an estimated gross loss of the 29 victims of \$1,517,197 and restitution previously received of \$856,233.

195. See *supra* Part VII (H).

196. See *Amchem Products, Inc. v. Windsor*, 521 U.S. 511 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

197. *Schuppert v. Down*, Stipulation and Agreement of Settlement, June 19, 2001.

198. *Id.* at ¶ 12.1.

“that agreement between Defendant’s Counsel and Plaintiff’s Counsel which will be filed under seal and attached as Exhibit ‘C’ hereto.”¹⁹⁹ It provides:

The terms of this Letter Agreement are to remain confidential and under seal of the Court and are to be disclosed to the Court but no other person shall have access to it without the prior approval of the Court on notice to James Blair Down by virtue of the confidential nature of the contents of this Letter Agreement.

.
. .
.

By virtue of the nature of the assets of Mr. Down, substantial time may be required in order to realize the full value of the assets and to overcome the damaging effect of the false and misleading statements that were made by Interclaim in relation to the assets. While the parties recognize that it is in everyone’s best interests to discharge the obligations under the Settlement Agreement as soon as possible, time may be required so as to satisfy the obligations that arise under the Settlement Agreement.

You have agreed to dissolve by consent the Temporary Restraining Order granted in Madison County on August 7, 2000 as a term of the Order of Preliminary Approval.

Pending approval and performance of the Settlement Agreement the parties have agreed to the following terms:

[A]s soon as reasonably practicable after the preliminary approval of the Settlement Agreement and provided that there are no appeals or other proceedings, which might affect the validity of the Order of Preliminary Approval, Mr. Down will cause sufficient money to be paid into trust with this firm in order that the Plan of Notice approved by the court can be implemented for the term and on the conditions prescribed by the Court....

[I]n the event that dispositions of [property]...are such that proceeds are not readily available, Mr. Down shall have up to three years from the date of the Final Judgment or the final conclusion of any appeals therefrom or after any other court application has been finally concluded and all appeals therefrom are exhausted to discharge his obligations to pay the amounts due to Members of the Settlement Class and fees awarded under a fee petition filed by the lawyers for Class Counsel. Obligations under the Settlement Agreement shall be paid in the following order of priority: first to Administrative Costs and costs of notice, second to amounts due to Settlement Class Members on account of valid proven claims and third to fees and expenses of Class Counsel....

[I]n the event that Mr. Down is able to pay the amounts of proper proven claims of class members prior to the disposition of [certain]...[p]roperties..., such payments shall be sufficient to satisfy his obligations under the Settlement Agreement to the class members and the Settlement Agreement shall be deemed to be fully performed with respect to his obligations to the class members notwithstanding that sufficient monies are not available to satisfy the claims of Class Counsel. In such circumstance, Mr. Down shall be obligated to pay the fees of Class Counsel but the Settlement Agreement and the releases contemplated thereby shall remain in full force and effect.²⁰⁰

199. Id. at ¶ 1.16.

200. Letter Agreement, Exhibit C, dated June 19, 2001, and filed in the Madison County court on the same date.

(a) Discussion of the Letter Agreement

Thus, contrary to what an informed reader of the Stipulation and Agreement of Settlement would conclude, the Settlement did not require Down to fund the two pools of money upon receiving court approval of the Stipulated Settlement. Instead, Down would have at least three years and possibly far longer to do so. Moreover, he would not have to post security for his promise to fund the settlement pools three or more years thereafter.

Such a provision in a class action settlement agreement is extremely unusual, if not unique. No class action settlement reported in case reports, journals, or the media has included a provision that both allows defendant to defer payment and does not require security for defendant's promise to pay into the settlement fund. Indeed, it is certainly possible, as the Settlement is structured, that under the terms of the Letter Agreement, Down will never have to fully fund both settlement pools. On the assumption that the dissemination of the Notice of Settlement will inform relatively few of the victims of Down's enterprises and that the onerous Proof of Claim Form will preclude or dissuade many of those so informed from asserting claims or result in invalidation of claims filed, Down can reasonably expect to actually pay very little into the settlement funds.

Moreover, because the Letter Agreement substantially varies the terms of the Settlement, if one of the victims of Down's enterprises who filed a claim and provided the obligatory release²⁰¹ later contested the Settlement on the grounds that it fraudulently omitted a material term, most courts would invalidate the Settlement on that basis.

Such realization probably accounts for why the parties decided to amend the Stipulation of Settlement. Thus, on November 20, 2001, five months after the original Settlement, Down and class counsel amended their Settlement²⁰² and added the following language to a paragraph providing for the payment of the settlement monies into the court for distribution per the terms of the agreement:

Funding of the obligations under the Stipulation is being carried out through the liquidation of real estate. Pursuant to the Letter Agreement the Defendant shall use its best efforts to liquidate real estate to pay the obligations under the Stipulation as soon as reasonably practicable, however, the Defendant shall have up to three years following the Final Judgment to fund his obligations under the Stipulation. Interest shall accrue on obligations arising under the Stipulation after January 1, 2001 at the rate of 8% per annum.²⁰³

Notwithstanding this apparent attempt to mitigate the risk of a prospective claim being brought by a victim of Down's enterprises (who had submitted a claim and release, and who might assert that the release was obtained fraudulently), the Letter Agreement remains a bizarre feature of the Settlement. Despite the more detailed reference in the Amended Settlement, it remains filed "under seal." No rational reason can be conjured up to explain this secrecy except possibly the desire to keep class members from learning the full details of the Letter Agreement or perhaps affording the court a modicum of protection for its anticipated approval of the settlement class and Stipulated Settlement by keeping the document secret.

201. See Release, Covenant Not to Sue, Indemnity and Assignment required for payment to any Settlement Class Member, Exhibit H, Amended Stipulation.

202. See Amended Stipulation and Agreement of Settlement, Nov. 20, 2001, filed with the Madison Cty. Cir. Ct. on Nov. 29, 2001.

203. *Id.* at ¶ 2.6

6. Right to Object to the Settlement

As is typical in class action settlements, members of the settlement class are permitted to appear at the Settlement Hearing, in person or by counsel, to be heard in opposition to the fairness and reasonableness of the Amended Stipulation of Settlement and/or the application for legal fees.²⁰⁴ However, unlike in other class action settlements, in *Schuppert*, that right to object is conditioned on the prior provision of “sworn evidence of the purchase of Lottery Products or Puzzle Products in the form of either credit card receipts, money order or postal receipts, cancelled checks or other evidence of payment.”²⁰⁵ Thus, all class members who do not have such documentation and who may wish to object to the requirement that, in order to submit a claim they would have to produce one of the listed documents, would be excluded from objecting to the Settlement and fee request (though, as noted, they could still participate in the second compensation pool).

7. Ness Motley’s Fee

Under the terms of the Letter Agreement, Down’s obligations to class members shall be deemed fully performed, provided he:

*is able to pay the amounts of proper proven claims of class members notwithstanding that sufficient monies are not available to satisfy the claim of Class Counsel. In such circumstance, Mr. Down shall be obligated to pay the fees of Class Counsel but the Settlement Agreement and the releases contemplated thereby shall remain in full force and effect.*²⁰⁶

On its face, the Letter Agreement thus provides that if Down fails to pay Ness Motley the agreed-upon \$2 million fee (assuming court approval), the settlement with the class remains fully binding, provided Down has paid their “proper proven claims.” Moreover, Down’s promise to pay Ness Motley’s fee is unsecured. Thus, if Down fails to pay the fee, Ness Motley will have to bring an action against Down and will have to locate Down’s assets—seemingly reposed in complex structures in many countries—to collect on any judgment.

No reported class action settlement allows the defendant to thus delay paying class counsel’s fee, let alone accept an unsecured promise to pay.

For these reasons, it is appropriate to treat the arrangement entered into between Down and Ness Motley, as stated in the Letter Agreement, with considerable skepticism. Indeed, anyone who believes that Ness Motley accepted a settlement in which payment of its fee could be delayed three years or more—and that requires it to rely on the unsecured promise of someone well versed in concealing his assets after he has obtained the benefit of a full release of liability from the underlying class—has obviously been standing out in the Madison County sun for too long. Whatever the reality is with regard to payment of Ness Motley’s fee, it is highly improbable that it is that which is set forth in the Letter Agreement.²⁰⁷

204. See Notice of Settlement, Exhibit F at 5, Amended Stipulation.

205. *Id.* This provision was not contained in the original Stipulation and Agreement of Settlement. It may have been added in anticipation of the possibility that publicity could lead to objectors appearing at the fairness hearing.

206. Letter Agreement, *id.* at ¶ (d) (emphasis added).

207. It is possible and perhaps even plausible that this bizarre fee-payment feature has some relationship to the suit for breaches of fiduciary obligation and of contract, brought by Interclaim against Ness Motley in U.S. District Court, which was filed on Dec. 4, 2000 (see *supra* n. 110). The filing of such an action against Ness Motley in Dec. 2000 took place at least six months before the apparent completion of negotiations leading to the execution of the Settlement Agreement and its presentation to the court. If it believed itself vulnerable to a claim of breach of fiduciary obligation and therefore possibly subject to

IX. SCHUPPERT V. DOWN: A CASE IN PROGRESS

In the face of the undoubtedly unwanted publicity about the Settlement in *Schuppert v. Down*,²⁰⁸ the rapid progress that Ness Motley and Down were making in moving the class action through the judicial process, a hallmark of Madison County class action claiming, was interrupted. As of the writing of this monograph, new deadlines and dates have been set as follows for *Schuppert v. Down*:

1) class members objecting to the Settlement must file notice with the court by August 2, 2002; 2) class members seeking to opt-out of the Settlement must so notice the court by August 2, 2002; 3) class members filing claims must submit them by September 6, 2002; and, most critically; 4) the fairness hearing originally scheduled for June 7, 2002, has been rescheduled to August 14, 2002.

On that date, August 14, 2002, approval by Judge Byron will cast the Settlement, including the Plan of Notice, in concrete. It will be impervious to attack²⁰⁹—except to direct appeal by an objecting class member to Illinois appellate courts, which have never heretofore disturbed a Madison County class action proceeding.

X. CONCLUSION

This monograph began with a reference to the “rule of law” that subtends our economic system.²¹⁰ It now concludes with the observation that in Madison County, the rule of law has been displaced by the “rule of class action lawyers.”

Even more disturbing than the Plan of Notice and Proof of Claim—each designed apparently to minimize the number and amount of claims—is the fact that the settlement was agreed to by one of the leading class action law firms, which apparently had acted in full confidence that it owed no fiduciary obligation to the class members it had undertaken to represent. Moreover, that in bringing the action in Madison County, it was thereby expressing confidence that the courts in that county would summarily approve the settlement and fee request while paying only lip service, at best, to the mantra that the court must be the guardian of the interests of class members.²¹¹

While the glare of publicity may subvert the apparent intention to subject the elderly victims of Down’s mass-marketing schemes to a second victimhood, such publicity rarely attends even the most abusive of class action settlements.

A solution to the lack of due process in state court class claiming necessarily includes a facilitated process for removing class actions filed in state courts to federal courts. The analysis of the Settlement in this monograph adds to the already substantial evidence that respect for the rule of law requires that defendants have the opportunity to bypass the “class action magnet courts”²¹² that stand, like speed traps, astride the nation’s litigation highways.

an order of disgorgement of fees received (see *Arce v. Burrows*, 958 S.W. 2d 239 [Tex. App. 1997]), Ness Motley may have sought to structure a fee that would not be subject to disgorgement. The Letter Agreement may be seen to be so constructed.

208. See supra 188.

209. See Brickman, “Aggregative Litigation,” supra n. 16 at 298.

210. See supra n. 1.

211. See supra nn. 52, 127–28.

212. See supra n. 3.

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