

THE REPRESENT ACT

A Model State Consumer Protection Statute

#REPRESENT

A PROJECT OF THE CONSUMER EDUCATION FOUNDATION

representconsumers.org

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Note from the Authors

The Represent Act, presented here as a discussion draft, is intended to accompany and complement *Reboot Required: The Civil Justice System Has Crashed*. We drew from our combined decades of experience litigating consumer protection cases in state and federal courts and administrative law proceedings. We relied on input from distinguished consumer advocates, law professors, public interest attorneys, and class action attorneys in private practice. We also consulted various state and federal statutes and regulations, case law, law review articles, published best practices, and court guidelines.

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§ 1 Findings and Purposes.

(a) **Findings.** The People find and declare that:

- (1) Democracy requires a clear system of laws that apply to everyone, fair court procedures, and public access to the courts so that all Americans can obtain full and impartial justice.
- (2) The laws protecting Americans have not kept up with the changes in commerce caused by the Internet and technology.
- (3) Existing laws inadequately protect consumers from harmful practices by corporations and their executives that cause consumers to lose their most valuable assets: their time, money, and property, including their personal information.
- (4) Existing laws inadequately deter corporations and their executives from engaging in harmful practices.
- (5) The American right to go to court to prevent harmful practices and seek justice has been degraded because of campaigns by corporations and their executives to change the law to favor corporations or elect judges who will rule in their favor.
- (6) Changes in the law have made it difficult, costly, and time consuming to obtain justice.
- (7) Government law enforcement resources are limited, subject to political influence, and insufficient to police the marketplace against harmful practices by corporations and their executives.
- (8) The state has a fundamental public policy of protecting the interests of its consumers, and consumers in other states, from harmful practices by corporations based in this state or doing business here.

(b) **Purposes.** The purposes of this Act are to:

- (1) protect consumers against harmful practices by corporations and their executives in an era when technology, and the ways that corporations abuse technology, are evolving rapidly;

- (2) prevent corporations and their executives from engaging in harmful practices;
 - (3) modernize and expand remedies for consumers who have lost money, time, and property, including control over personal information, as a result of such harmful practices;
 - (4) improve litigation procedures in order to restore and enhance consumers' right to go to court when necessary and to obtain impartial justice without undue delay;
 - (5) prevent lawyers for corporations from misusing the judicial system and creating expensive and time-consuming barriers to the resolution of cases against their clients;
 - (6) create transparency in judicial proceedings and provide full public access to court records while maintaining consumers' privacy;
 - (7) strengthen the integrity of the judicial system by eliminating practices that have undermined public support for class actions.
- (c) This Act re-balances the scales of justice by strengthening consumer protection and preventing legal tactics that obstruct, delay, or undermine consumer rights and the judicial process. Each of the provisions of this Act is a necessary element of an inseverable whole.

§ 2 Private Representative Actions.

- (a) **General.** Any person or nonprofit organization acting as a representative plaintiff on behalf of the interests of themselves, a minor if acting as a Guardian Ad Litem, or one or more consumers may bring a Representative Action in a court of competent jurisdiction against an entity that violates, has violated, or is about to violate this Act.

Note: Section 2(a) empowers any person or nonprofit organization (sometimes referred to as a “representative plaintiff” in this Act), whether or not they have been harmed, to bring a Representative Action against a defendant for a violation of this Act. This is a powerful improvement over state consumer protection laws in the U.S., which generally require a consumer to have been harmed by a defendant in order to bring a case. (In relatively rare circumstances in the U.S., an association may be permitted to represent its members.) The current “standing” requirement of harm limits the rights of the public to enforce consumer protection laws. In many cases, consumers who have been harmed do not have the resources or time to initiate legal action, do not know how to do so, or may not even know that they have been harmed. Additionally, wrongdoers often urge courts to apply standing requirements so narrowly that a court will conclude the consumer has not been harmed and dismiss an otherwise legitimate case. Under these scenarios, defendant corporations are not held accountable for their violations of law. Therefore, it is essential that private parties and nonprofit organizations, whether or not they have suffered harm from a defendant’s violation, be empowered to bring Representative Actions.

This reform is not unprecedented. Washington D.C.’s Consumer Protection Procedures Act permits nonprofit organizations that have not suffered harm to represent consumers as plaintiffs in class action lawsuits brought on behalf of the general public.¹ And prior to 2004, California’s primary consumer protection statute, the Unfair Competition Law (“UCL”), stated that “any person acting for the interests of itself, its members, or the general public” could bring a lawsuit under the UCL.² Thus, California plaintiffs did not have to be personally harmed in order to bring a lawsuit on behalf of the public.³ However, in 2004, the business community put an initiative on California’s ballot that required a plaintiff to show that they were personally harmed and lost money or property as a result of the illegal act in order to bring a lawsuit. Promoted by a \$15 million advertising campaign that deceitfully promised to

¹ D.C. Code §§ 28-3905(k)(1)(C) and (D).

² *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1011, n.3 (2005).

³ Proposition 64, http://www.lao.ca.gov/ballot/2004/64_11_2004.htm (last visited Nov. 1, 2021).

prevent “shake-down” lawsuits,⁴ the initiative passed.⁵ The result? It is far more difficult for California consumers to bring a case against corporations.

Lawmakers have introduced a bill in the New York legislature – the “Consumer and Small Business Protection Act” – that would strengthen the state’s consumer protection law by permitting both organizations and people to bring consumer protection class actions on behalf of others, regardless of whether the organization of plaintiff has been harmed themselves.⁶ One corporate defense-oriented group (deceptively named the “New York Civil Justice Institute”) has come out against the bill, invoking the same types of arguments that proponents of the 2004 California initiative used.⁷

⁴ Marc Lifsher, *Prop. 64 Backers Fight for Attention*, Los Angeles Times (Nov. 1, 2004) <https://www.latimes.com/archives/la-xpm-2004-nov-01-fi-prop641-story.html>, Marc Lifsher, *Last Minute Push for a Bill to Undercut Prop. 64*, Los Angeles Times (Aug. 24, 2004), <https://www.latimes.com/archives/la-xpm-2004-aug-24-fi-prop6424-story.html>.

⁵ See *2004 California Proposition 64*, Wikipedia, https://en.wikipedia.org/wiki/2004_California_Proposition_64, (last visited Nov. 1, 2021).

⁶ S. 6414, 2021 Leg., Reg. Sess. (N.Y. 2021).

⁷ Cary Silverman, *Class Action Chaos, The Rise of Extortionate Consumer Class Action Lawsuits in New York*, pp. 20-21 (May 2021).

§ 3 Government Representative Actions.

(a) Attorney General; District Attorney; City Attorney.

- (1) The Attorney General, a district attorney, or a city attorney may bring a Representative Action in the name of the People of this state in a court of competent jurisdiction against an entity that violates, has violated, or is about to violate this Act.
- (2) A Representative Action brought by the Attorney General, a district attorney, or a city attorney shall not preclude a person or nonprofit organization from bringing and litigating a Representative Action against the same defendant alleging the same or similar violations.

Note: Some federal environmental protection laws, such as the Clean Water Act,⁸ preclude lawsuits brought by citizens if the government files a civil or administrative action alleging a specific violation of that law. Prohibiting civil actions brought by private persons or nonprofit organizations when the government decides to pursue a similar case can be detrimental to consumers: an action brought by a private person or nonprofit organization may deliver justice to consumers on a faster timeline and obtain a better result than a government action. Further, giving consumers the authority to enforce laws recognizes that, for budgetary or even political reasons, the government may not pursue a case with the requisite zealouslyness.⁹

Thus, under Section 3(a)(2), if a person or nonprofit organization initiates a Representative Action under Section 2(a) and the government subsequently brings a similar Representative Action against the same defendant, Section 3(a)(2) allows the person or nonprofit organization to continue litigating their case. Similarly, if the government initiates a Representative Action under Section 3(a)(1), Section 3(a)(2) permits a person or nonprofit organization to subsequently file their own

⁸ Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*

⁹ For example, while California consumers were litigating a class action against DIRECTV over unlawful termination fees, the California Attorney General settled its own lawsuit with the company over the same type of fees. The California Attorney General obtained suboptimal relief for consumers: the settlement was negotiated in secret, allowed DIRECTV to continue to charge the unlawful termination fees, and did not provide consumers with refunds for the fees. See Press Release, Consumer Watchdog, *Statement of Consumer Watchdog Regarding Settlement Announced by Attorneys General and DIRECTV* (2011), <https://www.consumerwatchdog.org/newsrelease/statement-consumer-watchdog-regarding-settlement-announced-attorneys-general-and-directv>.

Representative Action under Section 2(a) alleging similar violations against the same defendant.

- (3) The Attorney General, a district attorney, or a city attorney may authorize a private law firm or nonprofit organization to prosecute a Representative Action in the name of the People of this state if the private law firm or nonprofit organization has no conflicts of interest preventing it from prosecuting the action on behalf of the public interest.

Note: *Government law enforcement agencies may not have the resources or particular expertise necessary to prosecute a specific type of violation in a Representative Action. For this reason, under Section 3(a)(3), the Attorney General, a district attorney, or a city attorney may authorize a private law firm or nonprofit to prosecute the Representative Action on behalf of the public as long as no conflict of interests are present.*

§ 4 Prohibited Acts.

- (a) **General.** This Section applies to practices and acts by an entity engaged in any commercial activity in this state. There is no limit to the application of this Section based on the nature of the product, service, or thing offered by the entity that is engaged in the commercial activity.

Note: The term “commercial activity” encompasses every type of action intended to induce or otherwise related to a consumer transaction. Section 4(a) holds accountable any type of entity, and any type of commercial activity in which an entity is engaged, that violates the prohibited acts set forth in this Section. In Fairbanks v. Superior Court, 46 Cal. 4th 56 (2009), the Supreme Court of California narrowed the scope of one of California’s consumer protection laws, the Consumers Legal Remedies Act (CLRA),¹⁰ by ruling that life insurance was neither a “product” nor a “service” and hence not subject to the protections of the CLRA. This ruling created a loophole that excluded a billion-dollar industry from having to comply with the protections of the CLRA. Section 4(a) is written broadly to include commercial activity involving “any product, service, or thing.”

- (b) **Unlawful practices and acts generally.** Unlawful practices and acts under this Act include, but are not limited to, any of the following:
- (1) A practice or act that is unlawful under a statute, regulation, or common law;
 - (2) A practice or act that is unfair;
 - (3) A practice or act that is deceptive.

Note: The prohibition on “unlawful” practices and acts in Section 4(b)(1) is modeled after California’s UCL, which prohibits “any unlawful, unfair or fraudulent business act or practice.”¹¹ With respect to the “unlawful” prong of the UCL, the UCL “borrows” violations of other laws and treats them as unlawful practices independently actionable under the UCL.¹² “Virtually any state, federal, or local law can serve as the predicate for an action under” the UCL.¹³ Section 4(b)(1)’s prohibition on unlawful

¹⁰ Cal. Civ. Code § 1770 *et seq.*

¹¹ Cal. Bus. & Prof. Code § 17200 *et seq.*

¹² *Farmers Ins. Exchange v. Superior Court*, 2 Cal. 4th 377, 383 (1982).

¹³ *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (1996).

practices and acts goes farther than the UCL by including a violation of common law as an unlawful act or practice.

The Federal Trade Commission Act (FTCA),¹⁴ as well as many state consumer protection laws like the UCL (which is modeled after the FTCA and referred to as “Little FTC Acts”), also prohibit unfair and deceptive practices like Sections 4(b)(2) and (3). The terms unfair and deceptive have somewhat different definitions depending on the state, the court, or the agency. The Act defines these terms to apply broadly (see Sections 21(24) and (76) to practices and acts.

(c) Specific examples of violations. The following practices and acts violate this Act:

Note: *The practices and acts set forth in Sections 4(c)(1) through (23) are examples of specific practices and acts that are considered unlawful, unfair, or deceptive under this Act. Please refer to the accompanying report, Reboot Required: The Civil Justice System Has Crashed, pp. 1-105, for a detailed discussion of why the prohibitions on each of the practices and acts set forth in Sections 4(c)(1) through (23) are necessary to protect consumers. The following practices and acts are illustrative only; the application of this Act is not limited to them.*

(1) False and deceptive marketing. False and deceptive marketing, including, but not limited to, any of the following:

(A) charging a higher price than the marketed price;

(B) representing that something has benefits, features, or characteristics when it does not;

(C) misrepresenting the previous prices other consumers paid for something;

(D) representing something as discounted or on sale when it is not;

(E) failing to provide a discount or sale price as marketed;

(F) marketing something that does not perform as a reasonable consumer would expect from the content or the context of the marketing;

(G) misrepresenting the quality, quantity, or amount of something;

¹⁴ See 5 U.S.C. §§ 41-58.

- (H) representing that a person, entity, or governmental entity, endorses, recommends, sponsors, or has an affiliation with something when it does not;
- (I) misrepresenting whether something meets or exceeds standards or certifications when it does not meet or exceed them or there is no such standard or certification;
- (J) misrepresenting the geographic origin of something;
- (K) representing something as new when it is used, refurbished, or contains refurbished components;
- (L) misrepresenting that a consumer has been personally selected for an offer or has won an award or other thing of value;
- (M) marketing something in a format or manner that would lead a reasonable consumer to believe that the communication is a bill;

(2) Failure to inform.

- (A) before completing a transaction, failing to inform a consumer that a lower price is available from the offeror;
- (B) before completing a transaction, failing to inform a consumer that assembly is required;
- (C) after completing a transaction, failing to provide a fully itemized printed receipt or a receipt sent by direct digital communication ;
- (D) failing to inform a consumer that a marketing has been paid for and by whom. If the marketing is in visual format, the disclosure shall be prominent and in a size and manner proportionate to the size of the marketing. If the marketing is in audio format, the disclosure shall be made at the beginning or end of the marketing in a clearly spoken manner with pitch, volume, and tone substantially similar to the rest of the marketing;
- (E) failing to inform a consumer of a material fact about the thing being offered;

(3) Contracts.

- (A) failing to obtain consent to a contract;
- (B) obtaining consent to a contract, or a term of a contract, by means of an unlawful, unfair, or deceptive practice or act;
- (C) obtaining consent to a contract without providing a reasonable amount of time to review the contract prior to the transaction;
- (D) failing to inform a consumer of all material terms of a contract prior to obtaining consent;
- (E) failing to write the contract in plain language and in a readable format.
 - (i) A contract is written in plain language and in a readable format if the contract meets all of the following conditions:
 - (I) it is written in a clear and coherent manner using words with common and everyday meanings;
 - (II) it is logically divided into sections and appropriately captioned by its various sections using bold headings;
 - (III) it uses type of readable size but in no less than a 12-point font size;
 - (IV) it uses layout and spacing that separate the paragraphs and sections of the contract from each other and from the borders of the medium upon which it is displayed;
 - (V) it uses ink or pixels that contrast with the medium upon which it is displayed;
 - (VI) for all contracts with more than 2,000 words, it contains a table of contents or alphabetical index;
 - (VII) it gives material terms of the contract, and any exceptions and conditions to the material terms of the contract, greater prominence, in at least 14-point font, than non-material provisions;
 - (VIII) it provides a glossary of definitions necessary for a reasonable consumer to understand the contract.
 - (ii) A contract is not in plain language in and a readable format if it fails to meet the requirements set forth in subsection (c)(3)(E)(i) or includes any of the following:

- (I) cross references that are confusing;
 - (II) references to words or phrases that are not included or defined in the contract and that are necessary to understand its material terms;
 - (III) sentences that contain double negatives and exceptions to exceptions;
 - (IV) sentences and sections that are in a confusing or illogical order;
 - (V) words with obsolete meanings or words that differ in their legal meaning from their common and ordinary meaning to a reasonable consumer;
- (F) unilaterally changing a term of a contract during the duration of a contract. If the duration of the contract is less than one year, an entity shall not unilaterally change any term upon renewal of the contract for one year after the initial contract was entered into, unless that change is requested by the consumer;
- (G) including any term in a contract that is unlawful, unfair, or deceptive;
- (H) including any term in a contract that limits an entity's liability, reduces the relief a consumer may obtain through a lawsuit, changes the statute of limitations, changes the rules of civil procedure, tort law, contract law, or other law that otherwise would apply;
- (I) making a transaction contingent upon a waiver of any rights provided by this Act or any other law;
- (J) failing to include all terms of a contract in one document;
- (K) requesting that a consumer pay a penalty for breaching a contract that exceeds the actual costs incurred by an entity as a result of the consumer's breach;
- (L) giving a check or other form of money to a consumer that, if endorsed or deposited, would purport to create a contract and bind the recipient to do something;
- (M) failing to provide a consumer with a copy of a signed contract upon request during the duration of the contract and for seven years thereafter.

Note: *Almost all companies with which a consumer transacts in the modern era insist upon “take-it-or-leave-it” contracts. The terms of these contracts are solely dictated by the company and give the consumer no power to negotiate or modify the contract. Consumers never actually “agree” to the terms – in fact, they are almost always unaware of the terms – but American courts have imposed as law a fiction: that the consumer is deemed to have read – and understood – every word of the contract. The prohibitions in Section 4(c)(3) are intended to reverse this principle of law and establish a more level playing field between companies and consumers when a consumer must consent to a contract in order to obtain something.*

The prohibitions in Section 4(c)(3) apply to all types of contracts with consumers. For example, the prohibitions in Section 4(c)(3) apply equally to contracts for subscriptions (Section 4(c)(7)), warranties (Section 4(c)(8)), loans and extensions of credit (Section 4(c)(14)), and connected devices (Section 4(c)(17)).

(4) Discrimination.

- (A) All consumers within the jurisdiction of this state are free and equal, and are entitled to the full and equal accommodations, advantages, facilities, privileges, or services of every kind whatsoever, regardless of such characteristics as their gender, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, gender identity, citizenship, primary language, or immigration status.
- (B) A violation of subsection (c)(4)(A) may be established through evidence that the act or practice has a disproportionately adverse effect on a group of persons based on one or more characteristics;

Note: *Section 4(c)(4)(A) is an anti-discrimination provision intended modeled on California’s anti-discrimination law, the California Unruh Civil Rights Act.¹⁵*

As under California’s Unruh Act, the recitation of characteristics as prohibited bases of discrimination set forth in Section 4(c)(4)(A) are examples; it is not a complete list.¹⁶

Proving that a corporation has discriminated against a particular individual is often impossible as a practical matter because corporations may not keep records of such

¹⁵ Cal. Civ. Code § 51 (b).

¹⁶ See generally *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022 (N.D. Cal. 2007).

conduct or may keep them secret. Therefore Section 4(c)(4)(B) permits a consumer to prove discrimination based on the “disparate impact” that a particular act or practice may have. “Disparate impact” is a method of legal analysis by which discrimination is established based on the effect that a particular practice or act may have on a group protected by the law, rather than by attempting to determine the intent behind a particular practice or act. An entity may employ what appears to be a neutral practice or act that is not intentionally discriminatory, but nevertheless has the effect of discriminating against a particular group. Prohibiting corporate practices or acts that have the effect of discrimination therefore is the most effective way to prevent discrimination against groups of consumers.

(5) Overcharges and unnecessary fees.

- (A) charging a consumer for something that they did not knowingly order;
- (B) charging a consumer for something that they did not receive;
- (C) providing a more expensive version of something than a consumer ordered and charging them a price higher than the price they agreed to pay;
- (D) failing to inform a consumer of a fee;
- (E) charging a fee for providing an original or copy of a bill, receipt, contract, or account statement;
- (F) charging a fee in an amount that exceeds the actual costs incurred for providing the product, service, or thing for which the fee is being charged;
- (G) charging a fee for something that a reasonable consumer would expect to be part of the price;
- (H) charging a new or an increased fee during a term of a contract or subscription;
- (I) failing to inform a consumer of the basis or purpose of a fee prior to a transaction in which a fee is being charged, or in an itemized bill, that is otherwise lawful under this Act;

(6) Refunds.

- (A) refusing to provide a refund, store credit, or otherwise reverse charges for something that a consumer returns or rejects unless the consumer was informed, prior to the transaction and in a manner that would be understood by a reasonable consumer, of an established written policy of denying refunds or store credit;

(7) Subscriptions.

- (A) unilaterally changing the terms of a subscription during the duration of a subscription;
- (B) converting a free trial subscription into a paid subscription and charging a consumer after the free trial subscription has ended, unless the conversion meets all of the following conditions:
 - (i) the consumer is informed of the conversion prior to the inception of the free trial subscription;
 - (ii) the consumer is informed of the conversion ten days before expiration of the free trial subscription;
 - (iii) the consumer consents to the conversion;
- (C) renewing a subscription without consent;
- (D) failing to inform a consumer of the method by which they can cancel the subscription prior to obtaining consent to the subscription;
- (E) failing to provide a consumer with the ability to cancel a subscription by voice technology, direct digital communication, and any other manner by which a consumer is able to agree to the subscription;
- (F) imposing a process for canceling a subscription that is more difficult than the process for signing up for the subscription;
- (G) failing to inform a consumer of a subscription's expiration date at the beginning of each subscription period;
- (H) failing to inform a consumer they will be charged for the next subscription period less than ten days before the consumers is charged for the next subscription period;

(8) Warranties.

- (A) prior to completing a transaction, failing to provide a consumer with a copy of the warranty;
- (B) failing to honor the terms of a warranty;
- (C) if new products or components are available, substituting refurbished products or components, other than raw materials, when repairing or replacing something that is under warranty;
- (D) charging for an extended warranty without consent;

(9) Right to repair.

- (A) failing to make available to consumers and independent repair providers any parts, documentation, tools and updates for the purposes of diagnosis, maintenance, or repair of a product or thing;

(10) Delivery and shipping.

- (A) failing to provide a reasonable and accurate shipping date and the price, if any, based on the consumer's selected method of shipping, prior to completing a transaction;
- (B) failing to deliver something on, or twenty-four hours after, the promised date and time, absent events or circumstances outside of the control of natural persons;
- (C) leaving something at a consumer's residence without the recipient's signature when the recipient has requested a signature upon delivery;
- (D) charging shipping costs to return something that meets any of the following conditions:
 - (i) the recipient did not order the thing;
 - (ii) the thing failed to work as a reasonable consumer would expect it to work;
 - (iii) the thing is covered by a warranty.

(11) Installations.

- (A) failing to promptly make adequate repairs at no charge after improperly installing something;
- (B) failing to pay for harm caused by the improper installation of something;
- (C) failing to specify a time and date for the installation of something and for the completion of the installation;
- (D) failing to initiate and complete the installation of something within the specified time;

(12) Rebates.

- (A) offering a rebate in any form including, but not limited to, money, a gift card, or a coupon;

(13) Gift cards.

- (A) offering a gift card that charges a fee for its use;
- (B) offering a gift card that expires;
- (C) offering a gift card that waives the rights provided by this Act or any other law;

(14) Loans and Extensions of Credit.

- (A) prior to obtaining consent to a contract for a loan or an extension of credit, failing to inform a consumer of the material terms of the loan or extension of credit, including, but not limited to, any of the following:
 - (i) the interest rate, the finance charge, fees, the amount of the payment, whether the interest rate is fixed or adjustable;
 - (ii) availability of the loan or extension of credit;
 - (iii) the fees that the consumer must pay to obtain the loan or extension of credit;
 - (iv) the amount and date by which monthly payments may change.

- (B) misrepresenting the likelihood of the consumer obtaining a loan or an extension of credit;
- (C) misrepresenting or failing to provide the date by which a consumer seeking a loan or an extension of credit will obtain the loan or extension of credit;
- (D) charging interest at a rate in excess of ten percent per annum of the principal amount of a loan or an extension of credit;

(15) Personal information rights.

- (A) processing more of a consumer’s personal information than is necessary to provide the thing for which the consumer provides their personal information.

Note: Section 4(c)(15)(A) establishes the principle of data minimization: the practice of limiting the “processing” (defined as collecting, retaining, storing, sharing, transferring, selling, controlling, monetizing, re-identifying, or otherwise using) a person’s personal information to that which is directly relevant and necessary to accomplish a specific transaction. This means, for example, that a consumer’s personal information collected during an online transaction can only be used for the purpose of processing that transaction; the data cannot be shared with data brokers that use the information to create profiles of consumers or sell the data to advertisers. Or, if a consumer consents to a weather app processing their location information, the weather app may only use the location information to provide the weather for the consumer’s location, rather than selling the location data to third parties.¹⁷

In 2018, the European Union passed the General Data Protection Regulation (GDPR), which is a law that, among other things, requires data minimization.¹⁸ The California Privacy Rights Act in 2020, which was approved by California voters in 2020 and will

¹⁷ See, e.g., Taylor Lyles, *Los Angeles Settles Weather Channel Lawsuit, Lets It Keep Selling Location Data to Advertisers*, The Verge (Aug. 19, 2020), <https://www.theverge.com/2020/8/19/21376217/los-angeles-the-weather-channel-app-lawsuit-settlement-location-data-selling>.

¹⁸ EU General Data Protection Regulation, Art.5.1(c), <https://gdpr-info.eu> (last visited Nov. 1, 2021).

become operative on January 1, 2023, also requires data minimization.¹⁹ There is no similar federal law in the U.S., but similar federal legislation has been proposed.²⁰

(B) **Disclosures and consent.** Prior to processing personal information pursuant to subsection (c)(15)(A), failing to meet all of the following conditions:

- (i) inform the consumer of the types of personal information being processed;
- (ii) inform the consumer of the purpose for which personal information is being processed;
- (iii) obtain the consumer's consent to process personal information;
- (iv) obtain the consumer's consent every time there is a change in the types of personal information being processed or the purpose for which personal information is being processed.

(C) **Right to access.** Failing to provide a consumer, within thirty days of a request, with all of the following:

- (i) a complete and exact copy, in a standardized, and machine-readable format, of the personal information about that consumer that was processed;
- (ii) a complete explanation of the manner in which such personal information was processed;
- (iii) the contact information for any person or entity that received such information.

(D) **Right to correction.** Failing to provide a consumer, within ten days of a request, with the opportunity to dispute the accuracy or completeness of any information provided to a consumer pursuant to subsection (c)(15)(C).

(E) **Right to deletion.** Failing to delete personal information, including failing to ensure deletion of personal information by any third party with which an entity has shared personal information, or to which an entity has transferred or personal information, pursuant to subsection

¹⁹ California Privacy Rights Act § 1798.100(c).

²⁰ Data Accountability and Transparency Act of 2020,

<https://www.banking.senate.gov/imo/media/doc/Brown%20-%20DATA%202020%20Discussion%20Draft.pdf>.

(c)(15)(A), within ten days of a request, in any of the following situations:

- (i) a consumer whose personal information has been processed has requested deletion;
- (ii) the personal information is no longer necessary to carry out the functions for which it was processed.

(F) **Right to data portability.** Failing to provide means for a consumer to transmit or transfer personal information from an entity to another entity in a standardized and machine-readable format.

(G) **Right to withdraw consent.** Failing to provide a consumer with the ability to withdraw consent pursuant to subsection (c)(15)(B)(iii), or exercise their rights pursuant to subsections (c)(15)(C) through (E), by voice technology, direct digital communication, or any other manner by which a consumer is able to contact the entity processing their personal information.

(H) **Penalties for exercise of rights.** Requiring a consumer to pay a fee, degrading service, or otherwise treating a consumer differently for exercising their rights under this Section.

(I) **Exceptions.** The requirements of this section do not apply if processing a consumer's personal information is necessary for any of the following:

- (i) prevention of imminent danger to the personal safety of an individual or the public;
- (ii) compliance with a federal, state, or local law or rule; or
- (iii) compliance with a court order or subpoena.

(16) **Automated decisions.**

(A) failing to immediately inform a consumer, when an automated decision is made about a consumer, of all the following:

- (i) that an automated decision has been made about the consumer;
- (ii) the outcome of the automated decision;
- (iii) the personal information used in the automated decision;
- (iv) the source of the personal information used in the automated decision;

(B) failing to immediately provide a consumer, when an automated decision is made about a consumer, with notice of the right to dispute either of the following:

- (i) the accuracy or completeness of any personal information used in the automated decision;
- (ii) the automated decision.

(C) failing to ensure the accuracy of personal information used in automated decisions;

***Note:** Automated decisions (see definition at Section 21(4)) about consumers are largely unregulated and occur all the time: they can determine what Internet search results a consumer sees, whether someone gets a job, housing, college admission, insurance or medical care, or what price a consumer pays for something. (See Reboot Required, pp. 69-77.) Consumers are presently unaware that these decisions are being made and have no way to know what data is being used to make the decisions. Sections 4(c)(16)(A)-(B) require transparency in automated decision-making and give consumers rights to correct data used to arrive at an automated decision and to contest automated decisions.*

(17) Connected devices.

(A) offering a connected device that is capable of capturing or responding to audio or visual signals that does not provide a consumer with an immediate and easily accessible way to temporarily and permanently disable such functions without rendering the device unusable.

(18) Practices aimed at minors.

(A) permitting consumers under the age of thirteen to complete monetary transactions online within an app, game, website, or other similar program without parental consent;

(19) Data breaches.

(A) failing to institute and continuously maintain security measures that safeguard and prevent access to personal information;

(B) failing to notify each affected consumer and the public, as soon as practicable but no more than five days after it knows or should have known that a data breach has occurred. The notice must include all of the following:

- (i) the name of the entity that experienced a data breach;
- (ii) a complete description of the personal information that was compromised;
- (iii) the date of the data breach;
- (iv) a description of the data breach, if such information is possible to determine at the time the notice is provided;
- (v) steps the entity has taken to protect the consumer from harm as a result of the data breach;
- (vi) any steps the consumer can take to protect themselves from harm as a result of the data breach.

(C) Notice shall be distributed as follows:

- (i) If a consumer's contact information is available, notice to affected consumers shall be distributed by U.S. mail and direct digital communication.
- (ii) Notice to the public shall be distributed through media notice.

(D) If subsequent information reveals that more personal information was compromised in a data breach than was disclosed in the initial notice, entities must send an additional notice to consumers pursuant to subsections (c)(19)(B) and (C).

(20) Software updates.

(A) distributing software to connected devices that degrades the performance of a device;

(21) Consumer reviews.

(A) providing payment in exchange for the deletion or alteration of a consumer review;

(B) imposing a fee upon, or otherwise punishing, a consumer who posts a consumer review;

- (C) including terms in a contract barring a consumer from posting a consumer review regarding an entity or concerning something the entity is offering;
- (D) if a consumer, or the platform on which a review appears, is or will be compensated by an entity to post, prioritize or deprioritize a consumer review, failing to disclose in a prominent manner the source and amount of compensation in the body of the consumer review;

(22) **Personalized marketing.**

- (A) failing to provide a consumer with the ability to opt out of personalized marketing by voice technology, direct digital communication, and by any other method by which a consumer is otherwise able to contact the entity that is processing their personal information;
- (B) sending personalized marketing to a consumer who has opted out of receiving such marketing;

(23) **Customer service.**

- (A) in every communication with a consumer, failing to provide the ability to contact a customer service representative through voice technology during regular business hours in the entity's time zone;
- (B) subjecting a consumer to a wait or hold time of longer than ten minutes before they are able to speak to a customer service representative during regular business hours in the entity's time zone;
- (C) failing to respond within twenty-four hours to a customer service inquiry;
- (D) failing to provide a consumer with the ability to speak, within twenty-four hours, with a corporate executive who has the authority to resolve an inquiry or complaint when the consumer is unable to resolve a complaint with a customer service representative;
- (E) failing to make available upon request records required to be retained pursuant to Section 19(g), including, but not limited to, copies of bills, communications with a consumer, and all records related to specific consumer transactions;

(F) failing to record the date, time, and subject of any communication with a consumer.

§ 5 Remedies.

(a) General.

- (1) A representative plaintiff may obtain the remedies set forth in subsection (b) for any of the following:
 - (A) lost money, property, time, personal information, or other tangible or intangible thing of value;
 - (B) diminished value of a product, service, or thing;
 - (C) physical injury;
 - (D) emotional distress;
 - (E) being subject to an imminent risk of suffering any of the types of harms set forth in subsections (a)(1)(A) through (D).

***Note:** Any person or nonprofit organization bringing a Representative Action may seek and obtain the remedies set forth in Sections 5(b)(1) through (8) to remedy any of the harms set forth in Section 5(a)(1)(A) through (E). However, a person or nonprofit organization does not need to establish that they themselves suffered the harms set forth in Section 5(a)(1)(A) through (E) in order to bring a Representative Action.*

(b) Remedies. Any person or nonprofit organization may obtain the following cumulative remedies for violations of Section 4 on behalf of themselves, a minor if acting as a Guardian Ad Litem, or consumers all of the following:

- (1) actual or statutory damages, whichever is greater when calculated as follows:
 - (A) actual damages, including, without limitation, consequential damages, and damages for emotional distress, plus interest calculated at this state's statutory interest rate from the time of the loss;
 - (B) statutory damages in the amount of \$1,000 per consumer per violation. The plaintiff need not establish actual damages to obtain an award of statutory damages.

(C) If the victim of a violation of this Act is a senior, minor, or person with a disability, then the court shall award three times the actual or statutory damages, whichever is higher.

(D) If the plaintiff establishes that a defendant violated this Act willfully, then the court shall award three times the actual or statutory damages, whichever is higher.

(2) punitive damages;

(3) compensation for the diminished value of a product, service, or thing;

Note: Section 5(b)(3) provides compensation for the diminished value of a product, service, or thing when a defendant has acted in an unlawful, unfair, or deceptive manner concerning the characteristics of a product, service, or thing in violation of Section 4 of this Act. For example, consumers often pay a price premium based on specific representations about a product, service, or thing – whether it is clothing labeled as “Made in the USA” or a vehicle with a superior Miles Per Gallon fuel efficiency rating. When such representations are not true and violate Section 4 of this Act, consumers deserve compensation for the difference between what they paid for the product, service or thing and the actual value of the product, service, or thing they received.

(4) compensation for lost time, at the rate of \$100 per hour, or another equivalent rate determined by the court;

Note: Consumers have increasingly limited disposable time. Many companies gamble that they will escape accountability by relying on the practical inability of consumers to rectify injustices – especially modest ones. Under Section 5(a)(1)(A), a person may be compensated if a violation of the Represent Act caused a person to lose time, defined in Section 21(45) as “any time expended by a consumer as a result of a violation of this Act.” While the concept of reimbursing a person for their time spent addressing or rectifying an injustice is not widely recognized, the Supreme Court of California has said in the context of the Consumers Legal Remedies Act²¹ that the expenditure of time “to avoid the consequences of a deceptive practice falls within the broad meaning of suffering ‘any damage as a result of the use or employment’ of an unlawful practice, whether or not those transaction costs are cognizable as ‘actual damages.’”²² Consumers who are forced to spend their scarce time as a result of a violation deserve

²¹ Cal. Civ. Code § 1770 *et seq.*

²² *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 643 (2009).

to be compensated for that time. Compensating consumers at a rate of \$100 per hour is fair, but Section 5(b)(4) still gives the court the authority to adjust the amount.

(5) restitution;

Note: *The meaning of restitution has been a source of confusion among American lawyers.²³ Part of the confusion stems from how California courts have defined restitution: “the return of the excess of what the plaintiff gave a defendant over the value of what the plaintiff received.”²⁴ California’s definition resembles more of the “diminished value” approach set forth in Section 5(b)(3). Under California’s definition, restitution does not include a defendant’s “unjust enrichment.” By contrast, Section 5(b)(5) applies the traditional meaning of restitution: the measure of a defendant’s gain, or unjust enrichment, as a result of a defendant’s illegal practice or act.*

Whereas damages measure and seek to provide victims with compensation for their losses, the traditional understanding of restitution focuses on the defendant’s improper gain, sometimes known as unjust enrichment. Restitution “seeks to force disgorgement of that gain”²⁵ by the defendant to the plaintiff. According to one scholar, “In many instances, a remedy based on a defendant’s enrichment would yield the same award as a remedy based on the plaintiff’s loss. In certain circumstances—typically those of conscious wrongdoing—a defendant may be required to disgorge any profits that it derived from the benefit, and the amount of recovery for unjust enrichment may therefore exceed the amount of the plaintiff’s loss.”²⁶ Disgorgement of unjust enrichment (profits) is rarely, if ever, awarded in traditional consumer class actions.

In a lawsuit, plaintiffs may assert their right to multiple remedies provided by this Act. But they may end up having to make a choice among them at the end of the case.

For example, where damages, such as actual or statutory damages under Section 5(b)(1) and restitution under Section 5(b)(5) are available, a plaintiff may “elect” either remedy: the loss they sustained (damages) or a return of the defendant’s gain (restitution).²⁷ Election of remedies is “the act of choosing between two or more

²³ See Doug Rendlemen, *Restitution Rollout: The Restatement (Third) of Restitution & Unjust Enrichment: Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 Wash & Lee L. Rev. 973 (2011).

²⁴ *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 174 (2000).

²⁵ 1 Dan B. Dobbs, *Law of Remedies: Damages–Equity–Restitution* 555 (2d ed. 1993).

²⁶ Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. Rev. 1577, 1582 (2002); see also Douglas Laycock, *Book Review, Restoring Restitution to the Canon*, 110 Mich. L. Rev. (2011).

²⁷ See, e.g., *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 350 F. Supp. 2d 160, 212 (2004).

concurrent but inconsistent remedies based upon the same set of facts.”²⁸ According to California courts, “a plaintiff need not elect, and cannot be compelled to elect, between inconsistent remedies during the course of trial prior to judgment,”²⁹ that is, at the end of the case. In other words, a plaintiff may seek different types of remedies throughout litigation, but would have to decide which remedy to ultimately pursue prior to judgment if one of the remedies is inconsistent with, or duplicative of, another one. This approach is consistent with statutes that provide for two or more remedies.³⁰ (California’s CLRA is an example of a consumer protection statute that provides for both actual damages and restitution.³¹)

(6) temporary and permanent injunctive relief;

(7) all available contractual remedies, including but not limited to any of the following:

(A) voiding of a contract or a term of a contract at the election of the consumer;

(B) reformation of a contract;

Note: Under Section 5(b)(7), “voiding of a contract” means having it declared invalid, whereas “reforming a contract” means asking the court to change a contract’s terms. The “election of remedies” principle applies to contractual remedies as well: a plaintiff may seek, but cannot ultimately obtain, inconsistent remedies in an action. The plaintiff would have to “elect” which remedy to obtain prior to judgment.

(8) any other remedies that the court deems necessary or appropriate.

(c) Government actions.

(1) In addition to the remedies set forth in subsection (b), the Attorney General, a district attorney, a city attorney, or counsel authorized to prosecute on behalf of the Attorney General, a district attorney, or a city attorney, may seek either of the following remedies:

²⁸ *Roam v. Koop*, 41 Cal. App. 3d 1035 (1974).

²⁹ *Id.*, 1037.

³⁰ See, e.g., 17 U.S.C. § 504 (c)(1) (“the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages”).

³¹ Cal. Civ. Code § 1780.

- (A) a civil penalty of up to \$10,000 per consumer per violation, or three times the dollar value of the damages to each affected consumer, whichever is greater;
 - (B) suspension or termination of the entity's authority to do business in this state.
- (2) When deciding the amount of a civil penalty, or whether to suspend or terminate the entity's authority to do business in this state, the court shall consider one or more of the relevant circumstances presented by the parties, including, but not limited to, any of the following:
- (A) the nature and seriousness of the misconduct;
 - (B) the number and length of time of violations;
 - (C) the willfulness of a defendant's misconduct;
 - (D) the vulnerability of the victims. If the victim of a violation of this Act is a senior, minor, or person with a disability, then the court may award the maximum amount of civil penalties authorized by this Section.
- (d) **Represent Fund.** Civil penalties collected under this Act shall be deposited into the Represent Fund, which is hereby created in the State Treasury, to compensate the court system for all costs and expenses incurred by the judicial branch as a result of this Act. Notwithstanding any other provision of law, all moneys in this fund are continuously appropriated for that sole purpose.
- Note: Civil penalties are paid by defendants to the state government. In addition to the remedies available under Section 5(b) that provide a direct benefit to consumers, Section 5(c) empowers government law enforcement authorities to seek civil penalties from defendants, to be deposited in the Represent Fund (Section 5(d)), which will help fund the operation of the courts. Section 5(c) gives the court broad discretion in ordering the civil penalties set forth in Section 5(c).*
- (e) **Individual liability.** A court shall hold an entity's corporate executive, board member, agent, or assign personally liable for the remedies set forth in this Section if it is determined by the court that the corporate executive, board member, agent, or assign caused, or failed to prevent, a violation of Section 4.

*Note: Corporations are inanimate constructs created by the legal system to facilitate commerce. But human beings – corporate executives, board members, etc. – make the decisions, and even under today’s laws, are theoretically responsible for the decisions they make and the actions taken. In practice, however, the people who make the decisions, and the personnel who enable their actions, are rarely held accountable, either under criminal or civil laws, when they cause harm. For example, note that the family that own and ran Purdue Pharma attempted to evade any legal responsibility for the company’s role in the deadly opioid epidemic (see *Reboot Required*, p. 126). Similarly, only one bank executive went to jail after the 2008 financial crash.³² The knowledge that they will likely escape accountability and legal liability for their actions encourages corporate players to evade the law. Senator Elizabeth Warren has introduced legislation that would hold corporate executives criminally liable when they permit or fail to prevent violations of the law.³³ This Act makes clear that courts must hold such individuals personally responsible when they are responsible for a company that violates this Act. Personal responsibility is a bedrock principle of American law – and no one should be exempt from it.*

³² Emily Stewart, *Elizabeth Warren wants CEOs to go to jail when their companies behave badly*, Vox (Apr. 3, 2019), <https://www.vox.com/policy-and-politics/2019/4/3/18294308/elizabeth-warren-op-ed-wells-fargo-equifax>.

³³ S. 1010, 116th Cong. (2019-2020).

§ 6 Open Records.

(a) **General.** The public has the right to obtain information about a Representative Action in a uniform manner on all state courts' websites.

Note: There is a common law public right of access to judicial proceedings and records, which includes the right “to inspect and copy public records and documents, including judicial records and documents.”³⁴ The United States Supreme Court has said, “A trial is a public event. What transpires in the court room is public property.”³⁵ Section 6 codifies this right by ensuring that the public has swift and free access to documents in Representative Actions. The benefits of allowing public access to court documents include subjecting the civil judicial system to public scrutiny and holding its participants more accountable, improving public confidence in the civil justice system, and educating the public about the courts.³⁶

Section 6 makes case information free to everyone, which enables the public, news media, lawyers, and the government to access contemporary and historical information about Representative Actions, making it possible to identify existing actions, repeat violators, and the outcomes of Representative Actions, including compensation provided to consumers and civil penalties obtained for the Represent Fund. Public access to such information will ultimately conserve legal and judicial resources. For example, if lawyers contemplating filing a Representative Action were able to determine that an identical action had already been filed, those lawyers may decide to not pursue a duplicative action – or decide to work with the lawyers who already filed the Representative Action.

(b) **Online Docket.**

(1) Upon the filing of a complaint in a Representative Action, an online docket shall be created by the court on the appropriate court website.

³⁴ *In re Cendant Corporation*, 260 F. 3d 183, 192-93 (3d Cir. 2001), quoting *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993); see also Reporters Committee for Freedom of the Press, *Open Courts Compendium*, <https://www.rcfp.org/open-courts-compendium/> (last visited Nov. 1, 2021); California Court, *Access to Electronic Court Records*, <https://www.courts.ca.gov/42512.htm> (last visited Nov. 1, 2021).

³⁵ *Craig v. Harney*, 331 U.S. 367, 374 (1947).

³⁶ See *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, The Sedona Conference (2005).

- (2) The online docket shall list each document submitted to the court. Each docket entry on the list shall display the title, date and time of the submission and the party who made the submission.
- (3) Court orders and rulings, pleadings, motions, evidence introduced into the record, and all other documents submitted to a court shall be available to the public on the online docket, in a downloadable format, upon their filing and free of charge.
- (4) The court may grant a request by either party to conditionally or permanently redact or withhold any of the documents or information required to be made public by subsection (b)(3) if the court finds that the interest of the public in accessing such information is outweighed by the private harm that would be suffered by either party if such documents or information are made public.

***Note:** Section 6(b)(3) requires all documents and information submitted to the court to be public (as is standard practice) on the online docket. Sometimes, however, the parties have a legitimate reason for redacting or withholding what would normally be public information in a filing. Section 6(b)(4) permits the court to allow parties to redact or withhold sensitive information in court filings unless disclosure of such information is in the public interest. This would include information that protects the economic interests, health, safety, and welfare of the public.*

- (5) The online docket shall include an option for members of the public to sign up to receive direct digital communications when new docket entries are made.
 - (6) The costs associated with the online docket shall be covered by the Represent Fund.
- (c) **Online discovery depository.** Discovery, testimony, and other evidence obtained in an action, not submitted to the court pursuant to subsection (b)(3), shall be made available to the parties and the public through an online discovery depository as follows:
- (1) The parties shall create and cover the costs of the online discovery depository, which shall be in a publicly accessible website where the public can view the materials. The parties shall file a report with the court containing the URL of the online discovery depository.

- (2) The court may grant a request by either party redacting or withholding any of the documents or information required to be public by subsection (c) if the court finds that the interest of the public in accessing such information is outweighed by the private harm that would be suffered by either party if such documents or information are made public.

Note: *Discovery is a procedure in a lawsuit that allows the plaintiffs and defendants to ask each other for evidence related to the lawsuit. They can ask each other for depositions (recorded interviews of individuals taken under oath), answers to written questions, or documents. Plaintiffs use the information they receive to prove their case; defendants use the information they receive to defend against the allegations in the lawsuit.*

By making material obtained through discovery easily accessible to the public, Section 6(c) is an intentionally radical expansion of transparency within the judicial process.³⁷ Despite enormous advances in technology, documents filed in court often remain difficult or impossible to access by the public, and often members of the news media or the public must petition the court in order to obtain them. Moreover, defendants typically fight hard to prevent public disclosure of “smoking gun” documents that reveal deliberate or serious violations of the law. Wrongdoers, unsurprisingly, don’t want the public, law enforcement officials, or shareholders to learn about corporate misconduct. Failure to disclose and publicize such misconduct jeopardizes the public’s health and safety by concealing dangers uncovered by litigation. And reduced transparency undermines public confidence in the civil justice system. Because Representative Actions are likely to affect and involve large numbers of consumers, such access is in the interests of justice.

Allowing the public to access such information, subject to a balancing of the public’s interest in obtaining the information and the private harm that might be suffered by the plaintiff or defendant in disclosure of such information, will, for example, enable consumers to evaluate whether a proposed settlement is fair in light of the allegations in a Representative Action. Similar to Section 6(b)(4), Section 6(c)(2) still protects a defendant’s or plaintiff’s legitimate need for confidentiality (such as protecting a consumer’s privacy) by authorizing the court to keep confidential information or documents if the party seeking to maintain secrecy has shown that the public’s general

³⁷ See Letter from Prof. David W. Opderbeck, Assistant Professor, Law Department, Baruch College, City University of New York, and Adjunct Professor, Seton Hall University Law School, to Hon. Ronald J. Hedges, United States District Court for the District of New Jersey, re *Sedona Guidelines: Best Practices Address Protective Orders, Confidentiality & Public Access in Civil Cases* (Jul. 26, 2005); see also Richard Zitrin, *Why Lawyers Keep Secrets About Public Harm*, 12 No. 4 Prof. Law 1 (2001).

interest in obtaining the information outweighs the private harm that would be suffered if such information was disclosed. Also, like Section 6(b)(4), the public's interest would include information that affects the economic interests, health, safety, and welfare of the public.

§ 7 Defenses.

(a) **General.** The provisions of this Section apply when a defendant requests that the court dismiss a cause of action, deny relief, or otherwise decide an issue in a defendant's favor in a Representative Action on the bases set forth in this Section.

(b) **Regulatory defenses.**

Note: As noted in Reboot Required (p. 10-11), defendants often argue that if a government agency oversees a particular industry, or if the defendant is required to submit information or obtain the approval of an agency, courts should dismiss a lawsuit brought by a private party against a company in that industry. These defenses can have the harsh effect of foreclosing the public's right access to the full protections of the judicial branch. Moreover, most of these defenses have not been enacted by statutes, but are doctrines created by court decisions. When courts apply these "regulatory defenses," the result can be a miscarriage of justice because government agencies are often led by political appointees and they may make decisions based on political concerns; are subject to legislative and budgetary constraints; and usually have limited or no power to order all appropriate remedies. Indeed, the procedures that govern enforcement actions by regulatory agencies are far more limited than those applicable to civil matters like Representative Actions. For example, government enforcement actions can take years longer than civil actions; provide fewer procedural tools such as discovery; typically provide different and more limited types of relief than civil actions (government agencies rarely have the authority to order all forms of compensation for injured consumers); and information about such proceedings may not be made available to the public.

Section 7(b) greatly restricts the ability of defendants to derail or escape responsibility in a Representative Action on the ground that a government agency has jurisdiction over a defendant or has taken actions that may apply to a defendant.

- (1) **Filed with or reviewed by a government agency.** A court shall not stay a case, dismiss a cause of action, or deny relief under this Act on the ground that the defendant is regulated by, or is required to submit information to, the agency, or that a practice or act has been disclosed to, reviewed by, or approved by a government agency.
- (2) **Agency approval of unlawful action.** A court shall not dismiss a cause of action brought under this Act, or deny relief provided by this Act, on the

ground that a government agency was aware of, purported to authorize or approve of a practice or act that would constitute a violation of this Act.

(3) **Exclusive jurisdiction.** A court shall not dismiss a cause of action brought under this Act, or deny relief provided by this Act, on the ground that a defendant, or a practice or act by a defendant, is subject to the exclusive jurisdiction of a government agency, unless the court determines that all of the following conditions exist:

(A) a statute expressly provides that the agency has sole and exclusive jurisdiction over the dispute;

(B) the appointed or elected head of the agency, or a majority of the members of the governing authority of the agency, are not, directly or indirectly, affiliated with active market participants in the relevant trade, profession, or business subject to regulation.

Note: The purpose of Section 7(b)(3)(B) is to ensure, when an agency has exclusive jurisdiction over a dispute, that those in positions of power within the agency are truly impartial and not controlled by the business interests that the agency is tasked with regulating.

(C) the agency has the power to order the same remedies and penalties set forth in Section 5 of this Act.

(D) the agency conducted a proceeding, including a public hearing, pursuant to the procedures set forth in this state's Administrative Procedure Act or other governing procedural law;

(E) the agency properly exercised the agency's remedial powers;

(F) the agency's decision was consistent with this Act;

(G) a separate statute provides for judicial review of the agency's action.

Note: The "exclusive jurisdiction doctrine" requires parties to initiate a dispute over a regulated entity's conduct through an administrative rather than a civil proceeding. At the urging of corporate defendants, the exclusive jurisdiction doctrine has metastasized into a general defense that applies to any conduct that is arguably within a government agency's authority – even if the conduct is illegal.

Section 7(b)(3) restricts the application of the exclusive jurisdiction doctrine, recognizing that it relies on erroneous assumptions concerning government agency expertise and resources.

Corporate defendants point out that the exclusive jurisdiction doctrine still allows people to go to court – but simply requires that they first bring their complaint to a government agency. This is misleading. It is true that, in most states, when a dispute is subject to the exclusive jurisdiction of an agency, and the agency issues a decision concerning a practice or act that violates this Act, either party to that proceeding may appeal the agency’s decision to a court through a lawsuit. But that kind of challenge must be brought against the agency, and only asks the court to compel the agency to act according to law and properly fulfill its duties. Courts have established very high legal hurdles for such challenges. Even if a consumer wins their appeal, the case goes back to the administrative agency. The consumer is still denied all the protections and remedies provided by the court system.

- (4) **Judicial abstention.** A court shall not dismiss a cause of action or deny relief in a Representative Action on the ground that the cause of action or relief implicates technical or policy determinations or otherwise requires the expertise of a government agency.

***Note:** Under the doctrine of “judicial abstention,” – another judge-made defense advocated by corporate defendants – courts will refuse to adjudicate disputes that they believe require technical or policy determinations or the expertise of a government agency –even though courts are called upon to decide complex cases in many areas. This Act forbids courts from applying this doctrine in Representative Actions. When a dispute implicates technical or policy determinations or otherwise requires the expertise of a government agency, the proper course of action is for a court to invoke the primary jurisdiction doctrine pursuant to Section 7(b)(5), stay the case, and request the agency to consider the matter.*

(5) **Primary jurisdiction referral.**

- (A) A court may invoke the primary jurisdiction doctrine in a Representative Action to obtain factual or legal determinations or an analysis of specific issues by a government agency, if the court finds all of the following:

- (i) The issues in the Representative Action are:

- (I) of a complex or technical nature;

- (II) within the expertise of a government agency, or that there are considerations of uniformity in regulation;
 - (ii) Referring the issues to the agency would assist the court.
- (B) If the court invokes the primary jurisdiction doctrine, the court, the parties, and the government agency shall adhere to all of the following procedures:
- (i) The court shall issue a primary jurisdiction referral in the form of an order setting forth the specific issues for which the court seeks the agency's consideration.
 - (ii) Within thirty days after the court issues the order referring the issue to the agency, the parties shall jointly transmit the court order and the complaint to the agency.
 - (iii) The parties may each submit a letter brief to the agency explaining why it should accept or reject the primary jurisdiction referral.
 - (iv) The parties shall provide additional pleadings or information upon the request of the agency; and
 - (v) Within sixty days of receipt of the court order and complaint, the agency shall notify the court and the parties whether the primary jurisdiction referral is accepted or declined, or that the agency requires more time to consider the referral. The agency shall affirmatively accept or decline the referral within one hundred and twenty days.
 - (vi) If the agency accepts the referral, the court shall stay the litigation during the pendency of the agency review.
 - (vii) If the agency accepts the referral, it shall conduct the requested inquiry pursuant to the state's governing procedural law.
 - (viii) If the agency determines that a hearing is necessary, the hearing shall be conducted pursuant to the state's governing procedural law. The parties in the Representative Action shall have the right to appear and participate as a party.
 - (ix) Upon completion of the inquiry, the agency shall forward the results of its inquiry to the court.
 - (x) If the agency rejects the primary jurisdiction referral, the court shall decide the issues in the case that were the subject of the referral.
 - (xi) The referring court shall have sole jurisdiction over challenges to the result of the inquiry of the agency or other disputes related to the primary jurisdiction referral.

- (xii) Nothing in this Section shall be construed to preclude the agency from initiating or conducting any action against a defendant concerning matters at issue in the referral.

Note: The primary jurisdiction doctrine is a more just and sensible alternative to the “exclusive jurisdiction” or “judicial abstention” defenses when a court must determine complex regulatory issues. As explained by the California Supreme Court in Farmers Insurance Exchange v. Superior Court, 2 Cal.4th 377 (1992), in the event that a court determines that it would benefit from the technical expertise of a government agency (in that case, the California Department of Insurance), a court may refer the case, or a particular issue within the case, to the agency. In addition to insurance-related matters, the primary jurisdiction doctrine has been invoked to refer issues to the U.S. Food and Drug Administration and the Environmental Protection Agency.³⁸ Such referrals often request that the agency determine certain facts or provide a legal opinion.

If the agency agrees to accept the referral (the agency can choose to accept or decline the referral), the court action is stayed – not dismissed – during the agency’s exercise of primary jurisdiction. When the agency completes its review, it issues a written response and the matter returns to the court from which it came. The court then proceeds with the civil case. Because the primary jurisdiction doctrine has been established by courts rather than enacted by the legislature, there are few established procedures. Section 7(b)(5) provides a much-needed procedural framework for this process.

- (6) **Ongoing investigation or enforcement action.** A court shall not dismiss a cause of action, deny relief, or otherwise decide an issue in a defendant’s favor on the ground that a government agency is investigating or has initiated or is conducting an enforcement or other proceeding against a defendant.

Note: As noted above, government agencies are subject to significant limitations, and are almost never a satisfactory substitute for the judicial branch. Section 7(b)(6) ensures that an investigation or ongoing enforcement action by an agency does not impede the progress of a Representative Action.

- (7) **Resolution by agency.** A court shall not dismiss a cause of action, deny relief, or otherwise decide an issue in a defendant’s favor on the ground that a government agency reached a settlement with, issued a consent

³⁸ See, e.g., *Figy v. Lifeway Foods, Inc.*, 2014 U.S. Dist. LEXIS 62700; *In re “Agent Orange” Prod. Liab. Litig.*, 475 F. Supp. 928 (E.D.N.Y. 1979).

order, or otherwise resolved an administrative action against a defendant, unless the resolution of the agency action provided relief identical to that sought by the Representative Action.

***Note:** An entity that is the subject of an agency action might reach a settlement with, or be ordered to do something by, the agency. But the resolution of an administrative action should not become a barrier to a Representative Action. This is because government agencies may not have the power to seek the remedies that are available under this Act. Agencies also may not seek to prosecute an entity as aggressively as a representative plaintiff would against the same defendant in a Representative Action over the same conduct. Litigants in a Representative Action may be able to obtain better results for consumers. Section 7(b)(7) ensures that partial resolution of a matter between an entity and an agency does not impede a Representative Action.*

(8) **Privileged information.** A defendant shall not assert that any information that it has provided to a government agency is privileged if the plaintiff seeks to obtain such information in a Representative Action.

***Note:** The information a defendant provides to a government agency may be relevant to a Representative Action. Section 7(b)(8) permits litigants in a related Representative Action to obtain such information through the discovery process, preserving resources, and promoting efficiency.*

(c) **Defenses to deceptive marketing.** A court shall not dismiss a cause of action, deny relief, or otherwise decide an issue in a defendant’s favor in a Representative Action alleging deceptive marketing on any of the following grounds:

(1) That the marketing contains exaggerations or “puffery,” unless the court finds that no reasonable consumer would believe the statement.

***Note:** Section 7(c)(1) clarifies the parameters of the so-called “puffery” defense. As the Federal Trade Commission explains, puffery is a “term frequently used to denote the exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined.”³⁹ Corporations are often able to avoid any legal liability for deceptive advertising if they can convince a court that their advertising is “puffery” (see *Reboot Required* at pp. 10-11). The “puffery” defense lets advertisers have it both ways; after all, companies would not spend large amounts of money on advertising if they did not intend consumers to believe their representations. Section 7(c)(1) prevents companies from*

³⁹ *In the Matter of Better Living, Inc.*, et al. 54 F.T.C. 648 (1955).

applying the puffery defense to marketing communications that a reasonable consumer would believe to be true.

- (2) A consumer on whose behalf representative claims are asserted cannot prove that they actually viewed or relied upon an advertisement or a specific communication.

Note: *Under current class action rules, courts often require that a representative plaintiff who is alleging false or deceptive advertising prove that they saw and relied on a specific advertisement or communication when deciding to buy something – a requirement that, as a practical matter, is impossible for a consumer to meet, and has resulted in the dismissal of many legitimate cases. Section 7(c)(2) eliminates these harsh requirements because proving what a person saw or relied upon is not necessary to determine whether an advertisement or communication is deceptive. The approach adopted by this Act intentionally conflicts with current federal rules that require that “a party [] state with particularity the circumstances constituting fraud”⁴⁰ with respect to deceptive advertising violations.*

- (d) **Safe harbor defense.** A court shall not dismiss a cause of action or deny relief on the ground that a statute or regulation authorizes the challenged conduct unless the statute or regulation expressly and unequivocally authorizes the act or practice challenged in the complaint.

Note: *A “safe harbor” is a provision in a statute or regulation stating that certain acts or practices are lawful. The safe harbor defense exempts defendants from liability for a specific practice or act. Defendants often contend that their conduct is lawful by pointing to statutes that do not actually say so. If a supposed safe harbor provision in a statute is written in an ambiguous manner, then disputes arise as to whether the provision is truly a safe harbor. Section 7(d) clarifies that the safe harbor defense only applies “if the statute or regulation expressly and unequivocally authorizes the act or practice challenged in the complaint.”*

- (e) **Contractual defenses.**

- (1) **Choice of law provision.** A court shall not enforce a contractual provision that applies the law of a state other than that of this state unless the law of the other state is more favorable to consumers than the law of this state.

Note: *Not all state consumer protection laws are equal. Some, like in California, provide consumers with strong protections. In others, like Michigan, Rhode Island,*

⁴⁰ Fed. R. Civ. P. 9(b); *see also* *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009).

Alabama, Florida, Louisiana, Nebraska, New Hampshire, Ohio, and Virginia, court decisions or legislative exemptions for certain industries have gutted the state’s consumer protection laws.⁴¹ Corporations often include “choice of law” provisions in the fine print of their contracts that require consumers to agree that the law of the least-consumer protective state will apply to any disputes, rather than the state in which the consumer resides. Section 7(e)(1) bars the application of these “choice of law” provisions when they disadvantage consumers.

(2) **Duty to read.** A court shall not dismiss a cause of action or deny relief on the ground that a consumer on whose behalf representative claims are asserted had a duty to read the contract or failed to do so.

Note: As discussed in Reboot Required at pp. 98-99, courts have imposed a “duty to read” contracts upon consumers.⁴² Under this legal principle, consumers are assumed to have read and agreed to all provisions of a contract, and they cannot argue that they were unfamiliar with the terms of the contract if they later challenge the terms in court. Of course, only a tiny fraction of people read these contracts (assuming they are even available at the time of the transaction), because they are long and full of incomprehensible legalese. For example, it would take an average person nine hours to read Amazon’s terms and conditions.⁴³ Section 7(e)(2) eliminates the fiction that consumers have read the agreement and prevents defendants from hiding behind the “duty to read” defense when slipping unfair contract terms into lengthy terms of service.

⁴¹ Carolyn Carter, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, National Consumer Law Center (Mar. 2018), <https://www.nclc.org/images/pdf/udap/udap-report.pdf>.

⁴² See, e.g., *Fields v. Blue Shield of California*, 163 Cal. App. 3d 570, 578 (1985); Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 Vand. L. Rev. 1051 (1966).

⁴³ New York Times Editorial Board, *How Silicon Valley Puts the ‘Con’ in Consent*, New York Times (Feb. 2, 2019), <https://www.nytimes.com/2019/02/02/opinion/internet-facebook-google-consent.html>.

§ 8 Discovery.

- (a) **General.** The provisions of this Section supplement this state’s law governing discovery.

Note: Section 8 is not intended to be a comprehensive set of rules governing discovery. The rules in Section 8 fix loopholes that often result in discovery abuses and are intended to supplement and work in concert with existing state rules.

- (b) **Duty to preserve evidence.** An entity shall preserve evidence when the entity or a corporate executive becomes aware of a practice or act that may violate this Act.

- (1) **Mandatory steps to preserve evidence.** Upon becoming aware of a practice or act that may violate this Act, an entity, its employees, agents, and assigns shall, with respect to documents and electronically stored information that may be relevant to the action, take all of the following actions:

- (A) preserve all such documents and electronically stored information, regardless of format;
- (B) suspend any procedures that may modify or delete the relevant documents and electronically stored information;
- (C) preserve any device, even if primarily for personal use, containing or storing documents and electronically stored information, wherever located, that are within its possession, custody, or control;
- (D) preserve documents and electronically stored information stored in any cloud service;

- (c) **Confidential documents.**

- (1) **Confidentiality log.** A party responding to a request for discovery shall provide and make public a confidentiality log. For each document marked confidential, a confidentiality log shall include all of the following:

- (A) the nature of the document;

- (B) date;
- (C) author;
- (D) recipients, if any;
- (E) the sequential number (or document control number, if any);
- (F) an explanation for why the document is confidential.

(2) **Public access to confidentiality log.** The confidentiality log shall be accessible on the online discovery depository pursuant to Section 6(c).

Note: Obtaining evidence is one of the most difficult and complex aspects of litigation against a corporate defendant. Corporations routinely refuse to provide plaintiffs with relevant evidence on the ground that the documents are “confidential.” The confidentiality of information is determined by state or federal laws that protect, for example, an individual’s privacy, or in the case of corporations, “trade secrets.” These are generally entitled to confidentiality only when the person in control of the documents can show that their disclosure would cause irreparable injury that outweighs the other party’s need for the information in the litigation,⁴⁴ such as research, development, and commercial information that would cause a business financial harm if released.

Not all information that a party asserts is confidential is truly confidential under applicable law. Incorrect confidentiality designations may result in the redaction or nondisclosure of information when it is included in documents submitted to the court – which prevents the public from having access to such information.

Section 8(c) codifies the duty to provide a log when producing documents, testimony, or other information that the party contends is confidential. Items marked as confidential are still produced to the requesting party (in contrast to documents withheld as privileged or work product, as discussed in the note to Section 8(d) below); however, they are not permitted to be disclosed to anyone other than the requesting party unless a court determines that the interest of the public in accessing such information is outweighed by the private harm that would be suffered by either party if such documents or information are made public under Section 6(c)(2).

Without a complete “confidentiality log,” it is impossible for a consumer or a court to assess the validity of a defendant’s assertion of confidentiality.

⁴⁴ *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965).

- (3) **Confidentiality designation challenges.** If a party that receives documents, testimony, or information designated as confidential objects to such designation, the party that designated such items as confidential shall have the burden of establishing the applicability of the confidential designation.

Note: Poorly negotiated “protective orders” sometimes include a provision that puts the burden on the party receiving discovery to establish that a particular item should not be designated as confidential. The burden should always be on the party designating something as confidential to explain why an item deserves confidential treatment because the document originated with them, not the party receiving the document. Section 8(c)(3) ensures the burden is on the correct party.

(d) **Privilege log.**

- (1) A responding party that asserts that information sought in discovery is privileged or protected work product shall provide a privilege log at the time the responding party provides its responses to discovery requests.
- (2) For each document withheld, a privilege log shall include all of the following:
- (A) the nature of the document;
 - (B) date;
 - (C) author;
 - (D) recipients, if any;
 - (E) the sequential number (or document control number, if any);
 - (F) the privilege asserted and why it applies.
- (3) A responding party who fails to provide a complete privilege log at the time it is required to respond to discovery requests shall waive its right to any privilege or assertion that the information sought is privileged or protected work product, unless the court determines that extraordinary circumstances warranted the failure to provide a complete privilege log.

Note: *The attorney-client privilege protects the confidentiality of communications between a client and their attorney; the work product doctrine prevents disclosure of information or documents prepared by an attorney in the course of legal representation. By contrast with the limited protection afforded to “confidential information,” the attorney-client and work-product privileges are considered absolute: a party cannot be forced to disclose legal advice they have received, or research on legal issues.*

However, corporations frequently misuse these privileges. As with confidentiality designations, responding parties sometimes assert a privilege when the privilege does not apply, simply in order to avoid revealing information to an opposing party.

Without a complete “privilege log,” it is impossible for a consumer or a court to assess the validity of a defendant’s assertion that a document is privileged. Moreover, under current practice, parties responding to a request are usually only required to produce privilege logs when the requesting party objects to an assertion that a document is being withheld as privileged.⁴⁵ Section 8(d) codifies the duty of responding parties to provide a privilege log at the same time they produce information and documents. By requiring a privilege log earlier in the process, with the detailed information set forth in Section 8(d)(2), the requesting party can adequately analyze the veracity of privilege assertions without wasting time demanding a privilege log or having to challenge a privilege log as incomplete.

Finally, Section 8(d)(3) provides a strong incentive for the parties to comply with the privilege log requirement: if a party fails to provide the required privilege log, it loses any privileges that may have applied.

(5) **Public access to privilege log.** The privilege log shall be accessible on the online discovery depository pursuant to Section 6(c).

(e) **Cost of document production.** A defendant shall bear the cost of producing documents or digital information to the plaintiff.

(f) **Limitation on informal interviews.** Informal interviews that are not conducted as depositions under oath shall not be admissible as evidence.

Note: *A deposition is an interview under oath that requires the person being deposed to answer questions related to a lawsuit. Sometimes parties may request informal interviews that are not conducted under oath. Proponents of such informal discovery techniques argue that they are less expensive and more flexible than formal discovery*

⁴⁵ See, e.g., Cal. Code Civ. Proc. § 2031.240(c).

procedures.⁴⁶ However, failure to require a person to answer questions under oath calls into doubt the reliability of the information being provided. Section 8(f) ensures that information obtained in an interview-style setting is reliable.

(g) Non-compliance.

- (1) A court may order a party that violates this Section to pay a civil penalty or may impose an issue sanction in favor of the other party.
- (2) When determining the amount of a penalty, the court shall consider the gravity of the violation and the impact of the violation on the resolution of the action.

Note: A sanction in a court proceeding is some form of a penalty or punishment imposed by the court on a party for disobeying the law or a court order. An issue sanction is a type of sanction imposed on litigants who abuse the discovery process: it means that the court will order that certain facts at issue in the case are taken as established. California law provides for issue sanctions during the discovery process.⁴⁷

⁴⁶ Joshua S. Goodman and Farley J. Neuman, *Conducting Discovery Beyond the Code*, California Civil Litigation Reporter (May 1998), <https://gnhlip.com/1998/05/conducting-discovery-beyond-the-code/>.

⁴⁷ Cal. Code Civ. Proc. § 2023.030(b).

§ 9 Arbitration.

- (a) **Prohibition on mandatory arbitration.** No contract may include a term that requires the parties to resolve a dispute arising out of the contract by arbitration.

Note: Traditional contract law presumes that two equally sophisticated parties have a “meeting of the minds” and agree to the terms of the contract.⁴⁸ However, as discussed in Reboot Required at p. 98, no “meeting of the minds” can possibly occur when big businesses use take-it-or-leave-it contracts with consumers, since consumers have absolutely no power to negotiate the terms much less understand them. But courts have nevertheless strained general contract principles to enforce take-it-or-leave-it contracts on the ground that the consumer has agreed to the terms.⁴⁹ As a result, almost all corporations use contracts that force consumers to waive their constitutional right to a trial by jury and require them to bring their cases against the company, in a private arbitration proceeding with a judge chosen and paid by the company. A 2019 study found that 81 of the 100 largest companies in the United States impose arbitration clauses on consumers.⁵⁰ The decision by the U.S. Supreme Court in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (“Concepcion”) held that these clauses were valid. Commentators agree that the Court’s decision reversed its own prior precedents and effectively eliminated the explicit exemption contained in the Federal Arbitration Act (FAA), which says that state contract laws govern all contracts, and therefore states may bar arbitration clauses.⁵¹

Section 9(a) is admittedly inconsistent with the Supreme Court’s decision in Concepcion. However, it is included here in anticipation of a future decision by the Supreme Court correcting its error, or passage by Congress of legislation confirming that states may pass laws to protect consumers against forced arbitration. The federal Forced Arbitration Injustice Repeal Act (FAIR), which would ban forced arbitration clauses, was passed by the House in September 2019, but was not passed by the Senate.⁵² Consumer advocates and legislators continue to fight for the passage of the

⁴⁸ See, e.g., *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (“[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract”).

⁴⁹ See *Some Solutions*, Citizen Works, <http://faircontracts.org/some-solutions> (last visited Nov. 1, 2021).

⁵⁰ Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America’s Top Companies*, 52 U.C. Davis L. Rev. Online 233 (2019).

⁵¹ See Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 Case W. Res. 91 (2012),

⁵² Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (1st Sess. 2019).

FAIR Act. Section 9(a) is modeled after the language in the FAIR Act. Consumers should be allowed to have their day in court.

(b) **Public disclosure of information regarding arbitrations.** An entity that requires consumers to arbitrate a dispute on behalf of themselves or on behalf of other consumers shall publish all of the following:

(1) on the home page of the entity's main website, in no less than 14-point font, the following statement and hyperlink: "[name of entity] requires consumers and [if applicable] employees who enter into contracts with us to agree to submit any disputes with us to private arbitration firms, and to surrender their right to seek justice in a court of law. To find out how our forced arbitration clause works and the results of previous arbitrations, click here:" which shall be followed by a hyperlink to a page with the following information:

(A) a complete copy of each version of a clause, contained in the entity's current and previous contracts with consumers, that restricts, or provides for a waiver of, the right to a jury trial or to bring Representative Actions on behalf of other consumers, and the dates during which each such version was in effect;

(B) the number of times the entity or a consumer has invoked the arbitration clause;

(C) the total number of arbitrations requested annually;

(D) the number of arbitrations initiated annually;

(E) the number of arbitrations completed annually;

(F) for each arbitration, within thirty days of the conclusion of the arbitration proceeding:

- (i) the type of thing at issue;
- (ii) the nature of the dispute;
- (iii) the prevailing party;
- (iv) whether the consumer was represented by an attorney;
- (v) the date when the complaint was filed in court;
- (vi) the date when the dispute was ordered into arbitration;
- (vii) the name of the company administering the arbitration;

- (viii) the date that the company administering the arbitration received the demand for arbitration, the date the arbitrator was appointed, and the date of the arbitration's disposition;
- (ix) whether the arbitration resulted in an in-person hearing;
- (x) whether the parties provided each other with any pre-hearing discovery, and if so, which party;
- (xi) the amount sought in the arbitration, the amount of the compensation awarded, and any other relief granted, if any;
- (xii) the name of the arbitrator(s), the total compensation including expenses they were paid for the case, and the percentage of the arbitrator's fee paid by each party;
- (xiii) the arbitrator's professional affiliations;
- (xiv) a copy of the arbitration decision in writing.

(2) Information published pursuant to this Section shall be made available to the public in a searchable format, which shall be accessible at no charge.

(3) Information published pursuant to this Section shall be retained by the entity for at least fifteen years after the arbitration has concluded.

(4) Nothing in this Section shall be construed to confer notice of an arbitration clause upon a consumer, nor to establish a consumer's consent to such a provision.

Note: Arbitration proceedings are known to be unfavorable to consumers,⁵³ yet they are conducted in secret and very little information and statistics about private arbitration proceedings and their outcomes is publicly available. Section 9(b) provides transparency into private arbitration proceedings. Even though laws in some states require private arbitration firms to disclose the type of information set forth in Section 9(b), many firms do not comply.⁵⁴

(c) Non-compliance.

(1) A court may order an entity that violates this Section to pay a civil penalty.

⁵³ Heidi Shierholz, *Forced Arbitration Is Bad for Consumers*, Economic Policy Institute (Oct. 2, 2017), <https://www.epi.org/publication/forced-arbitration-is-bad-for-consumers/>.

⁵⁴ See, e.g., Public Research Institute, *Arbitration Reporting in California: Compliance with CCP § 1281.96*, UC Hastings College of the Law (Jun. 28, 2017), http://carsfoundation.org/pdf/arbitration_UC-Hastings-report_final.pdf; Letter from Rosemary Shahan, President, Consumers for Auto Reliability and Safety, et al. to Hon. Kamala Harris, Attorney General, State of California, *Request for Investigation* (Dec. 12, 2013).

- (2) A court may order an arbitration clause employed by an entity void if an entity violates this Section.
- (3) When determining the amount of a penalty or whether to void an entity's arbitration clauses, the court shall consider the gravity of the violation.

§ 10 Representative Claims.

(a) **General.** Representative claims are causes of action brought by any person or nonprofit organization acting on behalf of consumers alleging that an entity has violated this Act. A plaintiff shall not assert causes of action on behalf of consumers and on behalf of themselves in the same Representative Action.

(b) **Standard for representative claims.** To proceed as a Representative Action, the complaint shall plead facts that, if taken as true, would establish all of the following factors:

- (1) An entity has engaged or is about to engage in conduct that violates one or more provisions of this Act;
- (2) More than fifteen (15) consumers have been harmed by the conduct;
- (3) It is inefficient or unfeasible for all consumers on whose behalf the representative claims are asserted to proceed in their own separate individual lawsuits before a court;
- (4) All consumers on whose behalf the representative claims are asserted suffered harm from the alleged practices and acts by a defendant.

(c) **Challenge to representative claims.**

(1) **Motion to dismiss representative claims.** Within thirty days of the filing of the complaint, a defendant may file a motion to dismiss one or more of the representative claims on any of the following grounds:

- (A) the plaintiff has failed to plead facts that, if taken as true, would establish the factors set forth in subsection (b);
- (B) the facts alleged are demonstrably false on their face;
- (C) the defendant proves that the Representative Action was filed with the intention of harassing or extorting a payment from the defendant.

No other challenges to the complaint shall be entertained by the court.

Note: Section 10(c) is a radical departure from current class action procedures.

*Under statutes and decades of court decisions, consumers must overcome multiple legal hurdles before they can prosecute a lawsuit. One of them is a motion by the defendant to dismiss the case.⁵⁵ Another (see *Reboot Required* at p. 120) requires consumers to meet rigorous “class certification” standards before the case can move forward.⁵⁶ The standards governing these motions have been tightened by court decisions in favor of corporations.*

Depending on where the case is filed, defendants can base a motion to dismiss a complaint on a number of grounds, one being that the complaint fails to state a cause of action upon which relief can be granted. If a defendant is successful, the case will be dismissed and will not proceed (unless a plaintiff successfully appeals the court’s ruling). In a pair of decisions in 2007 and 2009,⁵⁷ the U.S. Supreme Court imposed a requirement that plaintiffs in federal court provide some proof in support of the facts they allege in the complaint – at the start of the case, before the plaintiff has been given the opportunity to obtain evidence from the defendant. This has made it much more difficult for plaintiffs to bring cases.

The second legal hurdle under current practice is the requirement that the court certify the case to proceed as a class action. Defendants almost always challenge the motion for class certification.⁵⁸ A court ruling denying class certification prevents a case from ever reaching the stage where the merits of the lawsuit are addressed, i.e., where the court determines whether a defendant actually violated the law (unless the plaintiff successfully appeals the decision). If a defendant is unsuccessful, the class action will proceed (unless the defendant successfully appeals the decision or wins a motion for decertification).

*As discussed in *Reboot Required* at pp. 146, obtaining class certification is often difficult for a plaintiff because courts have imposed increasingly complex requirements as to the amount and type of evidence that is necessary. The class certification process*

⁵⁵ Such a motion is also known as a “demurrer” in California state courts.

⁵⁶ In federal court, class certification standards are: numerosity (the size of the class is so numerous that joinder of all consumers in the class is impracticable); commonality (there are questions of law or fact that are common to members of the class); typicality (the claims or defenses of the plaintiff are typical of the claims or defenses of all consumers in the class); adequacy (the plaintiff will fairly and adequately protect the interests of the class). Fed. Rule Civ. Pro. § 23(a). State courts apply similar factors based on the law of the particular state.

⁵⁷ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

⁵⁸ When plaintiffs and defendants settle a class action prior to class certification, the certification of the class proceeds along with the motion to approve the settlement, and class certification is not contested. Courts rarely refuse to certify a class for settlement purposes. As a practical matter, all that the settling parties have to do is explain in a general way how the class certification factors have been met, without having to meet the same evidentiary burden that is required when class certification is contested.

is costly and can delay litigation for years, especially when a party loses and appeals the court's decision.

Sections 10(b) and (c) revise this process on a large scale, eliminating redundancies and the procedural hurdles that improperly derail just cases. Under Section 10(c), a defendant has a single opportunity to challenge the complaint's allegations that a defendant has violated the Act (the standard under Section 10(b)(1) and whether the Representative Action can proceed on behalf of the group of affected consumers under Sections 10(b)(2) through (4)).

Section 10(b)'s standards eliminate the requirement that plaintiffs set forth specific evidence in support of the case before the case even begins. Instead, the court will be required to presume that the Representative Action is appropriate based on the factual allegations on the face of the complaint. The only exception is when a court determines that, under Section 10(c)(1), the plaintiff has failed to plead facts that, if taken as true, would establish the factors set forth in Section 10(b), the facts alleged are demonstrably false on their face, or the lawsuit was filed with the intention of harassing or extorting a payment from the defendant.

Section 10 also does away with the separate requirement of class certification. Instead, it requires a determination that the case can be brought on behalf of a group of consumers at the very outset of the case. By eliminating the artificial bottleneck caused by class certification, this framework will result in more cases reaching the stage where the merits of the case can be litigated.

This approach does not prevent the parties from filing other types of dispositive motions, like a motion for summary judgment. It also does not change any of the rules governing motion practice, such as those that permit plaintiffs to file opposition briefs and defendants to file reply briefs.

- (2) The court shall make any of the following determinations in response to the motion to dismiss:
 - (A) The plaintiff has pled facts that, if taken as true, establish the factors set forth in subsection (b), and the motion is denied.
 - (B) The motion is granted; however, the plaintiff shall be permitted to amend the complaint to plead facts that, if taken as true, establish the factors set forth in subsection (b).

- (C) As a matter of law, the facts, even if taken as true, do not establish the factors set forth in subsection (b). If the court finds that as a matter of law, the facts, even if taken as true, do not establish the factors set forth in subsection (b), the court shall grant the motion.
- (D) The facts are demonstrably false on their face. If the court finds that the facts are demonstrably false on their face, the court shall grant the motion.
- (E) The Representative Action was filed with the intention of disturbing or extorting a payment from the defendant. If the court finds that the Representative Action was filed with the intention of disturbing or extorting a payment from the defendant, the court shall grant the motion.

(3) **Failure to challenge representative claims.** If a defendant does not file a motion to dismiss representative claims, the plaintiff is presumed to have pled facts that, if taken as true, establish the factors set forth in subsection (b). The court shall issue an order finding that the plaintiff has pled facts that, if taken as true, establish the factors set forth in subsection (b).

Note: If a defendant does not challenge the representative claims, the court shall presume that the factors set forth in Section 10(b) have been met, and the plaintiff is therefore empowered to proceed to litigate the case on behalf of all affected consumers.

(d) **Appealability of court order on representative claims.** An order granting or denying a motion to dismiss representative claims is immediately appealable.

(e) **Right of the consumers on whose behalf representative claims are asserted to decide participation.** If the court issues an order finding that the plaintiff has pled facts that, if taken as true, establish the factors set forth in subsection (b), the consumers on whose behalf representative claims are asserted shall be provided the opportunity to exclude themselves from participation in the Representative Action pursuant to subsection (f).

(1) Consumers who exclude themselves from participation in the Representative Action do not release their right to sue a defendant for the causes of action that arise out of the identical factual predicate to the causes of action pled in the complaint.

- (2) Consumers who do not exclude themselves from participation in the Representative Action release their right to sue a defendant for the causes of action that arise out of the identical factual predicate to the causes of action pled in the complaint.
- (3) If the court grants a motion for settlement approval pursuant to Section 14, the consumers on whose behalf representative claims are asserted shall be provided a second opportunity to exclude themselves from participation in the Representative Action.

Note: Section 10(e) sets forth the rights of the consumers on whose behalf representative claims are asserted when a court finds that a plaintiff has met the requirements of Section 10(b), primarily the right of a plaintiff to exclude themselves from the litigation. The United States Supreme Court has held that, in class action lawsuits seeking money as relief, class members have a constitutional right to exclude themselves from the lawsuit and to receive notice of that right.⁵⁹ (The Supreme Court has not made any decisions as to whether this due process right exists for class actions seeking only injunctive relief as a remedy.⁶⁰)

Sections 10(e)(1) and (2) track the current practice when a class has been certified: consumers who exclude themselves from participation in a Representative Action under Section 10(e)(1) are free to file their own individual lawsuit against a defendant, but they will be barred from receiving any relief from a trial or a settlement in the Representative Action from which they excluded themselves. Consumers who do not exclude themselves from participation under Section 10(e)(2) release their right to sue a defendant for the causes of action that arise out of the identical factual predicate to the causes of action pled in the complaint, in exchange for obtaining any relief from a trial or a settlement in the Representative Action. If the lawsuit is ultimately dismissed, these consumers are not permitted to bring a subsequent lawsuit challenging the same conduct (unless, pursuant to Section 10(h), the court decides to preserve consumers' rights to sue in the furtherance of justice and based on the posture and progress of the Representative Action).

In other words, consumers are not allowed to both bring their own lawsuit and benefit from the Representative Action.

Section 10(e)(3) provides consumers with a second opportunity to exclude themselves from participation in a Representative Action if a settlement has been reached. This is

⁵⁹ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

⁶⁰ Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 *Loy. U. Chi. L.J.* 545, n. 3 (2013).

not always a consistent practice under current law. Federal Rule of Civil Procedure 23 gives courts discretion as to whether a second notice and opportunity to exclude is required when a settlement is proposed after class certification has been litigated.⁶¹ Some courts will allow a second opportunity for exclusion; others do not.⁶² Providing consumers with a second opportunity to exclude themselves from participation once a settlement has been reached is important because it allows consumers to review the actual terms of a settlement and make an informed decision whether to participate in the settlement. But, consistent with current practice, consumers who do not exclude themselves from participation under Section 10(e)(2) would have no further opportunity to exclude themselves from participation if the Representative Action is not resolved by settlement; they would be bound by the outcome of the case.

(f) Notice of rights under the Representative Action. If the court issues an order finding that the plaintiff has pled facts that, if taken as true, establish the factors set forth in subsection (b), the court shall order the parties to provide a notice of representative claims to the consumers on whose behalf the representative claims are asserted, consistent with all of the following:

(1) The notice of representative claims shall comply with the plain language and readable format requirements of Section 15(b) and include all of the following:

(A) information about the court proceeding, including the location and contact information for the court in which it is pending;

(B) a description of the case, including the nature of the representative claims in the case;

(C) a statement explaining how the recipient can confirm that they are a consumer on whose behalf a representative claim is asserted;

(D) detailed information explaining a consumer's right to exclude themselves from participation in the Representative Action, what happens when a consumer excludes or does not exclude themselves, and how a consumer may exclude themselves;

(2) The consumers on whose behalf representative claims are asserted shall be provided the opportunity, no less than sixty days from the date the notice

⁶¹ Fed. Rule Civ. Proc. § 23(e)(4).

⁶² See, e.g., *Low v. Trump Univ., LLC*, 881 F.3d 1111 (9th Cir. 2018).

is distributed, to submit requests to exclude themselves from participation in the Representative Action.

- (3) The consumers on whose behalf representative claims are asserted shall be provided notice by U.S. mail and direct digital communication, if contact information is available.
- (4) The consumers on whose behalf representative claims are asserted shall be provided the opportunity to exclude themselves from the Representative Action by U.S. mail and direct digital communication.
- (5) If the identity and location of consumers on whose behalf representative claims are asserted cannot be determined, the parties may utilize media notice consistent with Section 15(e).
- (6) Consumer counsel shall draft and provide the text and format of all notices required by subsection (f) to a defendant for review. The parties shall present disputes related to these notice requirements to the court for resolution.
- (7) A defendant shall pay for all costs associated with the notice of representative claims. If the plaintiff's action is dismissed by a judgment, the court may order the plaintiff to reimburse the defendant for the cost of the notice of rights under the Representative Action if the court finds that the Representative Action was frivolous.

Note: *In class actions, notice is how class members are informed about their right to exclude themselves. The U.S. Supreme Court considers notice to be an “elementary and fundamental requirement of due process”⁶³ under the Constitution. That’s because, as noted above, class members release their right to sue a defendant in exchange for the benefits they receive – unless they exclude themselves from participation. The information required to be in a notice under Section 10(f) – notifying them of these rights – is similar to the information required to be in a notice of class certification under federal law.⁶⁴*

The cost of notice can be significant, depending on how it is delivered to the consumer. In current class actions, the parties seeking class certification (the plaintiffs) normally bear the cost of distributing a notice of class certification to class members, then seek

⁶³ *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950).

⁶⁴ See Fed. Rule Civ. Proc. § 23(c)(2).

to have the costs recovered if they prevail in trial or through a settlement.⁶⁵ The expenses associated with notice can exert enormous financial pressure on plaintiff's counsel to settle a case.

To eliminate this pressure, Section 10(f)(7) requires a defendant to bear the burden of the cost of notice. A court order finding that a plaintiff has pled facts that, if taken as true, establish the factors set forth in Section 10(b) represents a determination that the Representative Action has merit, and therefore it is reasonable to place the burden on a defendant to pay the cost of notice rather than upon the harmed consumers. Moreover, this Act only applies to entities that have gross annual revenues in excess of \$25 million; they are in a better financial position to absorb the costs of notice than consumers. Section 10(f)(7) also contains a provision that acts as a safety valve against Representative Actions where the defendant ultimately wins, by giving the court discretion to require plaintiffs to reimburse defendants for the cost of the notice if the court finds that the action was frivolous.

(g) **Motion for notice of representative claims.** Consumer counsel shall submit a motion for notice of representative claims to the court for approval. If the court approves the motion, the notice shall be issued within sixty days of the court's order. If the court does not approve the motion, the plaintiff may amend the notice and resubmit the motion.

(h) **Voluntary dismissal of representative claims.** If the court issues an order finding that the plaintiff has pled facts that, if taken as true, establish the factors set forth in subsection (b), and the exclusion period has ended following the distribution of notice of representative claims, a representative claim shall not subsequently be voluntarily dismissed without the approval of the court. If the plaintiff moves to voluntarily dismiss the Representative Action, the court shall have the discretion to preserve, in the furtherance of justice and based on the posture and progress of the Representative Action, the right of the consumers who did not exclude themselves to sue a defendant for the causes of action that arise out of the identical factual predicate to the causes of action pled in the complaint. If the court approves the dismissal, notice of the dismissal shall be provided to consumers in a manner specified by the court.

Note: Voluntary dismissal occurs when the representative plaintiff decides not to further pursue a case. Sometimes plaintiffs in class actions voluntarily dismiss their cases for unknown reasons. Section 10(h) would require a representative plaintiff who

⁶⁵ Federal Judicial Center, *Manual for Complex Litigation (Fourth)*, § 21.311 (2004).

wishes to abandon a case to seek court approval before voluntarily dismissing it – to protect the consumers on whose behalf viable representative claims are asserted.

As explained above, under Section 10, once a court issues an order finding that a plaintiff has established the factors set forth in Section 10(b), and notice has been distributed, consumers are bound by any subsequent orders in the Representative Action, including the disposition of the case, whether in favor of or against consumers.

In one potential scenario, a representative plaintiff could voluntarily dismiss their case after notice of representative claims goes out and after the window to exclude oneself from participation has closed (meaning, at that point, consumers are bound), but before any determination about the defendant’s liability has been made. In this instance, it would be unfair for a consumer to be bound by the representative plaintiff’s decision – thus, Section 10(h) provides the court with the discretion to decide whether those consumers who did not exclude themselves from participation should have their rights restored so that they can pursue litigation against the defendant. The court’s decision must be in the furtherance of justice and based on the posture and progress of the Representative Action. (Conversely, if a determination has been made that the defendant is not liable – i.e., did not violate this Act – then consumers would still be bound by that decision, and it would not be appropriate for the court to “unbind” consumers who did not exclude themselves.)

Regardless of whether a representative plaintiff voluntarily dismisses their case when no determination of liability has been made and a court decides to “preserve, in the furtherance of justice and based on the posture and progress of the Representative Action, the right of the consumers who did not exclude themselves to sue a defendant” for the same conduct pursuant to Section 10(h), or whether consumers remain bound after a plaintiff’s voluntary dismissal, the court is required under Section 10(h) to direct notice to consumers. This is important because consumers must be notified when a Representative Action⁶⁶ is dismissed: they need to know whether they still have the right to sue a defendant for the conduct underlying the Representative Action. As the context may vary widely, Section 10(h) gives the court discretion in determining the manner in which such consumers are notified.

⁶⁶ See, e.g., Cal. Rules of Court, Rule 3.770.

§ 11 Representative Plaintiff.

- (a) **General.** When a court determines that the plaintiff has established the factors set forth in Section 10(b), the plaintiff is automatically appointed to serve as a representative plaintiff.
- (b) **Standards for representative plaintiff.** In order to remain a representative plaintiff, a plaintiff shall meet all of the following conditions:
- (1) participate fully in the action, such as by testifying at deposition and trial, producing documents, and answering written interrogatories;
 - (2) acknowledge that any resolution of a Representative Action, shall be in the collective interests of the consumers on whose behalf the representative claims are asserted and is subject to court approval;
 - (3) make every effort to provide their counsel and the court with relevant facts of which they are aware; and
 - (4) have no interest that conflicts with the interests of the consumers on whose behalf the representative claims are asserted;
- (c) **Challenge to the representative plaintiff.** Upon a motion presenting evidence establishing that the representative plaintiff substantially fails to meet the qualifications set forth in subsection (b), the court shall disqualify the representative plaintiff.

Note: Under Section 11(c), either a defendant or another representative plaintiff (in a Joint Representative Action) may challenge a representative plaintiff at any time by presenting evidence establishing that they fail to meet the qualifications set forth in Section 11(b).

- (d) **Substitution of a representative plaintiff.** If the court grants a motion to disqualify a representative plaintiff, the court shall permit the consumer's counsel to identify and substitute a new representative plaintiff within sixty days. Disqualification of the representative plaintiff shall not affect the court's finding that the complaint pled facts that, if taken as true, establish the factors set forth in Section 10(b).

Note: Under the current class action framework, the court must find that the plaintiffs are able to “fairly and adequately protect the interests of the class.”⁶⁷ Sections 10 and 11 do not require the court to make that finding. However, Section 11(b) contains safeguards to ensure that a representative plaintiff will protect the interests of the consumers on whose behalf representative claims are asserted throughout the litigation. Though Sections 10 and 11 have eliminated the requirement that the court make an affirmative finding of adequacy, the appointment of the representative plaintiff may be challenged pursuant to Section 11(c) if there is evidence that a representative plaintiff is unable to meet the qualifications set forth in Section 10(b).

(e) **Whistleblower representative plaintiff.** If a representative plaintiff is a current or former corporate executive, an employee, agent, or assign of a defendant and their direct and independent knowledge formed the original factual basis upon which the allegations in a Representative Action were asserted, they shall be entitled to all relief necessary to protect and compensate them if they are discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because the employee provided, caused to be provided, or is about to provide information relating to any violation or incipient violation of this Act.

⁶⁷ Fed. Rule Civ. Proc. § 23(a)(4).

§ 12 Lead Counsel.

- (a) **General.** If multiple Representative Actions have been coordinated or consolidated into a Joint Representative Action, the court that has been designated to adjudicate the cases shall appoint one or more attorneys to act as lead counsel in the Joint Representative Action.

Note: When multiple cases are filed against the same defendant alleging similar causes of action based on similar facts, they are usually “coordinated” (adjudicated before the same judge but as separate cases) or “consolidated” (combined into one case). An independent judicial body usually determines which court should manage and adjudicate the cases. For example, the Judicial Council of California is responsible for deciding which court will preside over a group of similar cases. The Judicial Council of California has issued rules and procedures by which it handles such matters.⁶⁸ Similarly, the Judicial Panel on Multidistrict Litigation handles the coordination or consolidation of similar federal cases and has its own rules and procedures.⁶⁹

This Act does not address procedures for the coordination or consolidation of cases into a joint proceeding. However, this Act proposes some procedures for Joint Representative Actions once they have been sent to a particular court for adjudication.

Once a court has been designated to adjudicate a Joint Representative Action, it must appoint the attorneys who will lead the prosecution of the representative plaintiffs’ cases. Choosing attorneys and defining their duties encourages efficiency and eliminates unnecessary duplication when multiple law firms are involved in a case. No comprehensive set of rules presently exists to guide this process. Section 12 provides rules for the appointment of attorneys to lead Joint Representative Actions.

- (b) **Standard for lead counsel.** The court shall appoint as lead counsel the attorney or attorneys best able to represent the interests of the consumers on whose behalf representative claims are asserted in the Joint Representative Action, based on all of the following factors:

- (1) the work that consumer counsel has done in identifying, investigating, or advancing the representative claims to date;

⁶⁸ See California Court, *Civil Case Coordination*, <https://www.courts.ca.gov/27922.htm> (last visited Nov. 1, 2021).

⁶⁹ United States Judicial Panel on Multidistrict Litigation, <https://www.jpml.uscourts.gov> (last visited Nov. 1, 2021).

- (2) consumer counsel's experience in handling Representative Actions, class actions, and other complex litigation involving the type of causes of action asserted in the action, including the following information:
 - (A) the outcome of consumer counsel's cases, focusing on the relief obtained;
 - (B) the extent to which other litigation pursued by consumer counsel met the purposes and requirements of this Act;
 - (C) if a trial or district court's approval of a settlement negotiated by counsel was reversed by an appeals court based on an objection or a statement of concern pursuant to Section 16, the terms of a settlement, the nature of the objection or statement of concern, and the outcome of the objection or statement of concern.
- (3) whether consumer counsel's firm has demonstrably adequate resources to conduct the prosecution of the Joint Representative Action and has committed to use such resources to prosecution of the Joint Representative Action;
- (4) consumer counsel's litigation plan for the action, including the substance and timing of anticipated motions and discovery;
- (5) whether consumer counsel adequately reflects the diversity of legal talent available;
- (6) whether consumer counsel works for a nonprofit organization that has a demonstrated history of working on the matters at issue in the Representative Action;
- (7) **Factors not to be determinative.** The following factors shall not be determinative of the choice of lead counsel:
 - (i) Whether the representative plaintiff represented by consumer counsel was the first party to file a complaint;
 - (ii) The number of Representative Actions, class actions, or other complex litigation previously filed and litigated by consumer counsel.

Note: Sections 12(b)(1) through (6) set forth the factors for a court to consider when appointing lead counsel in a Joint Representative Action. These factors are more detailed but generally consistent with the factors that courts currently consider and with “best practices” published by academic institutions.⁷⁰

Section 12(b)(7) highlights two factors that are frequently the basis for appointment of lead counsel under current practice but are not to be considered determinative under this Act.

First, it is not unusual for courts presiding over class actions to appoint as lead counsel the lawyers who are the “first to file” a lawsuit. However, winning the “race to the courthouse” may come at a significant cost. Being the first counsel to file does not necessarily establish that they are the best choice for a leadership position; in fact, being the first to file may be an indication that a complaint was drafted hastily and not investigated as thoroughly as related complaints filed later. Conversely, being first to file may reflect that counsel has worked hard to uncover wrongdoing when no one else was paying attention and figured out how to challenge illegal conduct before others have. Thus, Section 12(b)(7)(i) codifies the concept that first to file can be a factor, but should not be the determinative factor, in who gets to be lead counsel.

The same is true with respect to the number of cases a particular counsel has pursued in the past. Section 12(b)(7)(ii) prevents the court from appointing lead counsel solely based on the number of cases counsel has previously filed. While filing and litigating a large number of cases is evidence of experience, repeated appointment of the same attorneys as lead counsel is a pervasive problem in aggregate litigation. It prevents equally qualified attorneys from having the chance to be lead counsel and undercuts efforts to expand the diversity of skills and viewpoints. The factors laid out in Sections 12(b)(1) through (6) are sufficient to determine whether attorneys have the experience to be appointed lead counsel without taking into consideration the volume of cases an attorney has filed.

(c) Responsibilities of lead counsel. The responsibilities of lead counsel include, but are not limited to, all of the following:

⁷⁰ See, e.g., *Inclusivity and Excellence: Guidelines and Best Practices for Judges Appointing Lawyers to Leadership Positions in MDL and Class-Action Litigation* Text of Guidelines and Best Practices, James F. Humphreys Complex Litigation Center, George Washington Law School (Mar. 15, 2021), https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/3-Page_Summary_Report_and_Signatories_List_3.16.21.pdf; *Guidelines and Best Practices for Large and Mass-Tort MDLs*, Bolch Judicial Institute, Duke Law School (Sep. 2018), <https://judicialstudies.duke.edu/wp-content/uploads/2018/09/MDL-2nd-Edition-2018-For-Posting.pdf>.

- (1) establishing a litigation plan and making strategic decisions;
- (2) implementing a process for communicating key litigation events, deadlines, and other important information to all other consumer counsel;
- (3) drafting and filing motions;
- (4) drafting and conducting discovery;
- (5) if necessary or appropriate for the prosecution of the Representative Action, delegating tasks to other consumer counsel;
- (6) communicating and negotiating with defense counsel;
- (7) communicating with the court;
- (8) presenting arguments to the court;
- (9) conducting settlement negotiations, if applicable;
- (10) if necessary or appropriate for the prosecution of the Representative Action, establishing committees for the prosecution of the action.

***Note:** When establishing a leadership structure in class actions, many courts do not apply any consistent legal standards to justify the selection of specific attorneys; nor do they specify the scope of authority of those in leadership positions.⁷¹ Sections 12(b) and (c) formulate a concrete set of rules to govern the appointment process and ensure that the determination of a leadership structure is based on fair criteria.*

- (d) **Motion to be appointed lead counsel.** Consumer counsel in a Joint Representative Action may submit a motion to be appointed lead counsel. The motion shall address the factors set forth in subsection (b) and explain how proposed lead counsel will meet the responsibilities set forth in subsection (c).
- (e) **Hearing on the motion to be appointed lead counsel.** The court shall hold a hearing on all motions to be appointed lead counsel within thirty days of the filing of such a motion.

⁷¹ See David L. Knoll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders*, 24 Lewis & Clark L. Rev. 433 (2020).

(f) **Denial or absence of motion.** If the court denies a motion to be appointed lead counsel, or, in the absence of a party submitting a motion, the court may accept a stipulated proposal from counsel, or invite any plaintiff's counsel to submit a motion to be appointed lead counsel.

(g) **Liaison counsel.**

(1) **Appointment of liaison counsel.** The court may appoint liaison counsel if the nature of the litigation or number of the consumer counsel involved in the case warrant the appointment. The court shall invite consumer counsel to submit a motion to be appointed liaison counsel. The court shall consider the factors set forth in subsection (b) when appointing liaison counsel.

(2) **Responsibilities of liaison counsel.** Liaison counsel is an administrative role with all of the following responsibilities:

(A) facilitating communications between the court and other consumer counsel, including coordinating scheduling with the court;

(B) ensuring that all consumer counsel are apprised of important developments in litigation.

(h) **Duty of consumer counsel.** All consumer counsel in a Representative Action have a duty to ensure that the best interests of the consumers on whose behalf representative claims are asserted are protected at every stage in the process. If the court finds after a hearing that lead counsel or liaison counsel are not fulfilling the responsibilities set forth in this Section, the court may remove lead counsel and appoint another consumer counsel as lead counsel.

§ 13 Mediation.

(a) **General.** The parties may choose to enter into private mediation of a Representative Action, but no party shall be required to do so. Compliance with the provisions of this Section shall be a condition precedent to a court's consideration of a proposed settlement of a Representative Action.

(b) **Timing.**

(1) Parties shall not enter into mediation unless all of the following conditions have occurred:

(A) lead counsel has been appointed;

(B) the parties have agreed to an impartial mediator to oversee the mediation;

(C) lead counsel has conducted discovery on the merits of the allegations in the complaint sufficient to allow all consumer counsel to evaluate whether a settlement would be fair, reasonable, and adequate pursuant to Section 14;

(D) if the complaint seeks monetary relief, an analysis of potential recoverable monetary relief has been performed by consumer counsel.

***Note:** Mediation is the first step toward settlement of a lawsuit: it is a procedure by which the parties discuss and negotiate resolution of the dispute with the assistance of an independent third party, usually called a mediator. Mediation is typically a voluntary option, but the parties must comply with the procedures in this section if they choose to mediate a Representative Action.*

Sections 13(b)(1)(C) and (D) protect the efficiency and integrity of a mediation. They ensure counsel does not enter into mediation without having obtained enough information about the causes of action in the Representative Action – through discovery and an analysis of monetary relief – to be able to thoroughly assess the strengths and weaknesses of the merits of the case. Some state statutes, for example California's, provide a mediation privilege that protects from disclosure any information exchanged during or for the purpose of mediation.⁷²

⁷² See, e.g., Cal. Evid. Code § 1119.

Requiring parties to meet the pre-conditions of Sections 13(b)(1)(C) and (D) will better enable them to negotiate, and the court to approve, a settlement that is fair, reasonable, and adequate pursuant to Section 14.

(c) **Notice of mediation.** No later than seven days before the first mediation occurs, the parties shall file a notice of mediation with the court.

(1) **Content of notice.** The notice of mediation shall include all of the following:

(A) the time, date and place for the mediation;

(B) the name of the mediator overseeing the mediation;

(C) the names of the parties and attorneys attending the mediation, including whether persons with final settlement authority will attend;

(D) the mediator's rates and how the mediator will be compensated.

(2) **Joint Representative Action.** In a Joint Representative Action:

(A) Lead counsel shall determine which attorneys in the Joint Representative Action attend the mediation.

(B) Lead counsel shall inform consumer counsel of the date and time of the mediation no later fourteen days before the notice of mediation is filed with the court.

(C) In addition to the factors set forth in subsection (c)(1), the notice of mediation filed with the court shall be accompanied by a declaration from lead counsel stating that lead counsel has complied with subsection (c)(2)(B).

***Note:** Currently, when multiple cases have been filed and lead counsel and the defendant enter into settlement negotiations, lawyers representing other plaintiffs are typically not invited to participate. Section 13(c)(2)(A) follows this practice by permitting lead counsel, and those attorneys invited by lead counsel, to attend a mediation. This promotes efficiency in the process and prevents duplicative efforts by multiple attorneys involved in the litigation. Other attorneys involved in the case should still know what transpired during negotiations even they do not attend a mediation. Section 13(c) ensures transparency to the court, affected consumers, the*

public, and other consumer counsel when lead counsel and a defendant enter into mediation. Section 13(c) requires lead counsel to keep other consumer counsel and their clients informed so that, ultimately, they may be able to assess any proposed settlement that may result.

(d) **Good faith.** Mediation shall be conducted in good faith. Mediation is conducted in good faith if all of the following conditions are present at all times:

(1) the parties communicate honestly;

(2) the actions of the parties do not delay the progress of the case;

(3) a principal who has ultimate authority to settle the case attends on behalf of each party or is available to participate meaningfully in the mediation by voice technology, or such authority has been delegated to counsel in a writing, which shall be presented to the opposing parties;

(4) the parties deal fairly with each other.

(e) **Mediation shall not delay the progress of the case.** Unless otherwise ordered by the court, mediation shall not be a ground for avoiding or postponing a deadline or other obligation imposed by this Act or other law.

***Note:** Not all mediations result in settlement, and it can take years until a settlement is reached. Moreover, a party may agree to enter mediation with the purpose of delaying the progress of the civil case: defense lawyers are paid by the hour and have an incentive to prolong litigation; defendants seek to avoid accountability for as long as possible, or to make the litigation more difficult and costly to pursue. Section 13(e) ensures that mediations do not impede the timely progress of a Representative Action.*

(f) **Mediation report.** No later than seven days after a mediation, the parties shall jointly file a mediation report with the court.

(1) **Content of report.** The mediation report shall describe the progress of the mediation.

(A) **Settlement reached.** If the parties have decided in principle to settle the case, the mediation report shall include all of the following:

- (i) the principal terms of the settlement, including monetary, injunctive, or other relief;
 - (ii) A proposed schedule for filing the motion for settlement approval and the executed settlement agreement. The motion and executed settlement agreement shall be submitted within one hundred and twenty days after the mediation report is filed with the court.
- (B) **Additional mediation.** If the parties do not reach an agreement to settle the case and intend to pursue additional mediations, the mediation report shall include a schedule for such mediations. If and when the parties reach a settlement, the parties shall submit a report to the court containing the information required by subsection (f)(1)(A).
- (C) **No further mediation.** If the parties do not reach an agreement to settle the case and do not intend to pursue additional mediations, the parties shall inform the court in the mediation report. If the action has been stayed, within five days of the filing of the mediation report, the court shall issue an order lifting the stay.

***Note:** The purposes of the mediation report are consistent with the purposes of Section 13 as noted above: to keep the court, affected consumers, the public, and other consumer counsel (if the action is a Joint Representative Action) apprised of the status of the case and to prevent mediation from delaying a case.*

Section 13(f)(1)(A) requires parties who decide to settle to report to the court the general terms of the settlement and a schedule for filing the motion for settlement approval. This is not unprecedented: under current practice, it is not uncommon for parties to submit to the court a summary of the terms or a “memorandum of understanding” related to a settlement prior to presentation of the proposed settlement to the court for approval.

As noted above, the mediation privilege protects information exchanged during and for the purpose of the mediation. Because the parties are simply reporting the progress of the mediation and not the information exchanged during/for the mediation, the mediation privilege is not violated.

- (g) **Stay of Representative Action.** The court shall not stay a Representative Action for more than four months on the ground that the parties are pursuing mediation or settlement. If a case is stayed while the parties are pursuing mediation or settlement, the parties shall provide monthly reports to the court regarding the status of the negotiations.

(h) Non-compliance.

- (1) A court may order a party that violates this Section to pay a civil penalty.
- (2) When determining the amount of a penalty, the court shall consider the gravity of the violation and the impact of the violation on the resolution of the action.

§ 14 Settlement of Representative Claims.

- (a) **General.** A Representative Action may be resolved by settlement if the parties submit a proposed settlement to the court for approval consistent with this Section.
- (b) **Standard for approval.** The parties must establish, and the court must expressly conclude, that the proposed settlement is fair, reasonable, and adequate by analyzing the following factors:
- (1) The nature and value of the monetary, injunctive, or other relief. The court shall not approve a settlement if the valuation of the relief does not appear to be accurately calculated or explained.
 - (2) Whether the proposed settlement terms are a reasonable compromise in light of all of the following:
 - (i) the strength of the representative claims and any defenses to those claims, based on evidence obtained during discovery and presented to the court;
 - (ii) the nature and amount of recovery that the consumers on whose behalf representative claims are asserted could have obtained if the representative plaintiff prevailed on the merits at trial;
 - (iii) the risks, expense, and potential duration of further litigation;
 - (3) Whether the proposed settlement terms comply with subsection (c).

Note: *Under current class action practice, courts look at a variety of factors when assessing whether a settlement is fair, reasonable, and adequate. For example, Federal Rule of Civil Procedure, Rule 23(e)(2), requires federal courts to consider whether: “(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm’s length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claim forms; (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.”*

Section 14 includes some of these traditional factors but creates a much more stringent framework. For example, the factors set forth in Sections 14(b)(1) and (2) capture

many of the factors required to be assessed by Rule 23(e)(2). This Act dramatically differs from current practice, however, by requiring (in Section 14(b)(3)), that the fair, reasonable, and adequate assessment meet the conditions of Section 14(c).

(c) Other settlement terms.

(1) Confidentiality.

(A) A settlement shall not be confidential in whole or in part, except that:

- (i) personal information of the representative plaintiff or the consumers on whose behalf representative claims are asserted shall be redacted in public settlement documents; and
- (ii) any provision or arrangement permitting a defendant to terminate the settlement based on the number of consumers invoking their right to exclude themselves from participation in the Representative Action, or the amount of the settlement benefits otherwise attributable to such consumers, may be redacted.

(B) Except as provided by Section 14(c)(A)(ii), the parties shall disclose the existence and terms of all agreements made in connection with the settlement.

Note: *As noted previously, public disclosure and transparency is essential to maintaining public confidence in the judicial system. Section 14(c)(1)(B) is similar to Federal Rule of Civil Procedure, Rule 23(e)(3), which requires the parties seeking approval to “file a statement identifying any agreement made in connection with the proposal.” Section 14(c)(1)(B) requires more transparency up front: the parties must identify the terms, as well as the existence of, any side agreements that are separate from the settlement.*

Section 14(c)(1) ensures that the settlement agreement in a Representative Action (and all accompanying information not otherwise determined by the court to be confidential under Sections 6(b)(4) and 6(b)(2)) is public, with two limited exceptions: first, Section 14(c)(1)(A)(i) protects confidential personal information of a representative plaintiff or the consumers on whose behalf representative claims are asserted for privacy purposes.

Second, Section 14(c)(1)(A)(ii) permits “blow up clauses” or “blow provisions” to remain confidential. A blow up clause is a provision in a settlement that allows a defendant to terminate the agreement if a specified number of consumers exclude

themselves from participation in it. Courts are split on whether these blow up provisions must be public, and it is a complicated question.⁷³ Public disclosure of the threshold can be problematic: attorneys may threaten to use the information to recruit the required number of exclusions for the purpose of extracting a payment from class counsel. One organization has termed these type of lawyers as “opt-out farmers” because they “harvest” class members to exclude themselves from a settlement for this improper purpose.⁷⁴

(C) A settlement shall not prohibit or limit a party or a party’s counsel’s public communications concerning the Representative Action or the settlement.

Note: Some defendants seek to prevent the public from learning about a settlement, because they do not want the public to be aware of the allegation in the lawsuit, or simply to avoid the ensuing embarrassment. They insist that the settlement contain a provision preventing counsel for either party, representative plaintiffs, or a defendant from publicly speaking about the settlement. Section 14(c)(1)(C) prohibits such voluntary “gag orders.”

(2) **Future representation.** A settlement shall not prohibit or otherwise discourage counsel representing a party to the settlement agreement from representing consumers in a Representative Action or any other action against a defendant or any other related entity in the future.

Note: Some states’ ethics rules make it improper for a lawyer representing a defendant to request that counsel for plaintiff agree as part of a settlement to not to sue that defendant in the future.⁷⁵ Section 14(c)(2) codifies this rule.

(3) **Denial of liability.** A settlement shall not include a statement that a defendant denies or does not admit liability for the conduct underlying the action.

⁷³ See Louis C. Ludwig, *Plaintiffs’ Attorneys and “Blow Provisions”*: An Uneasy Coexistence, Pomerantz Monitor (Aug. 2019), <https://pomlaw.com/publications/2019/8/12/plaintiffs-attorneys-and-blow-provisions-an-uneasy-coexistence>.

⁷⁴ Jocelyn D. Larkin, *The Underground Guide to Class Action Slang*, Impact Fund (Feb. 16, 2016), <https://www.impactfund.org/legal-practitioner-blog/the-underground-guide-to-class-action-slang>.

⁷⁵ John K. Villa, *Practice Restrictions in Settlement Agreements*, ACC Docket (Jun. 2007), https://www.wc.com/portalresource/lookup/poid/Z1tOI9NPluKPtDNIqLMRVPMQiLsSwa3Dq0!/document.name=/Line%20310_PUBLICATION%20-%20Practice%20Restrictions%20in%20Settlement%20Agreements.pdf.

Note: As a condition of settling, defendants almost always demand that the settlement agreement include a statement that defendants did not actually violate the law, or that they do not admit they did anything wrong. Sometimes these statements are simply face saving; other times, they are intended to avoid admissions of responsibility that could lead to shareholder lawsuits, or criminal or other law enforcement actions. However, these exculpatory statements implicitly suggest the lawsuit was unmeritorious or even frivolous, and/or that the defendant is unrepentant. Defendants should not be allowed to make such a denial. In 2011, Judge Rakoff in the Southern District of New York denied approval of a settlement between the Securities and Exchange Commission and Citigroup over allegations that the company had misled investors concerning the value of speculative securities connected to the 2008 financial crash, in part because the settlement did not contain an admission of liability by Citigroup. Judge Rakoff's decision was highly controversial and it was ultimately overturned by the Second Circuit Court of Appeal on the ground that a district court judge had no authority to require an admission of liability as a condition for approving a settlement.⁷⁶

Section 14(c)(3) prevents defendants from denying responsibility as part of a settlement agreement; defendants would, however, be free to include language stating that liability was never determined by a court.

(4) **Release.** The release in a settlement shall not include any of the following:

- (A) a release of causes of action that do not arise out of the identical factual predicate to the causes of action pled in the complaint;
- (B) a release of causes of action that may or will arise in the future;
- (C) a waiver of unknown causes of action.

Note: A release is an agreement by the plaintiff(s) – and those on whose behalf the Representative Action was brought – that they will never bring another lawsuit against a defendant for the same misconduct that occurred during the specific period of time covered by the current lawsuit. Defendants properly seek such a release to protect themselves from repeat litigation by consumers over the same specific misconduct. Releases are “a standard feature of class action settlements.”⁷⁷ However, corporate defendants often try to obtain a release that could be interpreted to bar lawsuits over unrelated or future related misconduct. Sections 15(c)(4)(A) through (C) prevent defendants from including an overbroad release that would free defendants from

⁷⁶ *United States SEC v. Citigroup Global Mkts.*, 752 F.3d 285 (2nd Cir. 2014).

⁷⁷ *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015).

liability beyond the scope of the settlement and act as a “get out of jail free” card for unrelated or future misconduct.

(5) Distribution of Compensation.

(A) **Monetary relief.** A settlement providing monetary relief shall provide for the distribution of that relief directly to individual consumers. If after taking into consideration a credible estimate by the parties and the settlement administrator of the cost of identifying, locating, and compensating each consumer entitled to monetary relief, the court determines that direct distribution of monetary relief would, on average, cost each affected consumer more than they would receive in monetary relief, it may approve *cy pres* relief pursuant to subsection (c)(5)(B) in lieu of monetary relief.

(i) **Claim forms.** A settlement shall not require consumers to submit a claim form to obtain relief unless the court determines that:

- (I) the identity and location of a consumer entitled to monetary relief cannot be ascertained because a defendant or a third party does not have such information in its possession or is not able to obtain the information;
- (II) the amount of monetary or other relief to which each consumer is entitled cannot be ascertained without a claims process because a defendant or a third party does not have such information in its possession or is not able to obtain the information;
- (III) the settlement provides alternative forms of relief from which consumers on whose behalf representative claims are asserted may choose and each form of relief is of equal value.

Notes: *Corporations ordinarily have, or can access, the information (e.g., name, contact information) necessary to send payments directly to consumers without requiring them to submit any paperwork. But defendants often try to negotiate a settlement that requires consumers to submit a claim form in order to receive their compensation. Why? As discussed in Reboot Required (at pp. 159-162), claim forms are confusing and time consuming to fill out and submit. Defendants realize that many, if not most, class members will not go to the trouble. Thus, the vast majority of consumers who are victimized by a defendant’s actions ultimately do not receive the compensation to which they are entitled in settlements that require claim forms. For this reason, the Federal Judicial Center advises federal judges to “consider whether a*

*claims process is necessary at all. A defendant may already have the data it needs to automatically pay the claims of at least a portion of class members who do not opt out.*⁷⁸

Section 14(b)(5)(A)(i) ensures that claim forms are used only when truly necessary. One of those situations is set forth in Section 14(b)(5)(A)(i)(I), which permits claim forms if the court determines that “the identity and location of a consumer entitled to monetary relief cannot be ascertained because a defendant or a third party does not have such information in its possession or is not able to obtain the information.” This situation may arise, for example, in a false advertising case over deceptive food labeling – the defendant (or a third party) may not have the internal records of the names and contact information of the consumers who bought the deceptively labeled food at various supermarkets around the country, in response to advertising (in contrast to an insurance company or a subscription service company, which would have the names and addresses of all consumers who were impacted by one of their practices).

If the defendant cannot identify and locate these consumers through records it keeps or by other means, Section 15(e) permits parties to use media notice – referred to as “publication notice” under current practice – and defined by Section 21(48) as “notice distributed through online or paper publications, websites, social media, or any other public medium through which consumers may visually obtain information.” Settlements would have to utilize media notice in order to provide the affected consumers with a claim form – it is the only way the parties can meet the claims rate benchmark set forth in Section 14(g)(2)(B).

Sections 14(b)(5)(A)(i)(II) and (III) allow claim forms in circumstances where the identity and location of the consumer is available, but further information from the consumer is needed.

- (ii) **Coupons.** A settlement shall not provide coupons as monetary relief. However, a settlement may provide for a monetary credit to a consumer on whose behalf representative claims are asserted who has previously established and currently maintains an active account with a defendant if the amount of the credit is \$10 or less, and a defendant will directly provide the credit to the account without requiring the consumer to submit a claim form.

⁷⁸ Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd Ed. 2010), <https://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf>.

Note: *There has been much criticism of settlements that provide compensation in the form of coupons or other non-cash options that class members can only redeem by buying products or services from a defendant. As discussed in Reboot Required at pp. 162-163, such arrangements primarily benefit a defendant, not consumers. That's because (1) consumers are unlikely to redeem coupons (evidence shows that redemption rates in class actions that provide coupon relief are 3% or less⁷⁹), particularly when the coupon amount is modest and (2) requiring consumers to continue do business with a defendant in the future rewards a defendants' wrongdoing.*

The federal Class Action Fairness Act (CAFA) disincentivizes lawyers from utilizing coupons in settlements in federal court, by specifying that their attorneys' fees must be based on the total dollar value of the coupons that are redeemed.⁸⁰ Rather than disincentivizing the use of coupons, Section 14(b)(2)(E)(iii) outlaws such "relief," except in a very limited circumstance. For example, if consumer is presently purchasing a music streaming service for which the consumer pays a monthly fee, and the amount being provided by the settlement is small (\$10 or less), then it would be appropriate to permit settlement relief in the form of a credit to the consumer's account with the company (assuming that the court has approved that amount of compensation under the standard of approval set forth in Section 14(b)).

- (iii) **No further engagement with defendant.** A settlement shall not require a consumer on whose behalf representative claims are asserted to engage in an additional transaction with a defendant in order to obtain monetary relief.
- (iv) **Unclaimed or undeliverable funds.** Where there are unclaimed or undeliverable funds from a settlement, such funds shall be distributed proportionally back to consumers. If after taking into consideration a credible estimate by the parties and the settlement administrator of the cost of identifying, locating, and compensating each consumer entitled to the unclaimed or undeliverable funds, the court determines that distribution of unclaimed or undeliverable funds would, on average, cost each affected consumer more than they would receive in monetary relief, it may approve *cy pres* relief pursuant to subsection (c)(5)(B) in lieu of distributing the unclaimed or undeliverable funds.

Note: *Money from a settlement may not make into the hands of all affected consumers, for several reasons. Checks may not be cashed; money from checks or funds may be*

⁷⁹ Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 Geo J. Legal Ethics 1395, 1396-97 (2005).

⁸⁰ 28 U.S.C. § 1712; *In re HP Inkjet Printer Litig.*, 716 F.3d 1173 (9th Cir. 2013).

returned as undeliverable; or consumers may not submit the claim form. Section 14(c)(5)(A)(iv) clarifies what must happen when there are undistributed settlement funds. In such cases, the settlement shall require a second distribution of funds to consumers on whose behalf representative claims were asserted, in the same manner as the previous distribution, unless the court determines that distribution of unclaimed or undeliverable funds is economically impractical. Section 14(c)(5)(A)(iv) requires that funds be distributed “proportionally” to consumers – this means that the unclaimed or undelivered funds be distributed using the same calculation method as the initial distribution. For example, if the initial distribution was an equal, lump sum payment to consumers, then unclaimed or undelivered funds would be distributed in lump sum, equal amounts to those consumers. Or, if the initial distribution provided different amounts to different consumers, the unclaimed or undelivered funds would be distributed based on the same calculation that was used for the initial distribution.

(B) Cy Pres relief.

- (i) *Cy pres* recipients shall be proposed by consumer counsel, or lead counsel if a Joint Representative Action, and approved by the court. A defendant shall not participate in the selection of *cy pres* recipients.
- (ii) Prior to court approval, consumer counsel shall disclose any connection to, or business or personal relationship between, any consumer counsel and a proposed *cy pres* recipient.
- (iii) A court may designate an expert or nonprofit organization to advise the court on potential *cy pres* recipients that meet the requirements of this Section.
- (iv) The court shall approve a proposed *cy pres* recipient if the mission of the proposed *cy pres* recipient is consistent with the purpose of the Representative Action and its underlying causes of action.

Notes: *Sending money directly to people in whose name the case has been brought is always the preferable form of relief to remedy misconduct. Under current law, funds available in a class action settlement are “presumptively the property of the class members”⁸¹ and should be distributed to affected consumers. Section 14(c)(5)(A) requires that settlements providing monetary relief distribute such relief directly to individual consumers if at all feasible.*

But sometimes, after all reasonable efforts are made, there is money left over, as noted above, or it would not be economical to distribute the available funds. “Cy pres” – Latin for “as near as possible” – is a type of relief that has been developed in class action law to address such situations. It distributes money not directly to class

⁸¹ American Law Institute, *Principles of the Law Aggregate Litigation*, p. 256 (2010).

members, but indirectly – to an organization or institution – for the benefit of the persons on whose behalf the litigation was brought. Under the cy pres approach, “class members receive an indirect benefit (usually through defendant donations to a third party) rather than a direct monetary payment.”⁸² Currently, cy pres relief as part of a settlement is typically approved by courts “where the proof of individual claims would be burdensome or distribution of damages costly.”⁸³

Section 14(c)(5)(A) permits cy pres relief if the court determines that direct distribution of monetary relief would, on average, cost each affected consumer more than they would receive in monetary relief. Similarly, Section 14(c)(5)(A)(iv) authorizes a cy pres award where the court determines that distribution of unclaimed or undeliverable funds would, on average, cost each affected consumer more than they would receive in monetary relief.

As noted in Reboot Required at pp. 164-166, questions have arisen regarding cy pres awards to organizations that have little or no relationship to the subject of the lawsuit. Section 14(c)(5)(B)(iv) ensures that the cy pres funds are directed to the most appropriate recipient and therefore benefit the consumers on whose behalf representative claims are asserted.

Moreover, under current class action practice, corporate defendants typically oppose cy pres awards that would support research or advocacy related to the allegations of the complaint. But directing resources to organizations actively involved in protecting consumers against the type of abuses the defendant engaged in is precisely the next best use of the money. Section 14(c)(5)(B)(i) denies the defendant any role in determining the recipient of cy pres funds, leaving it to consumer counsel to propose and the court to approve. Section 14(c)(5)(B)(ii) requires consumer counsel to disclose any “connection” they may have to the proposed cy pres recipient so that any potential conflicts of interest can be identified. Section 14(c)(5)(B)(ii) only requires disclosure because the mere existence of an association, past or present, between consumer counsel and a potential cy pres recipient does not necessarily create a conflict of interest between the consumer counsel and the interests of the consumers on whose behalf the Representative Action was brought, as reflected in the purpose and goal of the litigation. If the disclosure does reveal a conflict of interest, however, the court may decide not to approve to proposed recipient.

⁸² *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).

⁸³ *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011).

(6) Injunctive relief.

- (A) A settlement shall not provide injunctive relief that is unrelated to the practices or acts alleged in the complaint to have violated Section 4 of this Act.
- (B) Unless a court determines that there has been a pertinent change in the law that a defendant was accused of violating, a defendant shall be under a continuing obligation of unlimited duration to comply with injunctive relief ordered by a court.

Note: While monetary relief compensates people for their losses, injunctive relief protects people from being harmed in the future. Injunctive relief typically requires a defendant to stop engaging in practices or acts that the plaintiffs alleged to be illegal. Sometimes the parties to a settlement will agree to prospective relief that requires a defendant to change its conduct rather than to cease the conduct. Injunctive relief protects the public against abuse and avoids the need for future litigation. Injunctive relief is almost always a critical component of any meaningful resolution of a representative action.

Courts must be particularly vigilant with respect to the details of injunctive relief, particularly where future harm to consumers remains a danger. Moreover, plaintiffs' counsel are permitted (and should be encouraged) to request attorneys' fees for their work in obtaining injunctive relief. However, calculating the value of injunctive relief is less exact than for monetary relief. Under current law, if the injunctive relief is overvalued, a defendant appears to be providing more relief than it actually is, and a plaintiffs' attorney may request more attorneys' fees than they deserve.

Section 14(c)(6)(A) ensures that the proposed injunctive relief has value. Injunctive relief that requires a change of defendant's conduct that is unrelated to the Representative Action should not be considered as having any value with respect to the Settlement.

Defendants often push for settlements that provide injunctive relief for a limited duration. When a settlement term expires at a specified date, the term is called a "sunset provision." Sunset provisions allow defendants to resume the challenged conduct after the specified time period has expired. Section 14(c)(6)(B) prohibits "sunset provisions" that terminate the injunctive relief. However, Section 14(c)(6)(B) recognizes that a subsequent change in the laws at issue in the case may nullify the injunctive relief.

- (7) **Reversion.** A settlement shall not permit a defendant to retain, or allow a reversion to a defendant of, any portion of monetary or other relief.

Note: Defendants typically prefer to include a term in settlement agreements that allows them to keep any money that is not distributed to consumers. Permitting wrongdoers to retain money that belongs to consumers permits a defendant to escape full accountability and undermines public confidence in the judicial process. Section 14(c)(7) prohibits defendants from retaining, or, if the funds are temporarily under the control of a settlement administrator or other third party, getting back any of the money intended to be distributed in a settlement.

(8) **Voluntary exclusion from participation in a settlement.**

- (A) A settlement shall provide the consumers on whose behalf representative claims are asserted no less than sixty days from the date that the settlement notice is disseminated to exclude themselves from participation in the proposed settlement.
- (B) A settlement shall provide procedures for the consumers on whose behalf representative claims are asserted to exclude themselves from participation in the proposed settlement through U.S. mail and direct digital communication.

(9) **Settlement administration.**

- (A) The parties shall select an independent settlement administrator to implement the notice and administration plan required by Section 15(j), except that either consumer counsel or a defendant may administer the settlement if the court determines that all of the following conditions are met:
- (i) consumer counsel or a defendant has the resources to administer the settlement;
 - (ii) the settlement does not utilize a claims process;
 - (iii) there are 500 or less consumers on whose behalf representative claims are asserted;
 - (iv) the addresses of all consumers on whose behalf representative claims are asserted are known to the defendant;

- (B) The settlement administrator must demonstrate that it maintains effective security measures that are updated regularly to safeguard and prevent access to or theft of personal information;
- (C) A defendant shall pay for all costs associated with the notice and administration plan required by Section 15;
- (D) Consumer counsel shall draft the text and format of any notices required by the settlement and provide it to a defendant's counsel for review. The parties shall present disputes related to a notice to the court for resolution;
- (E) Costs associated with notice and settlement administration shall not reduce the amount of monetary or other relief to be distributed to consumers.

***Note:** Section 14(c)(9) sets forth ground rules for the administration of a settlement. For the most part, Section 14(c)(9) does not depart from current class action practice: defendants bear the cost of notice and settlement administration, and the parties work together to draft the notices. Generally, having a third-party settlement administrator administer the settlement is the preferable approach, especially when settlements involve many consumers and large amounts of monetary relief. However, in some instances, it may be more efficient to have consumer counsel or defendant administer the settlement. Section 14(c)(9)(A) sets forth the only circumstances which would be appropriate for consumer counsel or a defendant to administer the settlement.*

(d) **Motion for settlement approval.** The court shall not approve a motion for settlement approval unless it includes all of the following information:

(1) **Summary of the case.**

- (A) the legal and factual basis for each cause of action in the complaint;
- (B) the procedural history of the case, including settlement negotiations and/or mediation;

(2) **Discovery.**

- (A) a description of the investigation conducted by consumer counsel prior to filing the complaint;

(B) an overview of the discovery on the merits of the allegations in the complaint that supports the fairness, reasonableness, and adequacy of the settlement pursuant to Section 13(b)(1)(C);

(3) Evaluation of the representative claims.

(A) a credible estimate of the nature and value of each form of relief that consumers on whose behalf representative claims are asserted could have obtained if the plaintiff prevailed at trial;

(B) the risks, expense, and duration of further litigation;

(4) Statement of Compliance with Section 14(c).

(A) the proposed settlement terms, including a detailed description of the monetary, injunctive, or other relief;

(B) the amount and manner of distribution of the monetary or other relief to the consumers on whose behalf representative claims are asserted, including the amount, or an estimate, of what each person will receive;

(C) the amount and proposed recipients of *cy pres* relief, if any;

(D) a description of the scope of the release;

(E) if consumers are required to submit a claim form to receive monetary or other relief, all of the following information shall be included:

(i) a declaration with supporting evidence by an executive of a defendant attesting that either the identity or location of consumers entitled to such relief cannot be determined, or that the amount of such relief to which each consumer is entitled cannot be determined without a claims process;

(ii) a description of each item of information that is required to be provided by consumers who are entitled to such relief and an explanation of why the information is necessary and cannot otherwise be obtained.

(5) Exhibits to motion for settlement approval. The motion for settlement approval shall include all of the following:

- (A) the fully executed settlement agreement;
- (B) discovery that supports granting the motion for settlement approval;
- (C) the proposed notice and administration plan, as required by Section 15(j);
- (D) a report evaluating the notice and administration plan by an independent expert, if required by Section 15(k);
- (E) the schedule for distribution of notice and claim forms, if utilized; the deadline for exclusion from participation; the deadline for the motion for confirmation; and the estimated processing date of claim forms, if utilized;
- (F) a declaration with supporting evidence by an executive of a defendant explaining how the list of consumers receiving monetary or other relief was compiled. If the list is incomplete, the declaration shall so state and explain how persons receiving monetary or other relief are to be identified;
- (G) a declaration from consumer counsel disclosing any connection to, or business or personal relationship between, any consumer counsel and a proposed *cy pres* recipient.

Note: Section 14(d) is generally consistent with current best practices for motions for preliminary approval of class action settlements. Incomplete motions for preliminary approval can lead to delays in settlement approval, which delays relief to consumers and wastes court resources. Two courts in California have led the way in enumerating the contents of a motion for preliminary approval to ensure complete submissions to the court and avoid unnecessary supplemental filings and hearings: The Los Angeles Superior Court has issued guidelines that complement Section 14(d).⁸⁴ Section 14(d) is more detailed than the Los Angeles Superior Court guidelines because incomplete submissions to the court are common. The federal court for the Northern District of California issued similar guidelines to ensure parties submit complete information when applying to the court for settlement approval.⁸⁵

⁸⁴ California Guidelines for Motions for Preliminary and Final Approval of Class Settlement (with comments referencing authorities) Draft (May 3, 2010), <https://www.fjc.gov/sites/default/files/2017/CalClass.pdf>.

⁸⁵ Guidance for Class Action Settlements, United States District Court for the Northern District of California (Dec. 5, 2018), <https://www.cand.uscourts.gov/ClassActionSettlementGuidance>.

(e) Settlement approval hearing(s).

- (1) Within seventy-five days of the filing the motion for settlement approval, the court shall hold a hearing on the motion. The court shall grant the motion if all of the following occur:
 - (A) the motion for settlement approval complies with the requirements of subsection (d);
 - (B) the court requires no additional information or revisions to evaluate the settlement;
 - (C) the court determines that the settlement meets the standards of subsection (b).
- (2) If the court does not grant the motion for settlement approval, the court may take any of the following steps:
 - (A) identify and invite a concerned party to submit a statement of concern;
 - (B) request additional information from the parties;
 - (C) require the parties to amend the notice and administration plan;
 - (D) require an independent notice expert to analyze the notice and administration plan, if not already required by Section 15(k);
 - (E) order supplemental briefing on any point relevant to the evaluation of the settlement;
 - (F) hold additional hearings as necessary until it grants the motion for settlement approval;
 - (G) deny the motion for settlement approval.

Note: Section 14(e) specifies the actions that the court may take at a settlement approval hearing. One significant way in which Section 14(e) departs from current practice is in Section 14(e)(2)(A): the court may invite a “concerned party” to submit a statement of concern (see Section 16 for more on concerned parties). A concerned party may be a person or nonprofit organization that has special experience in the

underlying subject matter. Encouraging these types of outside sources to present their views may assist the court in determining whether a settlement is fair, reasonable, and adequate. For example, a court could invite a nonprofit organization dedicated to consumer privacy rights to weigh in on a settlement that resolves representative claims that a defendant misused consumers' personal information in violation of Section 4(c)(15).

(f) **Motion for confirmation of settlement.** Thirty days after the deadline for consumers to exclude themselves from participation in a settlement pursuant to Section 14(c)(8), the parties shall file with the court a motion for confirmation that includes all of the following:

(1) information on the distribution of the notice, including, but not limited to, the number and percentage of notices that were returned as undeliverable and steps taken by the settlement administrator to update addresses and locate persons entitled to settlement benefits.

(2) if the settlement utilizes a claims process, all of the following:

(A) the number and percentage of claim forms received by the settlement administrator;

(B) such other relevant information as the court may specify.

(3) if the value of the monetary or other relief has changed since the date of approval, a revised estimate of such relief to each consumer entitled to settlement benefits;

(4) the number of consumers who excluded themselves from participation in the settlement;

(5) the number and a copy of any statements of concern submitted pursuant to Section 16;

(6) any responses to statements of concern submitted pursuant to Section 16.

(7) **Exhibits to motion for confirmation.** The motion for confirmation shall include all of the following:

(A) a declaration from the settlement administrator that includes all of the following information:

- (i) how many notices were distributed;
- (ii) how many notices were returned undelivered;
- (iii) how many consumers were required to submit a claim form, if utilized;
- (iv) how many claim forms were submitted;

(B) a timetable for the distribution of monetary or other relief following the court's approval of the motion for confirmation;

(C) a calendar for submission of the settlement compliance reports required by Section 18.

(g) Confirmation hearing(s).

(1) Within thirty days of the parties filing their motion for confirmation, the court shall hold a confirmation hearing. The court shall approve the motion for confirmation if it meets all of the following conditions:

(A) the motion for confirmation complies with the requirements of subsection (f);

(B) the court requires no additional information to evaluate the settlement.

(2) The court may continue the motion for confirmation and make any of the following orders:

(A) if more than 20% of notices were returned as undeliverable, the court may order one or more supplemental notices and an extended deadline for exclusion from the settlement.

(B) when a claims process is utilized pursuant to subsection (c)(5)(A)(i)(I), and less than 20% of persons entitled to settlement benefits have filed a claim form, the court shall order supplemental notice and an extended deadline for claim form submissions.

(C) when a claims process is utilized pursuant to subsection (c)(5)(A)(i)(II), the court shall order supplemental notices and one or more extended deadlines for claim form submission until at least 80% of persons entitled to settlement benefits have filed a claim.

- (D) when a claims process is utilized pursuant to subsection (c)(5)(A)(i)(III), the court shall order supplemental notices and one or more extended deadlines for claim form submissions until at least 80% of persons entitled to settlement benefits have filed a claim.
- (E) the court may order supplemental briefing on any point relevant to the evaluation of the settlement;
- (F) the court may hold additional hearings as necessary until it grants the motion for confirmation;
- (G) the court may deny the motion for confirmation.

Note: *The vast majority of class actions result in settlement. As set forth in Reboot Required at pp. 153-174, class action settlements that result in little to no benefit to the consumers on whose behalf the litigation was brought are problematic. Section 14 addresses those issues and also streamlines the approval process by creating specific requirements for what must be submitted to the court.*

Under current law, class action settlements are reviewed by courts in two phases: preliminary approval and final approval. At preliminary approval, courts typically require little information in order to approve the distribution of notice. Changes to Federal Rule of Civil Procedure 23 in December 2018 were intended to require the settling parties to provide more information about the settlement to the court at the preliminary approval stage than was previously required. This has laudably resulted in federal district court judges scrutinizing class action settlements more closely. Parties must now “provide the court with information [at preliminary approval] sufficient to enable it to determine whether to give notice of the proposal to the class.”⁸⁶ The 2018 amendments also made clear that the court should only approve the distribution of the settlement notice if it “is justified by the parties’ showing that the court” is likely to grant preliminary approval.⁸⁷

Also under current practice, at the final approval stage, the court analyzes the terms of the settlement and evaluates how many class members objected to the settlement and/or opted out. If the court grants final approval, then the settlement terms are carried out: the claims process begins (if there is one), money is distributed to consumers and/or any required changes to defendants’ conduct must be implemented.

⁸⁶ Fed. R. Civ. P 23(e)(1)(A).

⁸⁷ Fed. R. Civ. P 23(e)(1)(B).

While the intent behind the 2018 amendments was to front load the preliminary approval stage by requiring parties to submit more detailed information, the actual changes to the language of Rule 23 do not go far enough.

By setting forth more detailed standards for review, and more specific requirements for what must be submitted to the court for settlement approval and confirmation, this Act will improve the process so that settlement benefits will be delivered to affected consumers faster than under the current framework. And it will lead to settlements that maximize justice for consumers.

The first step under Section 14 – the motion for settlement approval under Section 14(d) and the approval hearing under Section 14(e) – requires the presentation of far more detailed information about the proposed settlement, and gives the court greater latitude in requesting additional information.

The second step – Sections 14(f) and (g) – consists of a motion for confirmation of the settlement, followed by a settlement confirmation hearing. The confirmation motion cannot be submitted until the process for notifying consumers has been completed, and, if the settlement requires consumers to submit a claim form, the claims process has been completed. This will enable the court to determine, at the confirmation hearing, if additional measures must be taken to inform consumers about the settlement and/or to increase the number of consumers who file claim forms for settlement benefits. For example, under Section 14(g)(2)(A), the court has the power to order supplemental notice and an extended deadline if more than 20% of notices are returned as undeliverable. Under Sections 14(g)(2)(B) through (D), the court must order supplemental notice and extended deadlines for claim forms if the submission rates fall below a certain percentage (the percentage depends on the specific justification for the use of the claim form). Thus, the court may choose to confirm the settlement, or require additional measures to be taken to ensure that consumers on whose behalf the Representative Action was brought can take full advantage of the benefits of their participation in the settlement. As under existing law, the court may not require changes in the terms of the settlement, so long as it comports with provisions of the Act.

The court may also deny the motion for confirmation completely, without requiring additional information or measures, under Section 14(g)(2)(G). If the court ultimately fails to confirm the settlement, the case could proceed to trial. Alternatively, though unlikely, the representative plaintiffs could decide to voluntarily dismiss their case and not further pursue the Representative Action.

§ 15 Notice and Administration Plan for Settlements.

- (a) **General.** A court may not grant a motion for confirmation of a settlement in a Representative Action without ordering the parties to provide notice to consumers on whose behalf representative claims are asserted pursuant to Section.

Note: As explained in Section 10, the consumers on whose behalf representative claims are asserted must be given the choice of participating in a Representative Action and being bound by its resolution, or excluding themselves from participation. Section 15 provides requirements for notices of proposed settlements.

Under current law a notice of a proposed class action settlement is sent out after “preliminary approval” of the settlement. This Section similarly mandates notice after a motion for settlement approval has been granted by the court pursuant to Section 14. However, Section 15 provides a far more detailed set of procedures to ensure that consumers can easily read, understand, and exercise their participation rights. The provisions regarding notice of a settlement provide consumers with expanded information about what they might receive under the settlement, whether they want to exclude themselves from participation in it, and whether they want to submit a statement of concern pursuant to Section 16.

- (b) **Plain language and readable format.** Communications with the consumers on whose behalf representative claims are asserted pursuant to this Section shall be written in plain language and in a readable format consistent with Section 4(c)(3)(E).

Note: The federal rule governing communications to consumers in class actions requires notices to be written in “plain, easily understood language.”⁸⁸ Not all notices meet this requirement. Notices are particularly problematic if they are written poorly or use overly complex legal jargon. Features such as font size, layouts, and spacing have a significant impact on whether consumers will read the notice and how much information they are able to digest. Ensuring that people can understand the notice is crucial, especially if the notice involves a settlement that requires consumers to file a claim form in order to receive benefits: the Federal Trade Commission found that, in settlements with a claims process, the rate of claim form submissions was higher when

⁸⁸ Fed. R. Civ. P 23(c)(2)(B).

notices were written in “Plain English.”⁸⁹ Formatting also makes a difference: the Federal Trade Commission found that, in settlements with a claims process, the claims rate was higher when notices used “visually prominent” text to describe the steps consumers need to take in order to obtain benefits.⁹⁰ Another study found that over 60% of class action notices are printed in less than 8-point font size.⁹¹

Section 15(b) expands upon the federal rule by incorporating Section (4)(3)(E), which specifies what elements are necessary to meet the plain language standard. Documents must be written in a readable format and style (e.g., divided into sections, 12-point font size and using bold headings), to ensure that the text in a notice is laid out in a way that consumers will not overlook important information about the case.

(c) **Summary notice.** If the consumers on whose behalf representative claims are asserted can be individually identified and located, the parties shall provide a summary notice to each such consumer.

(1) **Content of summary notice.** The summary notice shall include all of the following:

(A) description of the Representative Action;

(B) how the recipient can confirm they are a consumer is one on whose behalf representative claims are asserted;

(C) if monetary or other relief is to be provided to consumers on whose behalf representative are asserted:

(i) the estimated total amount of the relief to be distributed to all consumers entitled to benefits;

(ii) how the amount of the relief to which each consumer is entitled will be calculated;

⁸⁹ Federal Trade Commission, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*, (Sep. 2019), p.1, https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf.

⁹⁰ *Id.*

⁹¹ Matthew M. Walsh, Shannon Wheatman, Paul G Karlsgodt, *Class Action Notice Requirements: Challenges for Plaintiffs and Defendants*, Strafford (Jul. 31, 2012), <http://media.straffordpub.com/products/class-action-notice-requirements-challenges-for-plaintiffs-and-defendants-2012-07-31/reference-material.pdf>.

- (iii) the estimated or actual amount of the relief available to each consumer who is entitled to benefits, if such information is capable of being ascertained or estimated;
- (iv) the method by which the relief will be distributed;
- (v) any actions that a consumer must take to obtain the relief, if applicable. If the settlement requires submission of a claim form, the summary notice shall include:
 - (I) a claim form pursuant to subsections (c)(2)(A) and (B);
 - (II) the deadline for submission of a claim form;
- (D) a description of injunctive relief, if applicable;
- (E) how to obtain more information about the settlement;
- (F) if necessary to achieve the objectives of this Act, options for non-English speaking persons to obtain the information required by this Section.

***Note:** If some of the consumers entitled to relief through a settlement are known by the parties and the court to be non-English speakers, those consumers must be able to request and obtain notice in their spoken language. Since English is spoken by most, and it would be unwieldy and impractical to send out summary notices in multiple languages, Section 15(c)(1)(F) requires the summary notice to provide non-English speakers with an explanation of how to obtain more information in their preferred language.*

- (G) a statement that consumers will not be required to pay for their attorney(s);
- (H) the address of the settlement website where consumers can obtain additional information and all relevant court documents;
- (I) a statement that consumers may obtain more detailed information by downloading or requesting the full notice, and instructions on how to do so;
- (J) a statement that a statement of concern may be filed at any time after a motion for settlement approval has been filed with the court and seven days prior to the confirmation hearing;

- (K) how to submit a statement of concern to the court;
- (L) how consumers may exclude themselves from participation in the settlement;
- (M) a brief explanation of, and the deadlines for, voluntary exclusion from participation in the settlement;
- (N) the estimated amount of advocacy fees, in dollars, for which consumer counsel will apply to the court;

Note: *The information required by Sections 15(c)(1)(A) through (N) is drawn from exemplars provided by the Federal Judicial Center.⁹² This is the information consumers need in order to understand how the settlement of the Representative Action will affect their rights.*

- (2) **Manner of distribution.** If the court determines that a defendant or a third party has in its possession, or has the ability to obtain, the physical or digital address of each consumer on whose behalf representative claims are asserted in its possession, summary notice shall be distributed by all of the following methods:
 - (A) **U.S. mail.** Summary notice shall be sent to persons by U.S. mail. A summary notice sent by U.S. mail shall be in an envelope upon which a statement is printed, in at least 14-point font size, indicating that a consumer may be entitled to benefits from a court proceeding. The summary notice sent by U.S. Mail shall comply with the requirements of this Section and appear on no less than one 8 ½ x 11-inch sheet of white paper with no less than ½ inch margins. If a claim form is utilized, a paper claim form shall be enclosed with the summary notice.
 - (B) **Direct digital communication to a consumer.** Summary notice shall be sent to persons by direct digital communication that is capable of transmitting all of the information required by this Section. A summary notice sent by direct digital communication shall comply with the requirements of this Section and prominently indicate that the consumer may be entitled to benefits from a court proceeding. In summary notices sent by direct digital communication, any reference

⁹² Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* (2010), <https://www.fjc.gov/content/judges-class-action-notice-and-claims-process-checklist-and-plain-language-guide-0>.

to a document available online, a website address, or a phone number shall be in hyperlink form. If a claim form is utilized, a hyperlink to the settlement or case website where an online claim form may be submitted must be included.

Note: Sections 15(c)(2)(A) and (B) require summary notice to be distributed via U.S. Mail and direct digital communication. Under current practice, parties may solely send notice by e-mail or solely send notice by U.S. Mail– Sections 15(c)(2)(A) and (B) are more stringent than current practice by requiring both U.S. Mail and direct digital communication (which can include e-mail). At present, the U.S. Mail is considered the most effective means of notifying consumers; however, preparation, printing and postage costs make it relatively expensive.⁹³ By contrast, the cost of direct-to-consumer digital communications, like e-mail, is negligible, but run the risk of being intercepted by spam filters or overlooked by the recipient. Thus, requiring both methods will increase the likelihood that all consumers on whose behalf representative claims are asserted will be reached.

Also, Section 15(c)(2)(B) gives parties the option to select the form of direct digital communication to utilize (direct digital communication is defined by this Act as “a communication made online, including, but not limited to, e-mail and communications made by text or through an app, website, or other technology”). This flexibility reflects that there are many ways - known and currently unknown – that consumers can be reached outside of traditional e-mail. For example, notice may be more effective through an app’s messaging system if the Representative Action is against a company that operates an app and the affected consumers are more likely to see the notice through the app than via e-mail.

The Federal Trade Commission has concluded that consumers are more likely to pay attention to a notice if they understand that they may be entitled to a payment.⁹⁴ Sections 15(c)(2)(A) and (B) both require the summary notice to contain language indicating that a consumer may be entitled to benefits from a court proceeding. This requirement is flexible, so that parties can style the notice in a way that recipients will know that they may be entitled to receive some benefit from the Representative Action.

- (C) **Settlement website.** The summary notice shall be posted to the settlement website as a downloadable document in the same format utilized for distribution by U.S. mail.

⁹³ See Federal Trade Commission, *supra* note 89.

⁹⁴ *Id.*

Note: The settlement website is separate from the online docket on the court website pursuant to Section 6. (See the note to Section 15(h) for more on the settlement website.)

- (3) **Exemplars.** The summary notice exemplars published by the Federal Judicial Center comply with the requirements of this Section to the extent they are consistent with the purpose and requirements of this Act.
- (d) **Full notice.** The parties shall make a full notice available to consumers on whose behalf representative claims are asserted.
 - (1) **Content of full notice.** The full notice shall contain all of the information set forth in subsection (c)(1) and the following:
 - (A) a cover page with a summary of pertinent deadlines;
 - (B) a table of contents;
 - (C) basic information about the court proceeding, including the location and contact information for the court in which it is pending;
 - (D) contact information of consumer counsel, or, if a Joint Representative Action, lead counsel, and an explanation that counsel represents the consumers on whose behalf representative claims are asserted;
 - (E) detailed information explaining a consumer's right to exclude themselves from participation in the settlement, what happens when a consumer excludes themselves from participation in the settlement, and how a consumer may exclude themselves from participation in the settlement;
 - (F) detailed information as to what a concerned party is, detailed instructions for how to submit a statement of concern to the court, a statement that a statement of concern may be filed at any time after a motion for settlement approval has been filed with the court and seven days prior to the confirmation hearing;
 - (G) an explanation of the difference between a consumer's decision to exclude themselves from participation in a settlement and submitting a statement of concern under Section 16;

- (H) information regarding the confirmation hearing, including the date, time and location, description of what the confirmation hearing is, and how persons will be given an opportunity to speak at the hearing;

Note: *Summary notices provide all of the critical information consumers need to know about a settlement; but if consumers want more detailed information, they can obtain the full notice pursuant to Section 15(d)(2). Full notices are more detailed because they provide all of the information an affected consumer may want to know about the settlement of the Representative Action, short of reading the settlement agreement itself. The information required by Section 15(d)(1) is drawn from exemplars provided by the Federal Judicial Center.*⁹⁵

*Section 15(d)(1)(g) requires the full notice of a settlement to contain an explanation of the difference between excluding oneself from participation in a settlement and filing a statement of concern. This distinction is discussed in Sections 10 and 16. Currently, the right to opt out of, or object to, a settlement is a common source of confusion for consumers, so full notices often contain a section explaining that exclusion means a consumer chooses not to receive any benefits from and is not participating in a settlement, versus filing an objection (what this Act calls a statement of concern), where the consumer tells the court something they do not like about the settlement but chooses to receive its benefits nevertheless.*⁹⁶

(2) **Manner of distribution.**

(A) **U.S. Mail.** Full notices shall be sent by U.S. mail to consumers who request it. A full notice sent by U.S. mail shall be in an envelope upon which a statement is printed in at least 14-point font size indicating that a consumer may be entitled to benefits from a court proceeding. A full notice sent by U.S. Mail shall comply with the requirements of this Section and appear on 8 ½ x 11-inch sheets of white paper with no less than ½ inch margins. If a claim form is utilized, a paper claim form shall be enclosed with the full notice sent by U.S. Mail.

(B) **Direct digital communication to a consumer.** Full notices shall be sent by direct digital communication to consumers who request it.

⁹⁵ See, e.g., Federal Judicial Center, *Exemplar Products Liability Class Action Certification and Settlement: Full Notice*, p. 8 (May 2002), <https://www.fjc.gov/content/products-liability-class-action-certification-and-settlement-full-notice>.

⁹⁶ See *id.*

(C) **Settlement website.** The full notice shall be posted to the settlement website as a downloadable document in the same format utilized for distribution by U.S. mail.

(3) **Exemplars.** The full notice exemplars provided by the Federal Judicial Center comply with the requirements of this Section to the extent they are consistent with the purpose and requirements of this Act.

(e) **Media notice.** The parties may utilize media notice.

Note: Section 15(e) permits parties to place notice in the media when necessary to reach all members of the class. There are a number of situations in which parties would utilize media notice.

For example, the parties may have the names and contact information of all affected consumers, but decide to utilize media notice as a supplement to directly sent summary notice to boost claim form submission rates in order to meet the benchmarks set forth in Sections 14(g)(2)(B), (C), and (D).

Or, as detailed in the note under Section 14(c)(A)(i), in situations where the court determined that the identity and location of a consumer entitled to monetary relief cannot be ascertained because a defendant or a third party does not have such information in its possession or is not able to obtain the information, and therefore it is not possible to send settlement benefits directly to consumers. Thus, in that situation, the parties would have to publish notice in media channels in order to meet the benchmark set forth in Section 14(g)(2)(B).

(1) **Content of media notice.** Media notice shall include all of the following:

(A) the name of a defendant;

(B) information sufficient for a consumer on whose behalf representative claims are asserted to identify themselves as potentially entitled to relief;

(C) a link to the settlement website;

(D) if necessary to achieve the objectives of this Act, options for non-English speaking consumers to obtain the information required by this Section.

- (2) **Manner of distribution.** Media notice shall be distributed in a manner that will reach as many consumers on whose behalf the Representative Action is brought as is possible, based on the manner in which a defendant marketed the product, service, or thing that is the subject of the Representative Action.

Note: In some cases, such as in allegations of false advertising, the identity of those consumers who have been harmed is impossible to ascertain. In such cases, courts have traditionally required that the notice be published in magazines, newspapers, television, and radio. Section 15(e) is intended to include both traditional channels and new media (e.g., social media and banner advertisements⁹⁷) in a manner that will reach as many consumers as possible. As technology and the ability to target specific consumers evolves, there may be additional, and more effective, ways to reach consumers in addition to U.S. Mail and direct digital communications. Section 15(e) is intentionally written in a broad manner to accommodate technologies and approaches that may not currently exist.

- (f) **Defendant’s website.** Defendant shall maintain a hyperlink that states “Lawsuits that Might Affect You” prominently on its website, app, or other platform that the defendant used to communicate with the public. Such hyperlink shall take users to a page with a hyperlink that provides immediate access to the settlement website, in the form of the case name and description, and shall remain there until all compliance reports have been filed pursuant to Section 18.

(g) **Claim Forms.**

- (1) **Content of a claim form.** If a claim form is utilized under this Act, it shall meet all of the following conditions:

(A) include the consumer’s contact information and any other information in either a defendant’s records, or in the reasonably obtainable records of third parties, that is relevant to the claim form and that the court determines is necessary in order for a consumer to obtain the benefits of the settlement;

(B) provide instructions as to how to fill out and submit the claim form in plain language and a readable format pursuant to subsection (b);

(C) not require the consumer to:

⁹⁷ See Aiken, Alexander, *Class Action Notice in the Digital Age*, 165 U. Pa. L. Rev. 967 (2017).

- (i) provide any information or documentation that the court determines is in a defendant's or a third party's possession, or a defendant has the ability to obtain;
- (ii) provide more information or documentation than is necessary to accurately process the claim form and provide monetary or other relief;
- (iii) sign a statement that the consumer is providing the information under penalty of perjury or otherwise subject to civil or criminal liability;

(D) if necessary to achieve the objectives of this Act, be available in a form for non-English speaking persons to obtain the information required by this Section.

Note: As noted in Section 14(c)(5)(A)(i), claim forms discourage consumers from obtaining benefits to which they are entitled when litigation concludes. That is why some defendants attempt to impose onerous claims process requirements that a reasonable consumer cannot or might not attempt to meet, such as providing purchase records that date back many years, or require the consumer to comply with needless conditions such as writing an identification number on each page of a 12-page claim form. Moreover, in the modern era corporations have detailed information about customer transactions in their possession – and Section 19(g) requires all companies to retain records for ten years. Section 15(g)(1) ensures that a claim form, when necessary, is as easy as possible for consumers to fill out so that the claim form does not act as a barrier to participation.

In addition to making claim forms onerous and cumbersome, some defendant corporations also insist that the consumer attest to the accuracy of their claim form under penalty of perjury or other threat of legal action. This is also a tactic to discourage submission of claim forms, because if consumers believe they may be subject to prosecution by a corporation for making an error on a claim form, they are not likely to submit one.

(2) Manner of distribution and submission.

(A) If a claim form is utilized, it shall be sent with the summary notice pursuant to subsections (c)(2)(A) and (B). The settlement website shall also enable consumers to download a claim form.

(B) **U.S. Mail.** Consumers shall be able to submit a claim form by U.S. mail.

(C) **Direct digital communication.** Consumers shall be able to submit a claim form by direct digital communication.

(D) **Settlement website.** The settlement website shall provide a process for consumers to fill out and submit a claim form. When a claim form is submitted through the website, a unique confirmation code shall be provided to the consumer after they submit the claim form.

Note: Research by the Federal Trade Commission has found that the rate of submission is higher when claim forms are included with the notice.⁹⁸ Additionally, Section 15(g)(2) requires the claims process to also be available in a frictionless manner through the settlement website.

(3) **Timing.** The deadline for the submission of a claim form shall not be less than sixty days after the distribution of the summary notice and claim form.

(h) **Settlement website.** Prior to the distribution of notice , the settlement administrator shall create and manage a settlement website where anyone can obtain information about the settlement, download notice(s), obtain and submit a claim form, if utilized, and obtain any other relevant information or documents. The website shall provide a hyperlink to the court’s online docket required by Section 6. Any relevant court document shall be posted to the website within twenty-four hours after such document has been filed with the court. The website shall permit anyone to sign up for direct digital communications when a relevant document or update has been posted to the website. The website shall exist until all compliance reports have been filed pursuant to Section 17.

Note: The settlement website is different from the online docket on the court’s website referenced in Section 6. The online docket is operated by the court as required by Section 6 and is independent of the website established by the parties. Here, the settlement website is set up by an administrator. This is standard practice – in either case, a website is set up that is a central hub for information for consumers.

(i) **Consumer support.** The settlement administrator shall create and manage a voice technology contact system and a direct digital communication channel through which consumers can obtain more information about the settlement during regular business hours in the settlement administrator’s time zone. If necessary to achieve the objectives of this Act, voice technology contact

⁹⁸ Federal Trade Commission, *supra* note 89, p. 11.

system shall provide options for non-English speaking persons to obtain the information required by this Section.

***Note:** Like the settlement website, it is standard practice for a settlement administrator to operate a call center with operators who can answer consumers' questions about the settlement. Section 15(i) requires access to a live person because some consumers may not have access to the Internet to get information from the settlement or case website, or the website may not have the information a consumer is looking for. Or the consumer may need to follow up on the status of their claim form. Section 15(i) also requires direct digital communication for consumers to receive support, which is helpful for consumers who prefer to get support online and more accessible for consumers with disabilities.*

- (j) **Notice and administration plan.** The representative plaintiff shall submit a notice and administration plan for the court's approval with a motion for settlement approval pursuant to Section 14(d)(5), or when otherwise ordered by the court. It shall contain all of the following information:
- (1) exemplars of the summary notice (including the envelope), full notice (including the envelope, if utilized), and media notice, if utilized, in the form in which they will be distributed;
 - (2) exemplars of the claim form, if utilized, in the form in which they will be distributed, including images of each step of the digital claims process;
 - (3) images of every page of the settlement website;
 - (4) how the voice technology contact system will be operated, and where it will be located, and any scripts to be used by the settlement administrator for the purpose of responding to inquiries;
 - (5) a schedule setting forth the distribution of the summary notice, full notice, claim form, if utilized, and media notice, if utilized;
 - (6) how the summary notice, full notice, claim form, if utilized, and media notice, if utilized, comply with this Act.
 - (7) for the summary notice, a description of the steps that will be taken to locate and update consumer addresses before distribution, and when notices are returned as undeliverable, for re-distribution of notices to updated addresses;

(8) the process for distributing monetary or other relief to consumers, if applicable.

(k) Review of notice and administration plan by independent notice expert.

If a claims process is utilized to distribute monetary or other relief, the court shall appoint an independent notice expert to review the notice and administration plan.

(1) Appointment of independent notice expert.

(A) The court shall appoint the independent notice expert at least thirty days prior to the submission of the proposed notice and administration plan to the court.

(B) The court may select the independent notice expert from a list submitted to the court by the consumer counsel or designate an independent notice expert *sua sponte*.

(2) Independent notice expert report. The independent notice expert shall prepare a report for submission to the court that contains all of the following:

(A) an analysis of whether the list of consumers receiving monetary or other relief is accurate and complete;

(B) an analysis of whether the summary notice, full notice, claim form, if utilized, media notice, if utilized, and any other required communications comply with this Section;

(C) any other information that is requested by the court or relevant to assessing the adequacy of the proposed notice and administration plan.

(3) The independent notice expert shall consult with and provide the parties with an opportunity to correct the proposed notice and administration plan. If the independent notice expert concludes that any component of the proposed notice and administration plan does not comply with this Section, the independent notice expert shall make recommendations to the court as to how the notice and administration plan can be improved.

- (4) Consumer counsel shall pay for all costs associated with independent notice expert. Consumer counsel may seek reimbursement from the defendant for those costs in an application for advocacy fees and expenses made pursuant to Section 18.

Note: As mentioned frequently here, notifying consumers of their rights and responsibilities under a proposed settlement is especially important in cases where a consumer must submit a claim form to obtain relief; thus, the notice and administration plan and claims process must be designed to maximize participation. Requiring an independent expert to review the notice and administration plan and suggest improvements will ensure the highest participation possible and negate the need for multiple rounds of notice for the parties to meet the claim form submission thresholds set forth in Sections 14(g)(2)(B), (C), and (D).

- (l) **Communications to consumers after trial.** To the extent applicable, communications with consumers on whose behalf representative claims are asserted must meet the requirements of this Section. If a claims process is utilized to distribute monetary or other relief to consumers after a trial, such claims process shall meet the requirements of subsection (g).

Class action cases very rarely go to a trial these days. When they do, procedures vary based on each court's rules. There is no set of rules or guidelines that dictate how consumers are notified about the outcome of a trial. And, if consumers are entitled to money or other benefits as the result of a favorable trial verdict, the process by which a court issues a judgment directing money to consumers after a class action trial varies – there is presently no uniformity on the procedures by which class action trials proceed.⁹⁹ Thus, while Section 15 applies to settlement notices, Section 15(l) clarifies that, to the extent applicable, the requirements of Section 15 shall apply to communications with consumers after a trial judgment.

⁹⁹ See Federal Judicial Center, *supra* note 65 at §§ 12, 21.5 (2004).

§ 16 Concerned Party Rights.

- (a) **General.** Concerned parties are consumers on whose behalf representative claims are asserted, or nonprofit organizations that advocate for the interests of the public. Concerned parties may file a statement expressing their views of a settlement of representative claims. The court may invite the filing of a statement of concern.

Note: In traditional class actions, class members have the right to voice their concerns about a proposed class action settlement, via written objections and/or by appearing in court to object at the final approval hearing. Under current class action practice, class members who truly believe the settlement is inadequate may object. Such “objectors” can and sometimes do achieve major improvements in defective settlements, particularly when the court is open to improvements and indicates agreement with the objection.

*Unfortunately, a cottage industry of “professional objectors” has evolved to abuse the objection process. This kind of objector is not motivated to improve the settlement and does not have the best interests of the class in mind. Rather, unscrupulous lawyers recruit a class member to object to some element of the settlement – often minor – and threaten to delay or appeal the settlement unless they are paid (and their client is given a modest sum). Typically, no change is made to the terms of the settlement in these situations. This abuse has correctly been described as extortion and undermined the integrity of the class action system, as discussed in *Reboot Required* at pp. 172-174. For example, one court found a “serial objector” had been engaged in unethical “rent-seeking behavior” by objecting to many class action settlements with the goal of extracting payments in exchange for dropping his objections.¹⁰⁰ Indeed, a relatively small number of lawyers have specialized in the practice of serial objection.*

Discouraging abusive objections without foreclosing legitimate concerns has understandably proven to be an extremely difficult task for the courts. Some courts are reticent to acknowledge or encourage objections. If taken seriously, objections may require additional submissions by the parties and multiple court hearings. The difficulty is further exacerbated by the courts’ recognition that the parties to a lawsuit are assumed to be in the best position to determine resolution of the case, and that courts cannot rewrite a settlement contract between the parties.

¹⁰⁰ See, e.g., Michael J. Bologna, *Notorious ‘Serial Objector’ May Have Filed His Last Objection*, Bloomberg Law (Mar. 12, 2019), <https://news.bloomberglaw.com/class-action/notorious-serial-objector-may-have-filed-his-last-objection-1>.

“Concerned parties” are this Act’s equivalent to a class action objector. The rules and rights set forth in Section 16 are similar to those that apply to class action objectors. The major difference is that concerned parties under this Act include not only the consumers on whose behalf representative claims are asserted, but also nonprofit organizations that advocate for the interests of the public. Nonprofit organizations can provide a unique and important voice in improving settlement. For example, nonprofits may have expertise in the particular area of the law at issue in the Representative Action, or substantial experience in litigating or resolving consumers’ disputes with corporations. This Act also explicitly encourages the court to invite a concerned party to present its view of a proposed settlement, pursuant to Section 16(a) and Section 14(e)(2)(A) (during settlement approval); courts have this inherent authority now, but very rarely invoke it.

- (b) **Representation.** Concerned parties do not need to be represented by counsel to file a statement of concern.
- (c) **Statement of Concern.** A statement of concern shall include all of the following:
 - (1) the concerned party’s identity;
 - (2) the concerned party’s interest in the settlement, including whether they are a consumer on whose behalf representative claims are asserted;
 - (3) if the concerned party is represented by counsel, counsel’s name and contact information;
 - (4) an explanation of why the concerned party believes the settlement is not fair, reasonable, and adequate or otherwise does not comply with this Act;
 - (5) a statement disclosing whether the concerned party has received or been promised anything of value from any party to the action or other entity with respect to the statement of concern.
- (d) **Timing.** Concerned parties may file a statement of concern at any time after a motion for settlement approval has been filed with the court but no less than fourteen days prior to the confirmation hearing.
- (e) **Parties’ response.** Any party to the settlement may file a response no less than seven days prior to the confirmation hearing.

- (f) **Rights of concerned parties.** Concerned parties may appear at a settlement approval hearing and the confirmation hearing. Concerned parties who are represented by counsel may also request a separate hearing regarding their statement of concern.
- (g) **Rights of a concerned party.** Upon filing a statement of concern, a concerned party who is represented by counsel shall be considered a party and may do any of the following:
- (1) file motions;
 - (2) conduct discovery, subject to court approval, after a showing by the concerned party that any of the following conditions exist:
 - (1) the information submitted with the motion for settlement approval does not support a finding that the settlement is fair, reasonable, and adequate pursuant to Section 14;
 - (2) the negotiators failed to comply with Section 13;
 - (3) appeal the court's order granting the motion for confirmation of a settlement.
- (h) **Payments to concerned parties.** A concerned party or a concerned party's counsel shall not accept any form of compensation, direct or indirect, from the parties or any entity in exchange for submitting, supporting, or withdrawing a statement of concern or declining to pursue an appeal of the court's order granting the motion for confirmation of a settlement. Concerned parties may request advocacy fees and costs pursuant to Section 18(g).

***Note:** Federal class action law was amended in 2018 to prohibit objectors from withdrawing their objections in exchange for payments without obtaining the federal court's approval.¹⁰¹ The amendment does not explicitly require the objector and parties to disclose the amount of money that has been exchanged, but some courts will ask for such information before approving the withdrawal.*

Section 16(f) expands upon the 2018 amendment by outlawing such side payments altogether. This is consistent with the holding of the Seventh Circuit Court of Appeals in Pearson v. Target Corp., 968 F.3d 827 (7th Cir. 2020). In Pearson, the Court of Appeals required objectors, who had received side payments in exchange for not

¹⁰¹ Fed. R. Civ. P 23(e)(5).

pursuing an appeal of the settlement after their objections had been rejected, to return the payments they had received. The Court characterized the practice as “objector blackmail.” Another court used the federal amendment to deny a payment to an objector who sought to dismiss his appeal of a class action settlement in exchange for \$300,000, noting that the agreement “does little more than benefit [objector’s] counsel[.]”¹⁰² Section 16(f) prevents this type of abuse of the legal system.

This Act seeks to encourage the participation of concerned parties who present legitimate concerns about a settlement and propose improvements, by requiring that their lawyers be compensated for their advocacy pursuant to the process set forth in Section 18(g).

¹⁰² *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 334 F.R.D. 62, 63 (S.D.N.Y. 2019); see Elizabeth J. Cabraser and Adam N. Steinman, *What is a Fair Price for Objector Blackmail? Class Action Objectors and the 2018 Amendments to Rule 23*, 24 *Lewis & Clark L. Rev.* 549 (2020).

§ 17 Compliance.

- (a) **General.** The court shall have continuing jurisdiction to enforce and oversee a settlement or judgment in a Representative Action.

Note: Once a dispute has been resolved – either by settlement, or by trial and judgment – the case may be over, but often much work remains to be done. A defendant may refuse to comply with, or a dispute may arise over, some aspect of the court’s order. Or consumers on whose behalf the litigation was brought may encounter problems getting the compensation to which they are entitled. To address such circumstances, this Act specifies that courts retain jurisdiction after a settlement is approved and/or final judgment to resolve such disputes and enforce the settlement.

- (b) **Enforcement rights.** The representative plaintiff or a consumer on whose behalf representative claims were asserted may petition the court to enforce compliance with a settlement or judgment.

- (c) **Informal dispute resolution.** A settlement agreement may provide for an informal process by which the representative plaintiff, a consumer on whose behalf representative claims were asserted, or a concerned party may challenge a defendant’s compliance with the settlement before seeking the court’s assistance. However, no agreement shall preclude or waive the rights set forth in this Section.

- (d) **Compliance reports.** After the court grants a motion for confirmation of a settlement or issues a final judgment, a defendant shall file compliance reports with the court.

- (1) **Content of compliance report.** A compliance report shall contain all of the following, if applicable:

(A) information establishing that all monetary or other relief provided by a settlement or otherwise ordered has been distributed to those entitled to it;

(B) if monetary or other relief was not distributed to all consumers to whom it is entitled, an explanation of why it was not, and a plan for re-distributing such relief to consumers;

- (C) information establishing that all *cy pres* awards provided by a settlement or otherwise ordered have been distributed to those entitled to it;
 - (D) a declaration from the settlement administrator supporting the information in the compliance report;
 - (E) a declaration from a defendant, supported by evidence, establishing that it is in compliance with the injunctive relief provided by a settlement or otherwise ordered;
- (2) **Timing.** Compliance reports shall be filed with the court every six months for six years after the court confirms approval of a settlement or issues a judgment. The court may require reports be filed more frequently than every six months, and for a period of more than six years.
- (e) **Non-compliance.** A court may order sanctions against a party that violates this Section.

Note: Once a case concludes, the parties are not necessarily in an adversarial position. Consumer counsel may not become aware of subsequent problems with the settlement, nor do they have any financial incentive to ensure that a defendant complies with a final judgment or settlement agreement. Section 17 allows the court and consumers to monitor a defendant's actions by empowering both the representative plaintiff and consumers on whose behalf representative claims were asserted to raise compliance issues with the court and by requiring a defendant to prove its compliance in reports submitted to the court. Under Section 18, courts are also empowered to incentivize the continued advocacy of consumer counsel on behalf of all consumers through payment of advocacy fees.

§ 18 Advocacy Fees and Expenses, and Service Compensation.

- (a) **General.** Consumer counsel, counsel for a concerned party, the Attorney General, a district attorney, and a city attorney shall be entitled to the payment of advocacy fees and expenses, and representative plaintiffs shall be entitled to service awards, paid by a defendant pursuant to this Section.

Note: Requiring a defendant to pay the legal fees and expenses of a person who it has harmed is an indispensable part of the American civil justice system. Corporations can afford to pay lawyers by the hour. But very few consumers can do so.

Some state consumer protection laws provide for attorneys' fees to be paid by a defendant if the consumer prevails in their case – under laws known as “fee-shifting statutes.” Fee-shifting statutes pay plaintiffs' attorneys' fees and expenses only if the action is successful (either results in a final judgment or a settlement). Sometimes the consumer's attorney will take a percentage of the funds they obtained for the client, or a defendant will pay the attorney directly. If the case is unsuccessful, the consumer client is not charged at all – and their attorney gets nothing.

Fee-shifting statutes permit attorneys to take cases on a “contingency.”¹⁰⁵ This means that the payment of attorneys' fees and expenses is “contingent” on a successful result for the plaintiff. The “contingency fee system” enables consumers to pursue worthy cases that they could not otherwise afford. This is particularly appropriate where the amount at issue for each consumer is modest – even a few pennies – and no single consumer would be able to afford a lawyer to challenge such “petty theft.” Under a typical contingency fee arrangement, the client does not have to pay a retainer or hourly fee to the attorney; nor does the client typically pay expenses or other costs. The contingency fee system makes it possible for consumers to hire attorneys to take on corporations and their highly-paid attorneys.

The contingency arrangement also enables attorneys to litigate a case as intensively as necessary to obtain justice to present expert witnesses and obtain evidence needed to make a case, for example. Thus, the contingency fee system at least partly levels the playing field between an individual consumer and a corporate wrongdoer, although realistically few plaintiffs' counsel can match the unlimited resources available to a corporation subject to this Act. Finally, the contingency fee system discourages

¹⁰⁵ See Factsheet: Contingency Fees and Their Importance for Everyday Americans, Center for Justice and Democracy (Jan. 31, 2013), <https://centerjd.org/content/factsheet-courthouse-cornerstone-contingency-fees-and-their-importance-everyday-americans>.

unnecessary litigation: attorneys have no incentive to bring a frivolous case – because they will recoup nothing.

Section 18 is a fee-shifting provision that provides standards and a process by which attorneys, their paralegals, and expert witnesses can be compensated for their work and expenses in connection with Representative Actions. Section 18 uses the term “advocacy fees and expenses” instead of the traditional term “attorneys’ fees and expenses.”

(b) Standard for advocacy fees and expenses for Representative Actions brought by a representative plaintiff, the Attorney General, a district attorney, or a city attorney. A court shall order a defendant to pay all advocacy fees and expenses reasonably incurred in connection with the Representative Action by consumer counsel, the Attorney General, a district attorney, or a city attorney, or, if any of the following occurred:

- (1) a judgment was entered in the plaintiff’s favor;
- (2) the court ordered any of the relief requested in plaintiff’s complaint;
- (3) the court granted a motion for confirmation of a settlement;
- (4) a defendant makes objective changes to the conduct or relevant corporate policies challenged in the complaint after receiving written notice of a violation of this Act or after the filing of the complaint by the attorneys requesting advocacy fees and expenses;
- (5) upon a supplemental application, for any additional advocacy fees or expenses incurred to ensure a defendant’s compliance with a settlement or judgment.

Note: *State laws regulating attorneys’ fees vary widely. One California fee-shifting statute awards attorneys’ fees based on whether the plaintiff prevailed in the case. Under that fee-shifting statute, the plaintiff’s counsel is considered a “successful party” entitled to attorneys’ fees “in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make*

the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.”¹⁰⁴

Defendants invariably urge courts to limit their obligation to pay plaintiffs’ legal fees and expenses. However, this tactic is not merely a matter of reducing defendants’ expenses in the litigation. The goal is also to obtain judicial rulings that limit the amount of fees a plaintiff’s counsel can collect in the future - in order to directly discourage attorneys from taking complex or groundbreaking cases, effectively closing the courthouse door to average Americans.

Section 18(b) requires a defendant to pay all the legal fees and expenses reasonably incurred in connection with a Representative Action if the litigation results in any of the enumerated outcomes. The Represent Act expressly encourages civil litigation in support of the public interest by requiring courts to compensate lawyers in full for their meritorious advocacy and related expenses.

(c) **Payment of advocacy fees.** If the court determines that consumer counsel, the Attorney General, a district attorney, or a city attorney achieved any of the outcomes set forth in subsection (b), the court shall order a defendant to pay advocacy fees based on the following methodology:

- (1) **Work performed.** Advocacy fees shall be calculated based on the total number of hours reasonably incurred in connection with the Representative Action, including, but not limited to, any of the following:
 - (A) investigating the case and preparing the complaint prior to filing;
 - (B) litigating the case;
 - (C) negotiating the settlement, if applicable;
 - (D) preparing and defending the application for advocacy fees and expenses;
 - (E) defending against any appeal or in connection with any other subsequent or related proceeding;
 - (F) assisting consumers in obtaining benefits from, and monitoring and enforcing compliance with, the settlement or judgment.

¹⁰⁴ Cal. Code Civ. Proc. § 1021.5; *see* Cal. Civ. Code § 1780(e) (awarding fees to a “prevailing party”).

- (2) **Calculation of lodestar and hourly rate.** The total number of hours reasonably incurred by each advocate pursuant to subsection (c)(1) shall be multiplied by the advocate’s hourly rate, as determined by the market rate charged by private advocates with similar levels of experience, skill, and ability in any of the matters at issue in the Representative Action, at the time of the application for advocacy fees and expenses.
- (3) **Reasonably incurred.** Advocacy fees and expenses are reasonably incurred if they were necessary in order to litigate the action at a level of professional representation equivalent to the highest level of representation available to a defendant in similar litigation.
- (4) **Multiplier.** The court may apply a multiplier to the requested lodestar to increase or decrease the amount of advocacy fees based on any of the following:
- (A) the quality of the representation;
 - (B) the novelty and complexity of the issues involved in the action;
 - (C) the economic risk or substantial investment required by consumer counsel to bring and maintain the action;
 - (D) the results obtained.

Note: Levelling the legal playing field is crucial in order to encourage litigation challenging abusive corporate practices. Recognizing this, defendants constantly lobby courts and legislatures to reduce or limit consumers’ attorneys’ fees (see Reboot Required at pp. 134). Section 18(c) will compensate counsel for consumers (and the Attorney General, a district attorney, or a city attorney) for all of the work performed on the case if they achieve any of the results set forth in Section 18(b).

Under current practice, if a case is litigated to trial, the plaintiff’s counsel is paid based on the “lodestar” method, meaning the amount of attorneys’ fees is calculated by multiplying the number of hours spent working on the case by each attorney’s or paralegal’s hourly rate.

When cases are settled, however, there are generally two approaches to arranging compensation for the plaintiff’s counsel: (1) the common fund approach or (2) the lodestar approach. Under (1) the common fund approach, a defendant may agree to pay the plaintiff’s counsel’s attorneys’ fees from a “common fund” from which all

*monetary relief, attorneys' fees, expenses, and service awards will be paid. The rationale is that, since the attorneys expended their efforts and undertook the risk of litigation on behalf of the class, they should be entitled to recover legal fees and expenses from the fund.*¹⁰⁵

In such cases, the plaintiff's counsel may request a percentage amount of the common fund. The percentage can vary, but is usually capped at 33% of the fund. To assess that request, the court may utilize a "lodestar cross-check" whereby it assesses the reasonableness of the percentage of the fund requested based on the lodestar calculation. Common fund settlements present the concerns discussed below: discussing attorneys' fees simultaneously with the negotiation of settlement relief creates a conflict with the interests of class members. Any time there is one "pot" of money from which everyone will be paid, the tension between relief to consumers and compensation to attorneys is present. (As discussed below, Section 18(d)(3) prohibits settlement agreements from containing provisions governing attorneys' fees and thus effectively prohibits common fund settlements.)

This Act adopts the lodestar method in both settlements and trials. In California, the lodestar is "the basic fee for comparable legal services in a community."¹⁰⁶ Sections 18(c)(1) through (3) require that attorneys be paid based on the number of hours "reasonably incurred" in obtaining any of the results set forth in Section 18(b) multiplied by the hourly rate. Section 18(c) thus tracks, in part, current class action practice, which focuses on the attorney's hourly rate.

Defendants occasionally challenge a particular attorney's hourly rate. Corporations are much more likely to argue that some portion of the time a lawyer spent on the case was "unreasonable," and that lawyers who bring Representative Actions should only be paid for work that the defendants postulate was "necessary" to litigate the case. Section 18(c) precludes such time-consuming and self-serving arguments by requiring that lawyers who represent consumers in Representative Actions and whose work achieved any of the outcomes set forth in Section 18(b) be compensated by the defendant at an hourly rate equal to that of similar lawyers and law firms (Section 18(c)(2)). The explicit goal here is to enable consumers to hire advocates and experts that are as experienced and talented as the kind of lawyers and experts that are available to the defendant (even if the defendant itself chooses not retain such individuals).

Section 18(c)(3) requires that counsel be compensated for all the hours "reasonably incurred" on the litigation.

¹⁰⁵ See *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977).

¹⁰⁶ *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001).

As under current law, the court presiding over the litigation may also apply a positive (increasing fees) or negative (decreasing fees) “multiplier” to the lodestar amount, based on the quality of representation, the novelty and complexity of the issues, the results obtained, and the contingent risk of the case.¹⁰⁷ By encouraging courts to apply “multipliers” to the lodestar of lawyers representing consumers, this Act incentivizes lawyers to take on difficult or costly cases and obtain the best result possible for consumers. (Additionally, it ensures that government attorneys whose offices are often lacking in the resources necessary to pursue worthy cases, such as the Attorneys General, district attorneys, and city attorneys, are able to bring cases).

Section 18(c) is a radical departure from existing law (at least as it pertains to attorneys’ fees in settlements) because it only permits the lodestar approach. As noted above, Section 18(c) seeks to foster consumer protection by incentivizing compensation to attorneys representing consumers. When the court reviews the request for advocacy fees and expenses, it has the discretion to reduce the amount if it determines that advocacy fees were not “reasonably incurred” under Section 18(c)(3) or by applying a negative multiplier under Section 18(c)(4).

(d) Advocacy fees and expenses in settlement of representative claims brought by consumer counsel.

- (1) Consumer counsel shall not disclose to, or discuss with, a defendant the estimated amount of advocacy fees and expenses for which consumer counsel plans to apply to the court unless and until all of the following occur:
 - (A) the parties reach an agreement in principle on the material terms of the relief to consumers to be provided under the proposed settlement;
 - (B) the material terms of that agreement are set forth in a document that has been signed by the parties and submitted as a public filing to the court.
- (2) After the events set forth in subsections (d)(1)(A) and (B) occur, consumer counsel may inform a defendant of the estimated amount of advocacy fees and expenses for which consumer counsel plans to apply to the court for the purpose of including the estimate in the notice to consumers pursuant to Section 15.

¹⁰⁷ *Laffitte v. Robert Half International, Inc.*, 1 Cal. 5th 480 (2016).

- (3) A settlement agreement shall not contain any agreements pertaining to advocacy fees and expenses. The court shall determine the amount of advocacy fees and expenses pursuant to Section 18(c).
- (4) In a Joint Representative Action, consumer counsel shall file an application for advocacy fees and expenses jointly.

***Note:** The timing of negotiations over advocacy fees and expenses poses significant ethical issues.¹⁰⁸ Corporate executives often want to know the company's total financial exposure before they commit to paying consumers. Currently, their lawyers try to negotiate the amount of legal fees and expenses that they will pay out in connection with the settlement. This creates a potential, if not actual, conflict of interest because the payment of legal fees and expenses may decrease the total amount available for the consumers who the settlement is intended to benefit. Consumer counsel cannot effectively represent their clients' (consumers') interests in maximizing the compensation they receive while at the same time negotiating compensation for their own legal work. Therefore, Section 18(d)(1) bars any discussion of advocacy fees and expenses before the material terms of the benefits to consumers are put in writing, signed by the representative plaintiff and a defendant (not their lawyers), and filed as a public document. The term sheet does not have to be a fully executed or complete settlement agreement. It may be a memorandum of understanding or even a mediation report pursuant to Section 13(f)(1)(A).*

Section 18(d)(2) also makes clear that, once the parties have agreed upon the terms of a settlement in writing, consumer counsel can inform a defendant of the estimated amount of advocacy fees and expenses for which they will apply to the court. Even though the fee request will not be adjudicated until after the motion for confirmation of a settlement has been granted, an estimate of the advocacy fees and expenses must be placed in notices sent out to consumers in order for consumers to evaluate a settlement and potentially weigh in as a concerned party, as specified in Section 15.

Section 18(d)(3) proposes a major departure from current practice. Settlement agreements generally contain terms governing the plaintiff's counsel's attorneys' fees. To ensure that consumer counsel is not forced to balance monetary or other relief for consumers against their own fees, Section 18(d)(3) requires the court to determine whether consumer counsel is entitled to advocacy fees pursuant to Section 18(b), and, if so, the amount of advocacy fees defendant must pay pursuant to Section 18(c).

¹⁰⁸ See Federal Judicial Center, *supra* note 65 at § 13.24 (2004) ("It is problematic when settlement negotiations involving attorney fees are conducted simultaneously with negotiations on the merits....The ethical problem will be eased if the parties agree to have the court make the allocation.")

Practitioners argue that defendants will not agree to settlements if they are not permitted to discuss advocacy fees during settlement negotiations, because, as noted above, defendants will insist on knowing how much they are going to pay in advocacy expenses before agreeing to resolve the case. However, the potential remedies under Section 5 are so great (including statutory damages of \$1,000) that this Act will incentivize defendants to settle – an unspecified amount of advocacy fees will likely pose far less exposure risk to a defendant than proceeding to trial and facing the risks of the expanded liability and the possibility of far paying out far greater compensation mandated under the generous consumer protections of this Act.

(e) **Application for advocacy fees and expenses.** In order to obtain payment of advocacy fees and expenses by a defendant, consumer counsel the Attorney General, a district attorney, or a city attorney shall submit an application to the court and obtain the court’s approval.

(1) **Content of application.** An application for advocacy fees and expenses shall include all of the following:

- (A) the total amount of advocacy fees and expenses it incurred, including fees and expenses of attorneys, law clerks, paralegals, expert witnesses, or any other person who billed for time or services in connection with the action;
- (B) an explanation of the entitlement to the amount of fees and expenses pursuant to subsection (b);
- (C) a detailed narrative of the work performed and results achieved;
- (D) a list of attorneys, law clerks, paralegals, expert witnesses, or any other person who billed for time or services in connection with the action, the number of hours spent by each on the action, and their hourly rates;
- (E) summaries of the time records of attorneys, law clerks, paralegals, expert witnesses, or any other person who billed for time or services in connection with the action based on time records that were made contemporaneously with the work performed. The summaries may be organized into categories based on time spent on distinct activities. If requested by the court, counsel shall submit such time records to the court, with privileged and confidential information redacted;

- (F) if requested by the court, or at the option of counsel, a declaration from an expert supporting the requested advocacy fees;
- (G) a list of each requested expense, the date of each expense, and the amount requested, and upon request of the court, receipts for each such expense;
- (H) if advocacy fees are to be divided among co-counsel, an explanation of the division, including the amounts each co-counsel will receive. If counsel subsequently determines not to divide the fees in the manner disclosed to the court, counsel shall notify the court prior to the distribution of the fees of how the fees will be divided.

Note: *Section 18(e)(1) is generally consistent with current best practices for motions for attorneys' fees in class action settlements. However, to improve uniformity and transparency, and prevent incomplete fee and expense requests, it is necessary to specify what must be included in an application for advocacy fees and expenses.*

- (2) **Timing.** Consumer counsel, the Attorney General, a district attorney, or a city attorney shall submit one application for advocacy fees and expenses within thirty days after the last event set forth in subsections (b)(1) through (4), except that counsel may submit one or more supplemental applications ninety days after any additional work was performed pursuant subsection (b)(5).

Note: *The outcomes set forth in Section 18(b) entitle counsel to advocacy fees and expenses. The list in Section 18(b) is intended to be a comprehensive list of results that achieve the intended goal of the Representative Action. In order to conserve attorney and judicial resources, Section 18(e)(2) requires counsel to file an application for advocacy fees and expenses at the end of the proceeding. There is one exception to this rule: counsel may file supplemental motions if additional work was required pursuant to Section 18(b)(5).*

With respect to settlements, if a motion for confirmation of a settlement is approved, counsel is entitled to advocacy fees and expenses pursuant to Section 18(b)(3) and they would submit their application for advocacy fees and expenses after the motion for confirmation is approved. This departs from current practice because attorneys usually file their motion for attorneys' fees concurrent with a motion for final approval of a settlement (the equivalent of this Act's motion for confirmation of a settlement). In current practice, a judge can delay decision on a motion for final approval if the judge determines that the request for attorneys' fees is inadequate in some way and

needs to be amended. However, under this Act, the request process is broken up –to avoid any potential conflict noted previously. Thus, under this Act, the settlement would already be confirmed when attorneys request their advocacy fees.

(f) Challenge to application for attorneys’ fees and expenses.

(1) Content of challenge. If a defendant challenges an application for advocacy fees and expenses, the defendant shall submit to the court all of the following:

(A) the total amount of advocacy fees and expenses it incurred, including fees and expenses of in-house lawyers, outside counsel, or attorneys acting in any other capacity, law clerks, paralegals, expert witnesses or any other person who billed for time or services in connection with the action;

(B) a list of its in-house lawyers, outside counsel, or attorneys acting in any other capacity , law clerks, paralegals, expert witnesses, or any other person who billed for time or services in connection with the action, the number of hours spent by each, and their hourly rates;

(C) summaries of the time records of its in-house lawyers, outside counsel, or attorneys acting in any other capacity, law clerks, paralegals, expert witnesses or any other person who billed for time or services in connection with the action based on time records that were made contemporaneously with the work performed. The summaries may be organized into categories based on time spent on distinct activities. If requested by the court, a defendant’s counsel shall submit such time records, with all privileged and confidential information redacted;

(2) Timing. A defendant may submit a challenge to an application for advocacy fees and expenses within thirty days of the filing of the application.

***Note:** Section 18(f)(1) requires defendants that challenge an application for advocacy fees and expenses to provide information on their own legal fees and expenses. This information provides a relevant metric that will aid the court in assessing a request for advocacy fees and expenses. It also fosters transparency in the judicial process. This approach is required by regulation in California in administrative insurance rate*

*proceedings when advocacy fees are requested – a party challenging fee requests must disclose their own.*¹⁰⁹

(g) Concerned parties.

- (1) Standard for a concerned party’s advocacy fees and expenses.** The court shall order a defendant to pay all advocacy fees and expenses reasonably incurred in connection with a statement of concern submitted by counsel for a concerned party if any of the following occur:

 - (A) a change advocated by the concerned party is made to a settlement agreement or to any element of the notice and administration plan required by Section 15(j);
 - (B) at the request of the concerned party, the court seeks additional information from the parties to a settlement.
- (2) Calculation of advocacy fees and expenses for counsel for a concerned party.** Advocacy fees and expenses for counsel for a concerned party shall be determined pursuant to the methodology set forth in subsections (c)(2) and (3).
- (3) Counsel for a concerned party’s application for advocacy fees and expenses.** An application for advocacy fees and expenses by counsel for a concerned party shall contain the information set forth in subsection (e)(1).
- (4) Timing.** Counsel for a concerned party may submit one application for advocacy fees and expenses within thirty days of one or more of the events in subsection (g)(1), except that counsel for a concerned party may submit one or more supplemental applications ninety days after any additional work was performed pursuant subsection (b)(5).

***Note:** Current class action practice does not always welcome those who strive to improve a settlement. As discussed in the notes to Section 16, courts are in a difficult position: they must simultaneously protect settlements against those who improperly pursue objections in order to leverage compensation, and at the same time not discourage or foreclose the airing of legitimate concerns raised by objectors seeking to improve the terms of the settlement. Determining the correct dividing line between the two can be difficult.*

¹⁰⁹ 10 C.C.R. § 2662.3(g).

Section 16 discourages “objector blackmail” by prohibiting payments to concerned parties except through an application for attorneys’ fees and expenses pursuant to this Section, and placing the issue of objector compensation before the court.

Section 18(g) is designed to encourage and incentivize concerned parties to step forward with legitimate objections that would improve the settlement by requiring those efforts to be compensated.

- (h) **Special master.** The court may refer an application for advocacy fees and expenses to a special master for a hearing and recommendation.
- (i) **Interest accrued while action is on appeal.** Consumer counsel, counsel for concerned parties, the Attorney General, a district attorney, and a city attorney shall be entitled to interest accrued on advocacy fees and expenses while the action is on appeal and if they are successful in the appellate proceeding.
- (j) **Service compensation to the representative plaintiff.** An application for advocacy fees and expenses may include a request for service compensation for a representative plaintiff. The court shall approve service compensation in a reasonable amount in recognition of the representative plaintiff’s willingness to act as a representative of other consumers and in order to encourage others to do so. In approving service compensation and determining the reasonableness of the amount, the court shall consider whether a representative plaintiff engaged in any of the following:
 - (1) responded to written discovery;
 - (2) conferred with counsel about case background or settlement issues;
 - (3) performed any other tasks associated with the prosecution of the litigation;
 - (4) had their deposition was taken, how long it took, and the amount of travel it required;
 - (5) incurred a disruption in their schedule other than through any of the above;
 - (6) testified at trial or a pre-trial hearing;
 - (7) assumed any risks as a result of the representation, including risks of liability for advocacy fees and expenses, and the risk of adverse action by a defendant.

Note: *In class actions, courts often approve “service awards” or “incentive awards” to individuals who agree to become a representative of other unnamed consumers who were harmed and to initiate a lawsuit in their name. Service awards recognize that the initiation of, and participation in, a legal action is essential to the legal system, can be time consuming, intimidating, and have unforeseen consequences for the people who do so. Moreover, a representative plaintiff is agreeing to have their name associated with the litigation, a fact that will live on permanently in the digital universe. Some courts have been skeptical of service awards. The Eleventh Circuit Court of Appeals recently rejected incentive awards based upon U.S. Supreme Court precedent from the 1800s; the attorneys in that case have sought en banc review. ¹¹⁰ Judge Alsup of the Northern District of California has stated that such payments can have a deleterious effect: they “make a collusive or poor settlement palatable to the named plaintiff.”¹¹¹*

Section 18(j) is generally consistent with current practices related to incentive awards to named plaintiffs in class action lawsuits; however, it explicitly notes that a second purpose is to encourage others to undertake that leadership role. Serving as a representative of consumers is a civic service that should be encouraged. Also, there is no danger under this Act that a representative plaintiff will compromise the interests of other consumers when negotiating a settlement, because the safeguards required by this Act, particularly Section 14, will discourage collusion and prevent a flawed settlement from being approved.

(k) Service compensation to whistleblower. If a representative plaintiff entitled to service compensation is a current or former corporate executive, employee, agent, or assign of a defendant and their direct and independent knowledge provided the original factual basis upon which the allegations in a Representative Action were asserted, they shall be entitled to service compensation in an amount equal to 25% of the value of the settlement benefits as determined by the court. The service compensation shall be paid by a defendant and shall not reduce the amount of relief provided to consumers on whose behalf representative claims are asserted nor the compensation to counsel for advocacy fees and expenses.

Note: *Section 18(k) provides a financial incentive for employees, agents, or assigns who discover illegal activities to serve as a plaintiff in a Representative Actions. Section 18(k) is modeled after provisions of “whistleblower” laws like the federal False*

¹¹⁰ *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020).

¹¹¹ *Blair et al., v. Rent-A-Center, Inc. et al.*, No. 17-02335 (N.D. Cal. Sep. 6, 2017).

*Claims Act*¹¹² and *California's False Claims Act*,¹¹³ which provide incentives for government employees to report fraud being perpetrated against the government. Additionally, any whistleblower representative plaintiff whose service as a representative plaintiff under this Act results in discriminatory treatment is entitled to the protections and relief set forth in Section 11(e).

¹¹² 31 U.S.C. §§ 3729-2733.

¹¹³ Cal. Gov. Code §§ 12650-12656.

§ 19 State Advocacy Association.

(a) The State Advocacy Association is authorized to be established as an independent, nonprofit corporation. The Association shall be incorporated in this state and shall advocate for and represent the interests of consumers in any forum and in any manner that its board of directors determines.

(b) **Establishment of the State Advocacy Association.**

(1) No later than ninety days after the effective date of this Act, the Governor, the leader of each house of the Legislature, and the Secretary of State shall each appoint one person to an interim board of directors to serve until a board of directors is first elected. The interim board of directors shall incorporate the organization, arrange for the communication to potential members authorized by subsection (f), and establish procedures for the initial election of a permanent board of directors of seven persons democratically elected by the membership of the organization.

(2) There is authorized to be temporarily appropriated \$1,000,000 for the purpose of establishing the State Advocacy Association to fund the costs of the establishment, initial operation, the communication to potential members authorized by subsection (f), and all other activities necessary to establish the Association. The Association shall repay that amount to the Treasurer in four annual payments, with interest commencing one year after the Association begins operation, or when it has obtained sufficient revenue from membership to make each such payment.

(c) **Membership.** The membership of the State Advocacy Association shall consist solely of individuals who meet the following:

(1) are 16 years of age or older;

(2) have contributed the required annual membership fee determined by the board of directors but in no event more than \$40 per year;

(3) are not employees of a regulatory agency or corporate executives of an entity covered by this Act.

(d) **Election of the board of directors.** No later than ninety days after the membership of the State Advocacy Association reaches 2,500 consumers, the interim board of directors shall set a date for the first general election of the board of directors, which shall be held no later than sixty days thereafter.

(e) **Duties of the board of directors.** The affairs of the State Advocacy Association shall be managed by a permanent board of directors, which shall be elected by the members of the Association in accordance with procedures it shall adopt as part of the bylaws of the organization. Except as specifically provided by this Section, the board shall have the sole discretion to decide the Association's policies and actions. In addition to the authority provided to, and the obligations of, the board of directors under the law of this state governing nonprofit organizations, the bylaws shall require that:

(1) all information pertaining to the finances of the Association be made available to the general public on the Association's website;

(2) the Association's books be audited by a certified public accountant at least once each fiscal year, and the audit be made available to the general public on the Association's website;

(3) as soon as practicable after the close of the Association's fiscal year, an annual report of the Association's financial and substantive operations be conducted and made available to the general public on the Association's website;

(f) **Agency communications.** Any agency of this state that communicates with consumers by U.S. mail or other direct digital communication on a regular or periodic basis shall include a separate message, or in the case of U.S. mail, a postage-paid envelope, in such communications informing consumers of the opportunity to join the State Advocacy Association. The message shall be drafted by the Association and shall not be subject to regulation by any agency. The agency shall recoup from the Association any actual costs incurred by sending the message.

(g) **Duties and powers of the State Advocacy Association.**

(1) The duties of the Association shall be all of the following:

(A) to inform, educate, and advise consumers about the actions of entities covered by this Act;

- (B) to represent and promote the interests of consumers, collectively, and, when necessary, to negotiate on behalf of consumers, individually, with respect to entities;
 - (C) to take affirmative measures to encourage membership by low- and moderate-income and minority consumers, and to disseminate information and advice to consumers;
 - (D) to inform, insofar as possible, consumers about the mission of the Association, including the procedures for obtaining membership in the Association;
- (2) The Association shall have the power to do all of the following:
- (A) represent the interests of consumers before regulatory agencies, legislative bodies, the courts, and in any other public forum;
 - (B) initiate, intervene as a party, or otherwise participate on behalf of consumers in any type of proceeding that the Association determines may affect the interests of consumers;
 - (C) conduct, support, and assist in research, surveys, and investigations of consumer issues;
 - (D) solicit and accept gifts, loans, grants, or other aid in order to support activities concerning the interests of consumers, except that the Association may not accept gifts, loans, or other aid from any entity or from any director, employee, agent, assign, or member of their immediate family;
 - (E) provide other nonprofit organizations with gifts, loans, grants, or other aid in order to support activities that further the purposes of the Association.

(h) Annual meetings.

- (1) The annual meeting of the board of directors shall be open to the public.
- (2) Members shall be given an opportunity to speak at any annual meeting.

(i) **Conflicts of interest.**

- (1) No person may offer or give anything of monetary value to any director, employee, agent, or assign of the State Advocacy Association if the offer or gift influences, or appears to be an attempt to influence, the action or their judgment.
- (2) No director, employee, agent, or assign of the Association may solicit or accept anything of monetary value from any person if their solicitation or acceptance influences, or appears to be an attempt to influence, their official action or judgment.
- (3) Any person who violates this Section shall be subject to a civil penalty of up to \$10,000 per violation.
- (4) Any director, employee, agent, or assign of the Association who has violated this Section shall be immediately removed from their position.

Note: Section 19 mandates the creation of a State Advocacy Association: a membership-based, democratically controlled nonprofit organization that has the authority to represent the interests of consumers in the state in any forum. It is intended as a compliment to the representation of consumers by private attorneys under this Act.

The State Advocacy Association is based upon the “Citizen Utility Board” or “CUB” proposed by consumer advocate Ralph Nader in the 1970s, under which citizens could make modest (between \$3 and \$10 at the time¹¹⁴) annual donations to become voting members, and that the organization would advocate for the public’s interests before government agencies regulating utilities, because they did not (and still do not) always put consumers’ interests first. Before 1986, CUBs in three states (Wisconsin, Illinois, and California) included invitations inserted in customers’ utility bills informing them of the organization and inviting them to join – the bill inserts were the primary vehicle by which consumers learned of the existence of the organization. Hundreds of thousands of consumers joined.¹¹⁵ Consequently, consumers experienced major savings in their utility bills.¹¹⁶ It was a successful model.

¹¹⁴ Beth Givens, *Citizens’ Utility Boards: Because Utilities Bear Watching*, p. 22, Center for Public Interest Law (1991), http://www.cpil.org/download/CUB_Report.pdf.

¹¹⁵ At their heights, the CUBs had 100,000 members in Wisconsin, 50,000 in California, and 170,000 in Illinois. See *id.*, pp. 31, 36, 40.

¹¹⁶ *Id.*, pp. 31-33.

Before more states could follow suit, in 1986, the U.S. Supreme Court issued an opinion in Pacific Gas & Electric Co. v. Public Utilities Commission of California et. al., 475 U.S. 1 (1986), which held that the bill inserts violated the private utility companies' First Amendment rights because the bill inserts contained "speech" with which the utilities disagreed.¹¹⁷ After the ruling, the CUBs in the three states were no longer inserting their communications in the private utility companies' bills. However, in Illinois, the CUB law was amended to allow invitations in messages sent out by government agencies.¹¹⁸

Section 19 follows Illinois's approach by mandating that government agencies include in their communications with consumers a message about the State Advocacy Association. The State Advocacy Association will have a broader scope than the CUBs – it will represent the interests of consumers generally, in every consumer-facing industry, including tech, financial services, insurance, pharmaceutical, airlines, medical devices, autos, and more. The State Advocacy Association will fill the gap in helping to stop illegal, unfair, and deceptive practices where regulators have dropped the ball.

Section 19(f) requires every government agency in the state that communicates with consumers to send out the messages. The purpose of the messages is to garner the necessary funding for the organization – by leading consumers to sign up and pay the membership fees.

The State Advocacy Association's members would elect those advocates who would operate the organization, giving members a democratic voice in the control of the organization.

¹¹⁷ See Ralph Nader and Alan Hirsch, "The Corporate Conscience" and Other First Amendment Follies in *Pacific Gas & Electric*, 41 San Diego L. Rev. 483 (2004).

¹¹⁸ Givens, *supra* note 114, pp. 4, 29.

§ 20 Miscellaneous.

- (a) **Liberal construction.** The provisions of this act shall be liberally construed and applied to effectuate the provisions and purposes of this Act.
- (b) **Strict liability.** An entity that engages in a prohibited act or practice or otherwise violates this Act shall be strictly liable.

Note: When a statute is a strict liability statute, it means that a defendant is liable for any violation of the law regardless of whether the defendant intended to violate the law.

- (c) **Contrary laws.** In the event of a conflict between the provisions of this Act and any other law in this state, the provisions of this Act shall control. To the extent that existing laws or principles of jurisprudence are not incorporated or addressed in this Act, but do not conflict with the express and implied purposes or effect of any provision of this Act, they are intended to be left undisturbed by this Act.
- (d) **Rights and remedies provided by this Act.** The remedies and penalties provided by this Section are cumulative to each other, and to the remedies and penalties available under all other laws of this state.
- (e) **Severability.** The provisions of this Act are an integrated whole, reflecting the public policy of this state, which is that consumers shall be afforded maximum protection against all forms of corporate abuse; shall receive full compensation for any injury in connection with such abuse; and that court procedures facilitate these policy goals. If any clause, sentence, paragraph, or part of this Act or the application thereof is determined by a court to be unconstitutional, such judgment shall not affect, impair, or invalidate the remainder of that clause, sentence, paragraph, or part of this Act, and the application thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment of invalidity was rendered.
- (f) **Statute of Limitations.** A Representative Action shall commence not later than six years from the time that a reasonable consumer would have discovered the unlawful nature of the practices or acts constituting a violation of this Act.

- (g) **Retention of Records.** An entity shall retain all records related to transactions that are covered by this Act for a period of not less than twenty-five years.
- (h) **Dollar amounts.** Specific dollar amounts stated in this Act shall be adjusted by the general inflation rate or based on the Consumer Price Index as set forth by the United States Bureau of Labor Statistics.
- (i) **Federal laws.** To the maximum extent possible, this Act shall be construed to be consistent with federal law.
- (j) **Terminology.** As used in this Act, the word “shall” is mandatory and the word “may” is permissive, unless otherwise apparent from the context.

§ 21 Definitions.

- (1) An “action” or “Representative Action” is a civil action alleging a violation of this Act, including a Joint Representative Action.
- (2) “Advocacy fees” are the dollar amounts billed by an attorney, law clerk, paralegal, expert witnesses, or any other person who billed for time or services in connection with an action.
- (3) “Arbitration” is a private process under which disputing parties agree that one or several private individuals who are not judicial officers can decide a dispute.
- (4) “Automated decision” means a determination made by a computational process, including one derived from algorithmic decision-making, machine learning, statistical analysis, or other data processing or artificial intelligence methods.
- (5) A “cash gift card” is a document, card, code, or device that is issued on a pre-paid basis and that the holder may use in a manner similar to a debit card, without restriction.
- (6) A “claim form” is any printed, online, or other form of application, documentation or information that a consumer must submit to an administrator in order to obtain relief from the resolution of a Representative Action.
- (7) A “claims process” is the process for the submission and management of claim forms.
- (8) A “cloud service” is a method of computer storage in which digital data is stored online.
- (9) A “communication” is any shared written, oral, or pictorial information or signal.
- (10) “Confidential” means information entitled to confidential treatment under applicable law.

- (11) A “connected device” is any device, appliance, or other thing capable of connecting to or communicating with another device, the Internet, or a network, including, but not limited to cell phones, video cameras, recording devices, tablets, routers, remote sensors, computers, appliances, or vehicles.
- (12) “Consent” means a written statement or action whereby a consumer signifies agreement to an act or a contract when the consumer’s unambiguous expression of intent to agree is:
- (A) freely given,
 - (B) specific,
 - (C) knowing,
 - (D) informed, and
 - (E) through an affirmative act. Clicking a box on a screen next to, or with, the word “I agree” or “yes” or other similar words indicating agreement does not constitute an affirmative act.

Mechanisms or systems that presume consent where a consumer has not expressly declined to give consent do not constitute consent.

Note: Section 4 of this Act identifies numerous actions that make the failure to obtain consent illegal (see, e.g., provisions in Section 4(c)(3) related to contracts, Section 4(c)(7) related to subscriptions, Section 4(c)(14) related to loans and extensions of credit, and Section 4(c)(15) related to personal information). As discussed in *Reboot Required* at pp. 98-99, consumers rarely truly consent to any terms imposed on them by corporations. The definition of consent in Section 21(12) is intended to ensure that consumers understand what they are agreeing to and that they are unambiguously agreeing to a corporation’s actions or contract terms. Section 21(12) ensures that consumers are not considered to have consented merely by failing to say no.

- (13) A “consumer” means a natural person.
- (14) “Consumer counsel” means an attorney who represents a representative plaintiff and/or the consumers on whose behalf representative claims are asserted.

- (15) A “contract” is a promise or set of promises between a consumer and an entity the performance of which the law recognizes as a duty.
- (16) A “consumer review” is any written, oral, or pictorial review, performance assessment of, or other similar analysis of, the goods, services, or conduct of an entity by a consumer.
- (17) “Corporate executive” means any employee who, by reason of their position in the entity, has the responsibility or authority to take necessary measures to prevent or remedy violations of this Act or any other law.
- (18) A “coupon” is a document, card, code, or device that entitles the holder or recipient to a discount or money that can only be applied toward a particular product, service, or thing or redeemed at one or more specified entities.
- (19) “Court” is the court of competent jurisdiction in which a Representative Action is filed.
- (20) A “customer service representative” is a natural person who communicates and interacts with customers on behalf of an entity to provide information, assistance or resolution of a dispute regarding a product, service, or thing.
- (21) “*Cy pres* relief” is compensation that is distributed to a specified organization or institution on behalf of consumers on whose behalf the representative claims were asserted.
- (22) A “data breach” is an event in which an unauthorized person or entity has acquired personal information of ten or more persons without those persons’ consent.
- (23) “Data portability” is the ability for consumers to move personal information, including, but not limited to, e-mails, contacts, calendars, financial information, health information, favorites, friends, or content posted on social media, from one service to another, or to withdraw personal information from others and keep to themselves.
- (24) A practice or act, product, service, or thing is “deceptive” if it is likely to mislead a reasonable consumer.
- (25) A “defendant” is an entity alleged to have violated the Represent Act in a complaint filed in a court.

- (26) “Digital” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- (27) “Direct digital communication” means a communication made online, including, but not limited to, e-mail and communications made by text or through an app, website, or other technology.
- (28) “Diminished value” is a decrease in a product, service, or thing’s worth as the result of a violation of the Represent Act.
- (29) “Document” means any writing, photograph, recording, direct digital communication, and any other communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.
- (30) “Electronically stored information” means information that is stored in a digital medium.
- (31) “Emotional distress” is fear, anger, anxiety, or suffering.
- (32) “Employee” includes, but is not limited to, employees, directors, and officers.
- (33) An “entity” is any corporation, firm, partnership, joint stock company, or association that has gross annual revenues in excess of \$25 million.
- (34) “Expenses” are the monetary expenses incurred in connection with a Representative Action.
- (35) An “extension of credit” is a grant of access to specified amount of money that an entity provides to a consumer.
- (36) A “fee” is any monetary amount added to the price of a product, service, or thing other than a tax imposed by a governmental entity.
- (37) “Gift card” means a cash gift card or a document, card, code, or device that is issued on a pre-paid basis redeemable at a single business or an affiliated group of businesses.
- (38) “Harm” means any of the following:

- (A) the loss of money, property, time, personal information, or other tangible or intangible thing of value;
 - (B) physical injury;
 - (C) emotional distress;
 - (D) being subject to an imminent risk of suffering any of the types of harms set forth this subsection.
- (39) An “independent notice expert” is an expert who is knowledgeable about or has substantial experience analyzing settlement notices and administration and who has no affiliation with the representative plaintiff, consumer counsel, a defendant, or a defendant’s counsel in the Representative Action.
- (40) An “independent repair provider” is a person or business that is not affiliated with the manufacturer of a product or thing.
- (41) A consumer is deemed “informed” when a reasonable consumer would know and understand the information being conveyed by an entity. If more than 10% of consumers would not understand the information, a reasonable consumer shall not be deemed informed. Entities are under no duty to independently conduct a study to determine that more than 10% of consumers would not understand the information being conveyed.
- (42) “Joint Representative Action” means multiple Representative Actions that have been coordinated or consolidated by a judicial authority so that they may be adjudicated together.
- (43) A “law firm” is a business engaged in the practice of law.
- (44) A “loan” is an amount of money that an entity provides to a consumer and that is required to be repaid.
- (45) “Lost time” is any time expended by a consumer as a result of a violation of this Act.
- (46) “Marketing” is a communication or representation to the public in any medium offering a product, service, or thing that has the purpose of suggesting or inducing a transaction.

- (47) A fact or term is “material” if there is a substantial likelihood that a reasonable consumer would consider it important in deciding whether to accept an offer of something.
- (48) “Media notice” is notice distributed through online or paper publications, websites, social media, or any other public medium through which consumers may visually obtain information.
- (49) “Mediation” is a method by which disputes are voluntarily resolved by the parties and overseen by a mediator.
- (50) A “mediator” is an impartial third party who oversees a mediation.
- (51) “Monetary relief” is any remedy under the Represent Act paid to consumers in the form of money, or a monetary credit permitted by this Act.
- (52) “Money” includes, but is not limited to, cash, cash gift cards, checks, and cryptocurrency.
- (53) “Offer” includes, but is not limited to, selling, renting, and leasing.
- (54) A “party” is a representative plaintiff, plaintiff, defendant, intervenor, or concerned party.
- (55) A “person” is a natural person.
- (56) “Personal information” means any information that identifies, relates to, describes, is capable of being associated with, or could be linked, directly or indirectly, to a consumer, including, but not limited to:
- (A) an identifier, including but not limited to, a real name, alias, signature, date of birth, sexual orientation, gender identity, marital status, physical characteristic or description, postal address, telephone number, unique personal identifier, military identification number, online identifier, Internet Protocol address, e-mail address, account name, mother’s maiden name, social security number, driver’s license number, or passport number;
 - (B) information such as employment status, employment history, or other professional or employment-related information;

- (C) bank account number, credit card number, debit card number, insurance policy number, or any other financial information;
- (D) medical information, mental health information, or health insurance information;
- (E) commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies;
- (F) characteristics of protected classes under federal law, including race, color, national origin, religion, sex, age, or disability;
- (G) biometric information;
- (H) Online activity, including, but not limited to, browsing history, search history, content posted or stored online, and interactions with websites, mobile applications, advertisements.
- (I) historical or real-time geolocation data;
- (J) audio, electronic, visual, thermal, olfactory, or similar information;
- (K) education records;
- (L) political information, such as party registration and voting history;
- (M) digital photographs and digital videos not otherwise available to the public;
- (N) information on criminal convictions;
- (O) information (such as an Internet Protocol address or other similar identifier) that allows an individual or device to be singled out for interaction, even without identification of such individual or device; and
- (P) inferences drawn from any of the information identified in this subsection to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.

- (57) “Personalized marketing” is a communication or representation to a specific consumer in any medium offering a product, service, or thing that has the purpose of suggesting or inducing a transaction.
- (58) “Physical harm” is injury to the human body.
- (59) A “plaintiff” or “representative plaintiff” is a person or nonprofit who files a Representative Action in a court.
- (60) “Prominent,” in reference to text or images in a communication or contract, means to be displayed in a larger, bolder, and more noticeable font in relation to other text or images in that communication or contract.
- (61) A “private neutral” is a person who manages the negotiations between parties at mediation.
- (62) “Processing” personal information means collecting, retaining, storing, sharing, transferring, selling, controlling, monetizing, re-identifying, or otherwise using personal information.
- (63) “Property” is anything that may be subject to ownership including, but not limited to, personal information.
- (64) “Punitive damages” are money damages that a plaintiff may recover when a defendant has been found to have acted with malice, oppression, or fraud.
- (65) A “reasonable consumer” is a typical member of the general public.
- (66) A “rebate” is a promise by an entity to return some or all of a payment to a consumer after the consumer engages in a transaction.
- (67) Something is “refurbished” if it has been previously used or sold.
- (68) A “representative claim” is a cause of action for a violation of this Act.
- (69) “Restitution” is an economic remedy the amount of which is determined by measuring a defendant’s financial gain as a result of its violation of this Act.
- (70) A “reversion” is when a defendant keeps or re-acquires monetary or other relief intended for consumers on whose behalf representative claims are asserted.

- (71) A “service award” is an amount of money paid to a person for their service as a representative plaintiff in a Representative Action.
- (72) A “settlement administrator” is a private company, a defendant, or consumer counsel that administers the notice and administration plan pursuant to Section 15.
- (73) “Settlement notice” is any or all of the notices relevant to a settlement, including, but not limited to, the summary notice, the full notice, and media notice.
- (74) A “special master” is a person appointed by a court to carry out a specified action.
- (75) A “subscription” is a product, service, or thing for which a person makes periodic payments for a specified amount of time.
- (76) A practice or act is “unfair” if it:
- (A) offends a public policy established by statute, regulation, or common law; or
 - (B) is immoral, unethical, oppressive, unscrupulous, or injurious to a consumer.
- (77) “Voice technology” is technology that enables consumers to speak directly to a natural person, including but not limited to, phones, video devices, and Voice over Internet Protocol technology.
- (78) A “warranty” is a written guarantee promising to repair or replace something.
- (79) A practice or act is done “willfully” or with “willfulness” if it is an intentional violation of a known legal duty.