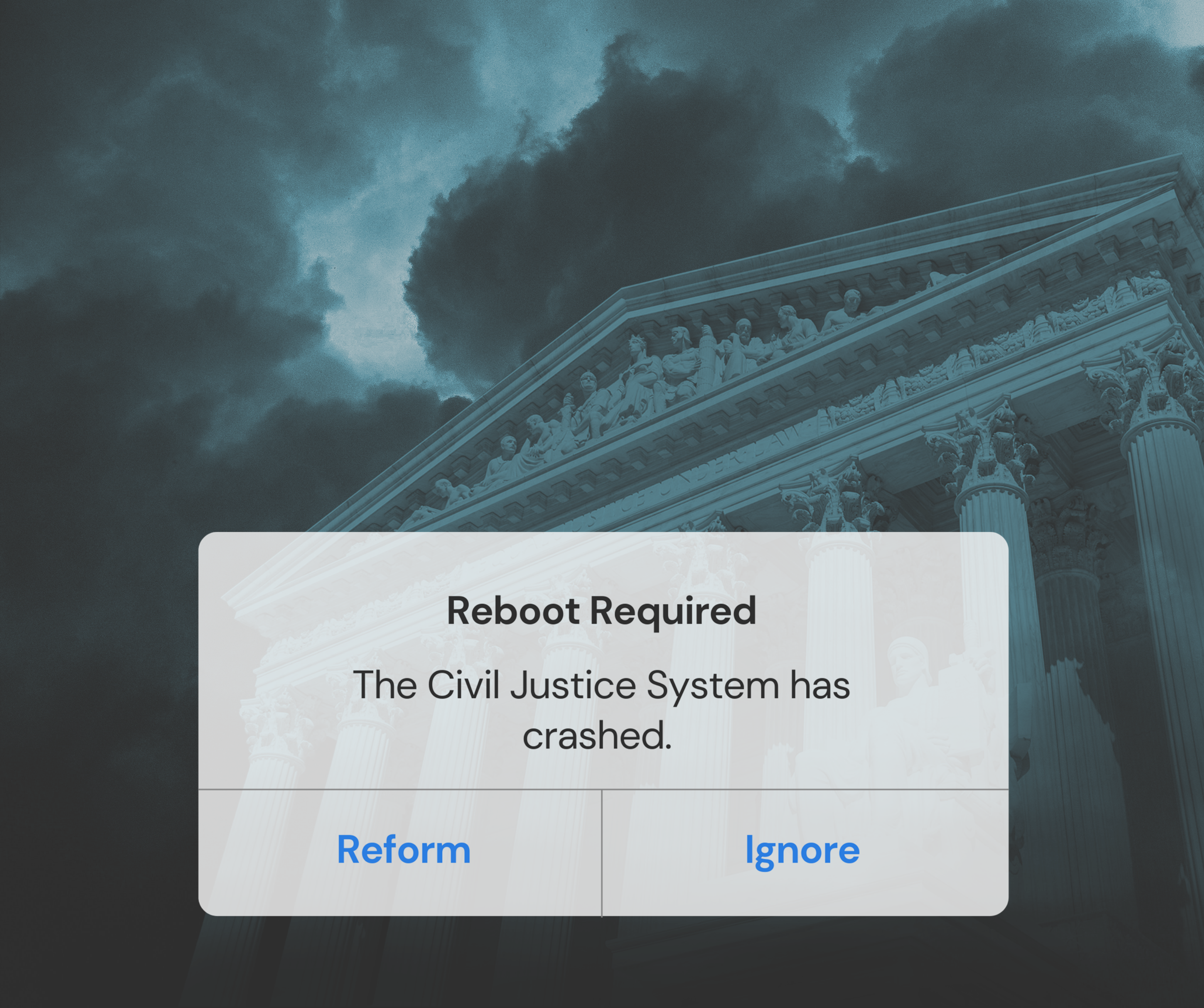

#REPRESENT

A PROJECT OF THE CONSUMER EDUCATION FOUNDATION

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About the Authors

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Harvey Rosenfield, co-author of *Reboot Required* and the accompanying Represent Act, is a nationally recognized consumer advocate. Trained as a public interest lawyer, Rosenfield has long been an unwavering defender of the civil justice system. In 1985, he founded Consumer Watchdog, where he is presently legal counsel; he authored insurance reform Proposition 103 and organized the campaign that led to its passage by California voters in 1988, at the same time defeating three ballot initiatives sponsored by the insurance industry that would have limited compensation for injured consumers and their attorneys. He co-led the citizen campaign that defeated three more ballot measures to restrict legal rights sponsored by California's business community in 1996. Rosenfield has testified before Congress and numerous state legislatures on corporate campaigns to undermine the rule of law and is a frequent commentator in national publications. He is the author of *Silent Violence, Silent Death: The Hidden Epidemic of Medical Malpractice*.

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INTRODUCTION

America's Civil Justice System Has Been Hacked

America's legal OS has been infected and corrupted by executives of powerful corporations and their allies inside and outside of government. A massive network of elected officials, lobbyists, law firms, trade associations, public relations flacks, think tanks, and academics have spent decades reprogramming the nation's laws and court procedures to favor corporations and the elites. As this report documents, the corporate cartel's colossal hack of the civil justice system has succeeded, changing the law to allow companies to rip off consumers, costing them anywhere from a few dollars to their lives, and leaving them with no power to hold the companies accountable under law.

That's why, as the first part of this report, "Corporate Coup Against Consumers," documents, you are overcharged for items you purchased, billed for things you never ordered, hit with exorbitant and unnecessary fees, or penalized by pandemic price gouging; subjected to outrageous interest rates you never agreed to; and why your private information is intercepted and then weaponized against you to deny you a job, credit, or a place to live. It's why you never got that rebate you were promised and why you can't get that warranty to cover anything. It's the reason you keep getting charged for a subscription you didn't know you had, and why you get charged when you try to cancel it. The corporate-rigged legal system is why items you bought don't look like what was advertised; why you have to pay extra money to use a "gift card"; and why you got a "store credit" instead of your money back when you returned a defective product – or the store outright denied you the right to return it. It's why you cannot rely on online reviews, and why you are inundated with an unceasing barrage of robocalls and spam trying to scam you.

And it's why you can't do a damn thing about it: after having an inane dialogue with a chatbot or waiting on hold for hours to speak to a poorly trained customer service representative to try to correct these injustices, you are told to get lost because you apparently surrendered all your legal rights in the fine print of a contract you never even saw.

Or maybe you did have some rights after all – you got a postcard (that you can barely read) or an email (that looks like spam) saying so – but there's already been a class action lawsuit, and it's been settled, and if you fill out a ten-page claim form, you might eventually get a token percentage of your money back or a coupon to spend at the company that betrayed you.

This is the front-line failure of the U.S. civil justice system that average Americans are deeply familiar with: the routine, frustrating, and time-wasting indignities of everyday life that are nearly impossible to deal with unless you happen to be a lawyer, wealthy, or someone with a lot of patience and time on your hands. "Corporate Coup Against Consumers" chronicles sixteen of the most common terrorizing tactics that are pervasive in this country, whittling away Americans' budgets and stealing not only their money, but the precious commodity of time.

These seemingly small-scale abuses in the marketplace are different only in the magnitude of their consequences from some of the most appalling corporate misconduct of this era. Two recent examples exemplify how the legal system has proven incapable of redressing abuses that turn deadly:

In a hurry to get a new plane to market, Boeing installed faulty software in its 737 Max, intimidating regulators at the Federal Aviation Administration so they would look the other way as scientific engineering gave way to the reckless pursuit of profit. The defective computer program hurtled 346 people into the ground at 550 miles per hour in two separate crashes. The company paid $261 million in federal fines (0.45% of its annual revenue, and possibly covered by Boeing's insurance). But its CEO avoided any personal responsibility – the federal prosecutor in charge of the case chose not to file charges against him and later went to work for a law firm that represents Boeing. Dennis Muilenburg walked away with a $62 million retirement package.

The next of kin haven't done nearly as well. Most of their lawyers have agreed to a settlement framework in which Boeing admitted liability (which was obvious) in exchange for the families' promise that they would not pursue the truth in court about what happened and who was responsible – no depositions of its top executives, no disclosure of internal documents – nor seek punitive damages. And the families agreed to keep the amount of money they negotiate on behalf of each victim secret from each other and the press.

There were no thunderous crashes in the opioid epidemic ignited by Purdue Pharma. Only the quiet agony of millions of Americans addicted to painkillers, over 500,000 of whom have died as a result. The Sackler family, owners of Purdue, got the Food and Drug

Administration to bless their marketing of Oxycontin, one of the most highly addictive drugs – with the help of an FDA employee who soon after went to work for.... the Sacklers! When the two decades-long Purdue party ended in a medical epidemic and an avalanche of litigation, the company's lawyers steered it into bankruptcy and then proposed a "global resolution" of the 138,000 claims by victims and the families of the dead. The company – still allowed to do business – is offering to pay $40,000 per dead family member. In exchange, the Sacklers, whose wealth is estimated at $11 billion, would be personally immune from any legal consequences. After a court refused to approve of the deal, Purdue vowed to appeal, inflicting still more delay and pain on its victims.

Disabling the Rule of Law

Our civil court system was intended to epitomize American ideals of impartiality, independence, equality, and fairness. The courts were supposed to be the only branch of government in which an American could take on the wealthy and the powerful, where truth and justice still had a fair chance over money and influence.

No more. The second part of this report, "Boom and Bust: America's Civil Justice System," charts how major reforms enacted in the late 1960s and early 1970s – dramatically advancing protections in automobile, water, environmental, air travel safety, not to mention government accountability – enraged the big business establishment. It spent the next fifty years simultaneously undermining those protections and blocking the passage of new laws badly needed to protect Americans against the abuses of commerce in the 21st century.

Everyone knows that most members of Congress and state legislatures are beholden to their corporate financiers. Corporate money has sponsored the election of countless public officials across the country who reliably kill legislation intended to protect consumers (take, for instance, the fact that the United States still has no comprehensive privacy law regulating the tech industry); the regulators appointed by these politicians fulfill campaign promises by gutting administrative regulations that impede industry wrongdoing.

A decision by the U.S. Supreme Court in 2010, *Citizens United v FEC,* has permanently locked into place this brutally effective imbalance of political power between people and big business. It held that corporations have a First Amendment right under the Constitution to spend unlimited amounts of money on politicians' political campaigns. Equating corporate money to "free speech," *Citizens United* legalized the bribery that is behind the defeat of every bill that would protect consumers against corporate misconduct, behind the passage of every law limiting corporate liability, compensation of victims, and the ability of a consumer to hire an attorney to challenge companies when they break the law.

The influence of money in politics is hardly news. But what should come as a shock to most Americans is how corporations have compromised the independence of the judicial branch.

Many of the serious setbacks that consumers have sustained within the judicial branch in recent years concern the arcane legal procedures that govern cases in state and federal courts.

“Standing to sue” rules determine who can get in the door of the courthouse. Courts routinely hold that citizens have no right to sue to challenge widespread corporate lawbreaking – or government malfeasance in failing to prosecute – unless they can show that they were personally injured – no matter how legitimate their grievance.

Even if they can get into court, consumers can be quickly kicked out based on the “arbitration clauses” that apply to everything from the purchase of a new toaster to a Sweetgreen salad, requiring all legal disputes be adjudicated by private judges hired by the corporation. Courts honor these outrageously one-sided agreements on the legal fiction that every person is “presumed” to have read and agreed to every provision of a contract, even if they never saw it.

One of the great procedural tools of modern jurisprudence, the class action lawsuit, has long been under siege in the courts. Class actions empower and incentivize citizens to join together to challenge misconduct that affects many people, where the cost of such litigation would otherwise be far beyond the financial means of any one person. Such lawsuits deter wrongdoing, stop illegal practices, and compensate those who are harmed. Class actions are a crucial alternative to government agencies that are corrupted by corporate lobbyists or lack the budgetary resources to protect the public.

“Boom and Bust: America’s Civil Justice System” shows how elements of the federal judiciary, led by the U.S. Supreme Court, have grown increasingly hostile to Americans’ attempt to have their collective day in court. Relying on hyper-technical and often impenetrable interpretations of procedural rules, the judiciary has imposed onerous hurdles that consumers must surmount before a class action case will be allowed to proceed. In numerous decisions, a majority of the U.S. Supreme Court has made petty thievery – involving a few dollars per victim, but on a mass scale – much easier for big corporations to get away with.

A Busted Civil Justice System Cannot Redress Injustice, Nor Confront the Future

Severely eroded by years of corporate propagandizing, today's class action process is confusing, cumbersome, and fundamentally unfriendly to the cause of average people. The third part of this report – "Reboot Required" – examines how this crucial mechanism for collective justice has become downgraded and often dysfunctional and why a new paradigm is needed.

A vibrant legal system intrinsically requires trials by jury in open court to maintain public awareness and confidence. Because current laws and judicial procedures are stacked in favor of corporate defendants, however, the lawyers who represent consumers are frequently forced to settle righteous class action lawsuits on less-than-ideal terms. All settlements are, by definition, a compromise. But lawyers willing to take on Goliath now face a daunting choice: they must calculate not merely the likelihood of obtaining justice under today's weakened laws, but also whether they can bear the costs of maintaining a lawsuit against an opponent with virtually unlimited resources. And they must weigh the impact that years or decades of delay instigated by the machinations of defendants will have on the people who have been injured.

And while no consumer lawyer has an incentive to bring a frivolous suit, there are a few lawyers who "sue and settle" immediately, cutting a deal with the defendant that falls short for the victims even by the low standards of today's inadequate laws. The existing safeguards against such settlements – principally, the right of unhappy class members to submit objections to what they think is wrong with a settlement – are themselves subject to abuse by unscrupulous lawyers. Because today's courts are badly overloaded with cases and severely underfunded, many judges find it difficult to police settlement agreements between private parties or fully consider the merits of objections.

As a result, most settlements are approved. Few class actions ever go to trial – an estimated 2% per year *nationwide*. This is an important red flag because it is at a trial that the truth about the corporate misconduct is fully revealed. The dearth of class action trials signals that the current legal regime is floundering.

Without fundamental reform, our legal system will be unable to confront the complex challenges of the coming decades, some of which current laws cannot even recognize, much less resolve.

Last century's legal paradigm – the antiquated contract law concept of "consent"– has proven to be of zero value in regulating the relationships between corporations and people in the digital age. Secret algorithms decide which Americans get a job, housing, insurance, higher education, or healthcare, perpetuating racial, gender, and income biases. To date, the deep intrusion of sophisticated technology in our lives, the dramatic shift away from personal interactions to electronic and mobile commerce, and the advent of artificial intelligence and machine learning have eluded virtually all legal constraints. As they increasingly drive the U.S. economy, these forces, left unchecked, will exacerbate the present divide between the haves and the have-nots. Corporations are developing technology, algorithms, and artificial intelligence systems far faster than lawmakers can possibly keep up with them, even if they were actually trying to.

Civil Justice vs. Civil War

For the last fifty years, corporations have dominated and downgraded consumer protection law. Systemic legal reforms that would abrogate their self-interested power grab and empower Americans with 21st century rights and remedies have received no serious consideration *for half a century*.

This is because the entrenched corporate state has managed to place consumers and their lawyers in a defensive crouch. Today's consumer movement – a remarkably dedicated community of advocates in nonprofits, government, and private practice – is constantly fighting to ward off the corporate agenda of arbitrary, cruel, and extremist legislation. So long as corporations are able to dictate the terms of the debate, our rights will continue to erode. In 1799, George Washington, who had led the nation to independence and was only a few months from death, wrote, "offensive operations, often times, is the *surest,* if not the *only* (in some cases) means of defence." To paraphrase: the best defense is a strong offense. Consider this report an urgent call to arms. Some will say the endeavor is "too risky" or "the time is not right." What is happening in America today makes it clear that we must act now.

Reclaiming and restoring America's civil justice system isn't just a matter of money. Law is the OS of Democracy, the system software that provides stability and order, enabling people and corporations to interact safely and prosper. Confronted with staggering economic inequality, unprecedented political division, a pandemic that stilled the nation, and a worsening climate catastrophe, it appears to many Americans that the country's democratic institutions are incapable of remedying these afflictions.

The collapse of public trust in the executive and legislative branches greatly accelerated with the devastation of the Great Recession. Wall Street bribed its way out of the very legal guardrails that would have prevented the 2008 financial collapse. The federal government's response – a trillion-dollar bailout of the Wall Street wrongdoers and big business – only exacerbated the debacle. Then, and now, the government's actions ensured that the elites remained protected and prosperous – while rest of the country was left to fend for itself.

The judicial branch has now fallen into disrepute as well. Long esteemed by Americans as a refuge from the failures and excesses of the "political branches," two thirds of Americans report they have lost faith in the judiciary. A majority of Americans cannot themselves afford legal representation, and they correctly perceive that the court system favors the wealthy and corporations.

The gravity of this crisis of confidence in the rule of law cannot be overstated. Over the preceding two years, we have learned how fragile our institutions are; we have witnessed anger and despair turn to violence when the rules do not apply to everyone.

Reboot Required: The Represent Act

The last section of this report provides a blueprint for rebuilding America's civil justice system. It summarizes the "Represent Act," which is presented in an accompanying document as draft model legislation. It proposes formidable new laws to protect against the abuses that characterize the 21st century marketplace. It expands the ability of consumers to go to court to enforce these new rights, including through a new paradigm of collective litigation – the Representative Action – that will address structural flaws in the current class action process. The model law also gets rid of outdated procedural obstacles and unreasonable corporate defenses that deprive Americans of access to justice. And it mandates far more powerful remedies for corporate misconduct, requiring that defendants fully compensate victims (and their attorneys), equalizing the disparity in professional legal representation between corporations and consumers and, of enormous importance, creating a stronger deterrent to corporate wrongdoing. Because, apart from criminal punishment, it is only the threat of staggering financial consequences that will impel these massive multi-national entities to obey the rules.

Collectively, the provisions of The Represent Act create an indivisible ecosystem of consumer protection. The proposed reforms provide tools that can be used beyond consumer issues, to enhance civil, environmental, and worker rights litigation.

By rebooting and upgrading the legal system, the Represent Act will restore the proper balance of power between people and corporations.

CORPORATE COUP AGAINST CONSUMERS

Corporations win when consumers lose. Every time a single consumer loses money because of corporate predation – even if only a few dollars – corporations reap a windfall. Every time a consumer is unable to resolve a complaint or dispute, corporations reap a windfall. Every time a consumer gives up their personal information online, corporations reap a windfall. These windfalls add up, allowing corporations to rake in billions of dollars while consumers lose money, time, and control. Here are sixteen of the most widely deployed schemes that cost Americans:

Lies to Make You Buy

There is one law that American corporations profess to obey: the law of supply and demand. The higher the price, the lower the demand for it. And vice versa – when the price drops, more people will buy. The interaction of supply and demand is supposed to lead to a fair price. This unwritten law is the foundational principle of the American marketplace. But it assumes that sellers compete honestly – that they disclose price, quality, and other important terms to buyers. They don't. In the pursuit of profit, corporations frequently flout this basic virtue.

False advertising ranks among the top complaints of American consumers.[1] Once upon a time, advertising was confined to television, radio, and newspapers. Today, American consumers are exposed to a 24/7 barrage of marketing through a startling array of omnipresent devices. Moreover, ads are increasingly tailored to each individual using unfathomably detailed data about our most personal tastes, desires, and behavior plundered from our daily interactions online and offline.

Businesses are engaged in false advertising when they lie to consumers about things like the price, quantity, or quality of their products and services in order to get consumers to buy what they are selling.

- ## Lying about price.

For most consumers, the price is the most important term of a transaction.[2] Companies employ a myriad of methods to lie about prices. One example is lowballing, which is when a company advertises a price that is lower than the actual price it demands.[3] Target, one of the biggest department stores in the country, was caught lowballing consumers by charging higher prices when items were scanned in the checkout line than were posted in the store's aisles.[4] Target agreed to stop the practice after California prosecutors brought a lawsuit.[5]

Businesses also lie about price by: failing to tell consumers about the extra "fees" they must pay; slipping in unauthorized charges when a business has a consumer's payment information on file; or signing people up for things that they never requested. (See pp. 16-34 for discussions of fees, unauthorized charges, and subscriptions).

- ## Tricking consumers into thinking they are getting a discount.

When consumers think they are getting a deal, they are more likely to buy something.[6] The online marketplace makes it much easier for companies to manipulate "discount" prices since they can program prices in an instant, without the burden of physically replacing paper price tags. That is why online retailers are often accused of displaying phony, inflated "comparison prices" next to their own prices. This tactic makes people think they are getting a bargain, when, in reality, they are not. These fake comparison prices come in different forms: "list" prices," "original prices," or "previously paid" prices.

For example, Amazon often displays what it calls "list prices" next to Amazon's prices for products on its e-commerce platform. Amazon describes a list price as "the suggested retail price of a product as provided by a manufacturer, supplier or seller."[7] By showing a higher list price next to a lower price, Amazon leads the consumer to believe that they are getting a deal because Amazon (or the third-party seller marketing their products on the Amazon website) is selling the product for less than the manufacturer, supplier, or seller normally charges. But in 2017, the advocacy group Consumer Watchdog accused Amazon of falsely inflating list prices to make Amazon's own prices appear discounted.[8] The group reviewed the list prices of over 4,000 products on Amazon's website and found that approximately 40% of Amazon's list prices were greater than the highest price charged by a known competitor.[9] One example was an Acer Laptop that displayed a list price of $799.99, even though the same laptop was $749 on Acer's own website:[10]

Source: *Is Amazon Moving Away from Misleading List Prices? Not So Fast.*, p. 7, Consumer Watchdog (2017), https://www.consumerwatchdog.org/resources/atp_pricing_2.0.pdf.

Amazon was fined $1.1 million in 2017 by the Canadian Competition Bureau for displaying inaccurate list prices, and it agreed to truthfully calculate the supposed savings to Canadian consumers.[11] Absent similar action by the U.S. government, however, Americans took to the courts, suing Amazon over its phony pricing schemes.[12] Unfortunately, at that time, Amazon required its U.S. customers to resolve any disputes through forced arbitration. The lawsuits were dismissed[13] and, because arbitration proceedings are shrouded in secrecy, it is unclear whether consumers' complaints against Amazon were pursued in arbitration.

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What is forced arbitration?

Arbitration is a legal procedure employed by corporations to prevent consumers from taking a company to court. Almost all "take-it-or-leave-it contracts" imposed on consumers by companies include forced arbitration clauses. As a result, a consumer is forced to submit their complaint to an arbitrator (a private lawyer acting as a judge, usually selected by the corporation), who decides the dispute. The odds are stacked against consumers in arbitration proceedings.[14] Corporations favor arbitration because court procedures that would force a company to disclose its internal practices do not apply in arbitration, there is no right to a jury trial, and there is no right to appeal. A report by the American Association of Justice found that the majority of arbitrators are white males, and posited that a "consumer is more likely to be struck by lightning than win a monetary award in forced arbitration[.]"[15] (See pp. 99-101 for more on how forced arbitration clauses have stripped consumers of the protection of the law.)

Retailers Macy's, JC Penny,[16] Wayfair,[17] Overstock,[18] Ann Taylor,[19] and Guess?[20] are just a few of the many retail companies that have been accused of deceptively discounting products online and in brick-and-mortar stores. The results in these cases vary. For example, when a group of California district attorneys sued online retailer Overstock for inflating list prices, the company agreed to pay a $6.8 million penalty.[21] But a consumer class action against Ann Taylor for advertising discounts based on fictitious "original prices" resulted in a settlement in which consumers who submitted claims were entitled to either $5 in cash or a coupon worth $12 to buy more Ann Taylor merchandise.[22] No public information is available regarding how many consumers actually received the cash and coupons.

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What is a class action?

A class action is a civil lawsuit filed on behalf of a group of people against one or more defendants (usually companies). The persons bringing the lawsuit are called **plaintiffs**. In a class action, one or more individual plaintiffs represent the interests of a group of people, all of whom were similarly harmed. The plaintiffs are called **class representatives**. The rest of the people on whose behalf a class action is brought are called **class members** (known collectively as "the class").

What is a settlement?

A settlement is an agreement between the plaintiff and the defendant to resolve a lawsuit. In a class action settlement, the defendant sometimes agrees to pay class members a certain amount of money and/or change its improper practices in exchange for terminating the case before trial. (See pp. 153-174 for discussion of class action settlements.) The judge presiding over the case is not involved in negotiating a settlement, but must review it – and approve it if it is "fair, reasonable, and adequate." A court's decision to approve or reject a proposed settlement is usually based on the monetary compensation or other benefits (sometimes referred to by lawyers as "relief") the settlement will provide to the class.[23] (See p. 153 for a discussion of the "fair, reasonable, and adequate" standard.)

Similarly, in a class action lawsuit against Guess?,[24] consumers charged that the products at Guess? Outlet stores were manufactured for and sold exclusively at the Guess Outlet stores, where they were advertised as deeply discounted. But the products had *never* been sold at retail, so the displayed "MSR" prices ("manufacturer's suggested retail" price, a.k.a the list price) were a complete fabrication.

Phony list price ($40) Guess? Outlet Price ($24.99)

Source: Consolidated Amended Class Action Complaint, ¶¶ 12, 13, *Adame, et al. v. Guess?, et al.,* Case No. BC579128 (Cal. Super. Ct. Los Angeles Cnty. Jan. 4, 2016).

The consumers and Guess? reached a settlement that gave customers coupons for discounts between $4 and $10 on future purchases at Guess?[25] No public information is available regarding how many consumers received and used the coupons.

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What is a coupon in a class action settlement?

Instead of giving class members some or all of their money back, settlements sometimes allow defendants to provide coupons or non-cash options that class members can redeem by buying products or services from the defendant company. This type of "compensation" is controversial: a coupon-only settlement may provide little to no value to class members and requires them to continue to do business with the company that took their money in the first place. (See pp. 162-163 for a discussion of coupon relief in class action settlements.)

- ## Lying about features or characteristics.

Companies also misrepresent the features of the product or service itself. For example, consumers filed a class action against Sony alleging its Xperia smartphones and tablets, which were advertised as waterproof, were not waterproof.[26] The case resulted in a "claims-made" settlement: consumers whose devices suffered water damage had to submit a claim online or by mail with supporting documentation to get money back.[27] The total amount of money that Sony actually had to pay out through the settlement has not been disclosed.

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What is a claims-made class action settlement?

A class action settlement that requires class members to submit paperwork or an online form in order to get their money back is considered a "claims-made" settlement. Depending on the amount of money at stake, many class members do not submit claims forms – because they can be confusing, time consuming to fill out, or may require paperwork that the consumer no longer has. (See pp. 159-162 for a further discussion of claims-made settlements.)

Car manufacturers have also been accused of lying about features of their vehicles. Most Americans are aware of "Dieselgate," the international scam perpetrated by Volkswagen and other auto companies.[28] First uncovered by the International Council on Clean Transportation and the California Air Resources Board, and later pursued by the Environmental Protection Agency (EPA) in 2015, Volkswagen's engineers programmed their diesel vehicles to meet air pollution standards *only when the vehicles were being tested for compliance with the pollution rules*.[29] About 500,000 American consumers who purchased or leased Volkswagen vehicles were affected.[30] Consumers in the United States filed more than 600 class action lawsuits in state and federal courts against

Volkswagen. Most of these class actions were grouped together in one federal court in Northern California.[31]

In 2016, the judge in the case approved a $10 billion settlement that required Volkswagen to buy back, upon request, the cars of customers – at their market values prior to the scandal. It also provided cash payments to customers.[32] By 2020, the total paid out under the settlement was $9.5 billion, and 86% of customers chose to return their cars for compensation.[33] Multiple actions brought by local governments, state Attorneys General, and federal agencies like the Federal Trade Commission and the United States Department of Justice (on behalf of the EPA) were also filed against Volkswagen – resulting in approximately $25 billion in government fines.[34]

Similarly, a 2011 investigation by Consumer Watchdog uncovered that the Hyundai Elantra was getting far fewer than the "40 Miles Per Gallon" fuel efficiency that Hyundai aggressively advertised. Consumer Watchdog complained to the White House, the EPA,[35] and later brought a class action lawsuit against Hyundai.[36] Shortly after that class action lawsuit was filed, the EPA announced that it had investigated and found that Hyundai was not only misrepresenting the fuel efficiency of the Elantra, but also of eight of its 2012 and 2013 model year vehicles, as well five vehicles made by its sister corporation, Kia.[37]

After the EPA's initial 2012 announcement that Hyundai and Kia had misrepresented the fuel efficiency of their vehicles, dozens of law firms filed over 50 additional class actions lawsuits across the United States.[38] Hyundai and Kia quickly negotiated a settlement behind the scenes with two of the law firms. Consumer Watchdog pressed the negotiating lawyers and the court to disclose the terms of the settlement and for information needed to assess the fairness of the proposed settlement – which was finally made public over a year after the parties announced they had settled. Consumer Watchdog also proposed improvements to the settlement benefits, some of which were made.[39] After a series of hearings during which the court required the settling parties to improve the settlement, it was eventually approved.[40]

In another example of a car manufacturer taking advantage of consumers, Mercedes was accused in 2016 of falsely marketing its BlueTEC "clean diesel" cars as being "earth-friendly" and emitting less greenhouse gases than gasoline.[41] The court approved a claims-made settlement that will provide cash payments up to $3,290 per class member.[42] And consumers filed a class action in March 2019 against Honda over its in-vehicle communication, navigation, and entertainment systems, saying the technology did not operate as advertised.[43] In June 2021, the court preliminarily approved a settlement under which most consumers will receive no money.[44] The settlement requires Honda to provide software updates, extended warranties for the systems (but not the cars), training of Honda personnel so they can fix issues with the systems, and an online resource center where consumers can go for more information.[45]

The food industry has recognized that Americans are increasingly concerned about the safety and nutritional impact of the foods they eat. Food companies have reoriented their marketing to appeal to the 73% of today's consumers who seek out healthy and "all natural" foods,[46] and are willing to pay higher prices for what they think are natural products.[47] Companies like Walmart, Sargento, Nature Valley, Naked Juice, HINT, Kraft Heinz, Dr. Pepper Snapple Group, Campbell Soup, Trader Joe's, Ben & Jerry's, and Kashi have been accused in recent years of mislabeling food as "natural."[48] For example, consumers filed a lawsuit against HINT, a company selling "all-natural" fruit flavored beverages, asserting that the drink contained a chemical solvent to give it flavor.[49] The court dismissed the case on a legal technicality before any decision was made about the "all-natural" claims.[50]

Some food companies have agreed to resolve such lawsuits by offering to pay consumers back for some or all of their purchases – assuming the individuals who were misled could be tracked down.[51] But in general, the food industry has strenuously opposed most lawsuits by arguing that courts do not have the power to determine whether the plain language of an advertisement was understood to promise health benefits. Courts have agreed, ruling that only federal regulators can decide what's "natural."[52] Under these court decisions, the fate of many "all-natural" lawsuits lies in the hands of the U.S. Food and Drug Administration (FDA), an agency often accused of being controlled by the industries it regulates.[53] Because the FDA has yet to define the word "natural" (despite promising it would do so back in 2015[54]), food companies have invoked so-called "regulatory defenses" to get the cases dismissed or put on hold pending the FDA's definition.[55]

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What are defenses?

A defense is an argument made by a defendant that, if successful, would defeat a claim in the lawsuit, or the entire lawsuit.

One type of defense frequently employed by corporate defendants is a "regulatory defense," in which businesses argue that a court should not hear a lawsuit challenging corporate misconduct because their industry is regulated by a federal or state government agency. There are many different types of regulatory defenses, but they all share a common set of assumptions: that a government agency has the power and resources to regulate the conduct of the company; that the agency actually has done so, correctly; that the courts should not second-guess a government agency, or are not sophisticated enough to do so; and that it's not fair to subject a corporation to lawsuits if it is also regulated by the government. Many of these assumptions are invalid.

Regulatory agencies are often led by political appointees; are subject to political influence and budgetary constraints imposed by legislative committees; and usually have limited or no power to order appropriate remedies. Indeed, enforcement actions by regulatory agencies are far more limited than civil actions. For example, government enforcement actions can take years longer than civil actions; may not seek as much information; 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.

Another popular corporate defense shows up in cases alleging that a defendant has engaged in deceptive marketing. Companies are often able to avoid liability for deceptive advertising if they can convince a court that their advertising is "puffery," – hype that is not meant to be taken seriously, as when a defendant markets a thing as "the best" or "the greatest," a statement that cannot realistically be proven or disproven. [56] However, companies frequently invoke the "puffery defense" when the advertising is presented as a fact. For example, one court found that an advertisement for pain reliever Advil, stating that the medication "doesn't upset ... [the] stomach" like competitor Tylenol, was not puffery because consumers could have interpreted the statement as a fact.[57] Similarly, a court rejected motor oil manufacturer Pennzoil's claim that its oil provided "longer engine life and better engine protection" was puffery.[58]

Many such defenses were established through written rulings by judges at the urging of corporate defendants. Rarely are they mandated by a statute. When courts apply them, the result can be a miscarriage of justice.

• Lying about where something is made.

Surveys show that Americans prefer to buy products made in the United States rather than imported products,[59] whether as a patriotic gesture of support for American manufacturing or based on concern about the quality of overseas products or the treatment of workers in other countries. But many products advertised as or labelled "Made in the USA" are not. After advocacy group Truth in Advertising accused Target of mislabeling over 100 products that were made in China as "Made in the USA," Target removed or replaced the deceptive "Made in USA" labels with "imported" labels.[60] Truth in Advertising also filed a complaint with the Federal Trade Commission (FTC) accusing razor manufacturer Gillette of advertising its shaving products as "Made in Boston" when they were in fact manufactured in Poland and Mexico.[61] The FTC did not take action.[62] But in another case, the FTC forced iSpring Water Systems to pay a $110,000 fine for marketing water filtration systems made in China as made in the United States.[63] In the first three months of 2021, the FTC ordered two other companies to pay fines and stop using false "Made in USA" labels.[64] The FTC finalized a new "Made in USA Labeling Rule"[65] in July 2021 that requires manufacturers be able to prove that their products are "all or virtually all" made in the United States when using the "Made in USA" label, and enables the FTC to penalize companies over $43,000 every time they violate the rule.[66]

• Lying about performance and effectiveness.

Statements about the performance and effectiveness of products and services are often misleading or simply false. Wireless carriers are often the target of consumer outrage over mobile phone service. One of the most pernicious practices is advertising flat monthly prices for "unlimited" data plans – and then degrading data services for those who heavily use their phones. Because the equipment and cell phone towers have a limited capacity for processing and delivering data,[67] wireless carriers intentionally slow down smartphone data speeds for some customers – a practice known as "throttling."[68] For example, a 2018 study showed that Verizon and AT&T throttled video streaming services like YouTube or Netflix, even for consumers who paid for unlimited data.[69] Because most wireless carriers include forced arbitration clauses in their take-it-or-leave-it contracts with consumers, it is very difficult for lawyers to bring class actions against these companies for data throttling. In one class action lawsuit against AT&T for throttling – that was able to proceed despite AT&T's arbitration clause – the parties settled and customers are expected to receive a total of between $10 and $25 each, despite the fact that they paid $30 *a month* for unlimited data.[70] Separately, the FTC, which may bring enforcement actions on behalf of the government against wireless carriers (the government is not subject to AT&T's arbitration agreement), settled an action in 2019 against AT&T for advertising its mobile data plans as "unlimited" and then reducing their data speeds.[71] Under the FTC settlement, AT&T was required to pay refunds to consumers totaling $60 million but was allowed to continue to market its "unlimited" data plans so long as it prominently disclosed restrictions that it may place on the amount or speed of data.[72]

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What is an enforcement action?

An enforcement action is a lawsuit or other legal proceeding brought by a government agency on behalf of the public against a company for violating laws. Most enforcement actions are brought before an administrative tribunal, not a court. But some are brought in civil court, typically by a state prosecutor such as a District Attorney or state Attorney General.

Depending upon the power of the federal or state agency, enforcement actions may result in an agreement by the company to stop certain practices. Enforcement actions may also result in civil penalties or, less often (and depending on whether the law allows it), refunds to consumers. For example, one of the laws governing the FTC gives the agency the power to compel a company to send money to harmed consumers. However, a recent decision by the United States Supreme Court, in *AMG Capital Management, LLC v. Federal Trade Commission,* 593 U.S. ___ (Apr. 22, 2021), stripped the FTC of its authority to obtain refunds for consumers. The FTC is urging Congress to pass legislation restoring that power.[73]

What is a civil penalty?

A civil penalty is a financial penalty imposed by a government agency against a company for violating laws. Money from penalties usually goes to the government.

In recent years, tech giant Apple has been accused of deliberately slowing down iPhones over time.[74] Apple has admitted that software updates slow down the performance of older iPhones to make their batteries last longer and that the company did not tell customers that their iPhones would eventually slow down.[75] Many class action lawsuits concerning iPhone performance were filed against Apple across the United States.[76] Apple agreed to pay out $310 million; however, the settlement requires each consumer to submit a claim form to receive compensation.[77] Additionally, Apple has agreed to pay $113 million in civil penalties to settle investigations brought by over 36 state Attorneys General.[78]

Some companies took advantage of the of the COVID-19 pandemic to claim, without any evidence, that their products or services would prevent or cure COVID-19. In 2020, the FTC sent warning letters to nearly 300 firms demanding they stop making unsubstantiated claims in marketing.[79] At the end of 2020, Congress gave the FTC broad powers to fine any company falsely advertising anything related to COVID-19, including seeking civil penalties against such companies.[80] The FTC used this power when a doctor was deceptively promoting $23,000 COVID-19 treatments – supplements and basic vitamins – on billboards, websites, and social media, promising "the disappearance of viral symptoms in two to four days."[81] The FTC required the doctor to refund customers and prohibited him from making further deceptive claims.[82]

- ## Celebrity endorsements.

Paying public figures to promote their products and services to their fans has always been a corporate marketing strategy, but the definition of "celebrity" has expanded far beyond traditional show business personalities. People with large audiences on social media – a.k.a "influencers" – are now routinely paid to post content on sites like Instagram and Twitter promoting a particular product. Consumers pay extreme attention to these influencers and buy things based solely on the influencer's endorsement. These promotional posts can fool consumers into believing that the influencer is a legitimate consumer themself, when in fact the influencer is being paid to post and may not have even tried the product.[83]

FTC rules regulate celebrity endorsements to prevent consumers from being misled.[84] In 2017, the FTC sent letters to 90 celebrities, athletes, and influencers ordering them to disclose their relationships to brands and when they are being paid to promote a product in online posts.[85] Many influencers continued to ignore the FTC rules.[86] As a result, in 2019, the agency issued guidelines and videos instructing influencers on how to comply with the laws requiring them to disclose any "financial, employment, personal, or family relationship with a brand."[87] The FTC rules also prohibit influencers from promoting products the influencer themselves have not used.[88]

Celebrity endorsements are such a powerful marketing tool that some companies are even forging them. Joining the "fake news" movement, some businesses post phony endorsements from celebrities and public figures in advertisements, web sites, blogs, and social media posts. This tactic has been especially rampant with the promotion of beauty products and diet pills.[89] One company was forced to shut down and fined $10 million by the FTC after falsely claiming that Oprah Winfrey endorsed their diet pills.[90]

- ## Lying about quantity.

Advertisers design misleading packaging and containers in a way that suggests that the consumer is going to get more of the product than they actually do. Companies selling items like snacks, candy, spices, lip balms, detergents, and nutritional supplements have come under fire for excessive "slack fill," meaning there is more air and less product in the packaging.[91] Approximately 300 slack fill lawsuits were filed between 2016 and 2017;[92] by 2018, slack fill class actions accounted for 11% of all lawsuits relating to foods and beverages.[93]

For example, consumers filed a case against Wise Foods claiming that the bags of potato chips they sold at stores like Walmart, Giant Food, and online through Amazon were filled with approximately 67% air and only 33% potato chips.[94] The consumers claimed that Wise Foods' advertising of the packages misled consumers into believing they were going to get more chips than they got, in violation of laws prohibiting deceptive advertising.[95] Most slack-fill lawsuits have been unsuccessful, however, because courts have allowed food makers to claim they need to maintain "functional" space in packaging.[96] ("Functional" slack-fill is defined by the FDA as space in a package that, among other things, exists for the protection of the contents of the package, is the result of unavoidable product settling during shipping and handling, and is necessary for the package to perform a specific function.[97]) A federal judge threw out the case against Wise Foods, saying that rather than relying on the inflated size of the package, consumers should have figured out the actual volume of chips from the weight, which was printed on the bag.[98]

StarKist settled a lawsuit in 2015 for $12 million after consumers claimed that it was under-filling its five-ounce cans of tuna by 1.99 to 2.65 ounces.[99] The settlement offered class members who filed a claim a choice between cash payments of $25 or coupons for $50 worth of StarKist tuna.[100] The settlement was challenged in a federal court of appeals by objectors on the ground that the affected consumers were not adequately notified of the settlement terms.[101] The federal court of appeals rejected the objections.[102] Because the challenge to the settlement delayed the case, consumers did not receive payments until late 2019.[103]

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What is an objector?

Under current class action law, all class members have a right to "object" to a class action settlement. This means that a class member can tell the judge – on paper or in court – why they think the court should reject a proposed settlement. They can also hire a lawyer to present their objection. (See pp. 172-174 for more on objectors.)

Every state has its own consumer protection statute prohibiting false and misleading advertisements. For example, California generally prohibits "untrue or misleading" advertisements.[104] California also has laws specifically identifying and prohibiting abuses like those noted above. (California's slack-fill law prohibits containers from being "made, formed, or filled as to be misleading;"[105] California also bars companies from displaying "Made in USA" labels where a product or parts of a product have been "entirely or substantially made, manufactured, or produced outside of the United States[.]"[106]) Private plaintiffs who have been harmed by false advertising may bring class action lawsuits to enforce these laws in California.

The FTC is tasked with enforcing the nation's strongest federal false advertising law, which cannot be enforced by private plaintiffs. However, like most government agencies, it has limited resources, and the five FTC commissioners – all presidential appointees – sometimes allow political concerns to guide their prosecutorial determinations. The FTC's new Chair, Lina Kahn, has a strong track record in challenging corporate misconduct and is expected to take a more aggressive approach in enforcing federal false advertising laws.[107]

Fees, Fees Everywhere

Extra charges tacked on to the advertised price are the bane of consumers – and a massive "revenue enhancer" for companies.

"Fees" that you never bargained for are everywhere. They can be so small that you won't even notice them unless you look carefully. But those few extra pennies, paid by millions of consumers, add up to a massive windfall for sneaky businesses. Not all fees are below the radar though. Some amount to hundreds of dollars.

In 2019, more than 85% of Americans reported that they had been charged an unexpected or hidden fee within the previous two years.[108] Companies use various techniques to try to slip fees past unsuspecting consumers. One such technique is "unbundling," in which companies demand payment of fees for items or services that were once included in the purchase price.[109] These fees are often presented as necessary to recover separate or unanticipated expenses on top of the price; they should be included within the price itself. When businesses fail to include mandatory fees in the advertised price, the true price of a product or service is concealed – and higher than the consumer expected. Another technique is "drip pricing," which occurs when companies tack fees – whether mandatory or for supposedly optional upgrades – on at the end of an online transaction, right before a consumer completes their purchase.[110] Companies know that once a consumer has selected an item, inputted shipping instructions, and submitted credit card information, consumers are much less likely to bail out – even if they are then presented with a hefty fee.

And there's more: penalty fees are a way to punish consumers if they do something (like cancel a subscription early) or fail to do something (like maintain a certain amount of funds in their bank account). An early termination fee (ETF) is a species of a penalty fee. Consumers are charged for ending a contract early – even if the product or service does not work as promised or the product becomes unusable. These fees are so exorbitant that consumers may not even be able to afford them – so ETFs often effectively lock people into contracts, flouting a basic principle of competitive markets.

Here are some types of fees that businesses try to sneak past consumers:

- ### "COVID fees."

Unsurprisingly, the COVID-19 pandemic has resulted in a new breed: the COVID fee. Instead of simply raising prices, surcharges between $5 and $1,200 are being added at doctor and dentist offices, senior living facilities, hair salons, and restaurants to supposedly cover the cost of cleaning and personal protective equipment.[111] With no data to support the additional charges, the fees can be considered another form of profiteering after a major natural disaster (which is illegal in many states[112]). Such fees may become more commonplace as consumers fail to notice or question them when tacked onto their bills.[113]

- ### Travel fees.

The travel industry is rife with fees. When booking lodging, the advertised "per night" price is rarely accurate. Hotels tack on an average of $17.30 per night in "resort fees," which they claim cover basic services like Internet access or in-room coffee.[114] Las Vegas hotel Circus Circus boasts $25 per night rates, but when consumers book a room, they are charged a $36.28 nightly resort fee.[115] Consumers have complained that Marriot tries to make consumers think they are getting a deal by paying a mandatory $35 per day resort fee, claiming the services included in the fee are actually worth $184 – even if you don't use them:

Source: JW Marriott Desert Springs Resort & Spa, TripAdvisor, https://www.tripadvisor.com/LocationPhotoDirectLink-g32846-d77534-i292949696-JW_Marriott_Desert_Springs_Resort_Spa-Palm_Desert_Greater_Palm_Springs_Cali.html (last visited Aug. 25, 2021).

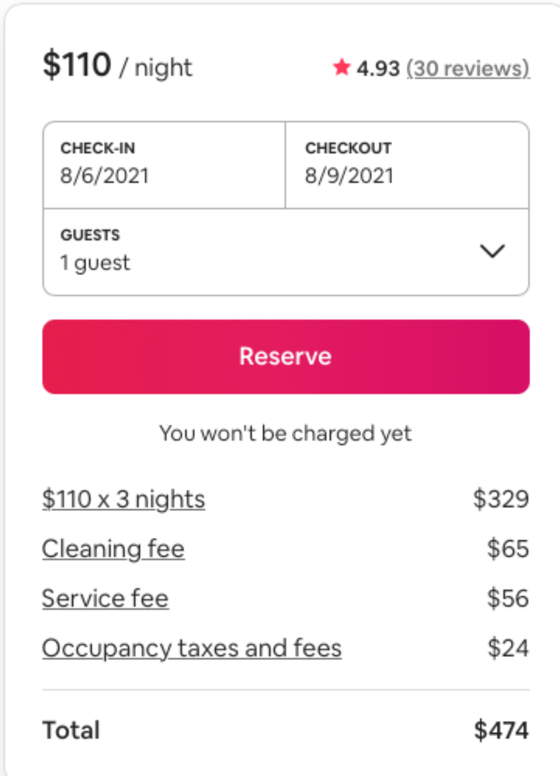
Consumer Reports has urged the FTC to require hotels to include mandatory resort fees in their advertised per-night rates.[116] The FTC has yet to take action.

In-room Wi-Fi service used to be a separate optional charge at many hotels, but with the advent of smart phones connected directly to the Internet, the hotels decided to make the fees "mandatory," preventing consumers from declining a service that they don't need. One consumer reported an unexpected charge of $300 to use the air-conditioning in a vacation rental home.[117]

Forty-seven state Attorneys General and the District of Columbia created a task force to investigate a dozen hotels' drip pricing practices in 2016.[118] According to the District of

Columbia Attorney General, that investigation “fell apart” in 2017 once the Trump Administration took office.[119] However, in July 2019, the District of Columbia Attorney General filed a complaint against hotel chain Marriott International for drip pricing – by tacking on fees of up to $95 at the end of online booking transactions for over a decade in at least 189 Marriott hotels.[120] The District of Columbia Attorney General’s complaint seeks to force Marriott to include the mandatory fees in the advertised price of a room, to pay back consumers who paid the fees, and it seeks to impose civil penalties on Marriot.[121] The District of Columbia Superior Court denied Marriott’s request to throw out the lawsuit, saying more information was needed about the advertised prices.[122] The lawsuit is ongoing.

Hotels aren’t the only lodging services tacking on fees. Airbnb advertises a “per night” price for a property, only to reveal additional charges further along in the booking process, such as a “cleaning fee” and a “service fee.”[123] The Los Angeles Times analyzed 40,000 Airbnb listings and found that 83% of all rentals charge a mandatory cleaning fee between $5 and $1,5000, with a median cleaning fee of $75.[124] An example of a checkout screen for renting an Airbnb advertised at $110 per night in Austin, Texas, for three nights (which would presumably amount to $330 before taxes, but appears in the online quote as $329):



Source: Airbnb.com, https://www.airbnb.com/rooms/47331054?check_in=2021-08-06&check_out=2021-08-09&translate_ugc=false&federated_search_id=ffc0e913-aa4c-4a84-b89b-b9e32efeba7d&source_impression_id=p3_1623377097_QWPj1U9jLU1CDMu8&guests=1&adults=1 (last visited Jun. 9, 2021).

Regulators in Europe have cracked down on Airbnb for its drip pricing practices. The European Union Commission requires Airbnb to display the full rental price – including the cleaning fees, service fees, and occupancy taxes and fees – in the advertised per-night room rate.[125]

The proposed Hotel Advertising Transparency Act was introduced in the U.S. House of Representatives in 2019 and would require hotels and short-term lodging services like Airbnb to include mandatory fees in the advertised per-night room rate.[126]

Airlines are notorious for unbundling.[127] They charge one price for a seat on the plane and then tack on fees for every aspect of the travel experience. For example, travelers are almost always required to pay for changing flights, to buy food, or to check baggage – services that airlines used to provide for free as part of the ticket price.[128] Airlines are even now charging customers between $15 and $25 for the opportunity to select a seat for their flight, which used to be a standard feature included in the purchase of an airline ticket.[129] Some airlines, like Spirit, make consumers pay extra for a carry-on.[130] In 2018, United Airlines, JetBlue, Air Canada, and WestJet all increased fees for checked luggage.[131] These fees pay off: U.S. airlines made $4.6 billion in 2018 on baggage fees.[132] Southwest Airlines, which leads most airlines in consumer satisfaction,[133] seems to be the only airline that generally does not charge fees for changing flights or checking up to two pieces of luggage.[134]

Because each airline has its own set of fees, it can be nearly impossible for a consumer to compare what a trip will cost them on each airline. Under the Trump Administration, the U.S. Department of Transportation killed a proposed regulation, developed after years of consumer complaints, that would have required airlines to disclose all carry-on and checked baggage fees up-front to consumers at the beginning of the ticket-buying process.[135] President Biden has asked the agency to proceed to adopt such a regulation.[136]

- **Cable fees.**

The cable industry has pioneered uniquely anti-consumer unbundling strategies: at the same time that it *unbundles* services through a combination of bewildering mandatory and voluntary fees, it bundles groups of channels into a single, "take it or leave it" price. Instead of raising baseline prices for services, cable companies keep adding fees and increasing the amount of existing fees. A 2019 report on fees charged by the cable industry found that consumers with cable are paying an extra $450 per year in fees on top of the advertised charges, making up 24% of the entire bill.[137] The report found that these fees net the cable industry $28 billion a year.[138] Between 2015 and 2018, Comcast, now known as Xfinity, increased its fees by 241%![139] Here's an example of a Comcast bill:

comcast

Service Details

Contact us: www.xfinity.com 1-800-XFINITY

Account Number	[redacted]
Billing Date	12/20/15
Total Amount Due	$138.93
Payment Due by	01/18/16
	Page 2 of 3

XFINITY Bundled Services

Starter XF Bundle Includes Digital Starter, Digital Converter, access to On Demand Programming, Performance Pro Internet and XFINITY Voice Unlimited.	01/06 - 02/05	99.00
Total XFINITY Bundled Services		**$99.00**

Additional XFINITY TV Services

HD Technology Fee	01/06 - 02/05	9.95
Additional Outlet Digital Adapter	01/06 - 02/05	3.99
Total Additional XFINITY TV Services		**$13.94**

Additional XFINITY Internet Services

Speed Increase Blast! Internet. Promotional Rate.	01/06 - 02/05	0.00
Wireless Gateway	01/06 - 02/05	10.00
Total Additional XFINITY Internet Services		**$10.00**

Additional XFINITY Voice Services

For Telephone(s): [redacted]

View Voice Detail at www.comcast.com/viewbill

Total Additional XFINITY Voice Services **$0.00**

Other Charges & Credits

Broadcast TV Fee	01/06 - 02/05	5.00
Regional Sports Fee	01/06 - 02/05	3.00
Universal Connectivity Charge	01/06 - 02/05	0.94
Regulatory Recovery Fee	01/06 - 02/05	0.13
Total Other Charges & Credits		**$9.07**

Taxes, Surcharges & Fees

TV		
[redacted] Communications Sales Tax	01/06 - 02/05	3.08
Rights of Way Use Fee	01/06 - 02/05	1.05
FCC Regulatory Fee	01/06 - 02/05	0.08
Internet		
Sales Tax	01/06 - 02/05	0.60
Voice		
Communications Sales Tax	01/06 - 02/05	1.36
911 Fees	01/06 - 02/05	0.75
Total Taxes, Surcharges & Fees		**$6.92**

Source: Consumerist, *The Consumerist Guide to Understanding Your Comcast Bill* (Feb. 1, 2016), https://www.consumerreports.org/consumerist/the-consumerist-guide-to-understanding-your-comcast-bill/.

Upon close examination, the charge for a "bundle" of cable channels is $99. The remaining $39.93 is for fees and taxes.

In January 2019, Comcast raised its "broadcast TV fee" from $8 per month to $10 per month and raised its "regional sports network" fee from $6.50 to $8.25 per month.[140] By January 2021, the company's broadcast TV fee was up to $14.50 and the regional sports network fee was $10.25 per month[141] (amounting to $297 a year just for these two fees!). Other cable companies, like AT&T, Altice, Charter, and Cox Communications raised broadcast TV fees in 2018 and 2019.[142]

Cable industry and airline industry prices used to be closely regulated. But the corporate-sponsored push for deregulation at the local, state, and federal level has left consumers at the mercy of these industries.

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What is deregulation?

Deregulation is the process of removing or curtailing government laws and regulations that control the conduct of an industry. Big business supports deregulation because when companies are less regulated, they have less responsibility to ensure their practices do not harm consumers – and they are held less accountable when they do. Deregulation not only costs consumers money, it threatens their health and safety and results in economic inequality, discriminatory practices, and environmental degradation. (See pp. 137-141 for a discussion of deregulation.)

- **Phone billing fees.**

Perhaps the most absurd fee is the "billing fee." That's a charge that a company puts on a bill supposedly for the cost of sending the bill to the consumer.[143] Cellphone company Nextel tried this in the 2000s, mandating a $2.50 per month "billing fee" for mobile phone customers who wanted to get a bill by mail.[144] Long before forced arbitration clauses became the norm, a California class action lawsuit forced the company to repay consumers.[145] (See p. 171 for more on the Nextel lawsuit.)

- **Bank fees.**

Banks are notorious for charging excessive and unjustified fees. They routinely punish customers with penalty charges, such as overdraft fees.[146] Overdraft fees are charged when a consumer does not have enough funds in their bank account to cover a transaction when a consumer uses their debit card, withdraws cash from an ATM, makes payments online, or writes a check. In 2017, Americans paid $11.45 billion in overdraft fees.[147] At the onset of the COVID-19 pandemic, some banks suspended overdraft fees in a public-relations driven attempt to appear empathetic to the economic struggles of their customers. However, by the end of 2020, income from overdraft fees soared back to pre-pandemic levels, and banks made $2.3 billion in overdraft fee income in the *fourth quarter* of 2020 alone.[148] Overdraft fees are most likely to be assessed against customers who live paycheck-to-paycheck: one study found that low-income, single, non-white renters are most likely to incur overdraft fees.[149] Another study showed that minorities are hit hardest by penalty fees, especially overdraft fees.[150] Overdraft fees average $35 and are often larger than the amount of the actual transaction resulting in the overdraft fee.[151] Banks do not disclose how much an overdraft transaction actually costs the bank.

In February 2019, consumers accused Bank of America in a class action of lying to its customers by telling them that it would not charge overdraft fees for certain transactions while still charging the fees.[152] A settlement was approved by a court in September 2019 for approximately $5 million to be directly distributed to affected customers, an estimated refund of $17.67 per each $35 overdraft charge.[153] As the ink was drying on the overdraft fee settlement, Bank of America was again accused of charging unlawful overdraft fees: in January 2020, consumers filed a similar class action lawsuit against Bank of America for telling its customers that it would not charge overdraft fees on “non-recurring” debit card transactions and then charging overdraft fees.[154] The bank claimed that the fine print of its take-it-or-leave-it contract with its customers permitted the charges. The court agreed and dismissed the lawsuit; the case is currently on appeal.[155]

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What is a take-it-or-leave-it-contract?

Almost all companies force consumers to accept take-it-or-leave-it contracts. The terms of these contracts are dictated by the company and of course benefit the company. Consumers never truly "agree" to the terms – in fact, they are almost always unaware of the terms. However, courts have adopted legal theories over the years under which they enforce the terms of such contracts against consumers. (See pp. 97-105 for a detailed discussion of take-it-or-leave-it contracts and how they hurt consumers.)

Bank of America also caused outrage when it announced in 2018 that it would charge customers who use a type of e-Banking account marketed to low-income customers a monthly $12 penalty if their balances fall below $1,500 or if they have less than $250 in direct deposits each month. [156] Bank of America is still charging the fee despite widespread protests from customers.[157]Citibank instituted similar fees.[158]

Credit card penalty fees are abundant as well. Some examples: late payment fees, fees for spending beyond the credit limit, and bounced check fees.[159] (And those are on top of the annual fees, balance transfer fees, cash advance fees, and monthly interest charges.)

Plus, as the U.S. evolves into a cashless society, consumers may be charged fees by businesses just for *using* a credit card. For example, restaurants may tack on a fee to a bill if a consumer is paying by credit card[160] (unless the consumer lives in one of the 10 states that prohibit such fees[161]).

Can a tech industry leader change the banking and credit card industry? On August 20, 2019, Apple rolled out a new Apple credit card – the "Apple Card," issued by Wall Street investment firm Goldman Sachs – that promises "No fees. Not even the hidden ones,"[162] meaning consumers will not be subject to annual fees, late fees and or over-the-limit fees. So far Apple appears to have kept its promise.

Rules under the federal Credit CARD Act of 2009 reined in some credit card fees by requiring lenders to get customers' agreement before they can be charged overdraft fees (a regulation that the Trump Administration unsuccessfully tried to repeal[163]); placing limits on how many times lenders can charge certain types of fees; prohibiting "inactivity fees" for not using a card; prohibiting fees for certain forms of payment (by mail or electronically); and setting limits on the amounts of certain fees.[164] By 2015, the Consumer Financial Protection Bureau (CFPB) found that consumers had saved more than $16 billion in credit card fees as a result of the Credit CARD Act of 2009.[165] (See p. 140 for a discussion of the CFPB.) However, some advocates criticized the rules for not going far enough. For example, the rules do not put a cap on the amount of fees that credit card companies can charge for transferring a balance from one credit card company to another.[166]

- **Mobile phone company fees.**

Cell phone companies were once some of the worst offenders.[167] They would require consumers to pay a several-hundred-dollar penalty if consumers wanted out of their contracts early, essentially requiring consumers to do business with that one company for years. Pressure from angry consumers forced the major cell phone companies (AT&T, Verizon, Sprint, T-Mobile) to pro-rate early termination fees so that consumers are charged based on the months remaining in their contract rather than one huge, flat fee.[168]

- **Entertainment company fees.**

Entertainment companies also charge early termination fees. DirecTV was accused of charging illegal ETFs – up to $480 – in a class action lawsuit filed on behalf of consumers in 2008.[169] DirecTV tried to force the case into arbitration, lost, and appealed that decision all the way to the United States Supreme Court.[170] The Supreme Court upheld the arbitration agreement.[171] (See p. 144 for more on the DirecTV case.)

As deployed by corporations, fees are a deceptive way for companies to mislead consumers and avoid competition. And for the most part, current law does not protect consumers from such fees. There are industry-specific exceptions, such as the federal Television Viewer

Protection Act that went into effect in December 2020, which requires broadband and TV companies to disclose all extra fees prior to customers signing up and bans such companies from charging "rental" fees to customers who own their own equipment.[172] However, there are no state or federal laws that require *all* companies to include *all* mandatory fees in the advertised price or that generally prevent companies from charging unnecessary fees.

You're Charging Me How Much? For What?!

Overcharges are surprisingly common – as are charges for things never ordered. These improper charges come in all shapes and sizes. They can range from a few cents to astronomically high amounts that cause "bill shock."[173] Vigilant consumers used to be able to avoid overcharges and unauthorized charges by scrutinizing a transaction before making a purchase. But many companies keep consumers' credit cards on file for continuous billing or provide automatic bill-pay programs. These "conveniences" make it easier to slip in a phony charge or an overcharge.

- **Increased rates.**

Consumers who signed up with AT&T for a bundled Internet and DirecTV satellite service package at promotional rates for two years experienced "bill shock" when they received bills within the two-year period for up to three times the amount of the promised rate.[174] A CBS News investigation uncovered *more than 4,000* complaints against AT&T about overcharges for promotional bundle services.[175] The companies never faced any consequences or addressed the consumer outrage.

- **Charges for services or items not ordered.**

Amazon faced three class action lawsuits from California, Texas, and Illinois customers claiming that Amazon had charged them between $99 and $400 for a Prime membership (which provides access to perks like free shipping and streaming video content) without their knowledge and then refused to provide refunds.[176] After Amazon tried to force the cases into arbitration,[177] the plaintiffs ultimately dismissed their cases.[178]

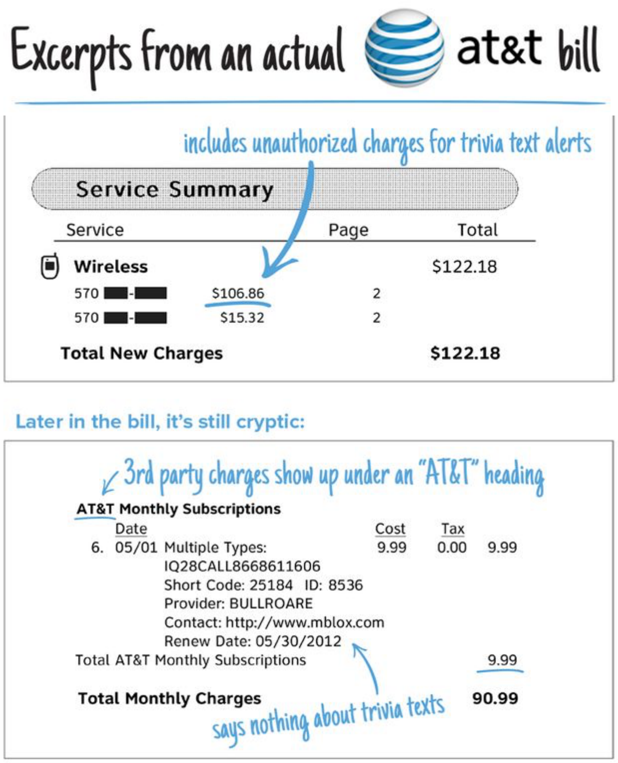
- **"Cramming."**

Unauthorized charges often appear as line items on a bill or invoice from a utility or other company with which the consumer has an ongoing account. Known as cramming, it's commonly used by phone companies to overcharge consumers. Cramming happens when a company adds a charge to your phone bill for an *unrelated* service you did not order or use.[179]

Companies have been cramming for decades. In 2001, the California Public Utilities Commission (CPUC) went after third party billing companies that added charges to consumers' Pacific Bell phone bills (now part of AT&T) for calling cards they did not order.[180] The CPUC issued fines and refunds back to consumers totaling more than $8 million, which was an unprecedented amount at the time.[181]

Cramming on phone bills can appear as third-party charges for things like horoscope readings, dating services, or ring tones.[182] A 2011 investigation by the U.S. Senate Committee on Commerce, Science, & Transportation found that phone companies generated over $1 billion in revenue for including unauthorized third-party charges on customers' bills for their landlines between 2001 and 2011.[183]

Federal regulators have filed numerous lawsuits against Verizon, Sprint, AT&T, and T-Mobile for cramming, resulting in fines and promises by the companies to stop cramming.[184] In 2014, AT&T paid $105 million to settle charges brought by federal and state regulators for cramming bills with unauthorized charges.[185] Here's an example of an AT&T bill (annotated by the FTC) reflecting $9.99 monthly charges for "trivia texts" from "Mblox.com":



Source: Lance Whitney, *AT&T to pay $105 million to settle charges over mobile billing,* cnet (Oct. 8, 2014), https://www.cnet.com/news/at-t-to-pay-105-million-to-settle-fraudulent-mobile-bill-charges/.

It is not just the major cell phone companies that get caught: telecommunications provider CenturyLink paid $550,000 in 2019 to settle charges for illegal cramming brought by the Federal Communications Commission (FCC).[186] The settlement required CenturyLink to "implement a process" for giving refunds to affected consumers.[187]

- ## "Negative option billing."

Another form of unauthorized charges is negative option billing. Negative option billing occurs when a business signs customers up for a service that they did not specifically order and then, if a customer does not affirmatively cancel the new service, the customer's silence is treated as an agreement to continue to pay for that service.[188] In 2016, the FCC imposed a $2.3 million fine against Comcast for negative option billing when it signed its customers up for services like extra TV channels they did not even know they had and equipment like cable boxes that they never ordered or received – and made the customer pay for it.[189]

Unauthorized charges may be illegal: they may violate false advertising laws, state consumer protection statutes, federal regulations, or sometimes even the terms of a take-it-or-leave-it contract. Some laws target specific practices and industries: cramming on a phone bill is illegal under federal rules and certain state laws;[190] cable companies are prohibited from negative option billing by federal law.[191] While agencies like the FCC may bring enforcement actions to enforce federal rules, the resulting settlements may not guarantee direct relief to consumers in the form of refunds. Many state and federal agencies do not have the statutory authority to order refunds.

Even with laws in place to bar unauthorized charges, federal and state agencies don't have the requisite resources to police the entire U.S. marketplace for violations. So they put the onus on consumers by instructing them to carefully review their bills for unauthorized charges.[192] If consumers do not check, they may end up paying these bogus charges.

Shackled by Subscriptions

Subscriptions allow consumers to pay for items or services that are provided over time or in increments. Subscriptions were common for magazines and newspapers, but nowadays, especially in the online marketplace, subscription services are replacing purchases for nearly every kind of product,[193] including software, groceries, meals, clothing, and beauty and pet products. Subscriptions are highly lucrative for any industry, because corporations know that once a consumer has signed up, they are much more likely to stay put – either through neglect or indifference. And the subscription economy is blowing up: among companies offering subscriptions, revenue has grown 300% since 2012.[194]

How do companies use subscriptions to rip off consumers?

Through tactics designed to imprison consumers into an ongoing, paying relationship with a company. Subscription "agreements" are often take-it-or-leave-it contracts that contain arbitration clauses, which strip consumers of their right to go to court if they need to escape.

Here are a few examples:

- ### Automatically renewing consumers' subscriptions without notice.

Companies that keep consumers' bank accounts or credit card numbers on file from a previous transaction often charge consumers for a subscription renewal without the customer's consent. In 2018, online dating service eHarmony resolved a government enforcement lawsuit for not clearly explaining to consumers that it would automatically renew their subscription once their initial membership expired, in violation of a California law regulating the cancellation of "ongoing" products or services.[195] Ultimately, eHarmony agreed to pay $1.28 million in civil penalties and $1 million to affected consumers.[196]

Apple also faced a class action lawsuit in California for allowing third party apps that are accessed on Apple devices to automatically renew subscriptions and charge consumers' credit cards without informing customers, in violation of the same law.[197] The case resulted in a $12 million settlement: approximately 3.9 million consumers were expected to receive about $3.00 in credit back to their Apple accounts.[198]

A similar lawsuit against skincare product company ProActiv claimed that the company failed to disclose that it automatically renewed subscriptions to the product.[199] After four years of litigation, the company agreed to a claims-made settlement under which it would pay consumers between $20 and $75 if they submitted documentation proving they had purchased the products.[200]

- ### Making it difficult to cancel subscriptions.

Churn rates in the subscription economy are high: half of consumers who enter into subscriptions cancel them within six months of starting the subscription.[201] However, some companies make it difficult or impossible to find instructions on how to cancel unwanted subscriptions.[202] And it's often equally hard for consumers to locate a customer service phone number to call about their subscriptions.

Gyms are notorious for requiring customers to sign a monthly contract that automatically renews – but the fine print permits a person to cancel only by sending a letter by "certified U.S. mail," which requires the customer to write a letter, fill out a form, and mail it.[203] Planet Fitness, one of the largest gym chains in the U.S.,[204] requires its members to either come to the gym in person (where the member could be subjected to high-pressure sales tactics to encourage them to continue their membership) or send a letter by certified mail to cancel their membership:

How do I cancel my membership? +

We hate to see you go! But if you must, the process is easy. You can fill out a cancellation form at the front desk of your home club, or send a letter (preferably via certified mail) to your club requesting cancellation. Memberships can't, unfortunately, be cancelled by email or phone. Please remember that your cancellation request is subject to any obligations of your membership agreement. Your club staff will be able to review the terms of your membership agreement and answer any questions you have. If you are cancelling because you're unsatisfied with your Planet Fitness location, please speak with your local club manager before making your final decision. We love feedback and would love the opportunity to improve and hopefully change your mind!

Source: *Membership FAQs,* Planet Fitness, https://www.planetfitness.com/about-planet-fitness/customer-service/membership-faqs (last visited Jun. 9, 2021).

The nation's number one retailer, Amazon, has generated many complaints about the difficulty in cancelling its Prime membership. Consumer groups in the United States and Europe have petitioned government regulators about Amazon's membership cancellation process.[205] These organizations claim that it amounts to a "dark pattern," a term coined to describe online systems that are designed to trap consumers into doing something online that they do not intend.[206] In contrast to Amazon's easy "One Click" sales system, the groups say that the cancellation process is onerous and confusing. [207] When a user tries to cancel a membership, they are forced to click through many pages, shown warnings that the user is going to lose "exclusive benefits," presented messages urging the user not to cancel, and provided options to switch to a different type of membership.[208] These hurdles often bully users into remaining Prime members instead of actually canceling.[209]

Online audiobook service Audible faced a class action lawsuit for telling customers they could cancel their Audible subscriptions at any time with "no strings attached," when in fact a cancellation requires customers to forfeit audiobooks they had purchased prior to the cancellation.[210] Audible agreed in a settlement to provide class members who cancelled the service with credits for more Audible audiobooks, which required customers who cancelled to re-establish a relationship with Audible in order to claim their settlement benefit. Audible also agreed to make its cancellation policy clearer.[211]

• Convert free trials into paid subscriptions.

When signing someone up for a "free trial," businesses usually require the consumer to provide payment information in exchange. As noted above, corporations count on customer inertia when it comes to cancelling a subscription. Once the trial period ends, companies start charging consumers – often without telling them that the free trial ended. Customers of online music streaming service Spotify complained that it failed to notify them when their free trial was ending, and that Spotify would start charging their credit card $9.99 per month for a paid subscription.[212] The plaintiff and the defendant privately settled the case on an individual basis rather than as a class action before the scheduled trial.[213]

• Change the terms of a subscription.

Companies often increase the price of a subscription when it's up for renewal, without getting customers' permission or even telling them. For example, customers of anti-virus software McAfee accused the company of charging higher prices for the annual renewal than had been advertised initially.[214] In a settlement, consumers were offered $11.50 – if they filed a claim – and McAfee agreed to add disclosures to its marketing materials about price increases at the time of the subscription renewal.[215]

Beginning in 2017, printer manufacturer HP provided a subscription plan that allowed HP printer owners to pay by the number of pages they print each month rather than for ink cartridges. HP's "free ink for life" subscription allowed customers to print 15 pages for free each month, and if customers printed more than 15 pages, they would be charged a fee. In December 2020, HP announced that it would end the "free ink for life" subscription and would charge customers 99 cents for the first 15 pages printed each month, plus additional charges for additional pages. After a consumer uproar, HP reversed course, allowing its existing "free ink for life" subscription members to keep the benefits of the original subscription.[216]

Thirty states and the District of Columbia now have "automatic renewal" laws on the books (another 12 states are considering legislation) governing how and when subscription companies can charge consumers.[217] California's law, for example, requires companies to provide clear disclosures of the terms of a free trial or subscription and how to cancel, requires companies to provide a way to cancel a subscription online, and prohibits companies and third parties from charging consumers' credit cards without consent to the terms of the subscription.[218] Individual consumers in California and other states can bring lawsuits in their states for violations of these laws. As the subscription economy continues to boom, lawsuits enforcing state auto-renewal laws are on the rise.[219]

The federal Restore Online Shoppers' Confidence Act[220] prohibits businesses from passing along consumers' payment information to third parties who then charge consumers for products or services without the consumer's consent. The FTC has used this law to combat unfair automatic subscriptions by bringing lawsuits against companies that violated the law.[221] The federal law is limited though: it only applies when a third party is involved and consumers cannot enforce it themselves.

Unsatisfied with Your Purchase? Too Bad

When customers are not happy with a purchase – because it's faulty or otherwise – they usually ask for their money back. Reputable establishments used to honor the maxim "the customer is always right," and permitted returns with no questions asked. Addressing their customers' complaints was considered a way for companies to build consumer loyalty to the brand.

But returns cut into companies' profits: 5-10% of in-store purchases and 15-40% of online purchases are returned by consumers; retailers refunded $400 billion in 2018.[222] Businesses increasingly discourage or even refuse customer returns and refunds:

- ## Refusing refunds during the COVID-19 pandemic.

The COVID-19 pandemic caused many businesses to abruptly stop operations in March 2020. As a result, consumers could not use gym memberships, tickets to events, airline tickets, or partake in other pre-paid activities. Multiple class actions were filed in 2020 against fitness centers, schools and universities, entertainment companies, and cruise lines over refunds for services that were not provided.[223] While many airlines promised full refunds for unused tickets, not all honored their promises – even after receiving $54 billion in federal pandemic aid in 2020.[224] The U.S. Department of Transportation, which oversees the airline industry, received over 90,000 complaints in 2020 about airlines refusing to honor refund requests (a 5,500% increase from 2019).[225] American Airlines has recently changed its take-it-or-leave-it contract with customers (which is only available online) ostensibly to allow it to strand passengers if their flight is cancelled.[226] One of the top ten consumer complaints in 2020 was against companies for failing to provide refunds as a result of COVID-related cancellations.[227]

- ## Failing to disclose – or lying about – the terms of the return policy.

Sometimes businesses hide or even misrepresent the terms of their return policies, leaving consumers in the dark or deceived as to their rights if something goes wrong with the purchase. One person who purchased a laptop computer from home shopping network QVC never received any document detailing QVC's return policy; when she wanted to return the laptop, QVC said that it was too late:

> **QVC - Return Policy**
>
> I ordered a HP Stream 13 Intel Laptop on 6/9/15. When received the item I did not have any information important papers inside of the box (i.e return policy or a return label).
>
> When I called QVC last week I was informed I could not return because of the date. I was told I had only 30 days to return item. But I have been paying for this item for almost 6 months. I don't have a order number or a written return policy.
>
> Your policy should have been inside of the box with the item. Usually when I receive mail orders there is always a return label and return policy included. This item is not worth what you charged.
>
> Your company sold me an inferior product. I feel I have been robbed by QVC.

Source: *QVC – Return Policy,* Pissed Consumer, https://qvc.pissedconsumer.com/return-policy-20151130742803.html (last visited Aug. 25, 2021).

Another company, LuLaRoe, was accused of lying about the terms of its return policy. LuLaRoe is a multi-level marketing company that requires its customers – "independent fashion retailers" – to purchase $5,000 worth of clothing items, promotional materials, and shipping supplies from LuLaRoe with the promise that they will make money when they resell the clothing on their own.[228] It is well known that multi-level marketing schemes often do not live up to their promises and ultimately cost people who join (as a way to make ends meet) hundreds and sometimes thousands of dollars (99% of people who join multi-level marketing schemes lose money).[229] Customers who made the required purchases from LuLaRoe filed a class action against the company when it refused to allow them to return clothing that was unsold due to undesirable and unpopular styles, duplicate items, or items that came in odd sizes.[230] The customers claimed that LuLaRoe had lied about its return policy, which said that it would provide full refunds of all unwanted inventory at any time.[231] A federal court determined that LuLaRoe's contract required the case against the company to be resolved in arbitration and dismissed the class action.[232] It is unknown whether the "independent fashion retailers" were able to resolve their individual claims through arbitration.

- **Customer return profiling.**

Many retail companies have begun applying secret surveillance scores to bar some of their customers from returning purchases. The scores, marketed to retailers by below-the-radar data analytics firms, are based on computer algorithms that process tens of thousands of intimate details of each American's life to generate a personal "fraud score" that supposedly predicts a consumer's potential for fraudulent return activity – the premise being that someone who frequently returns purchases is engaging in criminal misconduct.[233] Depending on a consumer's fraud score, companies will deny a consumer the right to return a product while allowing others to do so.[234] The third-party data analytics companies tout their scoring services as "fraud prevention."[235] The existence of these scores is largely hidden from American consumers.

For example, retail giants like Best Buy, Home Depot, J.C. Penney, Sephora, and Victoria's Secret have used or are currently using a company called The Retail Equation (TRE) to develop secret surveillance scores that label customers as fraudsters and refuse to accept returns from them.[236] Neither the scores nor these business's relationship with TRE is disclosed to consumers until the customers are informed that their returns are being denied.

12/16/2017

I am experiencing what appears to be everyone else's problem with this company- being given the run around. I feel that companies like Best Buy are using TRE to pass the buck in efforts to not honor their return policy.

I am an elite plus member, tried to return a laptop because it's not what I need for my business and I was denied. Now I'm stuck with a $1400 device that I don't want and I am being ping ponged between Best Buy and TRE. Absolutely terrible way to treat a long time costumer. I will do no more business with Best Buy.

5/10/2018

Customer service is terrible. Best Buy uses them to flag fraud but often catches regular consumers. If you have a policy all I ask is be transparent. I know when I buy something from Amazon I may have to pay for return shipping unless otherwise noted. Best Buy needs to be upfront about their return policy. All of the Retail Equation is done under secrecy and it unfair to the consumer.

3/14/2018

I have made more than $5000 worth of purchase in an year at Best Buy (I'm Elite Plus member), and only returned less than $300, then I was warned by BBY as if I committed a

Source: *The Retail Equation,* Yelp, https://www.yelp.com/biz/the-retail-equation-irvine (last visited Aug. 25, 2021).

Another surveillance scoring firm that generates "fraud scores" is Sift. Sift's clients have included coffee chain Starbucks, travel-booking service Airbnb, online restaurant-booking service OpenTable, online furniture retailer Wayfair, grocery-delivery service Instacart, and the professional social network LinkedIn.[237] Sift uses approximately 16,000 data points about each consumer to algorithmically determine whether a consumer is labelled a fraud, which could result in the refusal by Sift's clients to accept a return.[238]

On June 24, 2019, #REPRESENT submitted a petition to the FTC to investigate and take action against The Retail Equation, Sift, and other companies that develop and use secret surveillance scores.[239] The FTC took no formal action, but the petition inspired a New York Times reporter, in conjunction with one of the authors of this report, to ask Sift to turn over the personal data it had used to generate their scores. Sift responded with over 5,000 pages of data – including messages sent through Airbnb, the contents and timing of food orders going back several years, and logs of every time certain apps were opened on a digital device.[240] As a result of the New York Times article, Sift was inundated with over 16,000 requests from consumers demanding their data files, forcing the company to hire a third-party vendor to process the requests.[241] Sift has yet to explain why the intimate data it uses to generate its scores have any bearing on whether a consumer should be allowed to return an item. (See p. 77 for more on secret surveillance scores.)

- ## Changing return policies.

Before 2018, outdoor apparel company L.L. Bean was known for its return policy – customers were guaranteed 100% satisfaction and could return items in any condition back to the retailer at any time.[242] On February 9, 2018, the company announced it was changing the policy, citing $250 million in returns over five years.[243] Consumers were given one year to return items. Multiple class action lawsuits were filed against L.L. Bean pointing out that consumers had relied upon the advertised promise of the lifetime guarantee return policy when making purchases from L.L. Bean and alleging that L.L. Bean violated various false advertising laws and consumer protection statutes by changing its policy.[244] As a result of the lawsuits and public outcry about the change in the company's longstanding return policy, the company clarified that the new restricted return policy only applied to items purchased after February 9, 2018.[245] All of the lawsuits have since been dismissed.[246]

Other retailers – Macy's, Bed, Bath & Beyond, and Kohls – are following suit and opting to abandon policies that allowed for returns at any time in favor of shorten deadlines. Even retailer Nordstrom, which used to accept returns without a receipt and without any time limit,[247] has instituted restrictions. Abuses of Nordstrom's generous policy led it to place conditions on returns – like requiring tags to still be on evening wear – but the company remains one of the most flexible in the retail space.[248] Its return policy is also one of the reasons that Nordstrom has thrived online and at its brick-and-mortar stores despite the "retail apocalypse."[249]

Shrinking Return Deadlines					
Retailer	2015	2016	2017	2018	2019
Macy's	Unlimited	1 Year	180 Days	180 Days	90 Days
Bed, Bath & Beyond	Unlimited	Unlimited	Unlimited	1 Year	180 Days
Kohl's	Unlimited	Unlimited	Unlimited	Unlimited	180 Days

Source: *2019 Return Policy Survey: Return Deadlines Shrinking*, Consumer World (2019), https://www.consumerworld.org/gifs/returns-2019-5-year-chart.jpg.

The few federal laws governing returns provide limited protections from abuses. For example, the FTC's "cooling off rule" requires door-to-door sellers to inform buyers of their right to cancel a sale of $25 or more made at a home, workplace, school dorm, hotel room, convention center, fairground, or restaurant within three days of the purchase.[250] California has some of the strictest rules of any state regarding returns: businesses must clearly post their refund policy unless they offer a full cash refund, exchange, or store credit within seven days of the purchase; businesses that violate this rule are required to accept full refunds within 30 days of purchase.[251] Few other states regulate returns and the disclosure of return policies.[252] Currently, there are no laws regulating the practices of secret surveillance scoring firms like The Retail Equation and Sift.

Rebates may seem enticing, but they are a trap. Many businesses promise to return a portion of the purchase price to the consumer after the purchase.[253] You've seen the ads boasting of a discount – "$100 off" – but buried in small font at the bottom is "after rebate."

Consumers think they are getting a deal because they are being promised a lower price. But there is a reason why rebates are so popular with businesses: rebates typically require the consumer to submit receipts and other paperwork, which businesses know discourages consumers from claiming their rebate. It may take weeks to "process." It may also come with lots of strings attached. All of these hurdles make it less likely a consumer will ever collect the advertised rebate. Between 40% and 60% of rebates are *never redeemed* by consumers – amounting to over $500 million kept in corporations' pockets.[254]

How are companies using rebates to rip off consumers?

- **Require paperwork for redemption.**

  Most rebate deals require a consumer to take burdensome steps (that companies know many customers will not take) to redeem a rebate. For example, a mail-in rebate usually requires consumers to pay the full cost for an item up-front, then send documentation to the manufacturer or retailer by mail, and later receive the rebate by mail. People are less likely to redeem rebates when they are required to fill out forms, compile documents such as receipts and the original "proof of purchase" labels, and then mail them.[255] One glance at a mail-in rebate form once used by Verizon reveals why consumers are reluctant to redeem them:

Mail-In Rebates Authorized Agent/Retailer Customers

When you buy and activate the following equipment, please check the box of the device you purchased.

• Two year contract required.

Offers valid 3/28/14 through 3/31/14
Must be postmarked within 30 days of purchase date

	Wireless Equipment	Proof of Purchase (UPC)	Rebate Amount
	VERIZON		
☐	Verizon Ellipsis™ 7	8-84430-00001-0	$150
	SAMSUNG		
☐	Samsung Galaxy Tab® 2 (7.0) - Black	6-35753-50076-9	$ 200
☐	Samsung Galaxy Tab® 2 (7.0) - White	8-87276-01587-3	$ 200

See reverse for rebate submission instructions.
Available at participating Authorized Agent/Retailers only.

Rebates will be mailed within 3 weeks after receipt of claim, but may take up to 6 weeks.

Rebate questions? **verizonwireless.com/rebates**

Your rebate will be paid with a Visa® debit card. After activation, the card can be used everywhere Visa® debit cards are accepted.

Your card is issued by Citibank, N.A. pursuant to a license from Visa U.S.A. Inc. Citi Prepaid® Services is a Citibank, N.A. business.

New 2-year activation required. Certain restrictions apply. Limit one rebate offer per wireless phone number and IMEI. Equipment must be activated on Verizon Wireless service to receive rebate. Asurion insurance replacement devices are not eligible for rebate. Cannot be combined with other offers.

REBINDTAB32814

To receive your rebate by mail, please complete this rebate form in its entirety and submit the following:

1 CUSTOMER CONTACT INFORMATION (Use **CAPITAL LETTERS**)

First Name | Last Name

Billing Address

City | State | Zip Code

Wireless area code and phone number on rebate eligible equipment. (Must be included)
(See Customer Agreement for Wireless No. or Eligible Wireless No.)

☐☐☐—☐☐☐—☐☐☐☐

E-mail address (for rebate submission status only)

2 CUSTOMER AGREEMENT OR VERIZON WIRELESS SMALL BUSINESS RECEIPT

Copy of legible Customer Agreement (signed contract), dated between **3/28/14 through 3/31/14**

PLEASE ENSURE THAT ALL INFORMATION ON PHOTOCOPY IS LEGIBLE.

Two-to-one page copies are discouraged.

The following is required for agreements with multiple wireless numbers:

- First page with purchase location, Application ID (Appl. ID No.) and customer information
- Corresponding page indicating rebate eligible Wireless Number and IMEI

3 ORIGINAL BAR CODE LABELS (Photocopies will not be accepted)

- Include the entire original white bar code label cut from the outside of the manufacturer's box that your equipment came in.
- The bar code label includes two bar codes. One is **IMEI bar code and the other is Proof of Purchase (UPC) bar code.**
- The labels must only come from the eligible equipment that you purchased.
- Before sending, be sure to confirm that the number on your Proof of Purchase (UPC) bar code matches the Proof of Purchase (UPC) code for your device – listed on the front of this form.

Proof of Purchase (UPC) and IMEI label may be required for a full equipment refund. Return policies may vary at Verizon Wireless authorized retailers.

4 **SIGN AND MAKE A COPY**

This form must be signed, dated and postmarked within 30 days of purchase date.

(Failure to follow these submission instructions may invalidate your rebate.)

Make a photocopy of all submitted materials for your records, including all bar code labels.

Signature ____________________ Date ☐☐/☐☐/☐☐
MM DD YY

I certify by my signature that the information I have entered on this mail-in rebate form is accurate and complete. I agree to the terms and conditions as outlined on this form.

5 **DO YOU HAVE EVERYTHING?**

- ☐ This completed and signed form.
- ☐ Original bar codes including Proof of Purchase (UPC) and IMEI.
- ☐ Copy of Customer Agreement or Verizon Wireless Small Business Receipt (signed contract) indicating purchase location, customer information, and rebate eligible Wireless Number and IMEI.

Note: 2 weeks after you mail the rebate claim form, please visit our rebate center at verizonwireless.com/rebates to check the status of your rebate submission. At our rebate center you can also obtain answers to frequently asked questions or register your rebate online. For general questions you can also call 1-800-457-0864.

6 **MAIL TO**

Mail-In Rebate Offer
Promotion Code 14-989
P.O. Box 540047
El Paso, TX 88554-0047
(One rebate request per envelope.)

Your rebate will be paid with a Visa® debit card. After activation, the card can be used everywhere Visa® debit cards are accepted.

Your card is issued by Citibank, N.A. pursuant to a license from Visa U.S.A. Inc. Citi Prepaid® Services is a Citibank, N.A. business.

Any mail-in rebate form or rebate card lost or misdirected by the U.S. Postal Service or other delivery service is not the responsibility of Verizon Wireless or the Fulfillment Center. Overnight or certified mail may increase processing time. Incorrect information, illegible or incomplete rebate forms will be considered invalid and ineligible for rebate and presumed to be customers' acts or omissions. Verizon Wireless reserves the right to review and approve all offers and modify or withdraw this promotion at any time for any reason. Rebate cards will be issued in U.S. dollars only. Rebate cards are valid through the expiration date shown on the card. This rebate form has no cash value. Reproduction, purchase, sale or trade of this rebate form or bar code label from equipment box is prohibited. Materials received become property of Verizon Wireless and cannot be returned. Offer valid only in the United States for customers only. Fraudulent submissions could result in prosecution under U.S. Mail Fraud Statute (18 USC Sections 1341–1342).

Source: *Mail-in Rebate Verizon,* Google Image Search, https://www.pdffiller.com/40754377-fillable-verizon-ellipsis-8-rebate-form (last visited Aug. 25, 2021).

- **Late or vanishing rebates.**

A business may bait consumers into buying something based on the promise of a rebate, then never actually send the rebate, or send the rebate far later than promised. In 2007, the FTC reached separate settlements with two companies – InPhonic, a cell phone retailer, and Soyo, Inc., a computer equipment retailer – for delays in sending rebate checks.[256] InPhonic customers had been forced to wait six to nine months to receive rebates; Soyo, Inc. customers waited a year or more.[257] Both settlements required the companies to send outstanding rebates to consumers and to clearly disclose the time period in which consumers would expect to receive rebates.[258] InPhonic ultimately declared bankruptcy – and many people never received their rebates.[259]

One consumer who bought Goodyear tires on a promise that there would be a rebate could not get a straight answer from Goodyear about its status:

Goodyear - Rebate

1.0 Details 1 comment

There was a promotion going on that included a rebate. I have gotten rebates before and pretty quickly so i didn't mind buying a better quality of tires if i was going to get a rebate but its has been over 4 weeks and my rebate has yet to be mailed and every time I call the rebate center they brush me off and tell me to give it more time.

Source: *Goodyear – Rebate,* Pissed Consumer, https://goodyear.pissedconsumer.com/rebate-201902181474626.html (last visited Aug. 25, 2021).

Another consumer who was promised a rebate from T-Mobile never received the rebate:

Tmobile - Rebate Card Scam

T-Mobile was offering free Samsung Galaxie 2 phones for 2 days only. They were free in that you made the downpayment and they would send you a debit card in 8 weeks.

> Related: Tmobile - Been with them 10 yrs and this is how they act???

We bought 2 phones jumped through all the hoops , dotted all the i's crossed the ts and 8 weeks later received letter from young america corp that they regret they could not send card because we did not have qualifing rate plan as stated on rebate rules. I called and was told we had to have unlimited data and unlimited talk plan. The formsays we had to have unlimited data 2 lines and a talk plan.

I am going to report to BBB and post my sad saga on Face Book. I could change my rate plan, which would cost me $500 more over 2 years and then I would get my $400.00 rebate.

Product or Service Mentioned: Tmobile Phone Plan.

Monetary Loss: $400.

Source: *Tmobile – Rebate Card Scam*, Pissed Consumer, https://tmobile.pissedconsumer.com/44/RT-P.html (last visited Oct. 11, 2021).

Customers filed a class action lawsuit against home improvement store Menards in February 2020 for marketing products as “11% Off Everything” with a rebate promotion, then never providing customers with the savings after customers submitted the rebate paperwork.[260] Unfortunately, buried in the rebate paperwork, signed by the plaintiffs in the case, was a forced arbitration clause, and the case was dismissed and sent to arbitration.[261]

- **Send “rebate cards” instead of cash.**

A consumer who jumps through all of the hoops to redeem a rebate still faces challenges. Most people assume a rebate will be in the form of cash or a check. But retailers may provide so-called “rebate cards” instead.[262] Like bank gift cards (see p. 48 for a discussion of bank gift cards), rebate cards often come with monthly fees, expiration dates, and other restrictions that limit their value.[263] T-Mobile promises big bucks in the following rebate advertisement, but an examination of the fine print reveals that a consumer will receive a “Prepaid Mastercard Card” that cannot be redeemed for cash, has a six month expiration date, and is subject to “some limitations” that are not specified:

Costco Member Information: offer valid 10/4 - 10/10/2019. In Warehouse only. Device and carrier selection vary by location. Offer terms subject to specific carrier requirements. T-Mobile Offer: Tax on pre-rebate price due at sale. Limited time offer; subject to change. Qualifying credit, service, and add'l line (2+) required. If you have cancelled voice lines in past 90 days, reactivate them first. Rebate of up to $750 back on second device of equal or lesser value via Prepaid MasterCard® Card. This Card is issued by Sunrise Banks N.A., Member FDIC, pursuant to a license from Mastercard International Incorporated. Mastercard is a registered trademark of Mastercard International Incorporated. Use of this card constitutes acceptance of the terms and conditions stated in the Cardholder Agreement. Cards will not have cash access and can be used everywhere Mastercard debit cards are accepted. Must be active and in good standing when card is processed. Some limitations for virtual cards; cards expire in 6 months. Allow 8 weeks. Max 6 free or discounted devices/account. May not be combinable with some offers, or discounts (e.g. Carrier Freedom). See T-Mobile Terms and Conditions (including arbitration provision) at T-Mobile.com for additional information. T-Mobile and the Magenta color are trademarks of Deutsche Telekom AG. © 2019 T-Mobile USA, Inc. Samsung attributes © 2019 Samsung Electronics America, Inc. Samsung, Galaxy Note and Super AMOLED are trademarks of Samsung Electronics Co., Ltd. Device and screen images are simulated.

Rebate of up to $750 back on second device of equal or lesser value via Prepaid MasterCard® Card.

cards expire in 6 months.

. Cards will not have cash access and can be used everywhere Mastercard debit cards are accepted.

Source: *T Mobile Rebate Ad*, Google Images Search (last visited Jan. 21, 2020).

- **Unknown terms.**

Sometimes rebate offers come with terms that are not disclosed to consumers before they buy the product. For example, a consumer bought a washer and dryer from Lowe's partly because of a rebate offer. After going through the steps of trying to redeem the rebate, the consumer discovered that the offer had expired at some point after they filled out the required paperwork:

Lowes - Rebate, what rebate. Dec 31, 2018

Bought a washer and dryer from Lowes. Purchased in part due to a rebate offer. Trying to navigate to burdensome rebate application program on line and then find out the rebate has expired. Wife won't like it, but the new w&d are going back to the store and I'll buy elsewhere.... principle.

Source: *Lowes – Rebate, what rebate,* Pissed Consumer, https://www.pissedconsumer.com/browse-reviews.html?query=rebate&redirect=1 (last visited Aug. 25, 2021).

Rebates unquestionably benefit companies more than consumers. They are a form of false advertising, promising a lower purchase price without providing one at the point of sale. Despite the controversy surrounding rebates, they are largely unregulated. The FTC brought a series of enforcement actions in the late 1990s and 2000s against companies for rebate practices that violated federal false advertising laws and other rules,[264] but it has not focused on abusive rebate practices in recent years. Some states have passed laws setting limitations on rebates. For example, in California, rebates are lawful if the "price actually paid" at the point of sale is clearly displayed next to the post-rebate price in all advertising.[265] Connecticut has a similar disclosure rule, but also require sellers that advertise an "after rebate" price to provide the rebate to consumers at the time of purchase.[266]

Gift Cards (That Aren't Really Gifts)

Gift cards are a first cousin of rebates. Rebates are offered to consumers who purchase something. By contrast, most gift cards are offered for sale without the purchase of anything else. (As noted on p. 45, some stores offer gift cards as a rebate.)

Consumers spend approximately $130 billion on gift cards per year.[267] Gift cards are supposed to be like cash, but in the form of a plastic card, coupon, or online code. Some people buy gift cards because they may be perceived as more thoughtful than giving someone cash. But gift cards are rarely the same as cash. Gift cards typically come with restrictions that limit their value. There are two types of gift cards:

- **Retail gift cards** are sold by a specific business (e.g., a restaurant, retailer, movie theater, gym, toy store, or clothing store). Retail gift cards can usually only be used at that business.

- **Bank gift cards** are marketed like ATM/debit cards (i.e., as the equivalent of cash). Bank gift cards have the logo of a bank or credit card company, like American Express, Discover, MasterCard, or Visa, and can only be used where that brand is accepted.[268] In contrast to retail gift cards, bank gift cards are supposed to be able to be used as cash.

Gift cards often go unused or are only partly redeemed for purchases. One study estimated that the value of *unused* gift cards that accumulated in the U.S. between 2008 and 2014 was $44 billion dollars.[269] That is $44 billion dollars that companies kept for themselves. A prediction in January 2020 that consumers were expected to leave $3 billion worth of gift cards unspent that year prompted a group of businesses that included AMC Theaters, Applebee's, Kohl's, Macy's, and Saks Fifth Avenue to deem the third Saturday of every January "National Use Your Gift Card Day" as a ploy to get consumers to spend money at their establishments under the guise of encouraging consumers to not let their gift cards go to waste.[270]

Not only are gift cards unlikely to be redeemed, but they may also:

- **Come with unfair and undisclosed terms.**

  Consumers filed a class action against Wells Fargo for advertising and selling bank gift cards that the company claimed could be used like ATM/debit cards, when in reality the cards came with restrictions that ATM/debit cards do not have. The bank gift cards sold by Wells Fargo could not be used to make purchases online, could not be used to withdraw cash at an ATM, and imposed fees that were deducted from the gift card.[271] After years of litigation over whether a forced arbitration clause that accompanied the bank gift cards was valid, a federal court eventually sided with Wells Fargo and decided the case must be resolved through arbitration.[272] The class action was subsequently dismissed.[273]

- **Require the consumer to pay fees.**

Some gift cards require the recipient to pay a fee. For example, a $50 Visa gift card purchased at Target has a $5 "activation fee," and one purchased at Walmart has a $3.88 "activation fee."[274] Visa and Mastercard gift cards may also come with "processing fees" based on a percentage of the value of the gift card itself.[275]

While some companies charge a fee when you use a gift card, others charge a fee when you *don't.* Consumers who purchased gift cards at Costco for use at MGM Resorts sued both companies over a "monthly inactivity fee" of $2.50 if the value of the card was not used up within 18 months after purchase.[276] The consumers who brought the class action claimed that both companies failed to properly disclose the fee in violation of state and federal laws.[277] The case resulted in a settlement for $150,000, which was divided between all class members after their attorneys were paid.[278] Class members were required to submit a claim.[279] It is unknown how many class members did so or how much each was paid.

- **Expire.**

Some gift cards have an expiration date and lose their value after a specified date. However, a gift card that has an expiration date is most likely illegal (see below). Online "deal" website Groupon faced multiple lawsuits over the expiration dates of its discounted coupons for services and activities.[280] The lawsuits resulted in a settlement, under which class members could recover the full amount they paid for the Groupon deal or use their Groupon deal past the expiration date.[281]

While California generally prohibits gift cards sellers from charging a "service fee," or a fee for "inactivity,"[282] federal law permits fees for inactivity if the card has not been used within one year of when it was issued.[283] Also, under federal law, gift cards cannot expire earlier than five years from the date they were activated.[284] Most state laws have some restriction on the expiration of gift cards.[285] California prohibits any expiration date on gift cards.[286] No laws prohibit forced arbitration clauses from being imposed on gift card recipients.

Are You Shipping Me?

As online shopping becomes more popular – and arguably essential during the COVID-19 pandemic – consumers are increasingly receiving everyday necessities on their doorstep. Not surprisingly, online purchase deliveries are now among the nation's top consumer complaints.[287]

What can go wrong?

- **Customers receive their items late.**

  The delivery date is one of the critical terms of a purchase for many customers. When buying online, consumers are typically (but not always) given an estimated shipping date by which they will receive the item before they agree to the deal. Amazon, which pioneered online shopping and offers free same-day, one-day, or two-day delivery to its Prime membership customers for $119 per year,[288] is sometimes unable to meet the promised deadline. A quick skim of complaints against the online retail giant reveals that one of the major issues consumers have with the company is not receiving packages on time:

> ★☆☆☆☆
>
> If you are a Prime Member, you get priority shipping, so they say. Their ads say "guaranteed delivery tomorrow". Well, know what? Tomorrow comes and goes and the delivery does not show up. When you call them about it, they offer excuses and give you $5 for your troubles. They should be investigated for the lies they list on their website. This has happened to me twice in the last week. I will NOT be ordering any more office supplies from their website, their failure to deliver as promised literally stopped my business for an entire day. Be aware if you order from Amazon, you will NOT receive the delivery as promised. It will come one to two days later. Best to go to the store and pick up what you need.

We enjoy the benefits of being a Prime Member but lately we're HIGHLY disappointed in the ability of Amazon to ship in a timely manner. Not ONE item out of the 6-8 that we've recently purchased made it within the estimated time frame. Even worse is two of the items were lost and had to be refunded because they were no longer available. What happened to Amazon??

I have been an Amazon Prime member for years. That changed today. Their delivery reliability is awful. I don't see any reason to pay a fee to get what really amounts to guesstimates about delivery. If you ever want to talk to a live person... good luck. You might get to a person eventually but it's not likely you will be able to understand them.

Source: *Amazon.com*, Consumer Affairs, https://www.consumeraffairs.com/online/amazon.html (last visited Aug. 25, 2021).

• Consumers do not receive their items at all.

Even worse than a late delivery is never getting the item at all. The Arkansas Attorney General filed a lawsuit against online candy retailer Treatsie for failing to deliver hundreds of boxes of candy to consumers who had paid for orders.[289] Treatsie agreed in a settlement to refund consumers who never received their orders and pay a $10,000 civil penalty to the state.[290] Also, headphone manufacturer Kanoa faced a class action lawsuit for failing to send earbuds to consumers who paid $150 for the product in violation of California consumer protection laws.[291] The case was dismissed by the plaintiff for undisclosed reasons.[292]

- Excessive shipping charges.

Another way online retailers rip consumers off is by inflating shipping charges. For example, women's online clothing retailer Sundance has been criticized for charging exorbitant shipping fees (and even charges consumers to return items):

Sundance Catalog - Over priced items, misrepresented pictures, shipping charges can feed 10 hungry kids easily

Pictures are manipulated in the catalog to make things look better than they are. Orders are mostly misses, very few hits because of shoddy description and misleading pictures. Quality control is non-existent. You will want to return half the stuff you order because the quality doesn't justify the price tag.

Oh, btw, shipping is $20 one way, you will pay $8 shipping for returning an item; So count on $28 shipping on each and every order. And if you think you can exchange a *** product taking your chances on something else, get ready to pay another $20 in shipping. Yes, they charge shipping again when exchanging.

What prompted me to write this review and decide never to buy from them again???? On my last order, I ended up keeping one $38 scarf out of the entire order; and I was charged $56 in shipping when all was said and done.

Product or Service Mentioned: Sundance Catalog Catalogue.

Reason of review: Not as described/ advertised.

Source: *Sundance Catalog – Over priced items, misrepresented pictures, shipping charges can fed 10 hungry kids easily,* Pissed Consumer, https://sundance-catalog.pissedconsumer.com/review.html (last visited Aug. 25, 2021).

Sundance Catalog - Excessive shipping fees

2.0 Details

0 comments

If you really, really, really want to shop and buy something here. Just be warned that they charge an exorbitant fee to ship and 'handle' your order.

Not sure what the handling consists of, but it's highway robbery. Especially these days where most companies will throw in free shipping for order over $100.

I was going to order two shirts / blouses for a Christmas present, but they were going to charge me $17.95 to ship.

Also, they are very slow to credit your account (2 - 3 weeks) if you return something, and on top of that. They will also charge you to ship the item back.

Think carefully before spending money with this company.

Product or Service Mentioned: Sundance Catalog Top.

Reason of review: Pricing issue.

Sundance Catalog Cons: Shipping cost, Refund process.

Source: *Sundance Catalog – Excessive Shipping Fees,* Pissed Consumer, https://sundance-catalog.pissedconsumer.com/review.html (last visited Aug. 25, 2021).

Consumers have attempted to challenge excessive shipping prices in the courts in recent years, with varying results.[293] One class action claimed that Deluxe Corporation, a company that prints new and replacement paper checks for bank customers, charged shipping prices that greatly exceeded the shipping costs to the company in violation of state consumer protection laws.[294] The plaintiffs relied on public policy arguments, saying Deluxe Corporation violated a voluntary guideline published by the Data and Marketing Association that states shipping prices "should bear a reasonable relationship to actual costs incurred" by a business in shipping a product.[295] The federal court was persuaded and rejected Deluxe Corporation's attempt to dismiss the case, paving the way for the consumers to prove that the excessive shipping prices violated state consumer protection laws.[296] Despite the plaintiffs' victory, they decided to confidentially settle the case as individuals and dismiss the class action.[297]

In another case, consumers sued appliance manufacturer Electrolux for charging excessive shipping prices in violation of California law.[298] The consumers made public policy arguments similar to those of the plaintiffs in the Deluxe Corporation case. The federal court threw out the case on the ground that the shipping prices were clearly disclosed and easily avoidable by consumers who could take their business elsewhere if they felt the shipping prices were too high.[299]

Federal regulations require businesses to deliver items ordered online, by phone, or by mail by the time promised (unless the items are part of a subscription service).[300] But only the FTC has the authority to sue businesses that violate these rules; individual consumers are barred from doing so.[301] Consumers looking to challenge shipping abuses in state court must rely on novel arguments for why such practices violate state consumer protection laws, which courts may or may not interpret in favor of consumers.

Worthless Warranties

A warranty is a promise from a manufacturer or seller that a product will work a certain way[302] for a certain length of time. Warranties are similar to insurance policies; they outline "terms such as how, when, and if the product can be returned, replaced, or repaired."[303] Warranties are particularly important to protect consumers in an age when expensive electronic devices – phones, computers, televisions – are a crucial element of daily life for most Americans. If these devices fail and a consumer does not understand the warranty or the warranty does not cover repairs, they can be left out of pocket for hundreds or even thousands of dollars.

Sellers misuse warranties by:

- **Failing to disclose terms of the warranty.**

Companies often make it hard for a consumer to access warranty details when they are making the purchase or afterwards.[304]

In some cases, companies will disclose a warranty but not the specific terms. For example, consumers sued sunglasses retailer Costa Del Mar for failing to disclose all warranty terms. Costa Del Mar allegedly warranted to its customers that damaged sunglasses would be repaired or replaced "for a nominal fee" when in fact repair and replacement costs were costly – up to $89 plus additional shipping and handling fees.[305] The class action settled; consumers were provided coupons worth between $8.99 and $19.99 – to buy more Costa Del Mar products.[306]

- **Failing to honor warranties.**

Companies may refuse to honor warranties by telling customers that their product isn't covered. For example, Apple paid $53 million to settle a class action lawsuit after it refused to honor one and two year warranties on its iPhones and iPod Touches.[307] According to the lawsuit, customers whose devices malfunctioned for any reason were denied warranty coverage if a small piece of tape within the device indicated water damage.[308] The problem, however, was that the tape manufacturer acknowledged that humid air conditions outside could cause the tape to falsely indicate water damage.[309] The settlement offered each consumer between $105 and $300, depending on how many consumers submitted a claim.[310]

- **Making it hard to take advantage of a warranty.**

Unscrupulous companies can avoid making good on a warranty by making it difficult or impossible for a customer to reach the warranty department. Well known cookware company Calphalon, a division of Newell Brands, only responds to warranty claims via email. One customer who submitted a claim for a defective toaster part was required to fill out a claim form and send additional information multiple times. In order to process the claim, the customer was asked to take a selfie with the toaster. A total of fifteen emails ensued between the company and the customer. Eventually the customer contacted the company by phone, but the Philippines-based call center was unable to communicate clearly with the consumer. The receptionist at U.S. corporate headquarters initially refused to connect the customer to the executive customer relations officials. Few consumers are likely to survive that gauntlet.[311]

- **Substituting refurbished parts for new parts replaced under warranty.**

Our everyday devices like smartphones are extremely expensive pieces of equipment. If they fail prematurely, consumers rightly expect a replacement that is brand new – especially when they paid extra for an extended warranty. A lawsuit against Apple accused it of assuring customers who paid an extra $99 for "Apple Care" and "Apple Care Plus" that they would get replacement devices that were "equivalent to new in performance and reliability" under their plans if something went wrong, only to replace the defective devices with refurbished, i.e. used, equipment.[312] The plaintiffs claimed that Apple should have described the replacement devices as "refurbished" rather than the more ambiguous "equivalent to new."[313] A federal court rejected Apple's attempts to throw out the lawsuit and granted class certification.[314]

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What does "class certification" mean?

The current process of determining whether a plaintiff may proceed with a class action lawsuit on behalf of *other* similarly harmed individuals is called "class certification." During that process, lawyers for the plaintiff are required to persuade the judge that the case meets a series of complex legal standards and is therefore appropriate to be brought on behalf of a large number of people. Failure to meet the prerequisites for class certification means the case cannot proceed as a class action. (See p. 119-120 for more on class certification.)

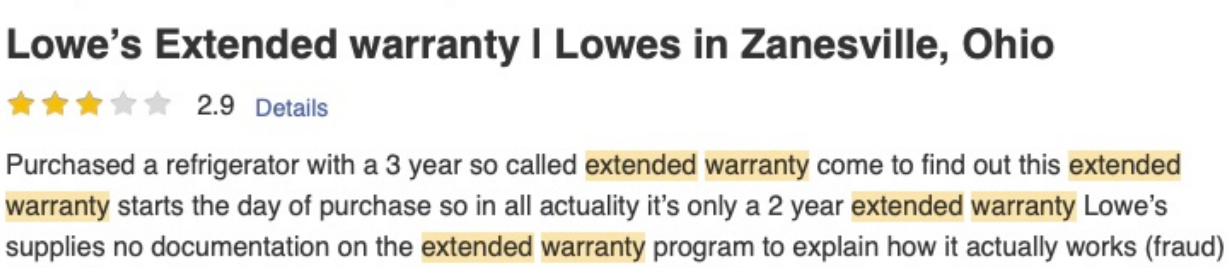
The parties subsequently reached a settlement in which Apple agreed to pay out $95 million; between $63 and $68 million will be paid directly to its customers to compensate them for between 13% and 25% of their losses.[315]

• Requiring customers to repair a product with authorized parts.

In April 2018, the FTC cracked down on six companies, including computer company Microsoft, electronics company Sony, video game maker Nintendo, and auto manufacturer Hyundai, over the terms of their warranties.[316] According to the FTC, these companies refused to honor their warranties unless the consumers used replacement parts or repair service providers dictated by the company.[317] The FTC warned the companies that federal law prohibits them from including such terms in a warranty unless they provide the parts or services for free, or receive a waiver from the FTC.[318] By May 2018, Microsoft, Sony, Nintendo, and Hyundai all voluntarily updated their warranty terms to comply with the law.[319]

• Charging for "extended" warranties.

Extended warranties provide coverage for maintenance or repair for a specific amount of time beyond the duration of the original manufacturer's warranty – and are not included in the price of a product.[320] Typically they are not offered by the manufacturer, but rather a separate company. Long after they purchase an extended warranty, consumers are often shocked to learn of the true terms:



Lowe's Extended warranty I Lowes in Zanesville, Ohio

2.9 Details

Purchased a refrigerator with a 3 year so called extended warranty come to find out this extended warranty starts the day of purchase so in all actuality it's only a 2 year extended warranty Lowe's supplies no documentation on the extended warranty program to explain how it actually works (fraud)

Source: *Lowe's Extended Warranty,* Pissed Consumer, https://www.pissedconsumer.com/browse-reviews.html?query=extended+warranty&redirect=1 (last visited Aug. 25, 2021).

Ford Extended Warranty

I bought my 2005 Ford F150 brand new and I had a 3year/36,000 mile warranty with Ford which was bumper to bumper.

I bought my Ford Extended service plan warranty on September 5,2008 and paid $1,569.50 on my credit card. Well, I was told this extended warranty is 72months or 60,000 miles.

My truck only has 34,000 miles on it right now(2/20/11). I looked at my contract and they are trying to start my extended warranty from the date I bought the truck. Now why on earth do I need an extended warranty from the date I purchased the truck brand new truck when it had a bumper to bumper covered already? My extended warranty should cover me for 60,000 more miles or 72 months which ever comes first.

This extended warranty is trying to say that my warranty expires this year 9/5/2011. Since I signed and paid for in 2008 that isn't correct. They aren't honoring what they sold me over the phone.

I realize it has been 2 1/2 yrs since I paid for this but this company is trying to do me wrong. Who would buy an extended warranty that dates back to when your truck was covered bumper to bumper for 3yrs/36,000 miles?

Contacted Chase ad hopefully they can do something for me.

Monetary Loss: $1530.

Source: *Ford Extended Warranty,* Pissed Consumer, https://ford.pissedconsumer.com/review.html (last visited Aug. 25, 2021).

Purchased extended warranty I Camping World in Byron, Georgia

1.0 Details

When we purchased our trailer 12/21/15 we purchased the extended warranty and were told that it covered everything that the original warranty covered. Everything was to be covered except the tires and wheels. When the laminate started peeling off the counter top/table/vanity top/ side tables by bed we took the unit in and at that time they replaced the counter and table tops. I took it back to have the other tops replaced and was told that it was out of warranty and that the extended warranty only covered mechanical and electrical issues.................We paid $1,800 plus for this warranty.

Source: *Purchased extended warranty,* Pissed Consumer, https://camping-world.pissedconsumer.com/review.html (last visited Aug. 25, 2021).

> Extended warranties are a big moneymaker for the car industry, appliance companies and big box stores, but the fine print or hidden restrictions typically offer limited protection, are often short-lived and may overlap with the original manufacturer's warranty. Such warranties are unnecessary,[321] if not worthless.

Many consumers are unaware of the various federal and state laws that provide them with warranty rights. The federal Magnuson-Moss Warranty Act requires product manufacturers and sellers that provide express warranties to make their terms available to consumers prior to completing the purchase (whether in-person or online); present the basic terms about the warranty – the name of the company, the product covered, duration of warranty, etc. – in understandable English; and identify whether a warranty is "full" (meaning the manufacturer or seller promises to repair or replace the product if defective) or "limited" (meaning the manufacturer or seller's obligations to repair or replace are restricted in some way).[322] Both the FTC and private individuals may bring lawsuits for violations of the Magnuson-Moss Warranty Act.[323]

State laws generally provide "implied warranty" rights that require companies to guarantee that their products are free of substantial defects and will function properly for a reasonable period of time regardless of whether an express warranty is offered.[324] Laws vary depending on the state. In California, for example, the Song-Beverly Consumer Warranty Act covers both implied and express warranties. [325]

In addition to warranty laws, a campaign is gaining steam among consumers across the country in support of “Right to Repair” laws. Manufacturers often make it difficult for a purchaser to fix a product by making replacement parts hard to obtain, or by limiting who is authorized to repair their products. Advocates of Right to Repair laws say their goal is prevent consumers from having to discard products that do not work and buy new ones.[326] The FTC voted unanimously in July 2021 to increase enforcement against manufacturers that make it difficult for consumers to repair products.[327] Right to Repair laws have been introduced in 25 states,[328] but state legislatures grappling with the economic and public health issues of the COVID-19 pandemic put many of the bills on pause in 2020.[329] Voters in Massachusetts approved an initiative expanding the Right to Repair laws applicable to cars, beating a $25 million opposition campaign by the auto industry.[330] On June 17, 2021, the Digital Fair Repair Act was introduced in the U.S. House of Representatives.[331] The bill would require manufacturers of digital products to give consumers and independent repair services access to parts needed for repairs.[332]

Enslaved by Loans and Credit

Lending abuses by big banks, credit card, and other Wall Street companies have brought many a consumer down (and nearly derailed the U.S. economy in 2008).

In the ten years leading up to the financial crisis of 2008, Wall Street investment banks, hedge funds, and commercial banks invested more than $5 billion in Washington, D.C. Their goal: to repeal the federal laws and regulations that kept their greed in check.[333] With an army of nearly 3,000 lobbyists, and nearly $2 billion in contributions to Republicans and Democrats, Wall Street succeeded. And the rest of America lost.[334]

Because of the repeal of rules and regulations that protected consumers from abuses by the financial industry, hundreds of millions of Americans have found themselves enslaved by the onerous terms of loans and lines of credit. Consumers were the fodder for Wall Street’s madness, encouraged to borrow to pay for homes, cars, diplomas, or everyday items to maintain or enhance their standard of living. Without disclosure and other rules that would once have barred or limited these practices, tens of millions of Americans were trapped.

After the 2008 crash, Washington lawmakers provided Wall Street with an even more lavish return on its investment. Big banks, hedge funds, and other financial institutions got over $3.3 trillion in loans of taxpayer money and the right to borrow from taxpayers at a nearly zero percent interest rate.[335] But American consumers were largely left to fend for themselves. The "Great Recession" revealed the staggering imbalance of political and economic power between regular people and the elites. America is still suffering from its profound economic and political effects.

Struggling to stay afloat in the shadow of a catastrophic pandemic, Americans are once again financially overextended: as of February 2021, Americans collectively owed $14.6 trillion in mortgage debt.[336] As of April 2021, Americans owe $1.37 trillion in auto loans.[337]

Credit card borrowing in particular has skyrocketed. In 2019, 23% of American consumers relied on credit cards to cover basic necessities like food, rent, and utilities.[338] Today, Americans are burdened by $930 billion in outstanding credit card debt.[339] Almost half of all Americans have credit card debt, and even with governmental assistance in the form of cash payments to the unemployed, 23% of credit card holders took on additional debt during the COVID-19 pandemic.[340]

Borrowing money is one of the most complicated transactions a consumer can face. Submitting a mortgage refinance or other loan application requires an obscene amount of paperwork – up to 200 pages and eight to ten notarized signatures;[341] trying to figure out the actual monthly payment on a loan can require a mathematician. If you don't make a payment on a home or car loan, the lender can go to court on an expedited basis to seize them. The law provides vast protections – for lenders. There are far fewer protections for borrowers.

Banking and finance are rampant with abuse, and the ways in which consumers are getting robbed are virtually endless:

- ### Lies about terms.

  Lenders and loan brokers are notorious for failing to disclose or lying about many critical terms: the amount of the interest rate, the true finance charge, the amount of the payment, whether the interest rate is fixed, whether there are any fees for loan "origination," cash advances, or balance transfers.[342]

For example, a California consumer who opened a line of credit with Bank One in order to purchase stereo equipment accused the company of misrepresenting its terms.[343] The consumer claimed he relied on statements by Bank One that the credit line was "the same as cash" with no payments required for 90 days.[344] In fact, Bank One required consumers to make *two* payments within the first 90 days or else incur fees.[345] Bank One argued that the plaintiff could not pursue the case on behalf of other victims because the plaintiff received different representations about the credit plan than other consumers.[346] A California court of appeal rejected Bank One's argument, noting that California law requires only that Bank One's representations are likely to deceive the public regardless of whether or not the particular plaintiff was exposed to them.[347] The lawsuit was eventually settled on behalf of the affected consumers.[348]

Another lawsuit accusing a bank of lying about credit card terms was filed against Capitol One Bank for breaking its contractual promise to not charge interest to consumers who fully pay off their credit card balance every month. (Most credit card companies do not charge interest on purchases if a consumer pays their entire balance by the end of each monthly billing period).[349] A federal court interpreted the terms of the take-it-or-leave-it contract differently than the consumers and threw the case out.[350] The consumers appealed the decision, and the Court of Appeals for the Fourth Circuit affirmed the district court's decision.[351]

In December 2020, consumers in New Jersey accused TD Bank of misleading consumers about the terms of a secured credit card (a "secured" card requires consumers to place money in a savings account that is held as collateral for the repayment of purchases).[352] Consumers claimed that TD Bank falsely told customers that if they kept their secured credit cards in good standing for seven months, the bank would let them "graduate" to an unsecured credit card – and that TD never in fact allowed the customers to do so.[353] The case is ongoing.

- ### Confusing terminology.

Financial institutions like banks routinely use confusing and intimidating legal jargon to mislead consumers about the terms of the deal. Predatory mortgage lenders, credit card companies, and student loan lenders all push potentially unsustainable levels of credit on onerous terms. But these terms are frequently indecipherable to borrowers and can include hidden fees and charges.[354] For example, when consumers shop for a mortgage, they may be overwhelmed by a litany of abbreviations and terms, like "APR," "TIP," "points," "preapproval," and "post date."[355] A bewildering array of fees, many only disclosed when the borrower is asked to sign for the loan (at the "close of escrow"), can add hundreds or even thousands of dollars to the cost of buying a home.[356] This is one page of a five page sample closing statement provided by the CFPB:

Closing Cost Details

Loan Costs		Borrower-Paid At Closing	Borrower-Paid Before Closing	Seller-Paid At Closing	Seller-Paid Before Closing	Paid by Others
A. Origination Charges		**$1,802.00**				
01 0.25 % of Loan Amount (Points)		$405.00				
02 Application Fee		$300.00				
03 Underwriting Fee		$1,097.00				
04						
05						
06						
07						
08						
B. Services Borrower Did Not Shop For		**$236.55**				
01 Appraisal Fee	to John Smith Appraisers Inc.					$405.00
02 Credit Report Fee	to Information Inc.		$29.80			
03 Flood Determination Fee	to Info Co.	$20.00				
04 Flood Monitoring Fee	to Info Co.	$31.75				
05 Tax Monitoring Fee	to Info Co.	$75.00				
06 Tax Status Research Fee	to Info Co.	$80.00				
07						
08						
09						
10						
C. Services Borrower Did Shop For		**$2,655.50**				
01 Pest Inspection Fee	to Pests Co.	$120.50				
02 Survey Fee	to Surveys Co.	$85.00				
03 Title – Insurance Binder	to Epsilon Title Co.	$650.00				
04 Title – Lender's Title Insurance	to Epsilon Title Co.	$500.00				
05 Title – Settlement Agent Fee	to Epsilon Title Co.	$500.00				
06 Title – Title Search	to Epsilon Title Co.	$800.00				
07						
08						
D. TOTAL LOAN COSTS (Borrower-Paid)		**$4,694.05**				
Loan Costs Subtotals (A + B + C)		$4,664.25	$29.80			

Other Costs					
E. Taxes and Other Government Fees	**$85.00**				
01 Recording Fees Deed: $40.00 Mortgage: $45.00	$85.00				
02 Transfer Tax to Any State			$950.00		
F. Prepaids	**$2,120.80**				
01 Homeowner's Insurance Premium (12 mo.) to Insurance Co.	$1,209.96				
02 Mortgage Insurance Premium (mo.)					
03 Prepaid Interest ($17.44 per day from 4/15/13 to 5/1/13)	$279.04				
04 Property Taxes (6 mo.) to Any County USA	$631.80				
05					
G. Initial Escrow Payment at Closing	**$412.25**				
01 Homeowner's Insurance $100.83 per month for 2 mo.	$201.66				
02 Mortgage Insurance per month for mo.					
03 Property Taxes $105.30 per month for 2 mo.	$210.60				
04					
05					
06					
07					
08 Aggregate Adjustment	– 0.01				
H. Other	**$2,400.00**				
01 HOA Capital Contribution to HOA Acre Inc.	$500.00				
02 HOA Processing Fee to HOA Acre Inc.	$150.00				
03 Home Inspection Fee to Engineers Inc.	$750.00			$750.00	
04 Home Warranty Fee to XYZ Warranty Inc.			$450.00		
05 Real Estate Commission to Alpha Real Estate Broker			$5,700.00		
06 Real Estate Commission to Omega Real Estate Broker			$5,700.00		
07 Title – Owner's Title Insurance (optional) to Epsilon Title Co.	$1,000.00				
08					
I. TOTAL OTHER COSTS (Borrower-Paid)	**$5,018.05**				
Other Costs Subtotals (E + F + G + H)	$5,018.05				
J. TOTAL CLOSING COSTS (Borrower-Paid)	**$9,712.10**				
Closing Costs Subtotals (D + I)	$9,682.30	$29.80	$12,800.00	$750.00	$405.00
Lender Credits					

CLOSING DISCLOSURE PAGE 2 OF 5 • LOAN ID # 123456789

Source: *Closing Disclosure Explainer,* CFPB, p. 2, https://www.consumerfinance.gov/owning-a-home/closing-disclosure/ (last visited Aug. 25, 2021).

When consumers apply for a credit card, they are assaulted with similar confusing terms. Here's a snippet of a credit card agreement from Citi:

- **Penalty APR for new Transactions (less than 60 days late).** If you make a Late Payment and it's less than 60 days late or you have a Returned Payment, the penalty APR only will apply to new Transactions. We'll review your Account from time to time, to determine if any penalty APR should be reduced.
- **Penalty APR for existing balances and new Transactions (60 or more days late).** If we haven't received your Minimum Payment Due within 60 days after its due date, we may apply the penalty APR to both the existing balances and new Transactions. If you make your next 6 consecutive Minimum Payments Due on time, we'll stop applying the penalty APR to existing balances and new Transactions. If you don't make your next 6 consecutive Minimum Payments Due on time, the penalty APR may continue to apply indefinitely to existing balances and new Transactions.

Daily Balance
We calculate interest on your Account each Billing Period first by calculating your daily balances. The following explains how we do that.

Here's how and when Transactions, fees and credits are applied to the balances on your Account:

- We add the amount of a Purchase or Balance Transfer to the Purchase balance as of the post date on your statement.
- We add the amount of a Cash Advance to the Cash Advance balance as of the post date on your statement.
- We add a Balance Transfer fee to the Purchase balance as of the post date on your statement.
- We add the amount of any eligible Transaction under Citi Flex Pay or a Citi Flex Loan to a Citi Flex Plan balance as of the post date on your statement. If you moved an amount from another balance within your Account to a Citi Flex Plan, we will credit the other balance in the amount you added to a Citi Flex Plan in order to avoid double counting that amount.
- We subtract any credits or payments credited as of that day.
- We make additional adjustments as appropriate, subject to applicable law (as an example, for a disputed charge). This gives us the daily balance for that day.

Daily balance for purchases from the previous day
+ New purchases
+ Fees and interest accrued on the previous day's Purchase balance
– Payments, credits and adjustments posted that day
= New daily balance for Purchases

Interest Calculation. Each daily balance may have a different APR. Certain categories of Transactions in a daily balance may have multiple APRs. For example, you may make a Purchase or Balance Transfer that's subject to a promotional APR. If a daily balance on your Account is subject to an APR, we'll charge interest on that daily balance. We use the daily balance method (which includes new Transactions). If interest applies to a balance, it will start applying on the day a charge is added to that balance and continue until that balance is paid in full. We consider a credit balance as a balance of zero when calculating interest on that balance.

- We multiply each daily balance by its applicable daily periodic rates (each applicable APR divided by 365).
- We do this for each day in the Billing Period. This gives us the daily interest amounts.
- Then we total all the daily interest amounts for all the daily balances. This gives us the total interest for the Billing Period.

Note: *Your balances, and their corresponding APRs, are shown on your statement.*

Source: *Citi Diamond Preferred Credit Card Agreement,* CFPB, https://www.consumerfinance.gov/credit-cards/agreements/issuer/citibank/ (last visited Aug. 25, 2021).

• Charging excessive interest.

"Usury laws" – which are supposed to cap interest rates for loans – date back to the Roman Empire.[357] But banks and other financial institutions have been able to secure loopholes in state usury laws that enable them to charge outrageously high interest rates.

For example, a 1934 amendment to California's Constitution says that interest on loans for personal, family, or household purposes may not exceed 10%.[358] However, the finance lobby made sure this cap does not apply to banks, credit unions, finance companies, pawn brokers and other lending institutions,[359] including payday loan lenders.[360]

Payday loan lenders are some of the worst offenders in the financial market. A payday loan is a short-term, high-cost loan that typically comes due within two weeks, or on a consumer's next payday.[361] These loans are usually made for $500 or less.[362] Research shows that payday loans disproportionately impact minorities, and payday loan lenders specifically target African American single mothers.[363] People with low incomes and minority Americans are 105% more likely to take out payday loans.[364] Consumers who need immediate cash will take out payday loans to cover the cost of bills. Payday loan lenders charge consumers up to 400% annual interest on these short-term loans.[365] Seventy percent of consumers who take out payday loans cannot pay off the debt within two weeks and end up having to take out a new loan to cover the cost of the first loan.[366] Twenty percent of consumers end up with 10 or more payday loans, each taken out to cover the cost of the previous loan.[367] In Utah, payday lenders are putting consumers who do not pay back their loans in jail.[368]

The payday loan lobby is so powerful that it is able to ward off attempts to rein in the industry's most egregious practices. For example, despite an outcry over payday lending abuses in California, legislation enacted in 2019 only bars payday lenders from charging interest rates higher than 36% on loans between $2,500 and $10,000.[369] Illinois passed a law in 2021 that also caps rates on payday loans at 36%.[370] North Carolina law also prohibits payday loan interest rates over 36%.[371] In 2012, payday loan company Advance America agreed to pay more than 140,000 North Carolinians $18.5 million as a result of a class action lawsuit over illegal fees and interest rates.[372] Advance America was charging consumers interest rates of 450%.

The Trump Administration finalized a rule exempting payday lenders from usury laws in any state where they are not already exempt, prompting opposition from multiple state Attorneys General.[373] In June 2021, Congress overturned the rule.[374] Also under the Trump Administration, the Consumer Financial Protection Bureau (CFPB) inexplicably dropped a lawsuit against four payday loan lenders accused of charging consumers illegal fees and high interest rates.[375] (See p. 140 for a further discussion of the CFPB.)

- ## Fraudulent accounts.

In 2016, the public learned that employees of megabank Wells Fargo had been opening new accounts in its customers' names in order to meet their sales goals.[376] Without the consent or knowledge of these consumers, Wells Fargo employees set up two million unauthorized checking, savings, and credit card accounts, enrolled those customers in online banking services, charged them for various types of insurance – like renters insurance, life insurance, and auto insurance – and improperly charged extension fees for mortgage rate locks.[377] These practices, fueled by threats of reprimands to employees if they failed corporate performance goals, went on for five years.[378] The company paid $575 million in penalties to resolve a lawsuit brought by 50 state Attorneys General.[379] Wells Fargo also signed consent orders with the federal Office of the Comptroller of the Currency and the Consumer Financial Protection Bureau to pay $1 billion in civil penalties to federal authorities as well as repay $600 million to consumers.[380] Under pressure from Congress, the CEO of the company quit in October 2016.[381]

- ## Retroactive interest.

One particularly egregious practice is to promise consumers 0% interest on a credit card for a period of time, only to retroactively charge interest on amounts that were paid off during the promotional period. A class action was filed against Best Buy for advertising that its credit card allowed customers to make purchases with a 0% interest promotional period of 18 months; the customers understood that they would only be charged interest on whatever loan balance was remaining at the end of the promotional period.[382] However, according to the lawsuit, unless the customer paid off the entire balance by the end of the promotional period, Best Buy retroactively charged customers interest on the original balance – including on the portion of it that had already been paid off.[383] Best Buy's credit card agreement contained an arbitration clause, and the lawsuit was dismissed after being sent to forced arbitration.[384]

- ## Lending to a consumer who is unable to pay.

Lenders set up marketing systems that prey on consumers who are short of money. Making loans to consumers who did not have the ability to repay them exacerbated the catastrophic 2008 financial meltdown. In response, federal and state laws have been put in place to discourage predatory lenders from making loans or extending credit to vulnerable consumers who cannot afford to make the payments.[385] For example, CFPB regulations required credit card companies to consider a consumer's ability to make monthly payments when deciding whether to open a credit card for a consumer, and require lenders to make a reasonable, good faith determination of a consumer's ability to repay a mortgage.[386] Lenders who violate this rule may be liable to consumers for up to three years' worth of finance charges and fees, as well as attorneys' fees if the consumer has to go to court and succeeds. Similarly, the CFPB required lenders providing payday loans to ensure the borrower's ability to repay before making the loans.[387] The Trump Administration withdrew the requirement[388] but, under the Biden Administration, the CFPB is now on track to require compliance with the rule by June 2022.[389]

A District of Columbia consumer protection statute prohibits lenders from making a loan when the lender knows there is no reasonable probability that the consumer can repay the loan in full. It provides for money damages and injunctive relief when a lender violates the rule.[390] A court in D.C. upheld a jury verdict against a mortgage lender that broke the law by refinancing a consumer's home without regard to his ability to make mortgage payments for the $58,300 loan. The jury decided that lender had to pay the borrower $8,400 for the payments that he was unable to make prior to being served with a foreclosure notice. The court then tripled the amount, ordering the lender to pay the consumer $25,200.[391] Similar laws in other states allow courts to multiply a victim's financial damages.[392]

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What is injunctive relief?

Injunctive relief is a remedy that a plaintiff may obtain in a lawsuit. An injunction can either require a defendant to act in a certain way or to stop engaging in certain practices or acts.

- ### Discriminatory lending and "redlining."

Predatory lending practices penalize the most vulnerable consumers in the U.S. Redlining occurs when financial institutions discriminate – by denying or limiting credit or loans, or by charging more for them – based on the racial demographics of a neighborhood or community. One study found that lenders in 2019 were 40%-80% more likely to deny home loans to people of color than to their white counterparts with similar financial characteristics.[393] Federal laws like the Equal Credit Opportunity Act and The Fair Housing Act prohibit banks from discriminating when extending credit and offering mortgages, but it is still a pervasive practice.[394] In 2018, housing advocates filed a lawsuit against Liberty Bank over unlawful redlining in a minority community and discrimination against African American and Latinx residents in processing mortgage applications.[395] The case settled, and Liberty Bank agreed to fund a multi-million dollar plan to "promote homeownership and enhance access to credit in underserved communities."[396]

Government agencies have also gone after banks for redlining. In 2019, OneWest Bank settled a lawsuit brought by the U.S. Department of Housing and Urban Development (HUD) alleging that OneWest discriminated against people seeking mortgages based on their race and national origin. OneWest agreed to invest $7.3 million in programs to increase homeownership in minority communities in Southern California.[397] Also, in 2019, First Merchants Bank settled a lawsuit by the U.S. Department of Justice alleging that the bank had engaged in redlining against consumers in a majority-Black area in Indianapolis between 2011 and 2017.[398] The agreement required First Merchants Bank to undertake several actions – like hiring third party consultants to monitor its practices – but provided little to no monetary relief to redlining victims.

Big Tech Takeover

The battle over whether our personal data can be collected and commodified is over. Consumers lost. Every American is now a victim of an unavoidable corporate surveillance capitalism.[399] The collection and sale of consumers' personal information generated $52.5 billion in revenue for the data industry in 2016, $76 billion in revenue in 2018 and is projected to generate $198 billion in revenue in 2022 – $616.82 per person per year in the United States. [400] Yet consumers are paid nothing for the theft of their valuable information.

By using the Internet, smartphones, social media and connected devices, consumers create a limitless stream of data: it is estimated that, in 2020, 1.7MB of data was collected *every second for every person on earth.*[401] That adds up to 146.88 GB per day; in less than 48 hours, the amount of data collected about an individual would exceed the storage of most mobile devices.

Anything that connects to the Internet is capable of collecting information about consumers. Today, that not only includes a computer or a smartphone, but the Internet of Things, or IoT. (IoT "refers to the capability of everyday devices to connect to other devices [or] people through the existing Internet infrastructure."[402]) IoT includes any kind of electronic equipment,[403] medical device,[404] home appliance, car,[405] clothing, "smart meter" in a home, or children's toy.[406] These machines are connected to the Internet via Wi-Fi, Bluetooth, cameras, microphones, and GPS tracking. Even digital billboards are surveilling the public, collecting data from the cell phones of people nearby. [407] In the future, consumers may live in so-called "smart cities"[408] that collect residents' data through cameras and sensors both inside vehicles and stationed throughout public places.

These surveillance systems, and the software, websites, and apps that run on them, track every conceivable aspect of consumers' behavior in intricate detail.

The perpetrators collecting and profiting from this information are not just the familiar technology giants Google, Facebook, Instagram, Netflix, and Amazon. Tens of thousands of smaller companies that provide an app, a program, or a website on the Internet or via software on connected devices are continuously surveilling Americans as well.

The invasion is not confined to high tech. Brick and mortar stores, desperate to compete with e-commerce's ability to turn personal information into profit, are continuously deploying new ways to collect information about their customers. For example, Microsoft and Kroger are teaming up to create "the grocery store of the future," equipped with sensors designed to deliver targeted ads to shoppers based on customer demographics.[409] Amazon Go, the retail grocery chain that charges customers for items through smartphones and allows shoppers to pay without interacting with a human cashier, is equipped with sensors and cameras that track what each specific customer takes and puts back onto the shelves.[410] Amazon is planning to install that technology in its Whole Foods stores starting this year.[411] Walgreens is rolling out beverage refrigerators that will collect data about consumers' eye movements and facial expressions to determine their age and gender as they browse for a soda or an iced tea.[412] One company has developed floor sensors that stores can use to read "a customer's unique foot compressions" to track how long a customer stares at a particular display in a store.[413]

As a result of this mass collection, the personal data of every American, starting at childhood,[414] is now in the hands of social media giants, data brokers, analytics companies, advertisers, insurance companies, and retailers. Most Americans are unaware of how much these powerful global corporations can see about the intimate details of people's daily lives. They know our race, religion, age, gender, social security number, driver's license number, household income and finances, zip code, marital status, height, weight, eye color, hair color, facial structure, fingerprint, the sound of our voice, whether we are parents or expectant parents (or would like to be), our pets, our location, what we are buying and where we are buying it, where and what we eat, where we vacation, our sexual interests, dietary restrictions, medical conditions, genetic information, political views, what we search for on the Internet, what websites we visit, when we open an email,[415] what apps we use and how long we use them, the names and contact information of people we text, call, and hang out with, and when we exercise. Americans have been hemorrhaging personal information on a minute-by-minute basis for years.

Most of this information is obtained through forced "consent" – the legal artifice that consumers "agree" to this mass-scale collection. Where are the contracts that consumers supposedly read and sign? Companies post their "privacy policies" and "terms and conditions" online, allegedly giving themselves the right to collect, sell, and use consumers' personal information however they want. These lengthy documents are incomprehensible to consumers and take many hours to read.[416] Yet courts have ruled that these "agreements" are binding on consumers. (See pp. 101-103 for a further discussion of privacy policies.)

Data brokers are the middlemen in this mega privacy heist. They scrape the Internet for data about consumers, purchase data from private companies, credit bureaus, and government agencies, and resell or share that information with other companies.[417] There are little to no legal regulations preventing data brokers from doing what they do.

Made possible by the introduction of vastly more powerful computers and instantaneous communications technologies, each American's "digital profile" contains thousands of separate data points.[418] The implications of this data trove are profound. Left unchecked, it will fundamentally alter the balance of power between consumers and corporations. The new science of "predictive analytics" is devoted to the development of algorithms that can digest the vast quantities of information that comprise our digital profile and predict our behavior. If a consumer's behavior can be predicted, it can be *manipulated*.

The evolution of algorithms and artificial intelligence technologies presents a threat greater than the mere collection of our data. These algorithms often perpetuate racial, gender, and income biases resulting from flawed and outdated data and the biases of the humans who develop them.[419] Another concern is that these technologies pose safety and security threats to consumers, as they are vulnerable to hacking. The deep intrusion of sophisticated technology in consumer products and services, the dramatic shift to electronic and mobile commerce, and the advent of artificial intelligence and machine learning have so far eluded any legal constraints. Corporations are developing technology, algorithms, and artificial intelligence systems far faster than lawmakers and the American legal system can keep up.

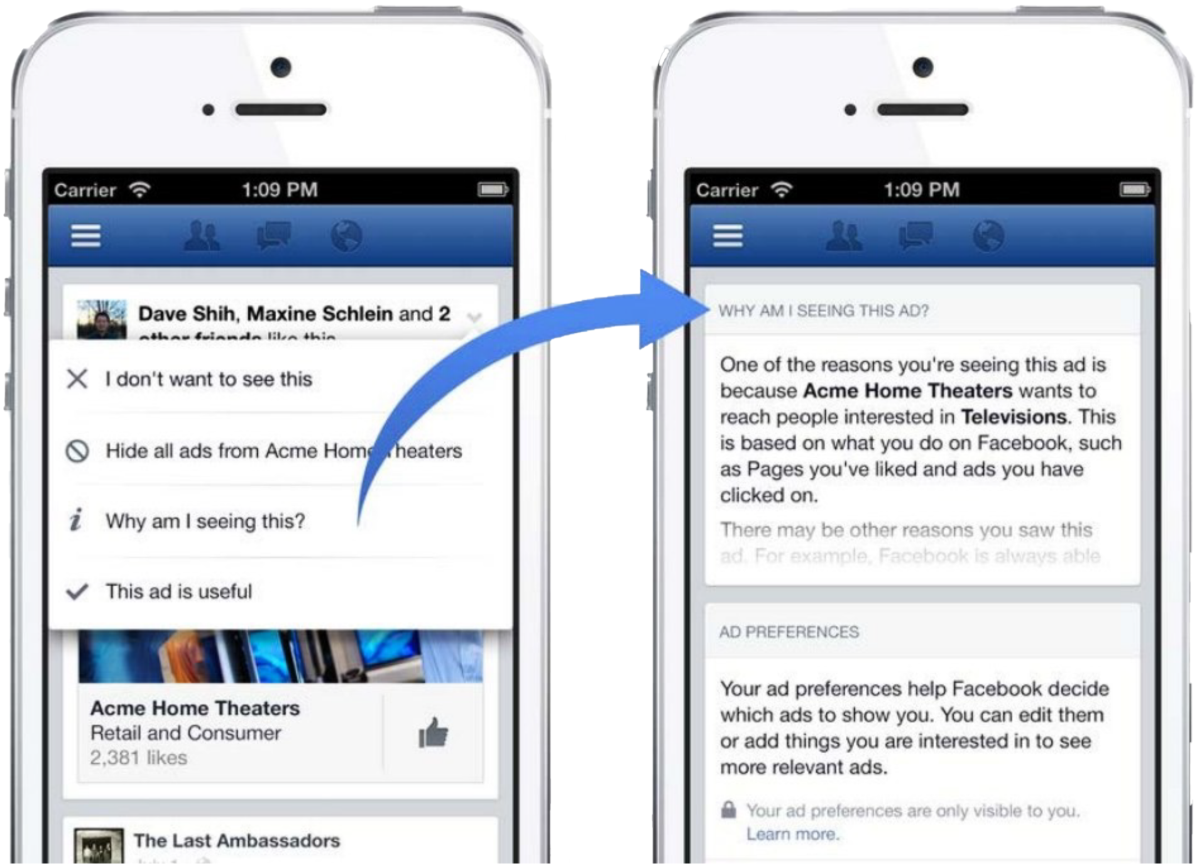
First: what is being done with all of our data?

- **Location data for advertising.**

The most lucrative reason for collecting consumers' data is so that it can be sold to and used by advertisers. Personal information is worth hundreds of billions of dollars to advertisers. And the most lucrative personal data is location data:[420] 40% of all mobile ad spending is on serving location-based ads.[421] In 2017, marketers spent $17 billion on location-targeted ads directed at consumers on their mobile devices; in 2020, $27.2 billion.[422] How do companies get location data? Smartphone apps. Consumers have an average of 40 to 80 apps on their smartphones and tablets, and those (often free) apps are believed to collect location data, which the owners of the apps sell to thousands of marketers for the purpose of targeted advertising.[423] Even the most innocuous apps collect location data. The CEO of the now-defunct movie theater subscription app MoviePass shocked the public in 2018 when he boasted, "We watch how you drive from home to the movies. We watch where you go afterwards."[424] Also, telecommunications companies and retailers are able to collect location data through cell phone towers and Wi-Fi hot spots. To stop the collection of location information, consumers must go into the individual settings for each app on their phone and turn off location sharing (assuming the apps don't cheat).

- **Targeted ads.**

Ever wonder why, after a person searches the Internet, advertisements related to that search later appear on consumers' devices? Advertisers pay companies like Facebook and YouTube to deliver ads on their networks to targeted audiences based on consumers' personal information.[425] These companies "essentially lease out [consumers'] online profiles to companies looking to sell us goods and services."[426] Advertisers use data from Facebook to show targeted ads to more than one billion Facebook visitors a day.[427] Facebook has rolled out a feature that allows consumers to click on the right-hand corner of an ad for an explanation of why that consumer is seeing that ad – although the explanations provided are very general and do not disclose to consumers the specific information that was used to deliver the targeted ad:



Source: Louise Matsakis, *Online Ad Targeting Does Work – As Long As It's Not Creepy,* Wired (May 11, 2018), https://www.wired.com/story/online-ad-targeting-does-work-as-long-as-its-not-creepy/.

Facebook is only one example of a company that exploits consumers' personal information for advertising dollars. Google does it, too. These businesses are famously known for their search and social media software. But they are in effect advertising agencies that are paid to place ads in the feed they present to their customers. Only recently did Facebook and Google finally give users the option to stop receiving targeted advertisements, but users must affirmatively opt-out of the ads,[428] which is a confusing multi-step process designed to discourage people from doing so.

Google and Facebook were the pioneers, but online advertising based on personal information such as your recent searches now appears everywhere – from the New York Times to Amazon to YouTube to Twitter.

Targeted advertising enables another deceptive anti-consumer practice: the search-based "bait and switch." Consumers often assume that search engines are "neutral," and present only the most directly pertinent results based on what the consumer types in. That is false; these days Google is akin to the public libraries of yore, but one which is surreptitiously paid to favor some books over others. The company, which has garnered approximately 88% of the search marketplace,[429] has been repeatedly accused of presenting search results that are skewed in favor of Google products, or those of its advertisers. The European Union fined Google $2.7 billion for the practice.[430] The Wall Street Journal reported in November 2019 that Google's search algorithms often favor businesses that advertise on Google.[431] Similarly, Amazon has also been found to present search results that maximize its sales and profit.[432]

Yelp, the business review site, has similarly been accused of prominently featuring reviews of businesses that pay Yelp to advertise. (See p. 86 for more on accusations against Yelp of giving special treatment to paying advertisers.) Consumers today cannot trust that their searches on these platforms are revealing the best priced or highest quality product.

Targeted advertising can also lead to discrimination in economic opportunities, like housing, employment, and credit.[433] For example, HUD charged Facebook with violating federal laws regulating housing discrimination in its targeted ads.[434] According to HUD, Facebook used data about users' race, national origin, religion, familial status, sex, and disabilities to deliver ads for available housing that discriminated against people based on these demographics. In 2019, HUD started investigating Twitter and Google for similar practices.[435] In June 2020, Google announced it would prohibit housing, employment, and credit advertisements from being targeted based on a user's zip code, gender, age, parental status, or marital status.[436] It is unclear whether Google's move was prompted by the HUD investigation, but HUD applauded Google's decision.[437]

Some industry watchdogs say that the continuous connectivity of the IoT poses the prospect of even more dangerous forms of non-consensual data collection. Voice-controlled household gadgets like Amazon's Echo and Google Home are able to record all sorts of audio information about their owners (including when consumers flush their toilets in their own homes![438]). A recent study found that 22% of Americans own an Amazon Echo or a Google Home – almost a quarter of the country.[439] Ring, an Amazon-owned company that sells security cameras for consumers to use in their homes, allows marketing companies to collect information about consumers through these devices.[440] The companies try to spin the "beneficial" uses of this always-on technology: to detect when a child is in danger, to secure a home, or to deliver entertainment suggestions or personalized deals and offers.[441] It is apparent that the goal of collecting the audio information is not to improve consumers' lives but to provide personalized advertisements to consumers based on extremely private, surreptitiously recorded data.

(In addition to collecting information about consumers, connected devices also pose significant security risks. Google Home and Amazon Echo are vulnerable to hackers.[442] Some connected toy dolls have microphones and video cameras that enable the dolls to interact with children – and also permit hackers to spy on children.[443] Hackers have also targeted consumers who own Ring products by accessing the cameras remotely and threatening people through the speaker function of the cameras.[444] One man whose children were harassed by a hacker through the Ring camera's speaker has sued Amazon for failing to equip the devices with adequate security measures.[445])

- **Artificial intelligence.**

"Artificial intelligence" is a form of algorithm that can "learn" to revise and "improve" itself without human involvement. Intelligent machines are already capable of assimilating enormous quantities of data and make automated decisions based on that data. Software can fly commercial airplanes.[446] Drones can follow (and kill) people.[447] Car manufacturers claim their cars can drive themselves.[448] AI decision-making will increasingly determine whether someone will have access to education, jobs, insurance, housing, medical care, transportation, and how much they will pay for such services. Algorithms and artificial intelligence tools raise fundamental civil rights issues: they have been shown to be biased, their decision-making based on ethnic, racial, gender and income characteristics.[449]

Not only does AI raise significant bias concerns, it also endangers our safety and security. The algorithms making the automated decisions are considered the property of the corporations that develop them and are kept secret. They are not regulated by any government agency and have proved dangerously imperfect – the software that flies airplanes also has driven them into the sea, killing hundreds of passengers and leading to a backlash against so-called "fly by wire" airplane systems that eventually diminish the skill of the pilots on board.[450] The wildly overhyped "autonomous vehicles" that carmakers once promised were safer than human drivers have been involved in numerous fatalities.[451] Heralded as "right around the corner" a few years ago, industry officials now admit intelligent vehicles and traffic systems are still years away.[452] Airplanes, cars and all virtually all digital devices are vulnerable to hackers. A recent report found that today's fleet of connected vehicles – approximately 50 million in the United States – could be hacked by terrorists or malevolent foreign powers and cause catastrophic deaths and injuries.[453]

Algorithms and AI are impervious to the current 20th century-based consumer protection regime; Americans are now merely bystanders left to observe a technology that has so far exceeded our political leadership's willingness to police it. And a number of eminent scientists believe that sometime between 2030 and 2045, machines using AI will become able to continuously improve themselves at an infinitely accelerating pace, quickly becoming smarter than humans and ultimately able to evade any attempt by humans to control it. Futurists call this pivotal moment in human history the "singularity."[454] Sooner than we may think, new laws will be needed to regulate the relationships between machines and humans.

- ## Facial recognition.

Facial recognition technologies – a major threat to people's privacy – rely on AI. A bombshell report by the New York Times in 2018 revealed that a small facial recognition company, Clearview AI, had scraped the Internet – including sites like Facebook, YouTube, and Venmo that publish peoples' pictures – to amass more than three billion photos of consumers – the world's largest commercial facial recognition database.[455] Clearview AI secretly allowed more than 600 federal and state government agencies to use its technology and database allegedly for "law enforcement" purposes. Clearview's software is expected to eventually be compatible with virtual reality glasses, allowing anyone with a pair to identify individuals as they walk or drive down the street.

Facial recognition technology is rife with the potential for racial and gender bias. Researchers at MIT found that facial recognition algorithms are most accurate when identifying white males but not other groups.[456] Indeed, one facial recognition software database – called "Faces in the Wild" and used as the benchmark when testing facial recognition software – was comprised of data on a group of individuals that was 70% male and 80% white.[457] The potential for bias is so strong that cities like Oakland, Portland, San Francisco, and Minneapolis have banned the use of facial recognition for law enforcement purposes.[458]

- ### Secret surveillance scores.

Using algorithms to analyze tens of thousands of separate pieces of private information about every American, corporations are secretly applying surveillance scores to charge some people – but not others – higher prices, limit their access to customer service, prevent them from returning products, deny them housing and jobs, and even tag them as potential criminals.[459]

These decisions are being made without disclosing to consumers the existence of the score; what personal information goes into the algorithm; or how the data is used to make a decision about them. Companies enlist a shadowy group of privacy-busting firms to engage in what is euphemistically referred to as "data analytics" to write the algorithms that generate the secret surveillance scores.

In a detailed investigative report on secret surveillance scores, nonprofit #REPRESENT called on the FTC to take action against companies that develop and use secret surveillance scores.[460] The FTC responded by urging the scoring firms to regulate themselves.[461]

- ### Influencing public opinion and voters' decision-making.

Accounts of widespread data misuse during the 2016 presidential election showed how personal information is collected and weaponized to manipulate the public. Facebook, which maintains one of the world's largest data treasure troves, allowed Cambridge Analytica, a political firm hired by the Trump campaign, to access information on up to 87 million users.[462] The firm used the data to serve targeted audiences with ads that would influence how they would vote in the election.[463] The news about Cambridge Analytica ignited a scandal because users were unaware of how Facebook shared their data with third parties for the purpose of manipulating how Americans decided which product – in this case, which presidential candidate – to “buy.”

In the wake of the Cambridge Analytica scandal, the FTC announced a settlement with Facebook that included a $5 billion fine for the social media giant’s repeated privacy violations and lies to the public about how it used consumers’ data.[464] Even though the $5 billion fine is record-breaking, the settlement does little either to protect consumers or to punish Facebook for its years of abuse. The settlement actually was a boon for Facebook, because it absolved the company of liability for all previous privacy violations – even for those unrelated to Cambridge Analytica, such as tricking children into making in-app purchases in Facebook games.[465] Privacy groups unsuccessfully challenged the settlement in court.[466]

Another way that data is used to influence U.S. voters is through automated “bots” that hackers use to create phony profiles on social media outlets like Twitter, based on personal information – like pictures and names – from real people. Just as bots are used to mislead consumers about the quality of products and services, the accounts spread fake news and post inflammatory material about economic and cultural issues as well as electoral candidates to promote certain ideologies, or simply create discord in the political marketplace.[467]

- **Scientific research (without consent).**

Some companies use consumers’ personal data to develop what they describe as innovative solutions to improve health, science, and society, but their methods can be very troubling. For example, in 2018, Google developed artificial intelligence software that it claimed can accurately predict whether a hospital patient will recover, die, or be discharged and readmitted.[468] Google researchers used 46 billion pieces of data obtained from patients at U.S. hospitals to develop the predictive program.[469] The researchers got a “waiver of informed consent” from a medical ethics board[470] (meaning that Google did not have to get consent from each patient whose data they used). Supposedly the data was “de-identified” so that none of the patients’ identities were revealed.[471] But almost all “de-identified” data can be “re-identified and linked to a person with additional computer processing.”[472] Even if everything the researchers did was legal, these patients went into the hospital to obtain treatment – now their data is in Google’s hands without their knowledge or consent.

An even more alarming Google project was exposed in 2019: "Project Nightingale." It was reported that Google secretly partnered with Ascension, a network of 2,600 hospitals, doctors' offices, and other medical facilities, to collect the personal health information of millions of consumers across 21 states without notifying any affected patients.[473] The goal of the project, according to Google, was to design AI software that would suggest specific types of care for patients.[474] However, Google has not been entirely clear about how the data will ultimately be used.[475] Federal regulators and lawmakers indicated in 2019 that they would investigate the project,[476] but there is no indication any action has been taken.

The sprawling tech industry – which contains both the most recognizable firms like Apple and Amazon and thousands more below the public's radar – is treating consumers' private data as its own.

In 2018, the European Union passed the General Data Protection Regulation, which, among other things, requires extensive levels of consent before companies can collect personal information about consumers and regulates algorithms.[477]

By contrast, United States privacy laws have not kept up with the rapidly evolving technologies that are seizing control over consumers' personal information.

Long beholden to tech industry donors, Congress has held several investigatory hearings but passed no comprehensive federal legislation to regulate data collection. Many state legislatures, subject to similar pressures, have also left consumers at the mercy of privacy violators. And consumers have shown they want privacy: after Apple released a feature in May 2021 that prompted consumers to answer whether they want to be tracked by various apps on their iPhones, 96% of consumers chose *not* to be tracked.[478]

But in the absence of congressional action, some states have put their own privacy protections in place. When California passed the California Consumer Privacy Act (CCPA) in 2018, social media giants were forced to accept some of the strongest privacy safeguards in the nation at the time. The protections in the CCPA were an important step toward giving consumers rights over their personal information. In particular, beginning January 1, 2020, consumers had the right to request that a business disclose the categories and specific pieces of personal information that it collects about the consumer, the categories of sources from which that information is collected, the business purposes for the collection or sale of the information, and the categories of third parties with which the information is shared. Consumers also have the right to opt-out of the sale of their data and to request that companies delete all the information they have on the consumer so far.[479] But the 2018 law failed to give citizens the authority to sue companies that break the law. California voters later approved an initiative on the 2020 ballot known as the California Privacy Rights Act (CPRA) that will enhance the CCPA, effective January 1, 2023. The CPRA establishes a state privacy agency to enforce Californian's privacy rights, triples the fines for violations of children's privacy, expands the type of information a consumer can request a business to stop using, and creates a right to correct the information a business has about a consumer.[480] Both laws establish an "opt-out" framework for privacy protections, meaning it is the consumer's responsibility to take action to exercise their privacy rights under the law, rather than put the burden on companies to obtain the consumer's permission.

Privacy bills with varying levels of protection in other states are pending.[481] Meanwhile, facing massive public pressure, the tech industry is beginning to take preemptive action to ward off strong reforms. The Virginia Consumer Data Protection Act, signed into law on March 2, 2021, was supported by Microsoft and Amazon – and opposed by privacy advocates because it creates an "opt-out" framework that puts the burden on consumers to protect themselves, permits companies to discriminate against consumers who exercise their privacy rights by charging them higher prices for services or offering inferior services, and provides inadequate enforcement mechanisms because the law can only be enforced by Virginia's Attorney General.[482]

On the federal level, there is no prospect of immediate reform. Numerous federal privacy bills have been introduced,[483] but the COVID-19 pandemic forced Congress to focus on the health and economic issues stemming from the crisis. Federal lawmakers have stated that their goal is to have a federal privacy law by 2022.[484] But Congressional inaction has led some lawmakers to urge the FTC to issue rules on privacy and data protection.[485]

And many of the federal privacy bills were actually drafted or promoted by tech corporations trying to get Congress to pass a law that will override California and other state laws. Even the strongest of the federal privacy proposals floated so far would not prevent most of consumers' personal information from being collected by firms that trade in it.[486]

Oops, We Forgot to Safeguard Your Data!

Because most state laws do not regulate the collection and sale of personal information, the companies that obtain it have little incentive to protect the data when it is in their possession. So, another way that the details of our private lives end up in the hands of strangers is through criminal hacking – data breaches. Think of it as a pickpocket being pickpocketed.

A data breach is an unauthorized acquisition of sensitive and confidential personal information – credit card, mortgage, bank account numbers; Social Security numbers and home addresses; medical and other sensitive information. A whopping 73% of all U.S. companies have been hacked.[487] These incidents nearly doubled from 2016 to 2017.[488] And between January 1 and March 31, 2018 alone, 1.4 *billion* records of American consumers were exposed in 686 separate data breaches.[489] In 2020, 36 billion records of American consumers were exposed in over 2,935 publicly reported breaches.[490] Some of the biggest U.S. companies that have lost control of their information – and ours – include Anthem, Target,[491] Home Depot,[492] Ashley Madison,[493] Yahoo,[494] Sony,[495] Saks Fifth Avenue, Lord & Taylor,[496] and Marriot.[497]

Ride-sharing company Uber suffered a data breach of 57 million consumers' and drivers' personal information in October 2016 and, instead of disclosing the breach to regulators and the public as required by law, tried to cover it up by paying $100,000 to the hackers that committed the data breach to keep quiet.[498] A settlement with state Attorneys General required Uber to pay a $148 million fine for the hack cover-up.[499]

In 2017, one of the most serious data breaches in U.S. history occurred when Equifax, one of three leading "credit bureaus" that assign Americans a credit score was hacked. The social security numbers, drivers' license information, and other personal financial data of more than 147 million consumers was compromised.[500] Equifax offered free credit monitoring services to victims immediately after the breach, but in exchange consumers had to release the company from legal liability and agree to forced arbitration to get the free services.[501] Equifax also initially offered to "freeze" affected consumers' credit for a fee – to prevent thieves from opening lines of credit in their names.[502] Equifax gave consumers a limited window of time to sign up for the credit freeze, and people had to unfreeze their credit if they needed to open a new line of credit.[503] Equifax's post-hack stance provoked widespread outrage, including in Congress.[504] The company quickly reversed course, and dropped the fees. In 2018, following the Equifax incident, a federal law went into effect that allows consumers to freeze and unfreeze their credit for free.[505]

Multiple class action lawsuits were filed against Equifax alleging violations of state data breach laws and consumer protection statutes and asking for compensation for consumers whose information was stolen.[506] Two years later, in July 2019, Equifax entered into a global settlement with consumers, the FTC, the CFPB, and the Attorneys General of all 50 states. The company agreed to pay between $575 and $700 million: $300 million to provide affected consumers with free credit monitoring for four years, as well as compensation for losses that consumers could document that resulted from identity theft (e.g., unauthorized charges to a consumer's account, or fees the victim paid to an attorney and/or accountant); $31 million to consumers who chose a lump sum cash payment instead of credit monitoring services; and the rest in the form of civil penalties.[507]

The settlement turned into a second debacle for people victimized by the Equifax breach, however. The FTC announced that affected consumers who chose the lump sum cash option could file claims to receive a cash payment of $125. However, the FTC failed to mention that $125 was an estimate, based on a guess about how many consumers were likely to submit claims – the more people who submitted claims, the less money there would be to pay each of them. Equifax was forced to publicly backtrack and tell consumers they would likely get less.[508] Because so many consumers requested a cash payment, they were expected to receive about $7 each.[509] A district court approved the settlement; the Eleventh Circuit Court of Appeals rejected appeals brought by objectors and affirmed the approval of the settlement.[510]

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What is a common fund settlement?

The Equifax settlement was a "common fund" settlement. In a common fund settlement, a defendant agrees to pay a specific amount and put that amount into a fund. All consumers who are entitled to money must share a portion of the fund. Unless the common fund is equal to 100% of the amount people lost, each person will receive only a fraction of their loss. In a "claims-made" settlement, which requires each consumer to submit a claim, the actual amount paid to each consumer will depend on how many consumers file claims, and is not known until all the claims are received. The parties to the Equifax settlement failed to clearly disclose to consumers that their payments were coming out of a "common fund" and that they were not actually *guaranteed* $125 each.

The frequency of data breaches in the U.S. has not slowed down since the Equifax fiasco. For example, Capitol One bank suffered a data breach in 2019 by a single hacker who gained access to more than 100 million customers' personal information, including bank account and credit card information.[511] The Department of Justice has filed a criminal complaint against the hacker and affected customers have filed more than 40 lawsuits against Capitol One.[512]

How do these data breaches harm consumers?

Consumers whose data are hacked are placed in danger of identity theft and financial fraud. The stolen information can be used to transfer money out of a person's bank account; make online purchases; take out loans or even mortgages; reroute paychecks and Social Security benefits to an address used by the thief; and to set the victim up for further hacking. Becoming the victim of identity theft and fraud is like contracting a lingering disease. The process of undoing fraudulent transactions, as well as preventing crooks from opening phony mortgages and bank accounts, can take months of grueling correspondence and phone calls with financial and other institutions that have little interest or incentive to protect their customers. Victims of these crimes are often forced to prove *they* are not the crooks.

Evidence suggests that hackers can sell consumers' data on the "dark web" (a secret location on the Internet that requires specific authorizations for criminals and others to access[513]) for the following amounts: $1 for a social security number; $20-$200 for login information for online payment services like PayPal; between $5 and $30 for credit card information; $20 for a driver's license number; and between $1,000 and $2,000 for passport information.[514] Hackers are even using stolen information about children to commit identity theft, make purchases and take out loans in kids' names.[515]

All 50 states have laws on the books that require companies who have suffered a data breach to notify the government and affected consumers of the breach.[516] However, the laws mostly focus on notification procedures and do not provide adequate remedies to consumers who are the victims of these breaches. Most companies that have been hacked only offer victims free credit monitoring services – which alert consumers to potential identity theft and credit card fraud but do not come close to compensating people for the time, expense, and trauma of undoing the frauds that result. And credit monitoring services have been criticized because they do not actually prevent consumers' data from being further compromised; they just alert consumers when questionable activity occurs.[517]

Under the present legal regime, consumers' stolen data is worth little or nothing when it comes to the responsibility of hacked corporations to compensate victims – even though it's a billion-dollar business for the industries that collect the information but fail to protect it. Since companies are rarely held liable and often do not have to pay consumers after a breach, they have little incentive to invest in the technology to safeguard consumers' data.

Customer Reviews – Fake News?

One of the best aspects of the Internet is that consumers have access to more information about businesses and their practices than ever before. Consumers also have a more powerful voice to communicate their opinions about businesses than ever before, thanks to the Internet, digital devices, social media websites, and other online forums. To research a business, all consumers must do is type in the name of a business, and boom! They will get pages of good and bad reviews posted by other consumers detailing the performances of and grievances about a company. According to the Pew Research Center, approximately half of adults under the age of 50 "always or almost always" check online reviews before buying something.[518] These "crowd-sourced" reviews potentially provide helpful information to consumers who are deciding where to spend their money. And they have a measurable positive or negative impact on businesses. One study concluded that businesses see a five to nine percent increase in revenue as the result of a one-star rating increase on the prominent online business review forum Yelp.[519] Thus, businesses have a real incentive to ensure their online ratings are positive.

But online review forums are rife with abuse. ***Here's how:***

- ## Changing or banning negative reviews.

Negative reviews can cause a business to lose customers, so companies have been known to manipulate or delete consumer reviews to protect their reputation. Sellers are reportedly reaching out to consumers who leave bad reviews on Amazon, asking the consumers to edit or delete their negative reviews in exchange for refunds or gift cards.[520]

While revision or deletion of negative reviews by the author leads to misleading information, manipulation of consumer reviews by anyone other than the author can have dire consequences. TripAdvisor, a supposedly independent online forum for travel-related reviews,[521] caused a public uproar when it deleted a review by a woman who was raped by security guards at a hotel in Mexico (two other women had also been raped by security guards at the same hotel).[522] The company said that the review was deleted because it was not "G-rated" as required by its policies, but it eventually restored the review and issued an apology.[523] Consumers' physical safety could have been at risk without access to the woman's honest review.

Similarly, another travel website, Expedia, would not permit a reviewer to post a negative review of a hotel, and refused to explain why.[524] In another case, Expedia offered $50 to a reviewer to *delete* their negative review of a hotel.[525]

No one should be surprised by this kind of behavior. Though sites like Expedia collect a commission from consumers who proceed to make a reservation, the sites are also paid by the hotels and airlines to advertise.[526]

SmileDirectClub, which sends consumers orthodontic mouth devices to straighten teeth, requires consumers who request a refund when the product does not work to sign a non-disclosure agreement in order to receive the refund, forcing consumers to agree not to post negative reviews about the company.[527] The gag order looks like this:

> "Releasor shall not post on social media any information or reviews regarding the Transaction or the terms or existence of this General Release, and shall take all steps necessary to delete or eliminate any such postings made prior to the date of this General Release. Without limiting any of the foregoing, Releasor further covenants and agrees that he/she will not make, publish, or communicate any statements or opinions that would disparage, create a negative impression of, or in any way be harmful to the business or business reputation of SDC or its affiliates or their respective employees, officers, directors, products, or services . Releasor covenants and agrees that he/she has not filed any complaint with any local, state or federal agency or regulator (each, a "Complaint" and collectively, the "Complaints"), or, in the event that Releasor has filed any Complaint(s) prior to executing this Release, Releasor hereby agrees to withdraw any and all outstanding Complaints upon receipt of the Payment. Releasor further agrees that he/she will not file any future Complaints."

Source: Erin Griffith and Peter Eavis, *This Company Says It Will Fix Your Smile. It May Shush You if It Doesn't,* New York Times (Jan. 21, 2020), https://www.nytimes.com/2020/01/21/technology/smiledirectclub-smile-nda.html.

- **Prioritizing good reviews of paying advertisers.**

Yelp allows businesses to pay to advertise on its platform.[528] In 2010, a group of business owners who were listed in a Yelp directory but who did not pay to advertise on Yelp filed a class action lawsuit against the company.[529] The business owners claimed Yelp prioritized negative reviews about their businesses after they refused Yelp's pitches to advertise on its platform (causing them to lose customers), while prioritizing positive reviews of competing companies that pay Yelp to advertise.[530] According to the business owners, Yelp's prioritization practices amounted to illegal extortion.[531] A federal court of appeals threw the case out, on the ground that Yelp's prioritization of negative reviews to non-advertising businesses amounted to "hard bargaining" rather than extortion.[532] The Wall Street Journal reported in 2014 that non-advertising businesses filed thousands of complaints about Yelp at the FTC, with some echoing the claims in the class action lawsuit: negative reviews proliferated on their business page after they turned down offers from Yelp to advertise on the platform.[533]

- ## Fake reviews.

Phony reviews permeate online review forums as well as popular shopping websites like Amazon.[534] Companies pay third parties to post rave reviews so that it looks like customers are really happy with the business.[535]

Phony reviews are abundant on Amazon, the nation's largest retailer. One study found that 30% of all reviews on Amazon are bogus.[536] Some companies solicit consumers who purchase their products to post a five-star review on Amazon in exchange for a gift card.[537] One woman who works as a "professional reviewer" revealed that she received over 700 products worth more than $15,000 from businesses in 2019 in exchange for posting fake five-star reviews on Amazon.[538] She gets jobs by responding to targeted Facebook ads and, once in contact with the sellers, she receives detailed instructions on how to proceed.[539] To get around Amazon's policy of prohibiting sellers from giving away free products in exchange for reviews, the woman purchases the products herself and is later reimbursed by sellers via PayPal or an Amazon gift card after she posts her review.[540]

Amazon blames the merchants on its site, saying "we will continue to pursue legal action against the root cause of reviews abuse — the sellers and manufacturers who [are the reason for the] fraudulent reviews."[541] A company spokesperson claims that in 2018, "we prevented more than 13 million attempts to leave an inauthentic review and we took action against more than 5 million bad actor accounts attempting to manipulate reviews."[542]

The FTC has legal authority to police these practices.[543] It brought an action against Cure Encapsulations, Inc., a company that sells weight-loss supplements, for paying a website – www.amazonverifiedreviews.com – to create and post fake five-star reviews about the effectiveness of the weight-loss pills it sells on Amazon.[544] The company settled with the FTC and agreed to pay a $12.8 million fine (which was reduced to $50,000 due to the company's poor financial condition) and to not make unsubstantiated claims about the efficacy of the pills in the future.[545]

Review sites that are paid by businesses to advertise have a conflict of interest. They present themselves as a source of reliable information for consumers, yet they have an incentive (advertising dollars) to suppress negative reviews about the firms that are paying them. And sellers have an incentive (profits from sales) to obtain positive reviews about their products by using bots to generate reviews, paying consumers to post positive reviews or posting fake reviews. Whether through the suppression of negative reviews or manufacture of positive reviews, the result is the same: consumers are presented with dishonest information.

Companies have even gone so far as to sue consumers who were posting critical reviews in an effort to silence them. For example, a pet-sitting company in Texas sued a couple for posting a one-star Yelp review describing the couple's unsatisfactory experience.[546] The company claimed the couple's Yelp review was defamatory and violated a non-disparagement clause (a provision barring customers from taking actions that negatively impact the pet-sitting company) in its standard contract with customers.[547] Consumer advocacy organization Public Citizen stepped in to defend the couple, and the pet-sitting company's lawsuit was ultimately thrown out.[548]

This is one problem Congress has enacted legislation to address. The Consumer Review Fairness Act of 2016 "protect[s] people's ability to share in any forum their honest opinions about a business' products, services, or conduct[.]"[549] It makes it illegal for businesses to include terms in contracts with consumers that are intended to prevent consumers from sharing their opinions and experiences through online reviews, social media posts, uploaded photos, videos and other media.[550] Specifically, it prohibits contract terms that: (1) restrict the ability of a consumer to post a review about a company; (2) make a consumer pay a fee in order to post a review[551]; or (3) require consumers to give up ownership rights over the content of their reviews.[552] The FTC and state Attorneys General are authorized to enforce the Consumer Review Act.[553] On August 16, 2019, the FTC announced that it had reached settlements with five companies (A Waldron HVAC, LLC, National Floors Direct, Inc., LVTR LLC, Shore to Please Vacations LLC, and Staffordshire Property Management LLC) that allegedly violated the Consumer Review Act by using contracts that barred consumers from posting negative reviews online and that imposed penalties on consumers for doing so.[554]

The Consumer Review Act is a step in the right direction, but it merely regulates contracts that restrict or punish a customer's behavior. It does not prohibit businesses, or third parties acting on behalf of businesses, from deleting or manipulating legitimate consumer reviews.

In the meantime, fake reviews can now be generated by artificial intelligence.[555] Amazon claims that 90% of the phony reviews on its site are computer-generated.[556] Researchers at the University of Chicago reported that consumers could not differentiate between reviews produced by robots using artificial intelligence and those posted by humans.[557] AI will exacerbate the growing fake review epidemic and is likely to become an enormous threat to the stability and integrity of the online marketplace.

Just Leave Me Alone!

As digital technologies have evolved and permeated daily life, they have empowered new forms of commercial harassment. Promotional messages come in the form of unwanted texts, phone calls, mailers, emails, in-app direct messages, social media posts, or pop-up ads. The most intrusive of these marketing communications are those made to consumers' primary (and private) modes of communication: phones and e-mails.

For example:

- ## Unwanted phone calls.

  Robocalls – a phone call with a prerecorded promotional message or simply dead silence on the other end[558] – have become the bane of Americans' existence. In 2019, 58 billion robocalls were placed to American consumers, a 22% increase from the 47.8 billion robocalls placed in 2018.[559] The number declined slightly in 2020 during the COVID-19 pandemic, to 46 billion.[560] Over 65% of all complaints to the FTC are about robocalls.[561] The increase in illegal robocalls is the result of new technology allowing telemarketers and fraudsters to fake a call from your local prefix (a.k.a. "spoofing") or anywhere in the world using phony caller ID numbers. Some consumers are reporting that 80% of all incoming calls they receive are spam.[562] Robocalls are not just made to cell phones; the 121 million households in the U.S. that still use landlines also receive robocalls.[563] The phone companies say they are helpless to stop the calls, but they are in on the scheme: they collect fractions of a cent for each robocall made to a landline.[564]

  These communications waste consumers' time and can expose them to money-losing scams. In one type of scam, if a caller asks, "can you hear me now?" and the recipient of the call says "yes," scammers will use a recording of the "yes" as a voice signature to approve fraudulent charges billed to the consumer.[565]

Getting the robot callers to stop is not so easy. Though phone companies claim they can not prevent these calls, experts insist it is technically feasible to do so.[566] Efforts by regulators and legislators have also been ineffective. Consumers used to be able to opt-out of unsolicited phone calls by signing up for the FTC's "Do Not Call Registry," which marketing organizations vowed to honor.[567] But the new robocall technology has swamped the antiquated "Do Not Call" honor system. The federal Telephone Consumer Protection

Act (TCPA), which prohibits robocalls without consent,[568] and FCC rules adopted in 2017 that give phone companies (not consumers) the power to block suspected robocalls[569] had no impact on the growing number of robocalls Americans receive daily. The FCC publishes a list of mostly useless tips to consumers to stop robocalls – like "[d]on't answer calls from unknown numbers."[570] The FTC has filed a grand total of 134 enforcement actions against telemarketers who called consumers on the Do Not Call Registry.[571]

Some state laws regulate robocalls. For example, California law requires calls made by automatic dialing announcing devices to be introduced by a live person.[572]

On December 31, 2019, former President Trump signed into law the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, which requires phone companies to implement caller-ID authentication programs to spot robocalls, requires the FCC to allow phone companies to block robocalls, expands the FCC's enforcement powers, and increases penalties for violations of laws regulating phone service.[573] Consumer advocates say the law does not go far enough because it does not require that robocall blocking programs be offered directly to consumers.[574] In March 2021, under the Biden Administration, the FCC announced the largest fine in FCC history - $225 million – against Texas telemarketers for violating the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act by initiating one billion robocalls pretending to be health insurance companies selling plans.[575] New acting FCC chairwoman Jessica Rosenworcel has also announced an aggressive agenda to stop robocalls.[576]

- **Unwanted spam.**

The story is no different for email. Email inboxes are inundated with unwanted promotional emails – an estimated 293 billion spam emails were sent *per day* in 2019.[577] When a consumer buys something through a website, the consumer usually gives an email address as part of the transaction. Companies may (but do not have to) provide a check box to allow the consumer to opt-out of future promotional emails.[578] If there is no opportunity to opt out, the consumer will likely get promotional emails from that company following the transaction. But promotional emails also come from companies that have obtained consumers' email addresses without having done business with them.

The federal CAN-SPAM Act[579] requires all senders of commercial emails to tell recipients how they can opt out of the emails and to honor the opt-out requests promptly.[580] That is why there is (or at least should be) a really tiny link at the bottom of promotional emails that says "unsubscribe." But the dirty little secret is that even when consumers unsubscribe, they may still continue to receive unwanted messages.[581] As with robocalls, scammers ignore the rules. In fact, it's now clear that requesting an "unsubscribe" often simply confirms a valid email address that will then be sold to spammers. Since it went into effect in 2003, the CAN-SPAM Act has not successfully decreased the amount of spam that consumers receive.[582] Statistics show that spam accounts for 45% of all emails sent.[583]

Crummy Customer Service.

Contemporary customer service is the insult after the injury. No one *wants* to call customer service – it's only when there's a problem that people reach out, hoping to rectify it. Consumers in the United States place an estimated 43 billion phone calls to customer service departments each year.[584] In 2017, an estimated 67% of Americans contacted some form of customer service.[585]

Research has shown that companies intentionally design complicated, multi-tiered, and often foreign-based complaint resolution procedures that prevent consumers from resolving their complaints – for the sole purpose of reducing their costs.[586] And Americans across the board say they consider the customer service experience abysmal, to put it charitably. Consumers reported being the most frustrated by airlines, Internet companies, cable companies and cell phone carriers when dealing with customer service.[587] Over 75% of consumers who have had an issue with a purchase say they were less than satisfied with their customer service experience in trying to resolve the problem.[588] Bad customer service affects vulnerable consumers and minorities differently: older consumers have trouble navigating complaint systems; African American and Latino consumers are less likely to attempt to resolve complaints through customer service than college-educated white consumers; and women usually are required to go through more steps than men when attempting to resolve complaints through customer service.[589]

Bad customer service is more than just a headache for a consumer. Long hold times or otherwise requiring consumers to jump through hurdles in order to resolve an issue costs consumers time and, in turn, money.

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Can consumers be reimbursed in a lawsuit for lost time?

When consumers are the victim of a corporate mistake or wrongdoing, the burden is on the consumer to try to resolve the problem, usually first by contacting customer service. Navigating customer service labyrinths may take hours that a consumer would otherwise spend doing something else – such as working. We've all heard the phrase "time is money," and when consumers lose time they often lose money. Generally, state consumer protection laws do provide remedies to reimburse consumers for the time they lose trying to rectify corporate errors or wrongdoing. However, the Supreme Court of California has said that the expenditure of time "to avoid the consequences of [an illegal] practice" amounts to damage to consumers sufficient to bring a lawsuit under one California consumer protection statute (and potentially recover money for the lost time).[590]

A class action settlement resolving data breach claims against Yahoo! provided compensation for lost time (for up to 15 hours at an hourly rate of either $25 or a consumer's hourly rate at work, whichever was higher) to consumers who spent time rectifying identity theft problems resulting from the data breach.[591] The Yahoo! settlement was unusual though - settlements or court decisions that reimburse consumers for lost time are rare.

For most Americans, contacting customer service is literally their only way to resolve a dispute. That's because almost all large companies include forced arbitration clauses that require consumers to "agree" to waive their rights to bring a lawsuit against these companies in court. That leaves the consumer 100% dependent on the customer service system maintained by the corporation.

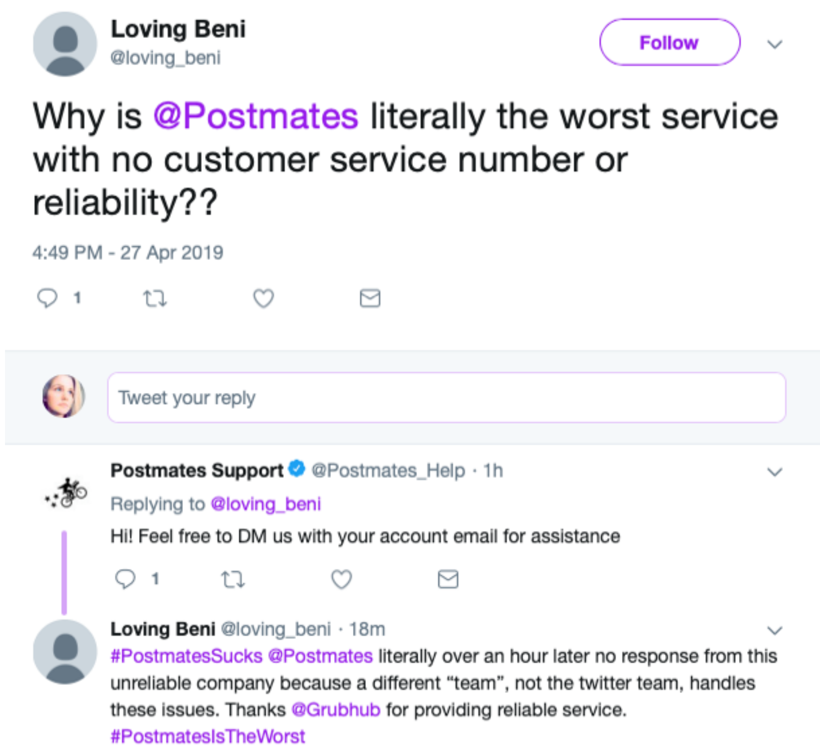
Unfortunately, consumers who wish to call customer service with a problem or a question have to overcome an increasing number of hurdles.

Here are some examples of companies' blatant lack of concern for their customers:

- **No contact information.**

A 2015 Consumer Reports study showed that 68% of the customer service-related complaints it received were that a particular business does not provide contact information for its customer service center.[592] This is a particular problem in the tech industry, which seems to think that traditional norms can be sacrificed for innovation. Consumers have reported that it is nearly impossible to find a customer service number for Google, YouTube, WhatsApp, and Kindle.[593]

Indeed, many companies provide no customer service phone number at all. American Airlines will take your reservation by phone, but if you want to dispute a charge you have to write them a letter or file a request on their web site.[594] Ride-share company Lyft requires consumers to submit an online request form if they need help.[595] Food delivery service Postmates also does not provide a customer service phone number, to the dismay of its customers:



Source: Twitter.com (last visited Aug. 25, 2021).

The plaintiffs in a class action lawsuit against electronics giant Motorola over violations of device warranties ran into this problem. They claimed that Motorola failed to clearly disclose customer service contact information in warranty materials, making it difficult to take advantage of the warranty.[596] When their customers' smartphones and smart watches broke, they did not know where to turn for answers about the warranties.[597]

There are even independent websites dedicated to providing the public with companies' customer service phone numbers because companies go to such lengths to hide them (e.g., https://www.contacthelp.com; https://gethuman.com). Savvy consumers can look to documents filed with the U.S. Securities and Exchange Commission to find the names of company executives and the headquarters' phone number. But some of the biggest companies have caught on and don't have live operators answering that number.

- **No live human.**

If and when consumers are able to identify contact information for customer service, reaching a live, informed human becomes the next obstacle. In the 2015 Consumer Reports study, 75% of customer service-related complaints were that a consumer could not get a human on the phone to discuss their grievance.[598] Most consumers want to talk to a live person on the phone.[599] Instead of investing in customer service call centers, companies are trying to minimize costs.

Coinbase, the largest cryptocurrency exchange in the country, primarily uses email for customer service inquiries.[600] Customers – who can have hundreds of thousands of dollars' worth of cryptocurrency held on Coinbase – had their accounts drained by hackers, then panicked because they could not get through to any customer service representatives at Coinbase.[601] Most of the 11,000 complaints that have been filed against the company with the FTC are related to customer service.[602]

In the future, there may be no humans at the other end of the phone: customer service will almost certainly be outsourced to AI. Many companies already attempt to handle customer service inquiries using e-mail or online chatbot programs, involving robot responders. But the stilted conversations that go nowhere show that it's very difficult to resolve a matter via a "chat."

Companies claim AI customer service will eventually be more efficient than human representatives – but for whom? Perhaps someday, getting answers to simple questions from a machine will be more efficient for the consumer. But robots are not likely to be sophisticated enough to understand the nuances of a consumer's complaint for many years to come.[603] When a consumer has an individualized issue that needs to be resolved, talking to a person on the phone is faster and more effective than communicating with a chatbot, because only a meaningful dialogue can lead to a proper resolution.

- **Shoddy service from customer service.**

Assuming a consumer can get a human on the phone, that doesn't always end the nightmare. One-third of consumers who have an issue with a company generally have to make two or more phone calls in order to resolve it.[604] According to a 2017 survey, 19% of consumers said they needed to contact a company seven or more times before their issue was resolved.[605] Many companies now outsource their customer service call centers to third-party vendors in other countries, where representatives work long hours for low wages (some call center workers in the Philippines earn $2 an hour), do not speak English well,[606] and may be working from a written script that does not enable representatives to give direct or correct answers to a customer's unique situation. In 2021, consumer advocate Ralph Nader – who has had decades of experience dealing with corporate incompetence and wrongdoing – chronicled his difficulty in getting through to a Verizon representative to answer a simple question about his phone service: he was rerouted to multiple representatives who could not help him and subjected to upselling attempts.[607]

- ## Algorithmic profiling.

Some consumers today receive shoddy customer service because an algorithm decides they are not worthy of better treatment. Companies now use technologies that digest massive amounts of information about a consumer – data on how long someone will wait on hold, the tone of a consumer's voice, the pace of their speech, demographic information, credit scores, past interactions with a company, etc. – and make instantaneous automated decisions about what level of customer service to provide.[608] The algorithms can determine whether customers are frustrated to "the breakpoint" of taking their business elsewhere; those angry "squeaky wheels" get prioritized by customer service.[609]

"High-value customers" who an algorithm determines will be profitable to a company will also get priority customer service.[610] #REPRESENT's June 24, 2019 petition to the FTC regarding secret surveillance scores asked the FTC to investigate data analytics firms Zeta Global, Kustomer, Inc., Opera Solutions, and Affinitiv for developing algorithms that allow their corporate clients to shunt "unworthy" consumers into inferior customer service systems, under which they may be put on a telephone hold for longer periods of time, or denied assistance altogether, depending upon their score.[611] The FTC response was to suggest companies behave better.[612]

- ## Long hold times.

Long phone hold times transfer the cost of customer service to the customer, in the form of wasted time. One study estimated that consumers spend a total of 43 days on hold waiting to resolve customer service issues during their lives;[613] another concluded that Americans spend 13 hours per year on hold to reach a customer service representative.[614] One survey revealed the worst corporate offenders for long hold times are Bank of America, Comcast, Sprint, Southwest Airlines, United Airlines, Delta Airlines, and AT&T.[615] Recently, a customer who called JetBlue's customer service were told they would have to wait 280 minutes – about four and a half hours – to reach a representative about a Miami to Los Angeles flight (about the same amount of time it would take to fly from Miami to LA).[616]

When a consumer is already experiencing problems with a product or service, they should not have to face time, language, or other hurdles. While there are some industry-specific regulations that set out rules for customer service hold times, for example in the area of health insurance or cable operators,[617] there are no customer service access rules applicable to all companies.

The shoddy state of customer service reflects the reality that corporations work energetically to make a sale, but often neglect their customers after the initial transaction. They apparently do not realize that taking care of customers would be in their best interest: a 2018 study shows that poor customer service costs businesses more than $75 billion a year (up from $62 billion in 2016) because customers take their business elsewhere.[618]

Accessible and appropriate customer service should be considered a part of the contract between a company and the consumer. But no law today requires it. Indeed, there is no legal standard for what constitutes adequate customer service.

The Fine Print Steals Your Rights

Say you are one of the many millions of Americans who have been duped, swindled, or thieved of your money or personal identity by any of the abuses described above. Chances are, you're the victim of yet another meta-fraud: the fine print.[619]

"Take-it-or-leave-it contracts" have been imposed on American consumers since 1919.[620] Consumers are confronted with them all the time: when they enroll in a membership, purchase a product[621] or service online or in person, buy software or download "apps," or sign up for social media accounts. Companies impose these contracts on consumers who obtain mobile phones or satellite TV service, credit cards, gym memberships, or access to social media sites, among many other products and services.

Whenever a consumer enters into a transaction with a corporation, whether they physically sign an agreement in person using a paper and pen, or transact business online and are required to click on a link to a "user agreement" – or accept it without spending the time to look, like most people do, the consumer is considered by the law to have "agreed" to all of the terms in the contract. The contract itself may be many pages long.

And almost always there are terms buried in these contracts that strip consumers of their right to hold a company accountable when something goes wrong.

But do consumers actually "agree" to the terms?

Contract laws dating to the early years of the last century presume that two equally sophisticated parties have a "meeting of the minds" when they agree to the terms of the contract.[622] Back when people exclusively used pen and paper, contracts may have been based on true negotiations, but those days are long gone. No "meeting of the minds" can possibly occur when a big business asks a consumer to sign a take-it-or-leave-it contract, since the consumer has absolutely no opportunity, nor any power, to negotiate the terms – or even understand them. Courts, attempting to "protect commerce," 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.[623] Courts have done so by imposing a "duty to read" the contract on the consumer.[624]

Here's one typical court ruling: a California consumer who became quadriplegic after being injured in an airplane accident sued her health insurer when the insurer denied payment for physical therapy.[625] At the time of the accident, the consumer's insurance policy had no limit on coverage for such treatment.[626] Shortly after the accident, the health insurer changed its policy terms to limit coverage for physical therapy.[627] The consumer argued that the original policy terms for unlimited physical therapy coverage should apply.[628] The court sided with the insurer, on the ground that the policy language included fine print that permitted the insurer to change the policy terms at any time, and that the consumer had a duty to read those terms – even though the terms weren't in the contract that the customer originally got.[629] The court noted: "it is a general rule a party is bound by contract provisions and cannot complain of unfamiliarity of the language of a contract."[630]

when he got a home equity loan.[632] For example, it would take an average person nine hours to read Amazon's terms and conditions.[633] And by design, the contracts are difficult to understand unless (or even if) you are a lawyer, because corporate attorneys draft them to be vague and ambiguous about the consumer's rights. So consumers who want to buy something have three options: blindly accepting the corporation's terms (which of course favor the corporation), spending an entire workday reading the contract (as well as the separate "privacy notice") and *then* accepting the terms, or just walking away. If a consumer goes ahead with a purchase and signs an agreement or clicks the box next to "I agree," they are almost always bound to whatever that fine print says,[634] whether they saw it or not.

Do consumers understand what these contracts say?

Contained within these fine-print contracts are terms that frequently differ – often enormously – from the way the product or service was described by a salesperson. When that happens, courts enforce the fine print, not the verbal promises that are, of course, impossible to prove.

The fine print can seriously harm consumers. Many of the economic problems in the U.S., such as the mortgage foreclosure crisis and crushing student loan and credit card debt, can be traced directly to take-it-or-leave-it contracts.[635] Unexpected bills or unaffordable charges can decimate a family budget.[636]

Here is a snapshot of how companies use contracts to rip off consumers:

- **Taking away the consumers' right to sue in court.**

  Businesses almost always include forced arbitration clauses in their take-it-or-leave-it contracts.

  The clause forces consumers to waive their constitutional right to a civil trial by jury and instead bring their cases against the company through a private arbitration process. Why? Because the United States Supreme Court long ago decided that arbitration clauses were valid. The Supreme Court pounded the nail into the coffin of consumer rights in 2011, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) ("*Concepcion*"), when it determined that arbitration agreements were protected by federal law and that any state law to the contrary is invalid. After *Concepcion*, almost every company with whom a consumer transacts started deploying arbitration clauses. Today, cell phone companies like AT&T and Verizon, video game companies like Electronic Arts, nursing homes, tech hardware companies like Sony, Dell, Western Digital, and Gateway Computers, banks and credit card companies, ecommerce companies like Amazon, streaming services like Netflix,[637] and even salad restaurant chain Sweetgreen impose arbitration on their consumers.[638] (See pp. 144-145 for a further discussion of Supreme Court decisions promoting arbitration.)

Forced arbitration clauses are an "agreement" to surrender a consumer's legal rights that locks them out of the courthouse and forces them into the secret world of "private justice" paid for and run by big corporations. Typically, these arbitration clauses are multiple paragraphs in an insanely long contract, sometimes required by state law to be highlighted in bold. But a consumer cannot fully understand their rights in arbitration, or how to bring an arbitration case, unless they read another lengthy and equally incomprehensible set of arbitration rules that appear on a corporation's website.[639]

The likelihood that arbitration will yield a positive outcome for a consumer is very low. If a consumer wants to bring a case against a company in arbitration, they may be required to pay "filing fees" of as much as $750.[640] Not surprisingly, most consumers cannot afford to arbitrate a case, or the costs associated with bringing the case may be more than the consumer has lost. Who would pay hundreds of dollars in a dispute over a toaster, for example? Consumers are also limited in the types of compensation they can receive in arbitration; monetary awards are "substantially lower" than awards received in court and arbitration agreements often forbid the private judges from ordering a company to stop its unlawful practice.[641] It is no surprise that one study found that consumers find court proceedings fairer than arbitration:[642] unlike public court proceedings, arbitration proceedings are conducted in private. The rules of a courtroom do not apply in an arbitration proceeding. The amount of information consumers can obtain from the business in an arbitration proceeding is much more limited than in a court proceeding. Moreover, arbitrations are conducted in secret (concealing abuses), biased in favor of business, and cannot usually be appealed or challenged in court.

- **Taking away the consumers' right to bring claims on behalf of other consumers.**

Worse, arbitration clauses also force a consumer to waive their right to bring claims against a company on behalf of other similarly harmed consumers via a class action (this is known as a "class action waiver clause").[643]

When a contract contains an arbitration clause with a class action waiver, each harmed consumer must bring their own separate case against the company in an arbitration proceeding. Since almost all cases against corporate defendants require immense legal resources (usually much more than any single consumer has lost), few individual consumers can afford to hire their own lawyer to bring an individual arbitration case. This is particularly problematic for the kind of low-dollar rip-offs that collectively add millions to an unscrupulous company's coffers. When put together, forced arbitration clauses and class action waivers kill the ability of most Americans to recover their losses and hold big corporations accountable.[644] (See pp. 144-145 for a further discussion of Supreme Court decisions validating class action waivers.)

• Waiving consumers' privacy rights.

Companies' fine print contracts may also force consumers to waive their right to keep their information private.[645] A privacy policy is almost always a separate legal document – also endlessly long and convoluted – that describes the ways a company collects, uses, and discloses a user's data.[646] Almost every website has a posted privacy policy.[647] It has been estimated that it would take an average consumer 76 work days to ready every privacy policy they encounter in one year.[648] Privacy policies are usually presented to consumers when they sign up for an account on a website or an app. Corporate practices affecting users' personal information may also be buried in other documents that the user may never find out about, except when links to the "Terms-of-Use" or "Privacy Policy" notices appear in an application or website's privacy settings and pop-up message notifications.[649]

Courts treat these "notices" as contracts too.

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Online agreements – whether they are terms of service or privacy policies – come in one of three forms:

- **Clickwrap agreement:** the user must click a box next to the words "I agree," which is situated next to a link to the user agreement, so that the user is not actually presented with the text of the contract unless she clicks on the link. Some courts have enforced these "clickwrap" agreements.[650]

- **Scrollwrap agreement:** the user must scroll through a wall of text and then click a box at the end of the text next to the words "I agree." Some courts have enforced online "scrollwrap" agreements.[651]

- **Browsewrap agreement:** the user is never presented with the terms or required to click any box that says "I agree"; the terms are only viewable through a link posted somewhere on the seller's website. Courts have said that browsewrap agreements are only enforceable if consumers have "reasonable notice" of the "browsewrap" agreement and exhibit "unambiguous consent" to its terms.[652]

As with all take-it-or-leave-it contracts, consumers rarely read the fine print of privacy policies. A New York Times study of 150 privacy policies of popular companies and websites found them to be "an incomprehensible disaster," written in language that exceeded the college reading level.[653] The reporter observed that Airbnb's policy in particular is difficult to understand, saying "[i]t's full of long, jargon-laden sentences that obscure Airbnb's data practices and provides cover to use data in expansive ways."[654]

And even if someone bothered to study the agreements, it likely wouldn't make a difference: privacy policies almost always disclose how the company uses consumers' data, in language so vague as to be useless. The breadth of information that is being collected, and who the company gives it to, is never disclosed. And of course, disclosure by itself does nothing to protect consumers from hacks or stop data hemorrhaging. With the exception of states like California, consumers aren't given the right to do anything to protect their privacy – other than walk away from the transaction.

• Unilaterally changing terms.

Here's another permutation of American contract law that illustrates how outdated it is. Businesses frequently include in their take-it-or-leave-it contracts a clause that lets the company *change the terms of the deal at any time*. The company forces the consumer to "agree" in advance to allow the company to alter the agreement – giving the consumer nothing in return. This eliminates the very notion of a contract or a "meeting of the minds."

Even in the absence of such a clause, businesses often make unilateral changes to terms. Consumers are usually oblivious to the changes since they are increasingly posted online rather than sent directly to consumers.[655] And even when companies do send consumers notices of changes to their contract terms, the changes may be hard for consumers to identify or understand. For example, when consumers buy music on Apple's iTunes, they "agree" to a contract (which is longer than Shakespeare's *Macbeth*[656]). When Apple changes any term in the contract, Apple shows consumers the entire 50+ page contract instead of pointing out the individual changes being made.[657]

Internet and social media companies unilaterally change terms of their privacy policies all the time as new technologies permit them to collect and manipulate more data about users. In 2016, Google quietly changed its privacy policy to allow it to create a digital profile "of a user by name, based on everything they write in email, every website they visit and the searches they conduct" and deliver targeted advertisements to consumers based on their profile.[658] After Google changed its privacy policy, consumers were automatically bound to the new terms.

Buried in Amazon's "terms of service" is a clause that gives Amazon power to change the terms at any time:

> **c. Changes to Amazon Services; Amendments.** We may change, suspend, or discontinue the Amazon Services, or any part of them, at any time without notice. We may amend any of this Agreement's terms at our sole discretion by posting the revised terms on the Amazon.com website. Your continued use of Amazon Services

after the effective date of the revised Agreement constitutes your acceptance of the terms.[659]

• Failure to disclose terms.

Sometimes consumers are not allowed to read the fine print of a contract prior to a purchase, even if they want to. Consumers brought a class action against Gogo, a company that provides Wi-Fi on airplanes, for charging their credit cards on an ongoing monthly basis when consumers believed they were buying the service for only one month.[660] Gogo claimed that its "terms of service" agreement notified consumers of the charge; it also tried to force the consumers to resolve their claims in arbitration.[661] Consumers argued that they never saw the "change in terms" clause when they signed up and that the "terms of service" did not contain a forced arbitration clause.[662] The court sided with consumers on both points and allowed the lawsuit to proceed in court.[663]

But other courts have held that consumers "agreed" to a contract when a company sent it to them *after* they had purchased the product.[664] For example, a court upheld a contract between Fitbit (a manufacturer of wearable fitness monitors) and buyers who purchased the devices online who were not even given the take-it-or-leave-it contract until after the sale.[665] The court said that the consumers "were perfectly free to reject the [contract] and return the device for a refund" if they did not like the terms once they read them.[666]

• Hiding terms.

Corporations design and format contracts so that harmful terms are easily overlooked. Unfair terms may be buried deep in a contract, within walls of small font, so consumers will never notice them. Companies also hide their contracts online by requiring consumers to follow a labyrinth of hyperlinks just to get to the contract. One court refused to enforce a forced arbitration clause in the terms of service of Zappos.com, an online shoe retailer, because they were in the form of a browsewrap agreement accessible through hyperlinks "buried in the middle to bottom of every Zappos.com webpage among many other links"[667] but were never affirmatively presented to consumers.

Companies may also hide anti-consumer terms in their contracts by lying about or downplaying them in a sales pitch. For example, 24 Hour Fitness faced lawsuits because its salespeople told customers that they could buy lifetime memberships by paying an annual fee that would never increase.[668] When 24 Hour Fitness then raised the annual fee, it pointed to a clause buried deep in the customer contract that permitted the company to raise the annual fees.[669] Customers were shocked. The case resulted in a claims-made settlement in which class members could receive a full refund of amounts they paid above their originally-promised annual fee and were entitled to continue to renew their memberships for the originally-promised annual fee.[670] Thirty-four percent of class members submitted claims – an unusually large response rate.[671]

- **Making language incomprehensible.**

Contracts written by corporate lawyers usually include incomprehensible legal jargon that confuses and discourages consumers from reading them. For example, one court described ride-share company Uber's terms of service as "nine pages of highly legalistic language that no ordinary consumer could be expected to understand."[672]

Many businesses clearly do not want consumers to understand their contracts. In 2013, consumer advocates introduced legislation in Illinois that would have required contracts to be "written in a clear and coherent manner using words with common and everyday meanings," in "type of readable size and no less than 10-point font."[673] The bill also prohibited terms "that permit[] the unilateral modification by the [company] to the disadvantage of the consumer without explicit consumer consent after the execution of the contract."[674] Unfortunately, the bill was too consumer friendly. Industry lobbying groups killed the legislation.[675]

Fine-print "contracts" are grotesquely unfair. Even assuming they are given the option to read and agree to the terms in advance, consumers who do not agree cannot complete the transaction. There is virtually no way to get a product or service that does not come with a contract designed to strip consumers of their rights. Consumer advocate Ralph Nader has described such contracts as incarcerating consumers into a status of consumer peonage.[676]

BOOM AND BUST: AMERICA'S CIVIL JUSTICE SYSTEM

Today, America's political and legal structure favors corporations.

The American consumer is prey for corporate predators – as exemplified in the preceding pages, almost every interaction that a consumer has with a corporation provides an opportunity for the corporation to take advantage of the consumer. Simply by participating in American commerce and using its technology, Americans are at risk.

Current laws offer little or no protection. The legal challenges brought under them frequently fail to rectify corporate abuses. And U.S. law is becoming more skewed towards corporations as we get deeper into the 21st Century.

This dynamic is no accident. Grassroots citizen movements to protect consumers, minorities, workers, and the environment – and to secure legal rights for them that are enforceable in courts – became a groundswell in the 1960s and grew over the following decade. But by the early 1980s, corporations were engaged in an all-out counterattack to ensure corporate supremacy in America. The counter-offensive continues today and has infected all three branches of government.

Roadway to Rights

Four remarkable movements galvanized interest in the civil justice system during the 20th century.

The consumer rights movement experienced a paradigm shift in the 1960s, but it began in the early 1900s. Here's a snapshot of the pivotal events:

- ## 1900s: Nasty food, The Poison Squad, and The Jungle.

The economic transformations of the Industrial Age provoked a rethinking of the respective roles of government, corporations, workers, and consumers in America. Refrigeration and chemical preservatives emerged around the turn of the 20th century, allowing food to have a longer shelf life than ever before.[677] This led to the development of a national food industry and, consequently, an increase in food prices.[678] But the new industry was not regulated, and toxic chemicals ended up in food, sickening many Americans.[679]

Enter the "Poison Squad" in 1902. The Poison Squad was a group at the U.S. Department of Agriculture led by its chief chemist, Dr. Harvey Washington Wiley, who tested chemicals used as preservatives.[680] Poison Squad members would eat meals laced with large amounts of chemicals like borax and formaldehyde until they got headaches and stomach aches.[681] The work of the Poison Squad got the public's attention and made consumers concerned about the widespread use of chemical preservatives.[682]

At the same time, writer Upton Sinclair published *The Jungle,* which also struck a nerve with the public. The book was a novel about the meat packing industry in Chicago that detailed the dirty conditions endured by workers and livestock and the resulting contamination of the food.[683] People were disgusted, afraid, and outraged.[684]

Groups of concerned citizens came together to call attention to food safety, including the Federated Women's Clubs of America and the National Consumers League.[685] The public uproar over harmful preservatives, unsanitary conditions in slaughterhouses and meat packing facilities, and rising food prices, led to the passage of the first federal law regulating food, the Pure Food and Drug Act of 1906.[686]

- ## 1910s: The Federal Trade Commission was created.

Amid growing concerns in the early 20th century about the increasing power and consolidation of a small number of companies (such as the infamous Standard Oil) that controlled the market,[687] President Woodrow Wilson signed the Federal Trade Commission Act (FTCA) into law in 1914.[688] The FTCA established the FTC and gave it the power to protect consumers and safeguard competition; it began operation in 1915.[689] Today, it is one of the leading federal agencies principally concerned with protecting consumers and the marketplace.

The FTCA gives the FTC the authority to issue regulations, investigate business practices in the marketplace, and bring enforcement actions against companies. The FTC uses this authority to stop illegal conduct, recover money for consumers, and obtain civil penalties (except against insurance companies, which got Congress to exempt them in 1945[690]). In general, the FTCA prohibits unfair or deceptive acts or practices.[691] After Congress passed the FTCA, many states enacted similar laws, such as California's Unfair Competition Law, known as "Little FTC Acts." The definitions of unfair and deceptive vary depending on the state, the court, or the agency interpreting them. Regardless of how they are defined, these terms are interpreted to apply broadly.

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How does the FTC define unfair?

A practice is unfair under the agency's definition if the practice causes an injury to consumers that is substantial, not outweighed by any countervailing benefits to consumers or competition that the practice produces, and that consumers themselves could not reasonably have avoided.[692]

How does the FTC define deceptive?

The FTC looks at several factors when deciding whether a practice is deceptive. To find deception, there must be a representation, omission, or practice that is likely to mislead a consumer acting reasonably under the circumstances, to the consumer's detriment.[693]

- ## 1920s - 1950s: Intermittent focus on consumer issues.

During World War I, the Twenties, the Great Depression and World War II, the public's attention was focused on consumer issues for brief, but important, moments.

In 1927, authors Stuart Chase and Frederick J. Schlink published *Your Money's Worth: A Study in the Waste of the Consumer's Dollar.*[694] The book explained how salesmen used high pressure marketing tactics that prevented consumers from being able to judge the value of products themselves.[695] It gained so much popularity with the public that it ignited another mini-consumer movement.[696] Chase and Schlink founded an organization called Consumers' Research. Employees of Consumers' Research went on to form Consumers Union (now Consumer Reports Advocacy), the advocacy arm of Consumer Reports magazine.[697]

Other groups of concerned citizens challenged various industries during the 1930s. For example, a group of housewives in Chicago banded together in 1935 to boycott meat in response to rising prices.[698] Prices stabilized not only in Chicago, but in other U.S. cities as well.[699]

The decades-long campaign by factory workers to protect themselves led to the 1935 enactment by Congress of the paradigm-shifting National Labor Relations Act, part of President Franklin D. Roosevelt's New Deal. That law guarantees the right of corporate employees to form trade unions, use their collective power to negotiate matters such as their pay and working conditions, and the right to strike if their demands are not met.

Congress followed that victory for working people with the Food, Drug and Cosmetic Act in 1938.[700] The law strengthened the Pure Food and Drug Act of 1906 by including new protections against harmful cosmetics and gave the U.S. Food and Drug Administration (U.S. FDA) more power to regulate food, drugs, medical devices, and cosmetics.[701]

While there were intermittent efforts to protect consumers over the following two decades,[702] the development of consumer protection laws was again paused by World War II and the immediate post-war recovery.

- ## Early 1960s.

President John F. Kennedy made a promise to the public during his presidential campaign that he would support new measures to assist and protect consumers.[703] In March 15, 1962, he sent a message to Congress outlining the problems faced by consumers.[704] President Kennedy's message also listed four essential consumer rights, drafted by consumer advocate Helen Ewing Nelson: the right to safety, the right to be informed, the right to choose, and the right to be heard.[705] It was the first time a president had ever specifically talked about consumer rights.[706]

President Lyndon B. Johnson continued the focus on consumer issues. In 1964, he created a special committee and executive branch leadership position focused on federal consumer legislation and made federal funding available for consumer education programs.[707]

- **Ralph Nader.**

Then came Ralph Nader, a Harvard Law School graduate who chose a decidedly different career path from his fellow students. His 1965 book, *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile*, drew unprecedented public attention to auto safety.[708] The book exposed and criticized car manufacturers for failing to consider consumers' wellbeing when designing cars, leading to motorists' deaths and injuries. *Unsafe at Any Speed* catalyzed the Highway Safety Act of 1966.[709] Helping Nader's cause was General Motors' attempt to discredit him,[710] which led to a public apology by the president of the company before a U.S. Senate Committee, and Nader's own lawsuit against GM for invading his privacy, which the company quickly settled.

Nader used the proceeds of that settlement to form multiple nonprofit consumer advocacy groups and train lawyers as investigators and advocates, who quickly came to be known "Nader's Raiders," to educate the public about "insurance, drugs, medical care, guarantees and warrantees, and product safety."[711] Nader brought the conversation about consumer rights into peoples' everyday lives for the first time.

As a result of Nader and his Raiders' efforts, thirteen federal laws were put on the books between the late 1960s and the late 1970s that transformed government and regulated corporations. These laws provided the public with access to government records and documents;[712] set safety standards for cars and roads;[713] ensured meat was safe to consume;[714] regulated oil, gas, and hazardous liquids pipelines;[715] mandated that employers provide safe working environments free from dangers like exposure to toxic chemicals, excessive noise levels, faulty machines, heat or cold stress, or unsanitary conditions;[716] protected consumers from deceptive warranties;[717] regulated product safety;[718] set standards for safe drinking water;[719] regulated pollution discharges into the air and waters of the United States;[720] prohibited bribery of foreign officials;[721] strengthened laws regulating the manufacture of flammable clothing;[722] improved working conditions for coal miners;[723] and protected whistleblowers who call out unlawful activity from corporate retaliation.[724]

These laws bolstered environmental rights as well as consumer, worker, and taxpayer protections. Long before the climate crisis became a global concern, and around the same time as Nader's Raiders, the first-wave environmental movement emerged to protect our planet. Rachel Carson's book *Silent Spring*, published in 1962, is considered the catalyst of the modern environmental movement; the book exposed the dangers of the widely used pesticide DDT, which was poisoning humans and destroying ecosystems. It was ultimately banned in 1972.[725] As a result, the public and lawmakers became more aware of the harm of chemicals.[726]

Another major force converged during the mid-20th century with the movement to protect consumers and the planet: the civil rights movement. It aimed to achieve social, educational, and economic equality for minorities. The movement began as a campaign by African Americans for equal rights after the formal abolition of slavery in the 1860s; in the 1950s and 1960s, a series of legal decisions and laws targeted some of the most odious forms of discrimination: segregation in schools,[727] discrimination on the basis of race, color, religion, sex, or national origin,[728] prohibitions on interracial marriage,[729] discriminatory voting restrictions,[730] and discrimination in the sale or rental of housing.[731] The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the leading umbrella organization representing labor unions across the United States, joined the civil rights movement in its press for legislation protecting civil rights.

These uniquely American movements – bolstered by the First Amendment and American ideals of justice – forced lawmakers to confront consumer, environmental, worker, and racial injustices occurring throughout the nation. The laws born from these movements empowered citizens and the government to use the civil justice system to defend these new rights.

Exercising Rights in the Courts

The hard-fought civil justice movements of the mid-20th century produced many federal laws. In some instances, it is primarily the role of the federal government, through agencies like the FTC, the Department of Justice, and the EPA to enforce these laws. Due to the limited resources of the federal government, and political pressure from big business, the vigilance of these agencies has varied greatly over time.[732] This is significant: some federal laws do not allow individuals to bring lawsuits on their own behalf to challenge violations. But many of the laws passed in the 1960s and 1970s permit citizens to go to court privately to enforce them. Historically, citizens were able to challenge corporate wrongdoing in the courts by bringing personal injury lawsuits in state courts, and through class actions.

Tort Laws: The Right to Hold Corporations Accountable

Prior to the civil justice movements, if citizens were physically harmed by, or lost money because of, improper practices, they had to bring a personal injury lawsuit on their own behalf. Citizens could do this under the common law of torts.

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What is the common law?

The judicial branch – composed of federal and state courts – is responsible for interpreting and applying laws. However, state courts also play a unique *legislative* role: they are the source of what is known as "common law." Originating from ancient English law and adopted by the American colonies,[733] "common law" is a body of written case decisions issued by state courts that defines rights and remedies in the absence of any underlying statutory authority. State legislatures have the authority to amend or even repeal the state's "common law," and they frequently do so.

What is a tort?

A tort is any wrongful act that causes a person to suffer loss or harm, such as bodily injury, monetary loss, or property damage. The common law of torts is a collection of legal rights, responsibilities, and remedies developed and applied by civil courts when a wrongful act has caused harm. The purpose of tort law is to publicly expose wrongdoing in the courts, compensate its victims, punish the perpetrators, and deter future wrongdoing.

Before the 1960s, citizens could bring tort actions against corporations, but those lawsuits were difficult to bring and to win. An individual who was harmed by the wrongful act of a corporation had to hire a lawyer who would collect and present evidence to prove that a company or institution did something wrong, either intentionally or through negligence. But the right to obtain evidence through discovery was limited, and court rules made it difficult for plaintiffs prove their case.[734]

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What is discovery?

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), written questions (known as interrogatories), or for documents. Each party to the lawsuit must comply with these requests, subject to court oversight and some exceptions. Plaintiffs use the information they receive during discovery to prove their case; defendants use the information they receive to defend themselves against the claims in the lawsuit. Discovery can be a time-consuming and expensive process. Abuses occur. For example, defendants may withhold evidence or even destroy evidence in an effort to shield themselves from liability.[735]

Plaintiffs who suffered a monetary loss were generally awarded small amounts of compensation.[736] For many of those harmed, the amount of money it would take to hire a lawyer to bring the lawsuit was vastly more than the person could expect to get back at the end of the case.[737]

Contingency fees.

One of the great developments in American tort law was the contingency fee system. Big corporations can afford to pay their lawyers by the hour – sometimes $1,000 or more – but few consumers can do so. The "contingency fee system," a unique and indispensable element of American justice, enables people without wealth to pursue worthy cases. Under contingency fee arrangements, the client does not have to pay a retainer or hourly fee to their attorney; nor does the client typically pay expenses or other costs. Rather, if the consumer wins their case, their attorney generally collects a percentage of the money the defendant is required to pay.

The attorney only recovers their fees and costs if the action is successful (either results in a final decision in the client's favor or a settlement[738]). Sometimes the consumer's attorney will take a percentage of the funds they obtain for the client, or the defendant will pay the attorney directly. If the case is unsuccessful, the client typically pays nothing. The contingency fee system makes it possible for consumers to hire attorneys with enough expertise to wage a fair fight against high-paid corporate attorneys. The contingency arrangement also enables attorneys to bring in experts (including engineers and scientists) and conduct testing or investigations when they are needed to pursue the case.[739] Virtually all consumer lawsuits – whether tort lawsuits, or class action lawsuits – are brought through "contingency fee" arrangements.

The corporate campaign against consumers has long targeted the contingency fees paid to the lawyers who represent injured consumers in tort or financial harm lawsuits. Corporations have worked tirelessly to prevent or disincentivize lawyers from representing consumers (see pp. 131-137). The corporate lobby feigns concern that attorneys for consumers are taking advantage of their clients by seeking excessive fees when they resolve consumer cases. This is a flimsy disguise for the cynical goal of making it impossible for an injured consumer to hire a lawyer and sue a corporation for breaking the law. Perhaps unsurprisingly, corporate defendants rarely acknowledge that they have virtually unlimited resources to spend on hiring their own lawyers, who bill by the hour and have every incentive to prolong cases and delay justice, and whose fees are subsidized by American taxpayers as deductible business expenses. Corporations are rarely required to disclose the details of the payments to their lawyers.

The Genesis of State Consumer Protection Laws

Under the U.S. Constitution, the federal government can only regulate commerce between the states, but not within a state.[740] In the 1960s, state legislatures began enacting consumer protection laws that set standards for business conduct in that state's marketplace and provided consumers with remedies for violations of those laws.[741] Lawmakers sought to fill the vacuum created by the federal government's inability to regulate conduct confined to an individual state's marketplace, as well as the limitations on the kinds of legal actions available to consumers under common law.

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What is the difference between federal courts and state courts?

Federal courts are established by the U.S. Constitution to resolve disputes involving the U.S. Constitution and federal laws, and disputes between states or parties in different states. State courts interpret state laws, but may also apply federal laws. Under certain circumstances, federal courts may also apply state laws, including state consumer protection laws.

The Federal Trade Commission Act became a model for the passage of state laws referred to as "Little FTC Acts," as noted above. These new laws expanded the ability of victims to recover in court by: (1) lowering the thresholds for the evidence consumers had to present in order to obtain compensation for the injury and (2) making more kinds of monetary relief available.[742] Further, these state laws added a new layer of law enforcement: both state

Attorneys General and individual consumers could bring cases against companies for violating their state's consumer protection laws.[743] California's Unfair Competition Law (UCL) is an example.[744]

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What conduct does a state consumer protection law make illegal?

Each state's consumer protection law is different, but, in general, they define unfair and/or deceptive practices and outlaw them. Many state laws also identify a specific list of practices in the context of consumer transactions that are considered harmful to consumers and are therefore prohibited.[745] For example, one of California's consumer protection laws, the Consumers Legal Remedies Act (CLRA), lists 27 specific acts that are prohibited, including:

- Passing off goods or services as those of another;
- Advertising furniture without clearly indicating that it is unassembled if that is the case;
- Making false or misleading statements of fact concerning reasons for, existence of, or amounts of, price reductions; and
- Representing that a part, replacement, or repair service is needed when it is not.[746]

Like the CRLA, the Model Act accompanying this report ("The Represent Act") identifies a number of specific modern practices that are made illegal, and also creates general standards for corporate conduct that must be met.[747]

California leads the way.

California is considered to have two of the strongest consumer protection laws in the nation: the CLRA and the Unfair Competition Law (UCL).[748] The original version of California's

Unfair Competition Law was passed in 1872 and only prohibited "unfair" practices in competition between businesses.[749] The statute was amended in 1933 to permit individuals to enforce the statute and was expanded to prohibit "unfair or fraudulent" business practices.[750] In its current form, the UCL prohibits "unlawful, unfair or fraudulent" business practices.[751]

Even though these state consumer protection laws made it easier for a consumer to bring a lawsuit and recover money, there was one significant drawback: each consumer had to bring their own separate lawsuit. Few attorneys could afford to represent a consumer in these kinds of cases (even with a contingency fee arrangement), since the total amount of money at stake for each client was often so small.[752]

In the early 20th century, many states created "small claims" courts where modest disputes could be decided through a more informal and speedy process.[753] But the jurisdiction of "small claims" courts is typically limited to cases involving less than $10,000, and lawyers aren't permitted to represent the parties.[754] "Small claims" courts aren't equipped to handle complex cases involving large numbers of people with the same modest injury.

The Development of Class Actions

Through the mid-20th century, the move toward greater regulation of economic activity in the marketplace and enhanced citizen rights bolstered the use of class actions.

The ability to bring a single case on behalf of a group of harmed individuals harkens back to English courts prior to the American Revolution, where people could agree to join together to pursue similar claims in one lawsuit (a practice referred to as "joinder").[755] In California, the use of "joinder" emerged in the courts in the 1830s.[756]

New York adopted the first true state "class action" statute in 1849: it permitted one person to sue for the benefit of a group of persons (the "class"), rather than requiring all persons to individually agree to join in a lawsuit.[757] California's class action statute was adopted in 1872 and, in its current form, allows class actions to be brought for violations of state consumer protection, civil rights, worker, environmental, and many other laws.[758]

Class action lawsuits are an essential element of our civil justice system. A person who has been harmed in a modest way by a large corporation is at a disadvantage: corporations have nearly unlimited resources to hire skilled attorneys.[759] It is financially impossible for each individual consumer to bring their own separate lawsuit over small amounts of money or to change a company's practices. Nor is it efficient for courts to decide such lawsuits on an individual basis – the cost to taxpayers would be enormous. The class action process empowers individuals to rectify injustice by enabling them to aggregate their claims so that equally skilled attorneys can afford to take on their case,[760] allowing people to fight back against those with more resources.[761]

Federal Rule of Civil Procedure Rule 23 ("Federal Rule 23").

The federal courts operate pursuant to published rules of civil procedure prescribed by the U.S. Supreme Court. Rule 23 empowers people to bring lawsuits on behalf of a group.[762] It was originally instituted by the United States Supreme Court in 1938 in a "highly abstract form" that often confused the courts and attorneys.[763] After Rule 23 was adopted, approximately ten class actions were filed each year in federal and state courts.[764]

In 1966, Rule 23 was transformed, establishing the class action in its current form. In the aftermath of the Supreme Court's 1954 decision requiring school desegregation in *Brown v Board of Education* (a class action), a new Advisory Committee on Civil Rules – comprised of lawyers, law professors, and judges – was appointed by the Chief Justice of the United States Supreme Court in the early 1960s to amend the rule.[765] The Advisory Committee drafted the 1966 amendments "to enable structural reform and broad remedial relief" for civil rights injustices[766] with the goal of empowering plaintiffs and "encourag[ing] more frequent use of class actions."[767] In particular, they created the "opt-out" framework that effectively eliminates the requirement that each person affirmatively agree to participate in the litigation.[768] The 1966 amendments were approved by the United States Supreme Court with very little controversy.[769]

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What is the right to "opt-out"?

All consumers who have been affected by conduct challenged in a class action lawsuit are automatically included in the class action unless they "opt-out." The opt-out system is a cornerstone of class actions in the U.S.: consumers who are not comfortable with a class action have the right to hire their own lawyer and proceed against the defendant individually. Or they can opt out and decide to do nothing. The opt-out system protects the independent legal rights of consumers while also maximizing the number of affected consumers who may benefit from the outcome of a case. Class action notices (discussed on pp. 155-159) sent to the consumers who are included in a lawsuit are intended to inform them of their right to opt-out of it. Defendants dislike the opt-out system because it automatically makes them potentially liable to everyone who has been harmed by their practices if the case goes forward. That's why every few years business trade associations (unsuccessfully) lobby the rulemaking committee to change Rule 23 to require consumers to individually "*opt in*" to participate in class actions.[770] That kind of hurdle – similar to requiring consumers to file a claim in order to get money from a settlement – would greatly reduce the number of people who participate in a class action.

The 1966 amendments to Rule 23 also established criteria that must be met for a case to proceed as a class action, a step in the litigation known as "class certification."[771]

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How does a consumer obtain class certification?

Under Federal Rule 23, here's what a plaintiff must prove to obtain "class certification" on behalf of the class:

- There are enough similarly harmed people to make a class action appropriate;
- The questions of law or fact that are necessary to resolve the case are common to all class members;
- The plaintiff's claims or defenses are similar to those of the rest of the class members';
- The plaintiff will fairly and adequately protect the interests of the rest of the class members;
- And one of the following three factors:
    - (1) That the prosecution of separate, individual actions by people who were harmed risks either: (i) inconsistent results that would establish incompatible standards of conduct for the defendant or (ii) would, as a practical matter, dispose of the interests of other consumers;
    - (2) That defendants have acted or refused to act in a similar manner toward members of the class; or
    - (3) That: (i) there are more common questions of law or fact between class members than any individual questions, and (ii) that a class action is superior to other methods of deciding the case.

Like all other federal statutes, Rule 23 is subject to interpretation by federal courts. The United States Supreme Court has analyzed Rule 23 many times since 1966. State statutes enacted to govern state class action certification sometimes differ from Federal Rule 23[772] and are sometimes less rigorous. Still, state courts' interpretations of Federal Rule 23 often influence their interpretation of the state's class certification statutes.[773]

Class actions proved to be a powerful tool for justice in the decades following the 1966 amendments to Rule 23.[774] The first decade of post-1966 class actions included major civil rights cases on school desegregation,[775] voting rights,[776] prison reform,[777] and racial discrimination.[778] The Amendments succeeded in addressing the concern of practitioners and scholars that Rule 23 was "underused."[779]

The Rise of the Class Action Settlement

Citizens invoked Rule 23 and state class action laws to attempt to hold big, poorly regulated industries like tobacco, pharmaceutical, and chemical companies accountable for incidents that imposed massive harm on the public. Because Congress has been unable or unwilling to regulate these industries effectively, class actions became a way to fill the vacuum, providing protection to large groups of citizens harmed by catastrophic events and a means of resolving systemic problems plaguing the country.

Companies that were at risk for potentially massive liability quickly realized that settling cases would cost them less than taking the cases to trial. As a result, landmark class action litigation challenging some of the most pernicious corporate misconduct of our era has often ended in settlements that reflect the limitations of current law.

- ### Agent Orange litigation.

  Agent Orange was a "tactical herbicide" purchased by the Defense Department during the Vietnam War to clear vegetation for military operations.[780] Tens of thousands of American soldiers were exposed to the chemical (as were over 2 million Vietnamese citizens).[781] They were told that Agent Orange was harmless – yet, when they returned home, they became seriously ill or died, their wives suffered from miscarriages, and their children were born with birth defects.[782] The cause was the toxic chemical dioxin in Agent Orange.[783] Dow Chemical, Monsanto, and other chemical companies that manufactured the product denied the herbicide was toxic and blamed the U.S. government for the veterans' health issues.[784] Vietnam vets and their families filed multiple lawsuits against the chemical companies. The district court overseeing the litigation agreed at the request of the parties to treat the individual cases as a single class action and certified a class of Vietnam War veterans.[785] The same day that jury selection was supposed to begin in 1984, the chemical companies suddenly reversed course and agreed to settle the case for $180 million.[786] Many veterans were angry about the deal and wanted to see the case go to trial.[787] Their anger was justified: under the agreement, a totally disabled veteran received $12,000 over the course of 10 years and, by accepting the payout, would relinquish any rights to state benefits like food stamps and government pensions.[788] The U.S. banned the use and production of Agent Orange in 1971.[789] The Agent Orange litigation is an example of a "mass tort" that was settled as a class action.

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What is a mass tort lawsuit?

When a case involves physical injuries, courts often rule that each harmed person has to provide personalized proof of their injury. This hurdle prevents many cases from proceeding as a class action. But when a large number of individuals bring a tort lawsuit against the same defendant related to the same product or defect, some courts allow their lawsuits to be grouped together. In these "mass tort" cases, each plaintiff must still prove their own case (unlike in a class action, which proceeds as one case). Sometimes issues of corporate liability can be determined in one of the individual tort cases and that determination can be applied to the other mass tort cases. Mass tort actions are appropriate when the lawsuits do not meet one of the most significant judicial barriers to successful class actions: the requirement that the plaintiffs meet the class certification standards (listed above).

In the 1980s, courts applied a creative, hybrid approach to mass tort cases. Instead of each individual plaintiff litigating or settling their own case, courts would allow the parties to *settle* mass torts as class actions. This occurs only when the defendant concludes that its potentially liability is so enormous and inevitable that it would be more cost effective to resolve all the individual claims at the same time through a single settlement agreement. In cases like the Agent Orange litigation, the courts will certify a group of plaintiffs in a mass tort as a class action to enable large-scale compensation to harmed consumers through a settlement.

- ## Dalkon Shield litigation.

The Dalkon Shield was an early intrauterine birth control device (IUD) that became extremely popular in the 1970s. It was manufactured and sold by A.H. Robins Company to an estimated 2.5 million women in the United States.[790] But women who had the devices implanted suffered serious injuries, infertility, and death,[791] and more than 300,000 lawsuits were filed against A.H. Robins.[792] Testimony of corporate officials obtained by the plaintiffs revealed that the company knew about problems with the device before it was brought to market.[793] One judge admonished company executives, saying, "You planted in the bodies of these women instruments of death, mutilation and disease… This is corporate irresponsibility at its meanest."[794] Some of the cases were resolved individually, and some were resolved as class actions.[795] In one class action, the Fourth Circuit Court of Appeals noted that class certification and resolution through a settlement was in the best interest of the parties because of the "great volume of cases which were inundating the court system and the similarity of the issues in all the cases[.]"[796] It is estimated that A.H. Robins paid close to $2 billion to victims.[797] The company eventually had to file for bankruptcy as a result of the litigation.[798] In 1976, Congress amended the Food, Drug and Cosmetic Act to require the FDA to approve medical devices before they went to market – including IUDs.[799]

- ## Asbestos litigation.

In the 20th century, asbestos was often used in construction materials like attic and wall insulation, roofs, pipes, and in fabrics.[800] Evidence showed that people who were exposed to asbestos developed mesothelioma, asbestosis, and lung cancer; such medical conditions are often fatal.[801] Notable lawsuits against asbestos manufacturers began in the 1960s, and, as noted by the United States Supreme Court, an "elephantine mass of asbestos cases" followed in the 1970s and 1980s.[802] While some asbestos-related cases have been brought and resolved as individual cases, some have been brought as class actions.[803] By the early 1990s, 25 asbestos manufacturers in the United States had filed for bankruptcy due to litigation costs.[804] In 1991 and 1999, the U.S. Supreme Court rejected class action settlements between asbestos manufacturers and victims on the grounds that the cases were not appropriate for class certification and that the settlements absolved the companies from liability for future lawsuits.[805] The exact number of asbestos-related cases filed in the United States is unknown, but the steady stream of cases continues to this day.[806] The average payout to victims is between $1 million and $2.4 million.[807] An estimated 40,000 Americans still die per year from asbestos-related diseases.[808] In 2017, the Furthering Asbestos Claim Transparency Act, which was promoted by pro-business groups, was introduced in Congress; the proposed law would have made it harder for asbestos victims to obtain compensation in court.[809] In 2019, legislation was introduced to completely ban the use of asbestos in the U.S., but it was never voted on.[810]

• The 1998 Tobacco Master Settlement Agreement.

The tobacco industry's infamous campaign to hide the harmful effects of cigarettes duped the public for decades. Between the 1930s and the 1950s, they advertised cigarettes as healthy and "physician approved."[811] During this time, tobacco companies would advertise in and sponsor research for medical journals.[812] But in the mid-1950s, scientists showed a link between lung cancer and cigarettes; by 1965, tobacco companies were required by the government to put warning labels on cigarette packaging and in advertisements.[813] Smokers with injuries began suing the tobacco companies in the 1950s and decades of litigation followed.[814] Lawsuits brought by consumers and 46 state Attorneys General against cigarette companies revealed that the companies deliberately concealed the harmful effects of smoking, and resulted in one of the largest civil class action settlements in U.S. history.[815] In 1998, the "Master Settlement Agreement" required four major cigarette companies to disclose documents to the public about the health effects of smoking; limit or stop certain advertisements, especially those aimed at children; pay billions to states to cover costs to the health care system of smoking that were borne by taxpayers; and create educational foundations to reduce smoking and make the public aware of the health effects of smoking.[816] Since then, 45 additional cigarette companies have signed on to the settlement.[817] The Master Settlement Agreement also resulted in the regulation of tobacco advertising in a manner that could not be achieved through legislation due to First Amendment concerns.[818]

• Lending discrimination.

"Redlining" (when lenders refuse to do business in, or charge higher prices to, residents in predominantly minority neighborhoods; see p. 69) has a long history in the United States.[819] Beginning in the 1930s, minority neighborhoods were deemed "hazardous" by the federal government and were outlined in red on maps to indicate that the area was a bad place to lend money to residents.[820] Residents in those areas were denied access to mortgages.[821] Though not as overt, forms of redlining continue to this day. Fortunately, anti-discrimination laws enacted in the 1960s allows victims of redlining to challenge lenders.[822] In July 2011, a federal court approved a nationwide class action settlement of a lawsuit brought by Black and Hispanic borrowers that alleged that a mortgage lender violated the anti-discrimination laws by charging 94,0000 Black and Hispanic consumers disproportionately higher rates compared to similarly situated whites.[823] The company agreed to pay $14.7 million in total, which included compensation to class members.[824]

- ## Employment discrimination.

A racial and gender wage gap has perpetuated inequality in the United States. Despite some progress, these wage gaps persist today.[825] The civil justice system provided a way for employees to challenge discriminatory compensation policies: in the early aughts, workers brought class actions against large companies – including Kodak, Morgan Stanley, Xerox, Walgreens, FedEx, Marriot, Abercrombie & Fitch, Coca-Cola, and Home Depot – for paying them less than their non-minority or male counterparts. These cases yielded settlements requiring the companies to change their practices and to make payments to minority employees.[826] As courts were beginning to finally rectify workplace injustice through litigation, the U.S. Supreme Court stepped in and made it much harder for wage discrimination class actions to move forward (see discussion of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), p. 146).

- ## Opioid crisis.

The opioid epidemic is the most calamitous drug crisis since the crack epidemic of the 1980s – and it has become a textbook example of corporate defendants and their lawyers manipulating the legal system to evade full accountability for their actions.

Unlike the crack epidemic, the opioid crisis was a corporate creation. Pharmaceutical companies intentionally pushed doctors to overprescribe opiates to patients, resulting in millions of Americans becoming addicted to the pharmaceuticals.[827] More than 500,000 Americans died from drug overdoses as a result.[828] The Centers for Disease Control estimates that opioid abuse costs the United States $78.5 billion per year.[829] People have turned to courts to find justice and stop this crisis: thousands of lawsuits have been filed against multiple pharmaceutical companies and pharmacies by the families of those who have died, as well as cities, counties, states, and tribal authorities seeking reimbursement of the enormous taxpayer expense of treating addicts.[830]

Among the worst offenders and main defendants in the lawsuits is Purdue Pharma, which manufactured OxyContin, one of the most widely abused opiates. Purdue Pharma filed for bankruptcy in order to limit the company's legal liability for the national epidemic of opioid addiction.[831] Lawyers for the family that controlled the company, the Sacklers, proposed a global resolution in bankruptcy court of all the lawsuits against them and the company for $4.5 billion, only a fraction of their fortune and not enough to compensate for the harm.[832] Though none of the family members have sought bankruptcy, they managed to negotiate immunity from any further lawsuits for themselves as part of the deal.[833] Under the Purdue global settlement, the maximum payment that victims' families will receive for a death of a family member is $40,000, an amount that the families feel is an egregious miscarriage of justice.[834] Ninety percent of the Purdue settlement funds will go to states, local governments, and tribes.[835] The Department of Justice and nine state Attorneys General urged the court to reject the settlement, and it has done so.[836]

Like the Purdue deal, many lawsuits against the manufacturers and distributors and prescribers of opioids are unable to proceed as class actions under current laws, and often settle as individual cases. One Ohio judge unsuccessfully attempted to guide 1,300 lawsuits brought by counties and cities against the manufacturers and distributors into a class action for purposes of settlement.[837] After the defendants and some of the plaintiffs objected to this approach, the U.S. Court of Appeals for the Sixth Circuit rejected the proposal, saying that such a class action could not be certified under Rule 23.[838] The parties are back in federal court in Ohio, with some of the individual cases going to trial and some of the cases settling.[839]

- ### Gulf of Mexico oil spill.

Oil company BP caused the largest oil spill in the history of the United States when its offshore oil drilling platform "the Deepwater Horizon" exploded in 2010, spilling 134 million barrels of oil into the Gulf of Mexico.[840] Eleven people died, 17 were injured, small businesses were destroyed, regional tourism was decimated, and the environmental damage is ongoing.[841] BP settled a class action lawsuit stating 100,000 claims from individuals and businesses that said they had lost money as a result of the spill.[842] The settlement has provided over $11.2 billion in compensation.[843] In addition to the class action, BP pled guilty to criminal charges, paid $14.5 billion in fines, and paid $18.7 billion to settle lawsuits with the federal government and five states for water pollution.[844]

- ## NFL concussion settlement.

There is a dark side to America's favorite sport. Football players frequently develop traumatic brain injuries from repetitive head trauma; 87% of footballers in one study had chronic traumatic encephalopathy (CTE).[845]As evidence mounted that the sport was the cause of their injuries, former football professionals filed a class action in 2012 against the National Football League (NFL) on the grounds that they suffered degenerative brain diseases as a result, including conditions like ALS, Parkinson's Disease, CTE, and dementia.[846] They claimed that their quality of life was ruined and their medical expenses were enormous. The NFL settled, and, as of October 11, 2021, injured class members have received a total of over $925 million in monetary awards.[847] In June 2021, one of the lead plaintiff attorneys in the case acknowledged that the method of calculating settlement benefits resulted in less money being paid out to Black players than white players due to a biased algorithm.[848] The attorney apologized and promised to remedy the disparate payments.[849]

- ## Facebook biometric data settlement.

Tech predators have been collecting and misusing consumers' data for years, unfettered by any laws meaningfully limiting or regulating their practices. Government officials have done very little to crack down on big tech; most class actions challenging privacy violations have not resulted in meaningful change or compensation to consumers. An exception is a class action against Facebook challenging its "Tag Suggestion" feature. Rolled out in 2011, Tag Suggestions applied facial recognition algorithms to identify the faces of people in the photos that Facebook users uploaded to their Facebook page. Without the knowledge or permission of the people in the photo, Facebook would offer the user who uploaded the photo a "Tag Suggestion" so that they could name the other persons.[850] Illinois residents brought a class action lawsuit against Facebook alleging that it violated the Illinois Biometric Information Privacy Act, which prohibits the unauthorized collection and storage of biometric data.[851] The Illinois law is unique in the United States: it requires a violator to pay $1,000 to every person whose biometric data was misused.[852] Because Facebook faced potentially massive liability under the law, the company settled. Facebook agreed to pay a total of $650 million, for a minimum of $345 to each class member.[853] This is the largest amount of compensation paid by a tech company to consumers for violating its customers privacy in the country to date – and 22% of class members submitted claims.[854] Three class members nevertheless objected and appealed the settlement, arguing that the amount of attorneys' fees that the attorneys are seeking is too high and the amount being paid to consumers is too low.[855] The case is currently before the Ninth Circuit Court of Appeals.[856]

- ### Roundup pesticide litigation.

Roundup, a massively profitable chemical weed killer manufactured by Bayer, is linked to non-Hodgkins lymphoma, a deadly cancer. Roundup was routinely used by agricultural firms and anyone tending to plants or gardens.

In 2020, Bayer agreed to pay up to $10.9 billion to resolve nearly 100,000 individual lawsuits by cancer victims.[857] (The specific terms of the lawsuit settlements have, unfortunately, been withheld from the public.[858]) Bayer also faced additional individual lawsuits that went to trial and has been forced to pay millions to individual plaintiffs, including jury-awarded punitive damages in one case of $20.5 million.[859] Despite the massive payouts so far, Bayer is still litigating other cases and insisting that Roundup is safe.[860]

In May 2021, lawyers for Bayer and for plaintiffs agreed to a separate $2 billion class action settlement in May 2021 to resolve expected claims brought by people who are currently healthy but may get cancer from Roundup *in the future*.[861] This is highly problematic: claims from people who discover they have cancer after the settlement has been approved would be forced to comply with the settlement, and there is no way to determine now whether $2 billion will be enough to cover the claims of an unknown number of future victims of the pesticide. After 93 law firms and 167 attorneys objected to that proposal, the judge rejected it, noting it “would accomplish a lot for” Bayer, but “would accomplish far less for the Roundup users.”[862]

The class action device is a potentially powerful tool for holding corporate wrongdoers accountable – which is why, as illustrated by these high-profile cases, many companies prefer to settle rather than subject themselves to the uncertainties of litigation and trials that reveal the extent of their wrongdoing.

Unfortunately, the courts are making it harder to pursue class action cases (see pp. 144-147), contributing to the growing trend toward settlement. Lacking the leverage of strong laws and procedural rights, many consumers and their attorneys have few other choices.

The Corporate Counterattack on Civil Justice

As the citizen movements in the 1960s and 1970s spurred new protections and procedures for citizens to enforce their rights in the courts, U.S. corporations began plotting their counterattack. In 1971, Lewis Powell, a corporate lawyer and future Supreme Court justice, wrote what is now referred to as the "Powell Memorandum," addressed to the director of the U.S. Chamber of Commerce, the chief lobbying group for American big business.[863] Described as a "call to arms for corporations,"[864] the Powell Memorandum highlighted Ralph Nader as the personification of the threat to corporate America and outlined why the Chamber's membership needed to aggressively make government, politics, and law more friendly to big corporations – and how to go about it.[865]

The Powell Memorandum's playbook was adopted by corporate America in the 1970s, expanded in coordination with the Reagan Administration's "hands-off business philosophy"[866] in the 1980s, and has been followed ever since. Today a network of law firms, lobbying associations, public relations companies, nonprofits, and pseudo-academic institutions collectively comprise a deep state infrastructure working to undermine the average American's access to justice.

"Tort Reform" and Formation of Pro-Business Lobbying Organizations

Beginning the 1970s, state tort lawsuits led to institutional changes: safer working conditions, products, hospitals, law enforcement practices, and public places, and a cleaner environment.[867] Thus the big business insurgency's first target was state tort laws.[868]

The assault began in earnest in the 1980s, with the formation of the American Tort Reform Association (ATRA)[869] in 1986. ATRA is funded by tobacco, insurance, chemical, and auto companies, and other corporate interests.[870] The group presents itself as "the only national organization exclusively dedicated to repairing our civil justice system."[871] Couched in platitudes and phony arguments professing concern for the impact of litigation on the economy and the public, the organization's strategy was to cripple the civil justice system (except when used by corporations): to prevent injured people from bringing tort cases against corporate wrongdoers and prevent juries from ordering full compensation for people's injuries. However, as the years passed, the group's funding dwindled – possibly a victim of its own success. As of 2018, ATRA had an annual budget of $4.3 million[872] (compared to $10 million in 1995[873]).

In its place now stands the U.S. Chamber of Commerce. Once content to press for tax breaks and other subsidies for big business, the Chamber has grown to become perhaps the most aggressive opponent of tort, civil justice, and consumer protection laws in the nation.

After the Powell Memorandum, the Chamber's membership vastly increased.[874] It is now the largest big-business funded lobbying group in the U.S., with an estimated annual budget of $200 million.[875] Its members include the world's largest corporations "across every sector of the economy."[876] Leaders of the organization – executives from those multinational firms – continuously chip away at every reform enacted during the ascendant consumer movement. In 1998, the U.S. Chamber of Commerce formed a subsidiary, the "Institute for Legal Reform," to institutionalize its anti-justice strategy.[877] Its multi-pronged approach includes attempts to influence judicial decisions and to amend state and federal laws to reduce citizen access to the civil justice system. In recent years, the Chamber has fought on behalf of its corporate membership to ensure that forced arbitration clauses became the norm, get rid of asbestos lawsuits, avoid liability for losses related to COVID-19, make class action lawsuits harder to bring, limit the liability of doctors and hospitals, and fight against limits on robocalls.[878]

Groups like ATRA and the Chamber of Commerce aim to influence public opinion through disinformation and demagoguery – to skew the public's perception of lawyers and juries and, ultimately, undermine confidence in the civil justice system and the rule of law.

Sensitive to the appearance that big business was ganging up on consumers, ATRA created and funded local affiliates designed to look like grassroots organizations with progressive sounding names (e.g., Citizens for a Sound Economy, Americans for Job Security, the Center for Individual Rights, the Washington Legal Foundation).[879] It used these "astroturf" organizations to grossly propagandize the public into thinking lawsuits were bad for consumers.

Legislative Offensive

Insurance companies and the medical profession provided much of the political cover for the national attack on the tort system. The insurance industry argued that tort lawsuits, jury verdicts, and trial lawyers were responsible for destabilizing increases in insurance premiums during the 1970s and 1980s. It promised that if laws were enacted to limit the right to go to court, insurance rates would come down. Subsequent studies have proven that laws to restrict legal rights had no effect on insurance premiums.[880]

After a series of damaging successes in undermining tort law rights in state legislatures across the United States, the organizations expanded their programs, to target class action lawsuits and state consumer protection laws that allow consumers to sue businesses.

Long considered the nation's "laboratory for democracy," California, with its robust initiative-referendum process, has been ground zero in many of these battles:

- **1970s: medical malpractice caps.**

  The strategy of fomenting a "litigation crisis" to obtain public support for limits on the legal rights of injured Americans was invented in California. Struggling with declining profits in the 1970s, insurance companies jacked up the price of the liability insurance health care providers had to buy to cover themselves in case they injured patients. But the insurers blamed lawyers and tort lawsuits for the higher premiums, and doctors and hospitals selfishly got behind a push to cap the amount of compensation a jury could award to victims of medical malpractice. California's notorious Medical Injury Compensation Reform Act (MICRA), enacted by the state legislature in 1975, barred juries from awarding victims of medical negligence more than $250,000 in compensation for their pain. To prevent negligence victims from finding a lawyer to represent them, MICRA also caps how much the victim can pay their attorney. After MICRA became law, an unholy combination of ATRA, the American Medical Association, and state medical societies pressed other states to follow California's lead. Alaska, Arizona, Delaware, Florida, Louisiana, New Hampshire, New Mexico, Ohio, Pennsylvania, Tennessee, Texas, Washington, and Virginia enacted similar laws overriding jury verdicts.[881] As of 2020, 23 states had caps on non-economic damages in medical malpractice cases.[882]

- **1986: Proposition 51.**

  In 1986, insurance and chemical companies, manufacturers, and business lobbies like the Association for California Tort Reform (which later re-branded as the Civil Justice Association of California[883]) put a measure on the California ballot to curb the application of state tort laws.[884] Proposition 51 limited corporate liability in cases involving multiple defendants and changed the rules on how corporations compensate the people they harm.[885] It was approved by California voters in the midst of another wave of increases in insurance premiums, which the insurance and business lobbies once again blamed on lawsuits and lawyers. As was the case with the medical malpractice caps in the 1970s, the reduction in insurance rates promised by the corporate sponsors of the initiative never materialized.[886] And the insurance industry's profits increased 605% in 1986 following the passage of Proposition 51.[887]

- ## 1986: The Personal Injury Compensation Reform Act (PICRA).

Emboldened by their success with Proposition 51, self-described tort "reformers" sought in 1986 to expand California's MICRA to cap economic damages and attorneys' fees in *all* personal injury cases (not just medical malpractice lawsuits).[888] Confronted with opposition by citizen groups and plaintiffs' attorneys, the legislature did not enact PICRA.

- ## 1988: Proposition 103.

A turning point in the corporate campaign against California's civil justice system occurred in 1988. California's grassroots-backed Proposition 103 was a direct response to skyrocketing insurance premiums and the public's recognition that the corporate-sponsored restrictions on tort laws had only enriched the insurance industry and other special interests. The initiative mandated a 20% rollback in auto, home, business, and medical malpractice premiums, instituted stringent regulation of insurance rates, barred a variety of abusive and discriminatory insurance practices, and gave "any person" the power to go to court to challenge violations of the law – a procedural right known as "standing to sue."[889] Its passage – despite being outspent 15 to 1 by the industry – was a startling consumer victory that forced insurance companies to refund over $1.43 billion in overcharges[890] and, by 2018, had saved California motorists an estimated $154 billion.[891] It had another unexpected benefit: after suffering an unprecedented political and financial defeat at the hands of California voters, the insurance industry largely sidelined itself from manipulating premiums to leverage restrictions on civil justice rights.

The California business community's assault on civil justice continued, however, and expanded beyond tort laws. The new objective: cancel California's nationally-recognized consumer protection laws:

- ## 2004: Proposition 64.

California's UCL prohibits unfair competition, including "any unlawful, unfair or fraudulent business act or practice."[892] For 70 years, the law stated that "*any person* acting for the interests of itself, its members, or the general public" could bring a lawsuit under the UCL.[893] Plaintiffs did not have to be personally harmed in order to bring a representative action on behalf of the public.[894] Class certification was not required in order to seek relief.[895]

Unethical actions by a few small law firms ultimately provided a convenient scapegoat for the California Chamber of Commerce[896] and the Civil Justice Association of California[897] to justify a wholesale rewriting of the UCL. In 2004, the business community put Proposition 64 on California's ballot. It amended the UCL so that a consumer is now required to show that they were personally injured and lost money or property as a result of the illegal act – otherwise they do not have "standing to sue." Corporations contributed more than $15 million in support of Proposition 64.[898] The companies described the measure as a tool to combat frivolous "shakedown" lawsuits.[899] Proposition 64 passed.[900] Because many people are unaware that they have become the victims of financial wrongdoing, the newly imposed "standing to sue" requirement has greatly impaired the ability of California consumers and lawyers to obtain compensation for victims of corporate wrongdoing.

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What is standing to sue?

Under federal and many state laws, a person must have been harmed before they can go to court. Physical or financial harm is a prerequisite for "standing to sue." "Standing" requirements restrict who can bring a lawsuit and on what grounds. They have served to shield corporate misconduct and government malfeasance for decades. Prior to Proposition 64, Californians could bring "representative actions": they could "represent" those who were injured but did not have to prove they were harmed by a business practice themselves in order to bring a lawsuit to protect consumers.

Judicially imposed "standing" barriers to the courthouse have accelerated in recent years. This is particularly problematic at a time when many courts refuse to recognize certain kinds of corporate misconduct or negligence as "harmful" and subject to legal challenge, such as the collection and use of information about a person. "Standing to sue" restrictions are an impediment to justice.

- **Limiting contingency fees.**

Attacking the fees that consumers pay their attorneys has long been a favorite target of big business. Business groups like the Chamber of Commerce, that are always opposing regulation of businesses in the name of the "free market," do not seem to be daunted by advocating an arbitrary cap on how much a consumer can agree to pay a lawyer to represent them. In the latest assault, one such group is taking aim at contingency fees (in both tort cases and cases brought under California's consumer protection statutes) by proposing three California ballot initiatives for 2022[901] that would severely limit the ability of consumers to find legal representation when they have been the victims of harmful corporate practices. The so-called "Civil Justice Association of California" is backed by big tobacco, oil, pharma, as well as companies like AT&T, Wells Fargo, and Monsanto.[902] All three measures proposed by the group would cap contingency fees at 20%[903] – which would make it economically impractical for attorneys to take on big corporations that break the law.

These examples of the efforts of the business community and its lobbying groups to limit consumers' access to justice in California are just snapshots of the state-by-state strategy they have deployed across the country for decades. And they do not limit their attacks to state laws. Business interests routinely sponsor legislation aimed at limiting consumers' access to justice in federal courts. For example:

- **Common Sense Product Liability and Legal Reform Act of 1995.**

In 1995, pro-corporate Republicans in Congress introduced the Common Sense Product Liability and Legal Reform Act of 1995, a bill drafted by the business lobby to limit the liability of manufacturers and sellers of defective products and cap the amount of damages that victims could recover.[904] It would also have required victims who lost in court to pay the corporation's attorneys' fees.[905] A related bill that would have limited the amount of money victims could recover and granted immunity to drug companies and medical device manufacturers for defective products[906] was approved by Congress but vetoed by then-President Clinton in 1996.[907]

- **Denying legal services to the poor.**

The Legal Services Corporation, created by Congress in 1974, is the largest funder of legal assistance for low-income Americans.[908] It supports 132 local nonprofits that provide much-needed representation to people in legal proceedings involving consumer issues, domestic violence, housing, and employment who cannot afford to hire their own lawyer.[909] The 1996 congressional Appropriations Act[910] imposed many restrictions on the Legal Services Corporation's budget, including prohibiting organizations it funds from bringing class actions.[911] Various legal aid nonprofits challenged the restriction on class actions on the ground that it is unconstitutional, but the courts have rejected the argument.[912]

- **Class Action Fairness Act ("CAFA").**

In the mid-1990s, numerous federal court decisions made it more difficult for class actions to proceed beyond the class certification phase in federal courts. In response, lawyers for consumers started filing more class actions in state courts.[913] State courts' standards for class certification are sometimes more accessible than those in federal court.[914] Not surprisingly, corporate interests did not like the migration of class actions to state courts. In response, a conglomeration of national and multinational business organizations won congressional approval in 2005 of legislation that made it easier for corporate defendants to force class actions filed in state courts to be sent to federal court.[915] CAFA has achieved the corporations' goal: most large class actions are now brought in, or moved to, federal court.[916]

- **The Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017.**

Described as the Chamber's "most lobbied bill,"[917] this legislation was intended to limit the ability of citizens to bring class actions. The bill would have required plaintiffs to show that *every* person in a class action suffered the identical extent of injuries as a result of an illegal corporate practice - a requirement which would have blocked class actions over asbestos poisoning, consumer rip-offs, pharmaceutical problems, dangerous products, and workplace discrimination.[918] The legislation was passed by the House of Representatives in 2017,[919] but did not make it past the Senate.[920]

- **Push for rules to restrict nationwide class actions.**

When a large corporation engages in misconduct that impacts large numbers of consumers across the United States, the result is multiple tort lawsuits or class actions, filed in federal courts across the country. Permitting each of these cases to proceed separately would be extremely inefficient and costly. A procedure to address such situations – whether the group of cases is a mass tort or a group of similar class actions – is known as "Multi District Litigation" (MDL). MDLs have been developed by the federal courts to make it easier for plaintiffs and their attorneys to jointly challenge corporate abuses that are nationwide in scope.

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How does an MDL work?

Upon the request of any party in any one of the multiple lawsuits, a special panel of federal judges decides whether to order all the related lawsuits to be grouped together and centralized in one federal district court. Academics estimate that about 21% of civil cases filed in federal court eventually end up in an MDL.[921]

Corporate defendants have launched a campaign to "streamline" MDLs, but their goal is actually to prevent consumers from bringing these cases.[922] "Rules 4 MDLs" is sponsored by "Lawyers for Civil Justice" – a group of defense lawyers and big corporations. One proposal would require that plaintiffs produce evidence about the corporate wrongdoing at a preliminary stage of litigation – before discovery – in order to qualify for MDL status. Obtaining such evidence would be extremely difficult, and, in some cases, impossible for plaintiffs.[923] According to Lawyers for Civil Justice, the fact that one million lawsuits have been consolidated or coordinated into MDLs since 1968 is proof that over-eager plaintiffs' lawyers are filing too many class action lawsuits[924] – rather than the consequence of over half a century of nationwide corporate mayhem that necessitated the lawsuits in the first place.

- **2020 COVID-19 liability shield.**

The U.S. Chamber of Commerce Institute for Legal Reform tried – and failed – to include anti-justice provisions in the COVID-19 relief bills passed by Congress in 2020. They proposed that all businesses be given immunity from *any lawsuits* related to the COVID-19 pandemic, including, for example, suits by employees who were forced to work in unsafe conditions, or lawsuits from consumers who lost money as a result of the pandemic, such as when airlines refused to refund unused plane tickets. In a victory for consumers, the proposal was rejected.[925]

Deregulation of Consumer Protections

While corporations were pounding away at consumer rights in the legislative branches, they were also working to diminish government regulation in the executive branch. With few exceptions,[926] the direction of public policy legislation since the Powell Memorandum in the 1970s has veered sharply toward fewer restraints and restrictions on corporate conduct in the American marketplace.

- **Reagan Era (1981–1988).**

Ronald Reagan campaigned by promising to "cut red tape."[927] Once elected, his administration began systematically slashing consumer protections in federal health, safety, and marketplace regulations,[928] which President Reagan blamed for slowing the economy. Reagan famously declared that "government is not the solution to our problem; government is the problem."[929] Under his administration and the direction of the chairman of the FTC, the number of enforcement actions brought by the agency against businesses for unfair and deceptive acts dropped dramatically.[930] The Reagan Administration's attempt to weaken pollution standards under the Clean Air Act and Clean Water Act failed,[931] but it was able to slash the enforcement power of the Environmental Protection Agency (EPA) by drastically reducing its budget.[932] Regulations regarding annual health-and-safety inspections of nursing homes were eliminated.[933] Reagan attempted to revoke auto safety rules requiring airbags in all vehicles, but the U.S. Supreme Court blocked the effort because the regulations were required by federal law.[934] Reagan also wiped out funding for consumer education programs in every agency.[935] His administration reduced the amount of government information that consumers could access, eliminating more than 2,000 government publications and reducing the availability of many previously free government publications.[936]

- **George H.W. Bush Era (1989-1992).**

The first Bush Administration continued President Reagan's pro-corporate agenda: it worked tirelessly to deregulate genetically modified food, limits on aircraft noise, bank liability for property loans, housing accessibility for persons with disabilities, the right of garment workers to work at home, pension disclosure requirements, protections against landfill runoff in groundwater, reporting requirements for religious child-care facilities, and controls on real estate settlement fees.[937]

- **Clinton Administration (1993-2000).**

With the strong support of the Clinton Administration, the Gramm-Leach-Bliley Financial Services Modernization Act (GLBA) deregulated the financial marketplace in 1999, removing protections against monopolies and Wall Street speculation that had been put in place in the 1930s to prevent another Great Depression.[938] The 1999 deregulation of the financial marketplace led to the financial crisis of 2008. Millions of jobs were lost.[939] Trillions of taxpayer dollars were expended in bailing out Wall Street and the financial sector.[940] Yet not a single high level corporate executive was ever prosecuted – itself a distinct failure of government that has had lasting political and economic repercussions. Additionally, one of the biggest corporate giveaways during the Clinton Administration was to provide major banks with free federal deposit insurance, freeing them from having to make premium payments – a five to six-billion-dollar windfall annually.[941]

• George W. Bush Administration (2001-2008).

President George W. Bush continued the efforts of President Clinton to deregulate Wall Street financial institutions. For example, federal agencies declined to issue any binding regulations governing the practices of mortgage brokers in response to the growing reports of predatory lending. Over one million people lost their homes between 2008 and 2010 as a result.[942] Under the administration of George W. Bush, regulations governing labor dispute protections for workers, clean air requirements for coal-fired power plants, cleanup of hazardous waste sites, and oversight of the meat industry were rolled back.[943] Bush also appointed over 100 people who had worked as lobbyists, employees, and lawyers for industry to top positions running federal agencies such as the EPA, Department of Labor, Department of Agriculture, Food and Drug Administration, and the Department of Interior.[944] New regulations were stalled, budgets were cut, and agency enforcement of federal laws collapsed.[945]

• Obama Administration (2009-2016).

In the immediate aftermath of the catastrophic 2008 financial crisis, the Obama Administration paused the deregulation of Wall Street. However, unlike the Great Depression ninety years ago, the 2008 financial crisis did not lead to sweeping and lasting change, either in the regulation of the financial industry or reform of the federal agencies that failed to prevent the economic collapse.

The singular legislative achievement that grew out of the 2008 financial crisis was the Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law by President Obama in 2010.[946] It protects consumers from being ripped off by the financial services industry through rules that prohibit abusive lending and mortgage practices by banks.[947] It created the Federal Stability Oversight Council to ensure that banks do not become “too big to fail”; it prohibits banks from owning and investing in hedge funds and private equity funds, and engaging in trading activities for their own profit (the “Volcker Rule); it requires fiendishly complex forms of speculation, such as credit default swaps, which figured prominently in the 2008 financial crisis, to be regulated by the U.S. Securities and Exchange Commission.[948]

Dodd-Frank also created the first federal agency dedicated to stopping a multitude of abuses by banks, credit and insurance companies and Wall Street: the CFPB, first proposed by Harvard Law Professor Elizabeth Warren in 2007.[949] The CFPB began operations in July 2011.[950] It banned financial institutions from using forced arbitration clauses that prohibit consumers from participating in class action lawsuits.[951] The CFPB also set up a comprehensive consumer complaint database to monitor and help the agency address consumer abuses by financial institutions.[952] The CFPB can take legal actions against financial institutions such as banks, lenders, credit reporting agencies, and debt collection companies and order civil penalties and refunds for harmed consumers. The CFPB has refunded over $12 billion to harmed consumers since its creation.[953]

A second major post-crash reform was the Credit CARD Act OF 2009. (See p. 26.)

• Trump Administration (2017-2021).

Using executive orders, President Trump embarked on deregulation of health, safety, and consumer protection rules at an extraordinary scale and breadth.[954] Consumer rights were ignored or degraded during the Trump Administration.[955] Among its many targets were, unsurprisingly, the CFPB and the few other post-2008 crash reforms. Mick Mulvaney, formerly a pro-Wall Street member of Congress, was initially appointed head of the CFPB.[956] Under Mulvaney's reign, the CFPB delayed regulation of payday lenders and high-interest-rate loans[957] and dropped investigations into payday lenders.[958] The rule banning forced arbitration was also repealed.[959] Mulvaney was succeeded by Kathleen Kraninger, who had no experience in the area of consumer protection. Kraninger declared that, when it comes to consumer protection in the financial arena, people need "to help themselves."[960] One study found that, during the Trump Administration, companies resolved fewer complaints submitted to the CFPB by lower-income and African Americans consumers than by other demographic groups.[961]

Within eight months of taking office, Trump boasted that federal agencies under his control had rolled back or repealed 67 regulations.[962] His administration repealed or blocked regulations in a wide variety of areas: student loans, housing discrimination, overtime pay for workers, coal pollution, fuel economy standards, protection of endangered species and migratory birds, affirmative action, greenhouse gas emissions, car dealer markup guidance, net neutrality, livestock welfare, oil and gas fracking, protections for teachers, protections for transgender students, and tobacco and medical devices.[963] Trump's civil rights record was atrocious, too. For example, the U.S.

Department of Housing and Urban Development gutted an Obama-era regulation that prevented lenders, landlords, and insurers from discriminating against racial minorities,[964] and the Office of the Comptroller of the Currency dropped six investigations of bank discrimination and redlining practices that Obama had initiated.[965] By recruiting into his administration the most ardent lobbyists for major industries,[966] President Trump unleashed a frenzy of unabashedly pro-business, anti-citizen actions in the name of the federal government.

- ### Biden Administration (2021-present).

Upon taking office, President Biden issued executive orders reversing many of President Trump's executive orders, particularly in the areas of healthcare and environmental protection.[967] On July 9, 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy, which mandated a breathtaking 72 initiatives by over a dozen federal agencies to lower prices for consumers and increase wages for workers.[968] Biden's executive order will reduce prescription drug prices, allow hearing aids to be sold over the counter, ban excessive early termination fees, improve the airline ticket refund process, and make it easier and cheaper to repair products.[969]

Stacking the Judiciary

A major component of the corporate counterattack on the civil justice system is its attempt to seize control of the judicial branch. An independent and apolitical judiciary has long been a founding principle of American democracy. Judges are bound by their oath to uphold the rule of law. However, corporations and their allies now routinely pour money into the process of selecting judges.[970] Their openly avowed goal is to install judges who would side with big business.[971] In the fight to maintain balance and fairness in the courts, consumers and lawyers who represent injured people are massively outmatched.

State judicial elections.

State court judges are typically appointed by the Governor for a specific term, or elected by voters. Judicial elections have become a partisan political battleground in the corporate campaign for a legal system tilted in their favor.

Texas was the forerunner of the one-sided court control battles that have been waged across the country.[972] In the mid 1980s, the Texas Supreme Court was known for issuing rulings holding businesses and employers liable.[973] In 1988, in the most expensive election in Texas history at the time, the corporate lobby was able to elect a majority of pro-business judges to the Texas Supreme Court.[974] Since then, that court has repeatedly overturned jury verdicts in favor of injured plaintiffs, and compensation for injured plaintiffs has been "wiped out" by their decisions.[975]

Nationwide, spending on judicial elections grew from $5.9 million in 1989-1990 to $21.4 million in 1995-96.[976] It exploded between 1999-2000 and 2007-08, when an average of $40.1 million was spent every two-year election cycle, including approximately $93.6 million on television advertisements between 2000 and 2009.[977]

The U.S. Chamber of Commerce spent a total of $100 million between 2000 and 2003 on 40 judicial races in Ohio, Illinois, Michigan, Mississippi, and Wisconsin, and mostly succeeded: 36 of the 40 state judges supported by the Chamber were elected.[978]

One of those campaigns was the 2000 contest to fill a single seat on the Ohio Supreme Court; the Chamber of Commerce spent $4.4 million on its preferred candidate because, it said, that court's judges had consistently ruled against businesses.[979] The Chamber's campaign organization, named "Citizens for a Strong Ohio," launched attack ads against its opponent, who had called Ohio's tort reform law "draconian."[980] The advertising – including one that featured Lady Justice with money tipping her scales and a narrator saying that the candidate opposed by the Chamber ruled too frequently in favor of plaintiffs as a result of special interest money – backfired, and the judge was re-elected.[981] That did not stop the Chamber. In 2004, Citizens for a Strong Ohio raised more than $3 million to back four anti-consumer candidates for the Ohio Supreme Court.[982] Their victory maintained a Republican majority.[983]

That same year, the U.S. Chamber of Commerce and ATRA put $2.5 million behind a judicial candidate for the Illinois Supreme Court[984] who was vocally in support of limiting the rights and protections of the state's tort laws.[985] Their candidate won.[986] The groups also targeted Alabama after claiming that the size of jury verdicts there made the state a "tort hell."[987] By 2006, every judge on Alabama's Supreme Court was "pro-business."[988]

Citizens United v FEC opens the floodgates.

The U.S. Supreme Court's 2010 decision in *Citizens United v FEC,* 558 U.S. 310, was a historic victory for corporate America. The Court held that corporations have the same constitutional rights as human beings, and that spending money is a form of "free speech" protected by the First Amendment. Under the ruling – a radical interpretation of the U.S. Constitution – corporations can spend an unlimited amount of money to support or oppose individual candidates in elections, including judicial elections.

Corporate spending on state judicial elections post-*Citizens United* has continued. In the 2015-16 cycle alone, over $70 million was spent in state judicial elections.[989]

Shaping the federal judiciary.

A different kind of corporate campaign has focused on federal courts. Federal judges, including Supreme Court justices, are nominated by the President and must be confirmed by the U.S. Senate. They are not subject to election, and are eligible to serve for life. Thus, the occupant of the White House and the political party that controls the Senate are the decisionmakers in what has become a highly politicized process. Candidates for both the presidency and the Senate routinely highlight their role in determining the composition of the courts, and some explicitly promise to appoint justices who share their ideological and political beliefs.[990]

The Federalist Society, a nonprofit organization composed of highly conservative lawyers, holds particular sway in the appointment of federal judges when a like-minded President is in power.[991] The Federalist Society is funded by "shadowy corporate" entities.[992] In recent years, the influence of the Federalist Society has grown.[993] It promotes the nomination of judges to federal courts across the country who it hopes will be hostile to regulation of corporations, the protection of the environment, the formation of unions, and the protection of workers.[994] Before President Trump was elected, he promised that "we're going to have great judges, conservative, all picked by the Federalist Society."[995] He appointed 54 Appeals Court judges and 169 District Court judges during his term;[996] most of them are connected to the Federalist Society.[997] These appointments "flipped" the balance of several of the 13 federal Courts of Appeal from a majority of Democratic appointees to a majority of Republican appointees.[998] Even more consequential, Trump appointed three conservative corporatist justices to the Supreme Court promoted by the Federalist Society – Brett Kavanaugh, Neil Gorsuch, and Amy Coney Barrett.[999] Their anti-consumer impact on the federal judiciary will be felt for decades to come.

In recent years, the Supreme Court has issued a number of decisions that have gravely impaired consumers' ability to join together to sue wrongdoing corporations in both state and federal courts:

- ## Forced arbitration.

In a series of highly controversial opinions dating back to 2011, the Supreme Court eliminated most consumers' right to go to court on behalf of themselves and others in cases where corporations claimed the consumers had "agreed" to forced arbitration clauses buried in take-it-or-leave-it contracts. Reversing its previous rulings, the Court enforced arbitration clauses that require consumers to surrender their right to bring a class action and force consumers to submit all disputes with the company to private judges paid by the corporation:

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011): In a class action brought by mobile phone customers against AT&T, a 5-4 majority of the Supreme Court upheld a contract clause that deprives consumers of the right to challenge overcharges and fraud in a court, either as individuals or collectively through a class action. In a startling departure from the text of the Federal Arbitration Act (FAA),[1000] the high court-imposed arbitration even if the clause would be illegal under a state's contract laws.

American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013): In a dispute between American Express and merchants over the fees merchants must pay American Express to accept its credit cards, a 5-3 majority of the Supreme Court held that courts may not invalidate forced arbitration clauses on the ground that the consumer's cost of individually arbitrating a federal statutory claim would exceed the amount of money the consumer might obtain if he won the private arbitration.

DirecTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015): The Supreme Court, adjudicating a dispute between cable television consumers and DirecTV over "early termination fees," reversed a California state court's refusal to enforce an arbitration clause. The Supreme Court, in a 6-3 majority decision, concluded that a California court's interpretation of California consumer protection law was invalid under its decision in *AT&T Mobility LLC v. Concepcion* and would conflict with the FAA.

Lamps Plus, Inc., et al. v. Varela, 139 S. Ct. 1407 (2019): An employee sued Lamps Plus after a data breach at the company led to a fraudulent tax return filed in the employee's name. The case went to arbitration and the employee sought to have his case cover similarly situated employees whose data had been compromised. In another inexplicable departure from the text of the FAA, a 5-4 majority of the Supreme Court held that an arbitration agreement must explicitly authorize "class" arbitration in order for an arbitration to proceed on behalf of others.

Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018): Employees sued their employer, a health care data management firm, for failing to pay overtime in violation of federal law. A 5-4 majority of the Supreme Court upheld a forced arbitration clause with a class action waiver, denying the workers their day in court.

After the *Concepcion* decision*,* almost every company and employer include in their contracts forced arbitration clauses and terms that prohibit consumers and workers from bringing a class action. Few people have the time to pursue a costly individual arbitration action to recover small amounts of money, or the resources to hire a lawyer to do so. Consequently, companies that steal from their customers and employees are never held accountable. In 2019, the U.S. House of Representatives passed the Forced Arbitration Injustice Repeal Act, which invalidates all forced arbitration clauses in employment, consumer, antitrust, and civil rights disputes.[1001] However, large corporations, industry groups, and the U.S. Chamber of Commerce made it a priority to defeat the bill, and it was killed in the Senate.[1002]

Thanks to the efforts of some enterprising consumer lawyers, companies are starting to face unintended consequences from their forced arbitration crusade, however, and they are backtracking. For example, Amazon *abandoned* its forced arbitration agreement in June 2021, after attorneys filed 75,000 demands for individual arbitration on behalf of each customer who had bought an Amazon Echo and later learned it recorded them and their families without their knowledge.[1003] Amazon faced tens of millions of dollars in arbitration fees.[1004] In May 2021, corporate defense law firm Gibson Dunn sent out a memo to its clients warning them of the "crippling" costs of individual arbitration and suggesting that companies change their arbitration agreements to "reserve the right to settle claims on a class-wide basis" (a right that was taken from consumers by the Supreme Court rulings).[1005]

- ## Class certification hurdles.

The U.S. Supreme Court has also made it more difficult for class actions to proceed to trial. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), women employees of the nation's biggest employer, Walmart, brought a class action against the retailer claiming they had been underpaid and underpromoted in violation of anti-discrimination laws. The Supreme Court ruled that their case could not proceed as a class action and reversed a lower court decision that certified a class of 1.5 million employees. The Court reasoned that the statistical evidence put forth by the plaintiffs showing the pay disparity between men and women employees was not sufficient to meet the "commonality" requirement for class certification (that there are questions or law or facts are common to the class). The Court created a more rigorous standard, requiring that the plaintiffs show that every single worker had experienced the same bias and suffered the exact same type of injury (same underpayment, same underpromotion) in order for the case to move forward as a class action. The ruling was widely hailed by big business.

Two years later, in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Supreme Court invalidated class certification in a case charging that Comcast had a monopoly on the cable market, on the grounds that the plaintiff's proposed method for estimating how much money the class had lost was inadequate.

Lower federal courts are bound by the Supreme Court's decisions, of course. Many have applied these rulings aggressively to deny cases class action status. By 2013, more than 1,200 federal and state courts had cited *Wal-Mart* in their rulings; some relied on *Wal-Mart* to overturn jury verdicts, deny class certification, and reject class action settlements.[1006]

- ## Limiting standing to sue.

The Supreme Court took up standing issues in two class actions brought against corporations for violations of the Fair Credit Reporting Act (FCRA), which regulates credit reports and files generated by credit reporting agencies and companies that collect, access, and publish consumer information.[1007] In these cases, the Court ruled that the Constitution severely limits the ability of people to go to federal court when there has been a violation of a statute but the consumer suffered no monetary harm:

Transunion LLC v. Ramirez, 141 S. Ct. 2190 (2021): Transunion, another credit reporting behemoth, incorrectly flagged over 8,000 people – mostly Latino and Middle Eastern consumers – as terrorists or drug dealers in their credit reports, a violation of FCRA.[1008] A lower court awarded $40 million to the affected consumers.[1009] Transunion appealed, arguing that "inaccurate information laying dormant in a file" did not amount to harm sufficient for a person who had been improperly flagged to have standing to sue.[1010] The Supreme Court agreed. In a 5-4 opinion, the Court ruled that the publishing of inaccurate information was not "concrete harm" ("[p]hysical and monetary harm") sufficient for a plaintiff to seek damages for a violation of FCRA, and that only consumers whose inaccurate information was actually passed on to creditors could bring claims.

Spokeo, Inc. v. Robins, 578 U.S. 330 (2016): A consumer searched himself on people search website Spokeo and discovered that the information about him was false. His online profile said he was married, had children, was in his 50s, was wealthy, had a graduate degree, and was employed. None of that information was true. Robins brought a class action against Spokeo for publishing false information in violation of FCRA. The district court had found that while the publication of false information violated the FCRA, it did not cause the plaintiff "actual and imminent harm" sufficient for him to have standing in federal courts; the Ninth Circuit Court of Appeals reversed, ruling he had standing to sue. The Supreme Court held that the Ninth Circuit did not adequately analyze whether Robins had suffered a "concrete injury" and that standing under the Constitution "requires a concrete injury even in the context of a statutory violation," and, therefore, a plaintiff "could not . . . allege a bare procedural violation, divorced from any concrete harm, and satisfy" that requirement. (The parties eventually settled, but the settlement provided little relief: it required Spokeo to include various disclaimers on its website, such as a statement that the information on its website may not be used for FCRA purposes.[1011])

The trifecta of forced arbitration clauses, class certification hurdles, and limited standing severely hinders class actions: forced arbitration and limited standing prevents many righteous lawsuits from ever being filed; those cases that do make it to a courthouse may never get past the class certification stage. If a case is not certified, it usually dies because the expense of bringing it on behalf of one individual is too high. When that happens, the question of whether the defendant corporation violated the law is never explored or answered.

Loss of Public Confidence

Big businesses bent on stripping people of their legal rights pour money into political candidates' campaigns to elect pro-business, anti-consumer lawmakers. In exchange, these corporatist politicians frequently support legislation to limit the amount of money that citizens can recover in tort lawsuits and similar restrictions.[1012] And in stacking state and federal courts with judges they expect to be biased in favor of corporations, the Chamber and other business interests are merely replicating the strategies they have long used to elect compliant candidates to the "political branches," i.e. Congress and the Executive Branch, and state legislatures.

Corporations opening their coffers to install friendly judges who will interpret laws in their favor is fundamentally at odds with American ideals and the integrity of the judicial branch. An investigation by the Wall Street Journal revealed that 131 federal judges have financial investments in corporations that were defendants in lawsuits before them, and many ruled in favor of those corporations.[1013] Questionable as a matter of ethics and law, these spectacles make it too easy for the public to characterize the judges, including the justices of the nation's highest court, as "politicians in robes."[1014] This is a profound threat to our democracy and the rule of law.

The judicial branch was once held in high esteem and considered a venue for justice untainted by politics – distinctly unlike the public's opinion of the executive and legislative branches.[1015] Trust in Congress has languished at low levels for many years. This broad erosion of faith in American government began after the 1960s.[1016] The number of Americans who trusted the federal government peaked in 1964 at 77%.[1017] After the Vietnam War and the Watergate scandal, that number dropped precipitously to 36%.[1018] And it kept falling. By the end of the 1970s, about 25% of Americans said they could trust the government at least most of the time.[1019] In the 1980s and 1990s, that trust waxed and waned.[1020] But the post-9/11 wars and the continuing effects of the devastating financial crash of 2008 have reinforced the public's perception that American democracy is in grave disrepair. According to a 2021 Gallup poll, only 12% of Americans have a "great deal" or "quite a lot" of confidence in Congress.[1021] 47% of Americans have "very little" faith in Congress.[1022]

Public faith in the U.S. Supreme Court is now following a similar downward trajectory. A mere 13% of Americans had a "great deal" of confidence in the U.S. Supreme court in 2021 (down from 18% in 2020).[1023] Only 40% said they approve of "the way [the Supreme Court] is handling its job" – a record low.[1024]

Troubling as these numbers are, more ominous is the report that most Americans appear to have given up on the court system itself: a 2019 study revealed that only one-third of Americans have confidence in the nation's courts.[1025] An earlier poll found that only 26% of Americans believe the civil justice system is reliable and trustworthy.[1026]

With Congress, state legislatures, and the courts dominated by corporate power, the laws and judicial procedures that are supposed to protect ordinary Americans against injustice no longer do so.

The attack on our rights and laws, executed by an enormous corporate-funded infrastructure of anti-citizen institutions and friendly government officials, has crippled the American system of justice. Those with money and power have always found it easier to access and navigate the judicial branch. But the restrictions and reversals in class action law imposed in recent decades have aggravated the disparity between the power of citizens and the power of big corporations within the halls of justice. Goliath has gotten the upper hand over David.

Our antiquated 20th century laws leave Americans at the mercy of the high tech 21st century marketplace and the sophisticated swindlers who inhabit it. The "system software" of justice – the framework of procedural rules that govern the judicial process in every court in the nation – has been weakened by judicial decisions that make it harder for consumers and their attorneys to pursue a case in court.

Paradoxically, the smaller the dispute – when the dollar amount at stake for each consumer is low, or the number of affected consumers is modest – the harder it is for an attorney to overcome the new legal barriers. And now consumers are having to *defend* themselves against companies without lawyers.

Operating under these increasingly onerous conditions, even the most successful consumer attorneys struggle to litigate a case all the way to trial – a process that can take years, or even decades.[1027] Not surprisingly, fewer civil cases are being filed. In 2017, civil caseloads in state courts were 18% lower than they were in 2007.[1028]

And the number of law firms able to take on corporate America in high profile class action lawsuits has dwindled: a recent study found that 50 lawyers in the United States are appointed by courts to be "lead counsel" in 30% of all MDLs – which include the largest, transnational class action cases.[1029] Not surprisingly, these repeat players "actively design" settlements with a "'surprising' degree of similarity'" in terms of structure and fee provisions.[1030] Thus, the fate of American consumers is now in the hands of a tiny pool of lawyers who have the resources to prosecute large class actions against wealthy corporations. Additionally, the lack of diversity among lead class counsel is stunning – a study showed that less than 10% of MDL leadership positions are awarded to lawyers who are not white.[1031] A long overdue reckoning has recently begun, however: some judges are pushing for gender, racial, and intellectual diversity in the appointment of the lawyers who lead MDLs.[1032]

Chronic budget problems are also choking Americans' access to justice. Drastic cuts in state court funding mean long delays in adjudicating civil cases – especially complex ones like class or mass actions. After the 2008 financial crisis, tax revenues fell, state courthouses closed, judicial seats became vacant, and court services were dramatically reduced.[1033] Between 2008 and 2011, 42 states slashed their judicial budgets, some by more than 12%.[1034] In New York in 2017, courts faced to $170 million in budget reductions; 500 employees were laid off, and courthouses started closing earlier.[1035] California courts endured severe financial repercussions. The cuts were so deep that the Chief Justice of the California Supreme Court said, "I am afraid California is on the wrong side of history when it comes to its funding of justice."[1036] Between 2012 and 2017, California courts lost 25-30% of their staff.[1037]

State economies were just beginning to improve from the 2008 recession when the COVID-19 pandemic arrived. Many court facilities were closed to the public for months and were forced to acclimate to online proceedings for most of 2020. As a result, a massive backlog of cases has accumulated in the civil justice system. In California, the government had to allocate $25 million to state courts to address the impact of the shutdown on court operations.[1038] Unlike their colleagues in the executive or legislative branches, judges have no direct financial power to keep their courts fully staffed.

Delay is a reality of today's judicial system. State (and federal) courts are required by the U.S. Constitution to prioritize criminal cases.[1039] That means lengthy delays for civil cases. Settlement is often a choice parties make in order for the sake of expediency. But even those class actions that result in settlements take multiple years on average[1040] (and can be delayed even longer if a class member objects and appeals); 14% of class actions take longer than four years.[1041] Because of the pandemic, half as many civil cases in California state courts were resolved between March and August of 2020 as were resolved in the previous year.[1042] As the adage says, "justice delayed is justice denied."

In summary, the power imbalance between American consumers and corporations has become overwhelming. One profound practical effect of this asymmetry: a trend toward settlement of consumer class actions, and on less-than-ideal terms. One study showed that one-third of all class actions settle, while nearly two-thirds of class actions are either dismissed by the court or by the parties who brought the case.[1043] In the study, *none* of the class actions went all the way to a trial by a judge or jury.[1044] By definition, settlements require a compromise of competing positions by the plaintiffs and the defendants. But as consumers find it more difficult to bring and prove their cases, corporate defendants are increasingly able to settle class action disputes on terms favorable to them.[1045]

This trend is not merely the result of hostile laws and judicial decisions. Institutional forces also play a role. Courts favor settlements because they consume less resources from a court system that has already been severely strained by budget cuts. Perhaps that is why the Supreme Court, despite its recent focus on class action procedures, rarely issues opinions about class action settlements.[1046] And though corporate defendants are now equipped to more easily defeat class certification as a result of *Wal-Mart* and related judicial decisions, companies may still favor settlements in high visibility, nationwide cases. This is because a settlement of a class action prevents consumers from suing the corporation for the same conduct in the future and protects the company from the risk of a class action trial and potentially massive jury verdict.

"Adversarial justice" is the guiding philosophy of America's legal system. It is premised upon a belief that the truth about any dispute can best be obtained by advocates representing each side who compete against each other, overseen by a neutral referee – a judge. But once there is a settlement, the opposing parties and their lawyers have resolved their principal differences. At that point, the process is no longer "adversarial." The judge presiding over the case then becomes the final arbiter of whether a settlement should go forward.

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What standards are used to approve a settlement?

Under Federal Rule 23, a judge must decide whether a proposed settlement is "fair, reasonable, and adequate." They have wide latitude to make that determination. Under current law, judges must look at the following factors:

- whether the class representatives and class counsel have adequately represented the class;
- whether the proposal was negotiated at arm's length (meaning the parties' lawyers acted independently);
- whether the relief provided for the class is adequate, taking into account:
  - the costs, risks, and delay of trial and subsequent appeal;
  - the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims;
  - the terms of any proposed award of attorney's fees, including the timing of payment of fees; and
  - any side agreements made in conjunction with the settlement; and
- whether the proposal treats class members equitably relative to each other.[1047]

Currently, class action settlements are reviewed by courts in two phases: preliminary approval and final approval. At the preliminary approval stage, the parties present the proposed settlement to the judge (and the public). The judge reviews the notice of settlement to be distributed to class members (see pp. 155-159 for a discussion of notice). The judge may request that the parties provide further information about the terms of the settlement and point out aspects of the proposal that must be addressed before the court grants preliminary approval. At the final approval stage, the court evaluates any objections to the settlement submitted by class members. 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 any required changes to defendants' conduct must be implemented.

The judge in the settlement phase of a class action therefore must exercise "the high duty of care that the law requires of fiduciaries" – in other words, the judge is required by law to act in the best interest of the class members.[1048] That's because the plaintiff and defendant are no longer considered adversaries, and the rest of the members of the class on whose behalf the lawsuit was brought – anywhere from ten to millions of people – are not present in court and rarely have their own independent counsel; they lack the knowledge and resources to closely review the proposed settlement.[1049]

A settlement is a contract between the consumer (the class members) and the corporation (the defendant). Judges are forbidden from rewriting or revising that agreement – they can only approve or reject it. Under the broad standards typically applied to class actions today, judges are granted enormous latitude in how they exercise that power. Some are zealous in their concern for consumers; others are less so. For example, former Judge Richard Posner of the U.S. Court of Appeal for the Seventh Circuit is known for his rulings on class action settlements. As an appellate justice, he overturned trial court decisions approving settlements that the Seventh Circuit found problematic, while emphasizing the importance of class actions.[1050] (See pp. 160, 166-167, and 168 for more on Judge Posner's decisions.)

Changes made to Federal Rule 23 in December 2018 reflect growing concern about the quality of settlements. They require that courts review class action settlements in a more exacting manner. Before the 2018 amendments, courts would find a settlement "fair, reasonable and adequate" if it fell "within the range of possible approval" and had "no obvious deficiencies."[1051] The amended Rule 23 requires the parties to show, at preliminary approval, that the "court will likely be able to approve" the settlement at the end of the process.[1052] The new approach "front loads" the approval procedure by requiring the parties to present the court with more justification for the settlement. The amendments seem to be working: since 2018, federal judges have been scrutinizing settlements more closely and asking counsel more detailed questions about settlements at the time of preliminary approval.[1053] One court rejected a settlement because the parties failed to identify the risks of going to trial, estimate what each class member might receive in they proceeded as individuals rather than as a class, and assess the strengths of their claims if the case were to go to trial.[1054]

The 2018 amendments to Rule 23 are a very modest step forward. They addressed some of the flaws of class action settlements but did not address other fundamental weaknesses. These problems have evolved in the class action system generally, and in settlements in particular, because of the imbalance of power between corporations on the one hand, and consumers and their attorneys on the other.

Here are NINE recurring and systemic problems in class action settlements:

1. Poor notice.[1055]

A key element of any settlement is notifying the consumers who were victimized – the class members – about the terms of the proposed settlement. The U.S. Supreme Court considers notice to be an "elementary and fundamental requirement of due process"[1056] under the Constitution. That's because in a settlement, each class member gives up their legal right to sue the company for the conduct at issue in the case, in exchange for which they will receive the benefits provided by the settlement (unless the class member opts out).

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What's a "release" of claims?

In a class action settlement, a release is an agreement from the plaintiff and all other class members that they will never bring an identical lawsuit against the defendant for the conduct covered by the settlement. (See pp. 167-168 for more on releases.)

The notice informs the class member of the settlement benefits they are entitled to, how to get them, how to voice their opinion through an objection to the judge if they believe the settlement is flawed, and how to opt out from the settlement if they prefer to bring their own case as an individual or simply do not want to participate as a class member.

A settlement notice is often the first time a consumer learns that she has been represented by a lawyer in a class action lawsuit.

There are no uniform procedures that govern the content, format, or distribution of settlement notices. Two kinds of notices are common. The first is a "short form" or "summary" notice. It outlines basic information about the settlement, explains a consumer's rights to object and opt-out, and how they can obtain more information. At present, the U.S. Mail is considered the most effective means of notifying consumers.[1057] But it's expensive to print and mail, so summary notices are often short on details.

"Long-form" notices are also made available to consumers, these days typically on a settlement website. Because summary notices may not contain all the information a consumer needs to evaluate a settlement, long-form notices provide much more detail. But the length of a long-form notice can be a significant issue: the longer the notice, the less likely a class member is to read it, much less understand it. Settlement notices are intended to summarize, for the class member, the key provisions of the settlement agreement. Settlement agreements themselves can run into the hundreds of pages and are also made available on a website. An effective notice must reach the right balance between too little and too much information. But to avoid ambiguity and to provide thorough directions to the consumer, lawyers for the class often end up drafting long-form notices that are a dozen or more pages.

Class action notices unfortunately have become something like the standard form contracts used by corporations – many, perhaps most, people ignore them.[1058] Where do notices go wrong? There are a myriad of problems:

- **The notice may not look like an important document.**

Summary notices may resemble junk mail or spam and thus be overlooked; they may be printed on postcards in a tiny, illegible font; or they may be sent via email with a vague or misleading subject line. In other words, they are easily overlooked or ignored by class members. Here's an example of a postcard notice that might get overlooked:

A federal court authorized this notice.
You are not being sued.

Records show that you may be entitled to money from a class action settlement.

A Settlement has been reached in a class action lawsuit claiming that Sirius XM made telephone calls to persons registered on the National Do Not Call Registry or Sirius XM's Internal Do Not Call Registry. Sirius XM denies any wrongdoing of any kind and the Court has not decided who is right. The Settlement gives Class Members the choice to receive either 3 months of Free Service or a cash payment.

Si desea recibir esta notificación en español, visite nuestra página web o llámenos.

Sirius XM DNC
Settlement Administrator
Toll Free Number: x-xxx-xxx-xxxx
PO Box [____________]
SiriusXMdncTCPAsettlement.com

PRESORT
FIRST CLASS
U.S. POSTAGE
PAID
PERMIT NO. XX

0 1 2 3 4 5 6 7 8 9 0 1 0 2 0 3 0 4
Postal Service: Please do not mark barcode

UNIQUE ID: [00001234]

<<Name1>>
<<Name2>>
<<Address1>>
<<Address2>>
<<City>><<State>><<Zip>>

I. PROVIDE INFORMATION

Name	First Name; Middle Name; Last Name; Suffix
Mailing Address	Street/P.O. Box; Unit/Apt. Number; City/Town; State; Zip Code -
Telephone Number – By providing this number, you certify that you received one or more telephone calls from Sirius XM to this number and that you had never been a paid subscriber when you received the first call. ( ) -	**Email Address**

II. CHOOSE FREE SERVICE BY [DATE]<u>OR</u> CASH PAYMENT BY [DATE] (<u>CHOOSE ONLY ONE</u>)

I choose three months of Sirius XM's All Access Subscription package currently valued at approximately $81. **You must provide a Vehicle Identification Number (VIN) or Electronic Serial Number (ESN).**

VIN [NOTE: The vehicle must have a Sirius XM-equipped radio. **Vehicle cannot currently have a paid subscription**.]

ESN [Find by tuning to "0" on your Sirius XM radio. **Vehicle cannot currently have a paid subscription.**]

Check Box □

<u>OR</u>, I choose a cash payment estimated by Class Counsel to be approximately $12. **Check Box □**

Source: Class Action Settlement Agreement and Release, *Buchanan v. SIRIUS XM Radio Inc.,* Case No. 17-cv-00728 (N.D. Tex. Apr. 26, 2019).

This vague notice provides almost no information about the case or the settlement, but it requires the consumer to fill in their personal contact information (some of which the company already has) in order to obtain the benefits. And there are no explicit instructions as to how to return the postcard – presumably the class member must send it back in their own envelope and pay for postage. The postcard also fails to inform consumers that they could submit a claim online through the website.

- **Notices do not reach class members.**

In a settlement of a false advertising case, it's often impossible to know exactly who among potentially tens of millions of consumers saw or heard the advertisement (although theoretically this would not be a problem online, where invasive tracking technologies are able to identify and target ads on an individual basis). In these kinds of cases, courts authorize "publication notice": informing the public of the settlement through ads placed online and in print publications, such as newspapers.

For example, a class action was brought in federal court against Budget Rent a Car over its failure to safeguard its customers' credit card information. The settlement provided consumers with coupons for more rental car services and required class members to submit a claim (see pp. 159-162) in order to get the coupon.[1059] The class included approximately 770,000 individuals.[1060] The parties proposed to post publication notices in rental car retail locations and on the Internet and publish one notice in a single newspaper on a weekday.[1061] The court rejected the class action settlement because the notice was inadequate and[1062] directed the parties to improve the notice "so that a large number of class members will participate in the settlement."[1063]

Studies have shown that publication notices are ineffective at reaching class members because few class members see them, they are written in small print, and they do not use language that incentivizes readers to look at them.[1064] In a class action filed against a debt collector for violating the Fair Debt Collection Practices Act (FDCA), the Second Circuit Court of Appeals found that the notice in that case – a single notice in the newspaper USA Today – did not satisfy due process requirements for notice.[1065]

Changes to Federal Rule 23 in December 2018 provided that a class notice "may" be provided by "electronic means."[1066] In most cases, this means email. One corporate-sponsored survey looking at the effects of the amendment found that increased use of electronic notice led to increased response rates in claims-made settlements.[1067]

- ## Notices are confusing.

Federal Rule 23 requires notices to be written in "plain, easily understood language."[1068] However, not all notices meet this requirement. They are particularly problematic if they are written poorly or use overly complex legal jargon. Consumers may be overwhelmed by confusing language and stop reading. Some class members may be afraid to participate in the lawsuit because they do not understand their options under the law. Others may not understand what steps they need to take.

Lawyers representing corporations have an incentive to propose lengthy and confusing notices in claims-made settlements, where class members are required to take some action before they can get the benefits to which they are entitled. If a consumer cannot understand what they are supposed to do, they are less likely to claim the benefits. Indeed, some settlements permit the defendant to keep any unclaimed money (see pp. 163-164, below).

- ## Notices may lack information.

A federal court initially rejected a settlement of class action against Yahoo over five data breaches because the notice failed to inform consumers that they would also be releasing claims against Yahoo for a sixth data breach and the notice failed to disclose to consumers the total size of the settlement fund from which consumers would be paid.[1069] The court noted, [w]ithout knowing the total size of the settlement fund, class members cannot assess the reasonableness of the settlement."[1070]

2. Unnecessary paperwork to get paid.

These days, big companies are almost always able to send class action payments directly to consumers without requiring them to submit paperwork. In such cases, companies know who the affected consumers are and their address. Theoretically, then, the only time a claim form would be necessary is when a company does not know the identity or address of class members. One example would be food-related litigation, in which settlements provide compensation to consumers who purchased small-value items in a grocery store; another would be false advertising cases. Still another scenario where claim forms might be necessary is when the amount of compensation an individual class member is entitled to depends on information solely within the control of the person, such as reimbursement of expenses that vary from person to person.

However, corporate defendants have been successful in negotiating class action settlements that call for claims forms that are unnecessary or burdensome.

Claims forms directly and substantially limit the compensation ultimately paid to consumers by the wrongdoer because they introduce "friction" into the process that discourages consumers from submitting the claim: the forms may require too much paperwork or detail; may require the consumer to sign "under penalty of perjury" or agree to some other intimidating condition; the forms may have too many steps to follow; the forms may never reach the consumer; or the consumer may be unaware of the deadline to submit the claim.

Former Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit criticized onerous claims processes in two different cases. In *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014), the Seventh Circuit rejected the approval of a settlement of a class action lawsuit against the manufacturer of windows that were allegedly defective. Judge Posner criticized a "complicated" 12-page claim form that class counsel had described as "simple," noting that the forms "require a claimant to submit a slew of arcane data," such as the "Purchase Order Number," "Glass Etch Information," "Product Identity Stamp," and "Unit ID Label" of each affected window.[1071]

In *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), the Seventh Circuit rejected the approval of a class action settlement concerning a vitamin company's advertising of the effectiveness of a supplement for joint health. Judge Posner found the claim process to be inadequate because of the "requirement of needlessly elaborate documentation, the threats of criminal prosecution [if the submitted claim contained errors], and the fact that a claimant might feel obliged to wade through the five other documents accessible from the opening screen of the website."[1072]

The Third Circuit Court of Appeals rejected a class action settlement of a price-fixing lawsuit against baby product manufacturers, noting that most class members were forced to accept a $5 monetary payment because they did not have the documentation to prove exactly what products they had purchased, which would have entitled them to more money.[1073]

Today, most courts do not usually reject settlements even when a claims process is completely unnecessary. In one exception, a federal district judge in Washington rejected a proposed settlement of a lawsuit brought by consumers against a company making illegal robocalls. It required consumers to submit a claim for a payment averaging $40.[1074] The parties then amended the settlement so that consumers would automatically receive a payment without requiring consumers to submit a claim, and it was approved by the court.[1075]

Statistics reveal just how discouraging claims-made settlements are. It is not unusual for only a small fraction of the total number of class members to submit a claim: most claims rates range between zero and roughly 20%.[1076] A study by the FTC in 2019 found that claims rates averaged between 4% and 9% and in claims-made settlements that relied on notice by email, only 2% of consumers made claims.[1077]

Similarly, a settlement administrator that has handled over 3,000 class action settlements (99% of which were claims-made) testified that the median response rate was 5% to 8%.[1078] In a settlement in a case against eight companies for improperly collecting consumers' data from their iPhone apps, notice was distributed via social media, including on Twitter, that each consumer would receive an average of $39.[1079] A bot on Twitter that appeared to originate from 11 IP addresses in Toledo, Ohio filed 6,000 fraudulent claims; even with those fraudulent claims, the claims rate in the settlement was still 4%.[1080]

Low claims rates mean that most class members are not receiving the settlement benefits to which they are entitled.

Though most courts don't reject proposals to use a claims process, courts will sometimes reject settlements because the claims rate turned out to be abysmal. For example, a federal judge in California initially approved a claims-based settlement between consumers and auto manufacturer Nissan over defective brakes, but later rejected it because the actual claims rate was just 0.5%.[1081] The settlement provided benefits to 263,967 Nissan owners but only 1,540 class members actually filed valid claims.[1082]

Finally, claims rates in class action settlements are rarely disclosed to the public – perhaps because they are so astonishingly low. However, The United States District Court for the Northern District of California recently issued guidelines for class action settlements that require attorneys to disclose claims rates following the distribution of settlement funds.[1083] Since the distribution of settlement funds usually occurs *after* the court grants final approval of the settlement, the Northern District court's guidelines allow it hold another hearing after the distribution of settlement funds once the court has obtained information on claims rates.[1084] This would allow the court to require the settling parties to take action to get more of the settlement proceeds back into consumers' pockets.

3. Non-cash "benefits" such as coupons.

Another troubling trend in settlements that has led to much criticism is to provide class members compensation in the form of coupons or other non-cash options that can only be redeemed by buying products or services from the defendant in the future. It doesn't take a law degree to recognize that consumers who sue a corporation for misconduct might not want to be forced to continue to do business with that company. Requiring a consumer to continue to do business with the company that they sued is almost always inappropriate. But it's a win-win situation for the defendants: consumers are unlikely to redeem coupons, and, for the few consumers who do, defendants are getting repeat customers. Evidence shows that coupon redemption rates are 3% or less,[1085] meaning that 3% or fewer of eligible consumers use non-cash relief provided by a defendant. Coupons are also a valuable marketing gimmick for defendants.[1086]

For example, in a settlement between consumers and General Motors (GM) over faulty fuel tanks, class members were entitled to a $1,000 coupon (that expired in 15 months) toward the purchase of a new GM car.[1087] Consumer advocacy groups objected to the settlement, arguing that the actual value of the settlement was far less than what the settling parties had told the court, because few coupons were likely to be redeemed. The court rejected the settlement.[1088]

A settlement of a class action against spa outlet Massage Envy over claims that the company increased the price of massages beyond what the subscription allowed proposed to compensate subscribers with vouchers for further bodywork. An objector challenged the settlement as unfair to the class, emphasizing that it was improper to require class members to patronize the defendant in order to obtain the benefits of the settlement. The district court approved the settlement, but an objector has appealed the approval.[1089]

The 2005 Class Action Fairness Act (CAFA, see p. 135) requires federal courts to evaluate the value of the coupons when ascertaining the amount of relief awarded to a class.[1090] CAFA disincentivizes – *but does not outlaw* – plaintiff's lawyers from utilizing coupons in settlements. It specifies that the portion of any attorneys' fee award that is attributable to coupon relief must be based on the total dollar value of the coupons that are "*actually redeemed*."[1091]

In an unprecedented move, during the Trump Administration, the U.S. Department of Justice (DOJ) intervened in class action lawsuits to challenge coupon settlements:

- In a class action against an alcohol retailer alleging false advertising of wine prices, the DOJ filed an objection to the proposed settlement on the ground that class members would receive "limited-value" coupons for more wine from the defendant.[1092] The court suggested that the parties improve the settlement if they wanted the court to approve it.[1093] They failed to do so; the court denied final approval of the settlement and the parties voluntarily dismissed the case.[1094]

- In a case against a cookie company over inaccurate labeling of its ingredients, the DOJ objected on the ground that most of the proposed coupon settlement's value would benefit people who weren't in the class: coupons for cookies would be distributed for free to the public through stores, which the DOJ argued was merely a promotional opportunity for the defendant.[1095] The parties amended the settlement by providing more cash to class members.[1096]

4. Defendant keeps leftover money that belongs to class members.

Rarely is every settlement dollar able to reach the class member who is entitled to it. Class members cannot be located, checks are not cashed, or class members do not submit claims. Defendants prefer to include a term in settlement agreements that allows them to keep any money that does not make it to class members. This term is called a "reversion" because the money "reverts" to the defendant.

Reversions are not illegal, but they are increasingly disfavored. The Ninth Circuit Court of Appeals rejected a settlement that would have compensated exotic dancers for lost wages for being misclassified as independent contractors because the settlement allowed a reversion.[1097] The Court said, "[w]hile we have not disavowed reversionary clauses outright, we generally disfavor them because they create perverse incentives" that "lead defendants to negotiate for a subpar notice process, a more tedious claims process, or restrictive claim eligibility conditions."[1098] Another court called a reversionary settlement coupled with a claims process a "bonanza" for the defendant company because very little benefits would actually go to class members.[1099]

California consumers brought a class action in 2003 against insurance company Farmers Group, Inc. over unfair fees charged to policyholders. The case settled in 2010 for $455 million; under the settlement, harmed consumers would receive an estimated $20 each – but only if they filed a claim.[1100] All of the unclaimed funds would revert to companies controlled by Farmers.[1101] Despite an objection from a prominent consumer advocacy group, a state court judge approved the settlement.[1102] How much of the $455 million reverted to the Farmers entities is unknown.

5. Directing settlement funds to causes unrelated to the litigation.

When compensation is unable to be distributed directly to all class members, the *cy pres* doctrine allows the parties to agree to allocate the compensation indirectly, for their benefit, to another recipient. The term is Latin for "as near as possible."

Cy pres awards may be justified when all or part of a settlement's benefits cannot be paid directly to class members (because they cannot be located, for example), or if there is money left over after all class members have been offered benefits. *Cy pres* distributions can provide value to class members if they fund a project or organization that benefits class members in the same way (or as closely as possible) as the class action intended.

In such situations, the recipient of *cy pres* funds are organizations or institutions "selected in light of 'the objectives of the underlying statute(s)' that the defendant violated and 'the interests of the silent class members.'"[1103]

In practice, however, the decision not to distribute cash to the class members is sometimes questionable. For example, *cy pres* is often employed when the amount of each person's payment is too low to justify the cost of sending it. But the meaning of "too low" is open for interpretation, and using the tools of digital commerce, the cost of distribution can be much lower.[1104]

The Fifth Circuit Court of Appeals rejected the approval of a settlement of a class action brought by Texas residents who sought compensation for exposure to toxic chemicals emitted by a nearby chemical plant. The appellate court ruled that $830,000 in undeliverable funds should have been allocated in a second round to class members who received the first distribution, rather than to charities as a *cy pres* award.[1105] The Court emphasized that *cy pres* awards are justified "only if it is not possible to put those funds to their very best use: benefitting the class members directly."[1106]

The United States Supreme Court has expressed concern about *cy pres* awards but has yet to address the issue. In declining to hear a challenge to a class action settlement in a 2013 case against Facebook that provided *cy pres* relief, Chief Justice John Roberts issued an unusual warning: he opined that the Supreme Court might need to address "fundamental concerns surrounding the use of such remedies [*cy pres*] in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on."[1107] In 2019, the Court accepted a controversial case over a class action settlement that included *cy pres* relief. Consumers sued Google claiming that the search engine violated various federal privacy laws.[1108] Google agreed to settle the case by paying $8.5 million: $2.2 million was slated to pay the plaintiffs' attorneys' fees; $5,000 would go to each of the three named plaintiffs. However, paying the balance – $5.3 million – to each of the 129 million class members would yield four cents per person.[1109] So the money was to be directed to several universities and think tanks selected by the parties, none of which operated programs related to Google's privacy infringement or the underlying lawsuit.[1110] Objectors claimed the settlement was not fair because it provided no direct monetary compensation to class members. The Supreme Court eventually punted on the issue. It sent the case back to the lower court to determine whether the named plaintiff had been harmed by the privacy violation sufficiently to have standing to bring the case in the first place.[1111]

In other cases, the choice of recipient of the funds is inappropriate. The Ninth Circuit Court of Appeals rejected a *cy pres* distribution in the settlement of a class action against AOL for inserting promotional messages into consumers' private emails in violation of the federal Electronic Communications Privacy Act and California consumer protection statutes.[1112] The court found that the proposed *cy pres* distribution – to the Legal Aid Foundation of Los Angeles, the Boys and Girls Club of Santa Monica, and Los Angeles and the Federal Judicial Center Foundation – were made to "substantively unrelated charities" that did not have "anything to do with the objectives of the underlying statutes" that the plaintiffs had claimed AOL violated.[1113]

But when the *cy pres* doctrine is applied appropriately, the mechanism works as intended. *Cy pres* awards to reputable nonprofit organizations and legal aid groups can provide resources for valuable work that protects class members, the public at large and benefits society. In one of the earliest examples of a *cy pres* award in a class action, the Los Angeles Superior Court awarded $1 million of unclaimed funds to nonprofit consumer groups in a case brought by a borrower alleging that the defendant Avco Financial Services of Southern California violated California consumer protection laws by changing the terms of loans and increasing interest rates.[1114] The court reasoned that the distribution would provide a benefit to the class.[1115]

6. Meaningless changes to defendants' conduct.

Not all settlements require the defendant to return money to class members, nor need they. In some cases, the defendant agrees simply to stop engaging in an illegal practice. This is known as "injunctive relief." Terminating misconduct is one of the most important purposes of a class action because it protects the physical and financial health and safety of consumers from corporate wrongdoing going forward.

Courts must carefully scrutinize settlements to ensure that the required changes in defendant's conduct are appropriate. Injunctive relief that would provide little or no benefit to consumers in the future is highly problematic for two reasons: first, under most settlements, class members would be giving up their right to sue the defendant for the same misconduct. Releasing a defendant from liability in exchange for inadequate protections against the same misbehavior in the future is a misuse of the class action system.

Second, treating meaningless changes to defendant's conduct as "injunctive relief" is a tactic sometimes used to improperly pump up the perceived value of a settlement agreement.

In *Pearson v. NBTY, Inc.*, mentioned above at page 162, Judge Posner rejected the parties' claim that proposed changes to the package labels for a joint health supplement provided value to class members.[1116] The court concluded that the following changes in the label were not significant: [1117]

Original Label	Proposed Change
"support[s] renewal of cartilage"	"contains a key building block of cartilage"
"works by providing the nourishment your body needs to build cartilage, lubricate, and strengthen your joints"	"works by providing the nourishment your body needs to support cartilage, lubricate, and strengthen your joints"

"rebuilds cartilage" or "repairs cartilage" or "renews cartilage"	"helps protect [or support] cartilage and helps with annoying flare-ups" or "helps to lubricate and cushion joints while supporting healthy connective tissue [or healthy cartilage]"

Judge Posner said that the label changes communicated the same message to consumers as the original text and called the settlement "a selfish deal between class counsel and defendant."[1118]

Plaintiff's attorneys should be fully compensated for the value of the injunctive relief they obtain for class members and the public at large. But if the injunctive relief is over-valued, the attorneys' fees will be inflated. The class action guidelines issued by the United States District Court for the Northern District of California specifically instruct plaintiffs' counsel: "To the extent counsel base their [attorneys'] fee request on having obtained injunctive relief and/or other non-monetary relief for the class, counsel should discuss the benefit conferred on the class."[1119]

7. Freeing defendants from liability for unrelated misconduct.

As explained above on page 157, a release is a term in a class action settlement that requires class members to give up their right to sue the defendant for conduct that has been redressed by the settlement. A release should only cover the conduct alleged in the lawsuit; it should not apply to unrelated claims, or future misconduct. Defendants' key incentive in settling class action litigation is to obtain a release that will protect themselves from repeat litigation by consumers over the same practices covered by the settlement. Not surprisingly, corporate defendants often try to negotiate releases that go beyond the current case and that would be interpreted later to bar consumers from suing over unrelated misconduct. Class action settlements that release defendants from liability beyond the scope of the settlement are a "get out of jail free" card for companies.

In a class action settlement with food company StarKist for "slack fill" packaging – selling under-filled cans of tuna – the proposed release would have barred all future "slack fill" claims against any StarKist Co. product, not just tuna. The court noted that the release went beyond the allegations in the original complaint.[1120] The parties narrowed the release.[1121]

In another ruling by Judge Posner, the Seventh Circuit Court of Appeals overturned a settlement of a class action lawsuit against H&R Block and Beneficial National Bank claiming that the entities offered tax refund anticipation loans at high interest rates without properly disclosing the terms and in violation of consumer protection laws.[1122] One reason the court reversed the $25 million settlement was that the release was overbroad – class members would have been forced to surrender up to $20 million in additional legal claims against H&R Block without giving anything to the affected consumers in return.[1123]

8. Unjustified attorneys' fees.

Fully compensating lawyers who represent consumers is essential to an effective civil justice system. Maintaining public confidence in the system requires courts to carefully scrutinize the propriety of attorneys' fees requests with "the fundamental focus [being] the result actually achieved for class members."[1124] This independent judicial scrutiny is necessary regardless of the method by which the defendant pays the plaintiff attorneys: whether they are paid by the defendant separately, or the fees are simply taken out of a common settlement fund that also covers class members' compensation. Lawyers are required to submit extensive documentation in support of their fee requests. In practice, not all courts are equally vigilant when undertaking the responsibility to ensure that lawyers for consumers are appropriately compensated for their legal services.

Additionally, it is considered an ethical requirement in the context of class action settlements that attorneys for consumers not negotiate their fees with the defendants until *after* they have reached an agreement on all the relief – financial and injunctive – the settlement will provide.[1125] Otherwise the consumers' attorney has a conflict of interest: they are supposed to maximize the compensation they obtain for consumers at the same time they are trying to maximize what they are going to be paid. This ethical obligation can be difficult to monitor, however, since settlement discussions are kept confidential.

Ultimately, the court has a responsibility to the class members to ensure that the request for attorneys' fees is fully documented and confirmed by an objective assessment of the actual value of the settlement. Attorneys generally follow two main approaches (or a combination of them) when requesting approval of their fees: seeking a percentage of the common fund or their lodestar.

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What is the common fund approach?

In current class action settlements, the class members' attorneys are usually (but not always) paid as a percentage of the "common fund" created by the defendant to compensate the class. When that happens, the amount available to be paid to consumers is reduced accordingly. The percentage can vary, but it is usually capped at 33% of the fund.

What is lodestar?

The defendant may alternatively agree to pay a set amount of attorneys' fees to lawyers for the class, paid separately from and in addition to the relief provided to consumers; this is usually based on a "lodestar" calculation, not a percentage. The lodestar calculation is a straightforward formula: the number of hours "reasonably spent" by the attorneys on the case is multiplied by each attorney's "reasonably hourly rate."

(Both approaches present the ethical concern noted above: discussing attorneys' fees simultaneously with the negotiation of relief to class members creates a conflict. Any time there is one "pot" of money from which everyone will be paid, the tension between relief to consumers and compensation to their attorneys is present.)

Under existing law, courts have discretion to adjust the agreed-upon payment of attorneys' fees. For example, in California, if plaintiffs' counsel requests a percentage amount of a common fund settlement, the court may utilize a "lodestar cross-check," under which it assesses the reasonableness of the percentage requested based on the lodestar calculation.

The court may also approve an increase in – or may reduce – the lodestar of the plaintiffs' counsel in a class action, based on the quality of their legal representation, the novelty and complexity of the issues, the results obtained, and the contingent risk of the case.[1126]

In 2013, sandwich chain Subway faced multiple class actions for selling "footlong" sandwiches that were less than twelve inches.[1127] Subway settled the class actions and agreed to institute numerous measures for four years to ensure its sandwiches were, in fact, twelve inches, including measuring the sandwiches and frequent inspections of bread ovens – acknowledging, however, that in the future some sandwiches would end up being less than 12 inches "due to the natural variability in the baking process."[1128] Plaintiffs' counsel asked for $520,000 in attorneys' fees; an objector appealed, and the Seventh Circuit reversed the fee award.[1129] It concluded that the discovery in the case "revealed that the claims [in the lawsuit] were factually deficient": the information collected by the plaintiffs showed that "the vast majority of" sandwiches were 12 inches, and that those that fell short were due to "unpreventable vagaries" in the baking process.[1130] Furthermore, the amount of meat, cheese, and other ingredients was standard in every sandwich – so even if the bread was slightly less than 12 inches, the customer always got the same amount of fillings.[1131] Thus, the court found that a "class settlement that results in fees for class counsel but yields no meaningful relief for the class is 'no better than a racket' and 'should be dismissed out of hand.'"[1132]

In *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014), the Seventh Circuit Court of Appeals rejected a settlement that the parties claimed was worth $90 million (the case is discussed on page 162). The court found that $11 million in attorneys' fees to plaintiffs' counsel was not justified because – after the claims process – the most that class members would receive under the settlement was $8.5 million.[1133] A revised settlement was finally approved by a district court five years later.[1134] It set up a $25 million settlement fund and required class members to submit claims;[1135] how many class members made claims and how much was paid out to class members cannot be determined.

The Sixth Circuit reversed the approval of a class action settlement of claims that Pampers' Dry-Max technology caused severe diaper rash.[1136] The relief in the settlement included changes to the product's label and Pampers website (but not the the diaper), and a refund for one box of diapers; to get the refund, consumers were required to submit a claim with an original receipt and a UPC code from the Pampers box.[1137] Attorneys were to receive $2.73 million in fees.[1138] The court noted that the plaintiffs' counsel "did not take a single deposition, serve a single request for written discovery, or even file a response to [defendant's motion to dismiss]." The court determined that the settlement was improper because attorneys received $2.73 million in fees while the relief to the class was "of negligible value."[1139]

Corporate propaganda often criticizes settlements in which each consumer gets a small amount of money but their lawyers get millions in fees. But that's an "apples to oranges" comparison that obscures the value and purpose of class actions and the work of class action lawyers. Paying an attorney a significant fee to successfully redress a widespread but low dollar injustice is not only acceptable, it's an example of the importance of enabling consumers to unite to challenge corporate misconduct. For example, in a lawsuit against cell phone carrier Nextel challenging the $2.50 it charged to mail a customer a monthly bill (see pp. 23-24), no single consumer could have afforded to pay a team of lawyers for the 1,297 hours of legal work it took over a period of five years to force Nextel to refund the overcharges.[1140] Absent the class action system, Nextel would have gotten away with the unlawful nickel and diming of California customers. The settlement refunded $750,000 to Nextel customers – approximately 44% of the amount consumers were charged for getting their bill.[1141] The attorneys for the nonprofit that brought the case on behalf of Nextel customers cut their fees by almost three million dollars.[1142]

College student athletes reached a class action settlement in a case they brought against the NCAA (National Collegiate Athletic Association) over its policy capping grants for tuition.[1143] The NCAA changed the policy and settled, providing a fund of approximately $208 million to go to 53,000 students, with $41 million going to attorneys for their fees.[1144] One student objected to the settlement on the ground that fees – 20% of the settlement fund – were unwarranted. The district court had concluded that the fees were reasonable and were not a windfall for the attorneys because 20% is below the typical 25% benchmark, the attorneys took on a significant risk by bringing the case and achieved an exceptional result.[1145] The Ninth Circuit rejected the objector's arguments and affirmed the fees.[1146] As with the Nextel case, the students likely could not have afforded to bring such a case themselves.

9. Meritless objections.

Under the present class action system, the class representative and their lawyer represent the class, which may include thousands or even millions of consumers. However, these absent class members almost never appear in court; they have no role in the case – or even any knowledge of the case. And when the class representative and the defendant reach a settlement of a class action, they are no longer in an adversarial position with each other.

Courts have an obligation to supervise the case and protect the class from inappropriate settlements. But the opportunity for class members to point out defects, urge improvements, or ask a court to reject a settlement is a crucial adjunct to the class action process. It recognizes that a proposed settlement may be flawed and that class members who were not part of the negotiation over a settlement may have legitimate concerns about it. Objectors can play an important role in making sure that terms are fair to class members. And so attorneys who represent objectors are entitled to compensation if the objector can demonstrate that their objection benefitted the class.[1147] But it is rare that a court awards fees to objectors.[1148] In one case where objectors challenged and improved a settlement of a price fixing case against airlines, the court awarded objectors their fees, quoting George Bernard Shaw: "'all progress depends on the unreasonable man[.]'"[1149] The court reasoned that the objectors benefitted the class because their efforts increased the monetary relief to class members, revised the court's valuation of the settlement for the purpose of calculating the plaintiffs' counsel's attorneys' fees, clarified settlement provisions, and made claim forms less burdensome for class members.[1150]

Unfortunately, some attorneys, known as "professional objectors," abuse this process. They recruit class members on whose behalf they submit purported objections to a settlement, coupled with the threat of an appeal and other delays in the completion of the litigation. Their sole or primary goal is to extract a payment of attorneys' fees from the parties in exchange for dropping the objections. In some cases, attorneys representing the class feel compelled to pay off a professional objector because the alternative is an appeal that can take years to work its way through the court system, during which the settlement is held in abeyance, the corporation may continue the wrongful conduct, and class members' injuries grow.

Courts routinely admonish professional objectors. In a class action against grocery store Trader Joe's for mislabeling products as "all-natural" when the products contained synthetic ingredients, objectors challenged a settlement that provided consumers with full reimbursement for all mislabeled products and required Trader Joe's to stop using the "all-natural" labels.[1151] The objectors made various arguments challenging the settlement relief and the amount of attorneys' fees to be paid to the plaintiffs' lawyers.[1152] The court found the objections to be "unmeritorious," noting that one of the lawyers for the objectors has "widely and repeatedly [been] criticized [by courts] as a serial, professional, or otherwise vexatious objector" and a second lawyer for the objectors "has a long history of representing objectors in class action proceedings."[1153]

To discourage "professional objectors," Federal Rule of Civil Procedure 23 was amended in 2018 to require objectors to present more detail in their objections and to prohibit objectors from withdrawing their objections in exchange for payments unless the objectors disclosed that they were paid and the court approved the payment.[1154] The amendment does not explicitly require the objector and parties to disclose the *amount* of money that has been exchanged, but some courts ask for such information before approving the withdrawal. For example, in *Pearson v. Target Corp.*, 968 F.3d 827 (7th Cir. 2020), the Seventh Circuit addressed a situation in which objectors had received payments in exchange for not pursuing an appeal of a settlement (after their objections had been rejected by the district court). The Court characterized the practice as "objector blackmail" and required the objectors to return the payments they had received. Another court used the 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[.]"[1155]

Despite the professional objectors who give the class action system a bad name, objectors can provide valuable assistance and input to the court. For example, dating app Tinder reached a class action settlement with its users over allegations that it charged people over the age of thirty almost two times the amount for premium subscriptions that it charged people under the age of thirty.[1156] The settlement eliminated its age-based pricing and provided 50 "super likes" (a special feature on the app) to class members who were still active Tinder members (worth $50).[1157] In addition, class members could file claims for either $25 in cash, 25 "super likes" (if they were still active users) or a one-month free premium subscription to Tinder (if they were no longer active users).[1158] The parties claimed the settlement was worth $24 million.[1159] Objectors appealed the settlement, arguing, among other things, that the claim form was burdensome and that the settlement provided insufficient value in exchange for releasing anti-discrimination claims against the dating service.[1160] The Ninth Circuit agreed with the objectors, noting that the district court "materially underrated the strength of the plaintiff's claims" (suggesting the claim was inadequate) and "substantially overstated the settlement's worth."[1161] The case was remanded back to the district court.[1162]

Flaws in the class action system come at a very high price, and not just for the people who are denied their full measure of redress in any one case. The precipitous collapse of public confidence in the judicial branch is a transcendent threat to America. Access to justice and the opportunity for every American to have their day in court before an impartial decisionmaker are foundational principles of democracy and represent the determination of free people to live in a civil society governed by rules that are applicable to all. When the rules no longer work, the system eventually crashes.

THE REPRESENT ACT

20th century laws and legal procedures are no longer able to address the corporate abuses of the 21st century. The legal system needs to be rebooted. Presented with this report in draft form as model legislation, the Represent Act adjusts and re-sets the balance of power between citizens and corporations. It recognizes the profound changes that technology has made to the marketplace and our culture and provides consumers with effective protections. It prohibits misconduct that current laws address poorly, if at all. And it reforms legal procedures that have become hurdles to the pursuit of justice. The Represent Act is proposed as a law that may be adopted by any state.

The Represent Act calls for a paradigm shift in today's civil justice system. Its overarching purpose is reverse the steady erosion of civil justice rights and remedies that have been architected by corporate lawyers and lobbyists through legislation and judicial decisions.

Here are the main elements of the Represent Act:

- **Expanding consumers' ability to go to court.**

  The Represent Act permits individuals and nonprofit organizations to bring "representative actions" on behalf of the general public, without showing they were personally harmed by the underlying abuse. The Act also lays out criteria that representative plaintiffs must meet to ensure that they are acting in the best interest of the consumers they represent.

- **Prohibiting 20th and 21st century abuses.**

  The Represent Act prohibits corporate scams and abuses that have been around for decades, and others that reflect the ways that companies now use modern technology to take advantage of citizens.

- **Expanding legal remedies.**

The Represent Act makes available a broader range of remedies for injustice. People who are harmed by violations of this Act can be paid "statutory damages" (a flat amount of $1,000 per consumer per violation) and compensated for all forms of injury: lost time, personal data abuses, as well as lost money or property, physical harm, and emotional distress. These remedies pave the way for citizens to obtain real relief in such contemporary technological fiascos as privacy invasions, data breaches, and algorithmic harm cases. And the Act establishes effective safeguards to discourage corporations from engaging in misconduct in the first place.

- **Limiting corporate defenses.**

The Represent Act prevents corporations from invoking certain defenses to shield themselves from responsibility and liability. In particular, the Act greatly restricts the ability of corporations to get lawsuits thrown out on the ground that a government agency regulates their industry.

- **Requiring transparency.**

The Represent Act mandates that virtually all legal documents filed in court cases are made public and free to access online. It requires corporations to fully disclose their records in litigation, closing loopholes that encourage delay, undermine public health and safety, and abet companies trying to evade accountability.

- **Protecting the right to go to court.**

The Represent Act bars companies from inserting forced arbitration clauses in take-it-or-leave-it contracts. The Act also requires companies to disclose information regarding the arbitration proceedings they sponsor, lifting the veil on the data that reveals the notorious advantage that private judging gives corporations.

- **Eliminating procedural barriers to litigation on behalf of groups of injured consumers.**

The Represent Act proposes more streamlined procedures for representative actions and eliminates one of the most inefficient and onerous hurdles to class actions today: the class certification process. The Act defines new, more easily met standards for obtaining compensation on behalf of groups of injured people. Consumers will no longer be required to meet difficult evidentiary burdens in order to bring a lawsuit on behalf of a group of harmed citizens.

- **Encouraging diversity and participation in representative actions.**

The Represent Act provides a new procedure for appointing attorneys to lead litigation involving multiple actions. This will ensure fairness when deciding who is in charge of the litigation, broaden participation in the process, and encourage diversity among the lawyers who lead representative actions.

- **Improving settlements.**

The Represent Act prohibits specific terms in settlement agreements that make it more difficult for consumers to obtain the benefits of a settlement and undermine public confidence in the civil justice system, such as unnecessary claims requirements and providing consumers with coupons rather than cash. The Act also prohibits a defendant from retaining settlement money that belongs to injured consumers.

- **Modernizing notice and claims requirements.**

The Represent Act sets forth more detailed and efficient rules for the format and content of notices informing people of their rights in a representative action, and when necessary, of claims forms.

- **Providing interested parties with more opportunities to voice their concerns about settlements.**

The Represent Act destigmatizes and incentivizes objectors who legitimately seek to improve a settlement, giving these “concerned parties” greater latitude to voice disagreements or suggestions about a settlement. It encourages courts to invite nonprofits with expertise to review settlements.

- **Requiring disclosure of compliance with settlement agreements and court orders.**

The Represent Act requires defendants to publicly report their compliance with the terms of a settlement or court order resolving the case in the months and years after the conclusion of the proceeding, and provides penalties for noncompliance.

- **Ensuring attorneys are fairly compensated for the work they do on behalf of consumers.**

The Represent Act requires that attorneys who have secured benefits for persons who are injured by corporate misconduct are properly and fully compensated and incentivized to do the best job they can – just like corporate lawyers are. And it eliminates potential conflicts of interest when attorneys for consumers request compensation.

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[1106] *Id., p.* 475.

[1107] *Marek v. Lane*, 571 U.S. 1003, 1006 (2013).

[1108] *Frank v. Gaos,* 139. S. Ct. 1041 (2019).

[1109] David A. Savage, *Supreme Court to decide on reining in class-action deals that only pay lawyers and their favored institutions,* Los Angeles Times (Apr. 30, 2019), http://www.latimes.com/politics/la-na-pol-court-class-actions-20180430-story.html.

[1110] *Frank v. Gaos,* 139. S. Ct. 1041 (2019).

[1111] *Id.*

[1112] *Nachshin v. AOL, LLC,* 663 F.3d 1034 (2011).

[1113] *Id.,* p. 1036, 1040.

[1114] *Vasquez v. Avco Financial Services,* Case No. NCC 119 B (Los Angeles Super. Ct. Apr. 24, 1984).

[1115] *Id.*

[1116] *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014).

[1117] *Id.,* 785.

[1118] *Id.*, 785-7.

[1119] United States District Court for the Northern District of California, *supra* note 1083.

[1120] *Hendricks v. Starkist Co*, 2016 U.S. Dist. LEXIS 20628, *2 (N.D. Cal. Feb. 19, 2016).

[1121] *Id.*

[1122] *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277 (7th Cir. 2002).

[1123] *Id.,* 284.

[1124] Rothstein *et al.*, *supra* note 1049, p. 33.

[1125] *See Ethical Guidelines for Settlement Negotiations,* American Bar Association Section of Litigation (Aug. 2002), pp. 41-44, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/settlementnegotiations.pdf.

[1126] *Laffitte v. Robert Half International, Inc.,* 1 Cal. 5th 480 (2016).

[1127] *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551, 553-554 (7th Cir. 2017).

[1128] *Id.,* 553.

[1129] *Id.,* 555.

[1130] *Id.,* 554.

[1131] *Id.*

[1132] *Id.*, 556 (citation omitted).

[1133] *Eubank v. Pella Corp.*, 753 F.3d 718, 723-29 (7th Cir. 2014).

[1134] *Eubank, et al. v. Pella Corp., et al.*, http://pellawindowsettlement.com (last visited Aug. 25, 2021).

[1135] *Id.*

[1136] *In re Dry Max Pampers Litigation*, 724 F.3d 713 (6th Cir. 2013).

[1137] *Id.,* 716.

[1138] *Id.,* 715.

[1139] *Id.,* 718.

[1140] Long Form Notice of Proposed Class Action Settlement, *Campbell v. Nextel Communications Inc.,* Case No. BC304559.

[1141] Memorandum of Points and Authorities in Support of Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement and for an Award of Attorneys' Fees and Expenses, *Campbell v. Nextel Communications Inc.,* Case No. BC304559 (Cal. Super. Ct. Los Angeles Cnty. Dec. 10, 2009).

[1142] *Id.*

[1143] *Alston v. NCAA (In re NCAA Ath. Grant-in-Aid Cap Antitrust Litig.)*, 768 Fed. Appx. 651 (9th Cir. 2019).

[1144] *Id.,* 653.

[1145] *Id.*

[1146] *Id.*

[1147] *See* National Consumer Law Center, *supra* note 1076, § 15.5.12; Fed. R. Civ. P. Rule 23(h), Notes of Advisory Committee on Rules–2003 Amendment: Rule 23(h) "provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel."

[1148] Robert Klonoff, *Class Action Objectors: The Good, the Bad, and the Ugly,* 89 Fordham L. Rev. 475, 480 (2020).

[1149] *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 358 (N.D. Ga. 1993).

[1150] *Id.,* 359.

[1151] *Larsen v. Trader Joe's Co.*, 2014 U.S. Dist. LEXIS 95538 (N.D. Cal. Jul. 11, 2014).

[1152] *Id.,* *18-25.

[1153] *Id.,* *21, ns. 3, 4.

[1154] Fed. R. Civ. P. Rule 23(e)(5).

[1155] *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).

[1156] *Kim v. Allison*, 2021 U.S. App. LEXIS 24495, *4-5 (9th Cir. 2021).

[1157] *Id.,* *9.

[1158] *Id.*

[1159] *Id.,* *13.

[1160] *Id.,* *10-11.

[1161] *Id.*, *6.

[1162] *Id.*

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