Brooklyn Journal of Corporate, Financial & Commercial Law

Volume 15
Issue 1 *SYMPOSIUM Consumer Structure, Market Structure, and Political Power*

Article 6

12-30-2020

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Recommended Citation

Anne Fleming, *A HISTORY OF CONSUMER CLASS ACTIONS IN STATE COURTS*, 15 Brook. J. Corp. Fin. & Com. L. 131 (2021).
Available at: https://brooklynworks.brooklaw.edu/bjcfcl/vol15/iss1/6

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A HISTORY OF CONSUMER CLASS ACTIONS IN STATE COURT

*Anne Fleming**

ABSTRACT

Most historians date the "modern" class action to the 1966 amendments to the Federal Rules of Civil Procedure. Yet, the class action or "representative suit" has a longer, unexplored history in the state courts. In the late 1930s and 1940s, a group of scrappy, first-generation lawyers tried to build their businesses by aggregating the small-sum claims of many consumers. The defendants in these cases were, for example, lenders who failed to comply with the technicalities of state disclosure mandates, and utility companies that charged consumers extra fees. Each consumer's claim was small, but, as a group, the claims could yield a recovery large enough to make the case worthwhile for an entrepreneurial plaintiffs' lawyer.

State courts were not ready to embrace the consumer class action, however, for a few reasons. First, representative consumer suits threatened the professional identity of the organized bar. Class counsel came from the same ranks as personal injury attorneys, derisively labeled "ambulance chasers" by legal elites, and they similarly viewed litigation as a means to earn their fees. Both the bench and the elite bar disapproved of this approach. Second, representative consumer suits threatened the business community. Judges were sensitive to the objections of businessmen, who had been involved in writing some of the laws that class plaintiffs now sought to turn against them. Finally, past judicial decisions concerning representative suits did not favor allowing consumers to aggregate their claims, in the absence of some "common interest" among the plaintiffs or proof that the defendant had insufficient funds to pay all class members in full. In response to these concerns, state courts delayed the development of procedural devices that would have provided meaningful remedies for violations of substantive consumer rights. Without these remedies, substantive rights proved of more limited value.

This history underscores the importance of effective enforcement mechanisms in consumer law, which typically pits numerous individuals with small-dollar claims against more sophisticated and well-resourced corporate defendants. It also shifts the narrative arc of consumer law's history. Rather than a story of decline, in which the remedial promise of Federal Rule 23 was thwarted by contractual developments and judicial maneuvering in the 1990s and beyond, it becomes a story of reversion, in which judicial, legislative, and business hostility to class actions near century's end caused the pendulum to swing back towards norms that had prevailed in state courts at the very beginning of the consumer class action era.

INTRODUCTION

By most accounts, the 1960s witnessed two momentous legal events: the birth of consumer law and the creation of the modern class action.[1] It makes sense that these developments would have occurred in the same era. Consumer law endows individuals with substantive rights that, when violated, often result in small-dollar damage awards. Absent procedural mechanisms that allow consumers to aggregate their small-dollar claims and bring a single suit for damages, these rights will rarely be enforced through private litigation. To bring an individual suit for a small-dollar claim, a litigant would need to have free or low-cost legal assistance.

According to this narrative, in the 1960s and 1970s, federal statutes and regulations created and expanded consumer rights, which could then be vindicated through class action suits brought under Rule 23 of the Federal Rules of Civil Procedure or state-law equivalents.[2] In the late 1990s, however, companies began inserting mandatory arbitration provisions with class action waivers into their form contracts, which prevented consumers from aggregating their claims in court.[3] Although consumers challenged these provisions, the U.S. Supreme Court interpreted the Federal Arbitration Act to bar most challenges and overturned consumer-friendly state court decisions that would have allowed class litigation to proceed.[4] The Court's most recent decisions have offered some victories to classes in securities and employment cases, but consumer classes have largely suffered defeats.[5] Thus, despite the flowering of federal consumer rights that began four decades ago, industry legal maneuvers coupled with favorable judicial decisions have rendered those rights unenforceable through private lawsuits.

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* Professor of Law, Georgetown University Law Center; Ph.D. (History), University of Pennsylvania, J.D., Harvard Law School. [Eds. It is with great sadness that we note the untimely passing of Anne Fleming on August 25, 2020. This article is being published with the permission of her family. It is just a small glimpse of her talent and the insight that she had to share with the world. Even as we still learn from her, we are reminded of how much we will miss.]

1.Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147 (2010) (beginning in 1969 with the Federal Truth in Lending Act); David Marcus, *History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980,* 90 WASH. U. L. REV. 587, 588 (2012) (beginning with the drafting of FRCP 23 and dating the modern era of class actions to 1966 when revised Rule 23 took effect).

2. Stephen C. Yeazell, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

3. Myriam Gilles, *Opting out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 396–98 (2005).

4. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 357 (2011) (holding that the Federal Arbitration Act preempted California's rule that class action waivers in consumer form contracts were unconscionable under some circumstances).

5. J. Maria Glover, *The Supreme Court's Non-Transsubstantive Class Action*, 165 U. PA. L. REV. 1625–1668, 1650–1653 (2016) (describing the Court's procedural decisions in class action cases and arguing that the variation in outcomes tracks the underlying substantive law at issue, distinguishing consumer-type cases from others). *But see generally Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.,* 559 U.S. 393 (2010).

This history is accurate, but incomplete because its starting point is decades too late. Although federal rights and federal remedies have mattered to consumers, the states adopted the earliest consumer laws and witnessed the earliest attempts to aggregate consumer claims. Historians and legal scholars have largely ignored state-level developments, perhaps because they are stories of failure – of attorneys thwarted in their efforts to aggregate claims and litigants left with consumer rights backed by ineffective remedies. Yet, in many ways, the history of consumer class actions in state courts foreshadows more recent trends. Like the conventional narrative about federal rights and remedies, it affirms that substantive consumer law and procedural rules have developed in tandem. The creation of substantive consumer rights did induce efforts by attorneys to aggregate low-value claims in order to provide a means for their redress – just earlier than the conventional narrative suggests. Moreover, it reveals that earlier generations of state judges shared the modern U.S. Supreme Court's hostility to consumer class actions. But, unlike the modern Court, these judges voiced those concerns directly, rather than allowing them to rest under the surface.[6]

More broadly, the incorporation of state-level developments into the story shifts the narrative arc of consumer law's history. The traditional narrative, told from a federal vantage point, is a story of lost promise, in which contractual developments and procedural decisions in the 1990s and 2000s thwarted the full vindication of substantive federal consumer rights through private litigation. But when the states are incorporated, the story instead becomes one of gradual reversion to the pre-1960s status quo, in which growing judicial, legislative, and business hostility to class actions near century's end caused the pendulum to swing back towards norms that had prevailed in state courts decades before – at the very beginning of the consumer class action era in state courts.

This article proceeds in four parts. Part I surveys doctrinal developments in class action law and explains why state courts provided the only viable venue for aggregation of consumer claims in the early 20th century. Part II describes how several enterprising lawyers attempted to pursue representative consumer actions in state courts in the 1930s and 40s, largely without success. Courts rejected suits for money damages against lenders and utility providers, among others, in light of concerns about fee-hungry plaintiffs' lawyers polluting the legal profession and in deference to 19th century doctrinal understandings. Part III chronicles how state hostility to consumer class actions slowly began to thaw in the 1960s and 1970s,

6. J. Maria Glover, *The Supreme Court's Non-Transsubstantive Class Action*, 165 U. PA. L. REV. 1653 (2016) (arguing that "it is the Court's composite judgment regarding the interaction of class action procedures with low-value claims, unsophisticated parties, and lawyer-driven suits, and not the interaction of class procedures with the 'nature' of arbitration under the FAA, that produces the deleterious effects of the class action the Court seems so determined to eliminate").

beginning with Illinois and California. Part IV then examines the fate of class actions in the states in the 1980s and beyond, after most jurisdictions updated their rules to track the newly-amended Rule 23 on class actions. As Part IV describes, state courts served as the main venue for consumer class actions until two recent developments diminished their jurisdiction: the 2005 federal Class Action Fairness Act and a string of U.S. Supreme Court decisions allowing defendants to force consumer claims into arbitration. The Conclusion reflects on how the landscape of consumer class action litigation has changed over the past century.

I. DOCTRINAL DEVELOPMENTS

The roots of modern state court class actions reach back to the mid-19th century Field Code of Civil Procedure.[7] Drafted and first adopted in New York in 1848 and amended in 1849, the Field Code provided that "when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."[8] Along with the rest of the Field Code, this provision spread to other states and became, in the words of one scholar, "the American standard provision for class actions."[9] The rule then remained on the books, in modified form, in at least fifteen states into the 1970s.[10]

To the extent that consumers sought to pursue class litigation prior to the revision of the Federal Rules in 1966, they had to look to state courts and state procedure. Although Rule 38 of the 1912 Federal Rules of Equity tracked the Field Code language authorizing representative actions, it was soon supplanted by the Federal Rules of Civil Procedure, which merged law and equity at the federal level in 1938. The new Federal Rule 23 also provided for class actions, but divided these into three categories: the "true" class where members held joint or common rights (such as shareholder derivative suits), the "hybrid" class where members held individual rights that needed to be aggregated to ensure equitable distribution of payments out of a limited recovery fund or piece of property (such as a suit by creditors against an insolvent defendant), and the "spurious" class where class members each asserted an individual claim for injury that arose out of some common set of facts.[11] Spurious class actions were different in kind because class members had to opt-in to the action in order to be bound by the judgement, unlike for

7. The Field Code, in turn, merged procedures at law with those in equity, which allowed for group litigation. On the medieval roots of group litigation, *see* Yeazell, *supra* note 2.

8. James E. Starrs, *The Consumer Class Action - Part II: Considerations of Procedure*, 49 B.U. L. REV. 407, 435 (1969).

9. Adolf Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 613 (1971).

10. *Id.* at 613.

11. Marcus, *supra* note 1 at 600–601.

true or hybrid actions.[12] In this way, the spurious class action functioned as a "permissive joinder device" rather than like a modern class action with *res judicata* effect on absent class members.[13]

Consumer suits, which fell into the third category of "spurious" actions, were difficult to pursue in federal court both because of the opt-in requirement and because of subject matter limitations on federal court jurisdiction. Before the late 1960s, consumers lacked federal substantive rights and so could not bring suits that implicated questions or issues of federal law. Furthermore, consumers could not meet the jurisdictional limit for diversity cases, meaning those arising between residents of different states, because plaintiffs in "spurious" class suits could not aggregate their claims to meet the minimum "amount in controversy" requirement.[14]

The earliest consumer lawsuits asserted state-law claims in state courts. Beginning in the 1910s, states adopted statutes and regulations that granted legal protections to consumers against overreaching by those with superior bargaining power, such as lenders, retailers, and utility providers. These legal developments both reflected and enabled broader social and economic transformations. By this time, more people lived in urban, rather than rural, areas and relied on wages to support themselves.[15] Beginning in the late 19th century, electrical utilities began offering service to urban homes, gradually supplanting gas light and candles as the primary sources of residential lighting.[16] In addition to fuel and light, urban families purchased their food and clothing, and rented their housing. With increasing frequency, they bought mass-produced, factory-made goods rather than items made by local artisans or at home.[17] And when household expenses exceeded incomes, credit sometimes filled the gap.[18] All of these developments meant that ordinary people regularly contracted with businesses to procure their day-to-

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12. *Id.* at 601.

13. Multiparty Litigation in the Federal Courts Developments in the Law, 71 HARV. L. REV. 874, 930 (1957) (quoting 3 Moore, Federal Practice 23.11 at 3465).

14. Starrs, *supra* note 8 at 411 (noting that "it was all but gospel under Rule 23, prior to the 1966 amendments, that aggregation would be permitted to establish the jurisdictional amount in diversity cases only where the claims were joint [the true class action]"); *see also* Snyder v. Harris, 394 U.S. 332 (1969) (refusing to allow aggregation of claims to satisfy amount-in-controversy requirement for consumer class suit under new FRCP 23); Zahn v. International Paper Co., 414 U.S. 291 (1973) (holding that all plaintiffs must satisfy amount-in-controversy requirement, not just named plaintiffs). This jurisdictional barrier was later eroded by the Class Action Fairness Act of 2005 (CAFA) and the U.S. Supreme Court's decision in Exxon Mobil Corp. v. Allapattah Services, Inc. 545 U.S. 546, 125 S. Ct. 2611 (2005), interpreting the federal supplemental jurisdiction statute to provide jurisdiction over all class claims where at least one named plaintiff met the amount-in-controversy requirement. See *infra*, Part IV.

15. SUSAN STRASSER, SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET (Reprint edition ed. 2004).

16. *Id.*

17. On this shift, see *id.*

18. ANNE FLEMING, CITY OF DEBTORS: A CENTURY OF FRINGE FINANCE (2018).

day necessities, which multiplied the opportunities for small consumer injuries to arise.

II. REPRESENTATIVE SUITS IN THE 1930S AND 1940S

Although mass consumption provided one necessary prerequisite for mass consumer litigation, other ingredients were also required. Consumers also needed lawyers willing to bring their claims to court. Local legal aid societies offered free legal assistance in some cities, but only to poor litigants that the lawyers deemed deserving of help. They shied away from cases involving small loans and debt forgiveness.[19] In the absence of free assistance, consumers had to seek out private counsel that accepted fee-generating cases and did not reject clients based on whether they were deemed morally deserving of assistance.

These attorneys had already drawn the ire of the elite bar by seeking to make a profit through personal injury cases filed against corporate defendants.[20] These attorneys, nicknamed "ambulance chasers," flooded the New York City courts with personal injury suits in the 1920s, which prompted an investigation of their professional practices.[21] The attorneys often worked as solo practitioners, came from immigrant households, and were Jewish or Catholic.[22] The elite bar criticized the upstart lawyers for accepting cases on a contingency-fee basis, for actively soliciting clients, and for purportedly lowering the public perception of the profession.[23]

In the late 1930s and 1940s, a handful of these upstart, non-elite lawyers branched out into consumer cases. Attorney Israel Beckhardt, the grandson of German immigrants, numbered among them. Beckhardt was born in New York in 1907, earned a B.S. from City College, and graduated from New York Law School in 1931.[24] He began his career representing workers' compensation claimants before he instituted a suit on behalf of a class of utility customers in 1938.[25] Beckhardt represented Brooklyn resident Marcel

19. *Id.* at 89.

20. Kenneth De Ville, *New York City attorneys and ambulance chasing in the 1920s*, 59 HISTORIAN 290 (1997).

21. *Id.* at 292. (describing the "flood of lawsuits that overwhelmed the local courts" with jury cases in the main trial court for Manhattan rising from 9,309 in 1915 to 29,466 in 1927 due to an increase in personal injury suits).

22. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 50 (1976).

23. De Ville, *supra* note 20 at 293.

24. Martindale-Hubbell directory list, 1934; 1910 Census for Beckhardt family (Bronx, NY)

25. Knorr v. Gen. Baking Co., 278 N.Y.S. 3, 4 (App. Div. 1935) (Beckhardt representing widow of deceased bread salesman); Record on Appeal, Sciborski v. Childs Co., 288 N.Y.S. 1083 (App. Div. 1936) (Beckhardt representing waitress disabled by fall at work). Beckhardt also represented one of over 15,000 shareholders in the Bank of United States and a defendant shoe company sued for negligence related to a water overflow. Broderick v. Aaron, 272 N.Y.S. 219 (Sup. Ct.

Kovarsky, who sought an injunction and refund of fees against the Brooklyn Union Gas company for collecting a $1 service charge billed to him to reconnect his residential gas after a voluntary disconnection of service over the summer.[26] Kovarsky sued in a representative capacity, on behalf of himself and all others similarly situated, alleging that the service charge was impermissible under New York's 1928 Public Service Law that prohibited gas providers from assessing service charges.[27] On behalf of the class, Kovarsky also sought an accounting to those who already paid the charge and a declaratory judgment and an injunction for the benefit of those who could be subject to the charge in the future.[28]

The New York Court of Appeals ruled that Kovarsky could seek an injunction and a declaratory judgment, but not an accounting – essentially, a request for the gas company to return the $1 charge to each class member who had paid it.[29] According to the decision, to maintain a representative action for monetary relief, the plaintiff would need to allege either "that a multiplicity of suits is threatened" or that the defendant had limited funds to pay a judgment.[30] Kovarsky alleged neither. On remand to the trial court, Kovarsky obtained a declaratory judgment and an injunction preventing the gas company from billing or collecting reconnection service charges, but no money.[31] The trial court also ruled that Beckhardt could not collect attorneys' fees from the class because the class did not receive any funds from the gas company.[32] Beckhardt had requested a fee of twenty percent of the illegal service charges collected, which he estimated at $250,000 to $500,000 in total.[33]

The attorneys' fees ruling erected a nearly insuperable barrier to the pursuit of future class claims. Attorneys could not afford to represent consumers if plaintiffs could recover neither monetary damages nor attorneys' fees. Beckhardt appealed the fee denial but met with no greater sympathy at the appeals court. The lawyer for the gas company accused Beckhardt of bringing the case merely to "earn a fee" and lamented that such litigation lowered the reputation of the profession. According to the gas company's lawyer, law should be practiced as "a profession" and should not

1934), aff'd, 277 N.Y.S. 499 (App. Div. 1935), aff'd, 268 N.Y. 411 (1935) (shareholder); Ribbon Narrow Fabric Co. v. Wellington Shoe Co., 272 N.Y.S. 516 (Mun. Ct. 1934) (negligence).

26. Kovarsky v. Brook. Union Gas Co., 3 N.Y.S.2d 581 (App. Div.), aff'd, 279 N.Y. 304 (1938) (appeal from dismissal by trial court).

27. N.Y. PUB. SERV. LAW § 65(6) (added by N.Y. L. 1923, c. 898).

28. Kovarsky v. Brook. Union Gas Co., 279 N.Y. 304, 314 (1938).

29. *Id.* ; 1A Corpus Juris Secundum Accounting § 6.

30. *Kovarsky*, 279 N.Y. at 314 (1938).

31. Kovarsky v. Brook. Union Gas Co., 11 N.Y.S.2d 286, 287 (Sup. Ct. 1939), aff'd, 25 N.Y.S.2d 784 (App. Div. 1941).

32. *New Suit Asks Refund of Gas Company Fees*, BROOK. CITIZEN, Dec. 11 1940, at 1.

33. *Id.*

be allowed to "degenerate into a law business."[34] He warned the court that it must deny fees to Beckhardt to "keep [law] a profession." In response, Beckhardt argued that "whoever benefits a class is entitled to a fee" for serving in "the role of public benefactor," and noted that he represented litigants "to collect fees, the same as the counsel for the gas company."[35] But the appeals court did not budge. After Beckhardt lost the appeal, he shifted his practice towards shareholder derivative suits.[36]

Despite Beckhardt's failure, other upstart attorneys tried their luck at aggregating consumer claims into representative suits in the 1940s. They brought these actions on behalf of classes of consumers who had borrowed cash from personal finance companies. Like public utilities, finance companies in most states operated under strict regulations that capped their maximum charges. State legislatures adopted these regulations to meet the challenge of a mass consumption economy, in which households regularly transacted with large corporations that possessed superior bargaining power and could dictate the contract terms. Claims arising under state regulatory statutes were particularly amenable to class treatment because they were usually based on deficiencies in standardized written terms or uniform rate schedules. As such, each plaintiff's claim relied on a shared factual foundation and did not require individualized proof of wrongdoing. In this way, these statutory claims differed from those based on common law prohibitions against fraud, which might take many forms and depend on proof of the specific interactions between the fraudster and each individual consumer to establish deception and reliance.[37]

In New York, two attorneys – Noah Rotwein and Irwin Slater – each attempted to bring a representative suit on behalf of personal finance company customers in 1943.[38] Both men came from immigrant households and did not rank among the elite of the profession.[39] Slater, born Irving Slutzkin, anglicized his name after entering the practice of law in 1938, perhaps to distance himself from his Russian-Jewish immigrant background. Rotwein, admitted to the bar in 1935, was likewise descended from Russian-Jewish immigrants, but retained his family name.[40] Both seem to have worked on a contingency fee basis, like their brethren who represented personal injury plaintiffs.[41]

34. Fred Andersen, *New Suit Seeks Refund of Gas Fees of 300,000*, BROOK. DAILY EAGLE, Dec. 11 1940, at 3.

35. *Id.*

36. *See e.g.*, Baker v. Macfadden Publ'ns, 59 N.Y.S.2d 841 (App. Div. 1946), *rev'd*, 300 N.Y. 325, (1950); Wagner v. Armsby, 35 N.Y.S.2d 488 (App. Div. 1942).

37. EDWARD J. BALLEISEN, FRAUD: AN AMERICAN HISTORY FROM BARNUM TO MADOFF 11–12, 49 (2017).

38. FLEMING, *supra* note 18, at 90–91.

39. Neither appears in the Martindale-Hubbell national directory of lawyers.

40. FLEMING, *supra* note 18, at 91.

41. *Id.* at 92–93.

Slater represented consumers Richard and Ella Challenger and "all others similarly situated" in a suit to void their loans from Household Finance Corp. The Challengers sought to prevent the lender from collecting on the $255 loan that they took out in 1942, of which they had repaid $7.44. The lawsuit alleged that the lender's standardized form contract violated New York's lending laws, specifically because some of the boilerplate language stated that the "holder" of the debt could accelerate the loan in the event of default, while some of the other fine print specified that "Household Finance" could do so. This alleged "inconsistency" invalidated the loans under New York's lending laws, Slater argued, meaning that the borrowers would not have to repay any amounts outstanding and would receive a refund of any payments already made.[42] Slater estimated that Household's daily collections in New York State, which the lawsuit would halt, amounted to over $75,000 per day and that the plaintiff class had already overpaid $50 million in principal and interest on voidable loans over the past three years.[43] He also noted that the borrowers' only hope for relief was to aggregate their claims into a representative suit; the class was "too numerous" for each individual borrower to appear before the court.[44]

Noah Rotwein likewise sued a personal finance company, Madison Personal Loan, on behalf of borrower Irving Berk and other similarly situated borrowers.[45] Berk borrowed $144 secured by a mortgage on his car and agreed to pay a $12.50 charge for insurance on the vehicle.[46] On behalf of Berk and the class members, Rotwein argued that the insurance charge was unlawful and that "similar amounts were extorted from some 10,000 other borrowers."[47] He sought recovery of all the insurance fees paid to the lender, which totaled more than $25,000.[48]

Just as the courts denied Israel Beckhardt's class claim for monetary relief against a utility company, the courts dismissed the representative suits by both Berk and the Challengers, without much legal reasoning.[49] The *Challenger* court concluded that the plaintiffs "have no right to sue on behalf of others," without further explanation.[50] It then admonished Irwin Slater for manufacturing the litigation, suggesting that he might have violated the

42. *Id.* at 94. ; Record on Appeal at 8, Challenger v. Household Finance Co., 43 N.Y.S.2d 517 (App. Div. 1st Dep't 1943), New York State Appellate Division Records, New York State Library, Albany, New York.

43. Record on Appeal at 15, 26, Challenger v. Household Finance Co., 43 N.Y.S.2d 517 (App. Div. 1st Dep't 1943), New York State Appellate Division Records, New York State Library, Albany, New York

44. FLEMING, *supra* note 18, at 94.

45. *Id.* at 95.

46. *Id.*

47. *Id.*

48. *Id*.

49. *Id*.

50. *Id*.

ethical canons against attorneys soliciting clients. The judge warned Slater that "most of the borrowers are honest enough to pay their debts and you are not to go out and solicit these cases."[51] The *Berk* court provided even less guidance to the litigants. The court dismissed the case for a pleading error without reaching the question of whether Berk could sue on behalf of others for monetary relief.[52] But the *Berk* decision suggested that a representative suit required class members to share a common bond or interest, akin to the relationship among creditors all seeking payment from the debtor's limited funds. In support, the court cited a case brought by the customers of an international money transmitter who failed to transmit their money, stole the customers' funds, and absconded.[53] The class members could proceed because they had to seek pro rata payment of their claims from the surety bond that the transmitter had posted.[54]

Other New York cases reached similar results. The New York Court of Appeals, the state's highest court, rejected an attempt by a group of bond certificate holders to bring a representative action on behalf of themselves and other similarly-situated investors to rescind their purchases based on fraud. The court reasoned that the complaint failed to state a claim for rescission on behalf of "similarly situated" bond purchasers because each plaintiff entered into a separate transaction with the seller based on distinct representations about the transaction.[55] The New York Court of Appeals likewise found that a class of bank depositors could not bring a representative action on behalf of themselves and thousands of others against a foreign bank for failure to repay funds deposited. The court held that "[s]eparate wrongs to separate persons, though committed by similar means and even pursuant to a single plan, do not alone create a common or general interest in those who are wronged."[56]

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51. *Id.*

52. *Id.* at 95–96.

53. *See* Guffanti v. Nat'l Sur. Co., 196 N.Y. 452 (1909).

54. *Id.* at 456.

55. Brenner v. Title Guar. & Trust Co., 276 N.Y. 230, 238 (1937) ("Upon such sales the representations, if any, made by the seller and relied on by the buyer may have been different in each case.").

56. Soc'y Milion Athena v. Nat'l Bank of Greece, 281 N.Y. 282, 292 (1939); *see also* Bouton v. Van Buren, 229 N.Y. 17, 22 (1920) ("A representative action cannot be maintained unless it appears from proper allegations in the complaint that the plaintiff not only has a cause of action, but that he is representative of a common or general interest of others."). New York courts similarly barred "representative actions" under the Fair Labor Standards Act (FLSA) based on New York procedural rules and instead required each employee-plaintiff to be joined separately in any action. Simmons v. Rudolph Knitting Mills, 35 N.Y.S.2d 494, 496 (App. Div. 1942). Congress later amended the FLSA to prohibit representative suits entirely and to require employees to opt-in to any collective action through written consent. Portal-to-Portal Act of 1947, Pub. L. No. 49, 8oth Cong. 1st Sess., § 5(a); *But see* Hunt v. Nat'l Linen Serv. Corp., 157 S.W.2d 608, 609 (Tenn. 1941); Potts v. Stedman Co., No. 17774, 1942 WL 6495, at *2 (Ohio Com. Pl. Feb. 21, 1942) (allowing representative suit under FLSA).

State courts outside of New York interpreted their class action rules in a similar fashion.[57] In Illinois, an appeals court rejected a representative action by customers of the local telephone utility, alleging that the company failed to provide them with printed directories in compliance with the commerce commission's rules and that they suffered "millions of hours of time, inconvenience, and aggravation."[58] The court held that each customer's claim was "legally separate and distinct since each subscriber's claim presents a different question with respect to the right of recovery and the amount of the alleged damages."[59] In Kentucky, the state's highest court likewise dismissed a representative suit filed on behalf of 199 African-American land purchasers who each were induced to buy property based on alleged fraudulent statements by the seller.[60] Although the purchasers did not seek damages but only to rescind the land sales contracts and recover the price paid, the court nonetheless denied relief.[61]

Thus, the courts hewed to a 19th century understanding of the representative suit, despite dramatic changes in the social, economic, and legal context surrounding them. Two Illinois attorneys, Harry Kalven, Jr. and Maurice Rosenfield, described these changes in the pages of the *University of Chicago Law Review* in 1941. They observed: "Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive."[62] Examples included employees who were denied their overtime pay, stockholders who invested based on misrepresentations, and utility customers who were overcharged.[63] They lamented that, in the absence of a way to aggregate individuals claims, "there will at best be a random and fragmentary [law] enforcement, if there is any at all."[64]

57. Joseph J. Jr. Simeone, *Class Suits under the Codes*, 7 W. RES. L. REV. 5–44, 29 (1955) (noting that "state courts in construing the [Field] code provision consistently deny the propriety of the class suit device where one or more seek to represent a group of persons who have separate and distinct claims, and each one is entitled to distinct relief").

58. Burke v. Illinois Bell Tel. Co., 348 Ill. App. 529, 531 (Ill. App. Ct. 1952).

59. *Id*. at 536-37 ; *see also* Union Light, Heat & Power Co. v. Mulligan, 177 Ky. 662 (1917) (dismissing representative suit brought by customers against gas company for overcharges); Batman v. Louisville Gas & Elec. Co., 187 Ky. 659 (1920) (same); Davies v. Columbia Gas & Elec. Corp., 151 Ohio St. 417, 423 (1949)(same).

60. Acton v. Johnson, 240 S.W.2d 541, 542 (Ky. 1951)

61. Acton v. Johnson, 240 S.W.2d 541, 544 (Ky. 1951); *see also* Spear v. H.V. Greene Co., 246 Mass. 259, 270 (1923) (affirming dismissal of class suit by purchasers of stock who alleged the sales were procured by the seller's fraud and sought to rescind the sales);
Thomas v. Ky. Tr. & Sec. Co., 156 Ky. 260, 160 S.W. 1037, 1038 (1913) (dismissing representative suit by borrowers to recovery usurious loan charges from lender).

62. Harry Kalven & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

63. *Id.* at 684.

64. *Id.* at 686.

III. A GENERATION LATER

American consumerism grew significantly in the decades after World War II, serving to magnify the number of unredressed group injuries that Kalven and Rosenfield had described in their 1941 article. In the post-war period, after the austerity of the Depression and war years, Americans eagerly purchased new furniture, radios, vacuum cleaners, televisions, refrigerators, and freezers – often on credit.[65] But new products also created opportunities for new forms of fraud and sharp dealing. Appliance purchasers complained that fast-talking sellers peddling new household technologies preyed on unsophisticated buyers, that sellers engaged in bait-and-switch advertising, that repair shops and detailers performed shoddy work, and that merchants overpriced their wares and sold defective goods.[66]

Substantive consumer law grew over the 1950s and 1960s,[67] but private enforcement mechanisms did not in most jurisdictions. More states regulated retailers who sold goods on credit,[68] as well as food and drug makers[69] and chemical manufacturers who sold households goods such as cleaning products.[70] Most states also adopted the Uniform Commercial Code, which included provisions governing the sale of goods and granted courts the power to refuse enforcement of "unconscionable" contracts.[71] And a handful of states enacted statutes banning unfair and deceptive trade practices and allowing aggrieved consumers to bring private lawsuits.[72] These new state laws supplemented existing consumer credit statutes, utility regulations, and common-law tort and contract rules. The federal government also slowly began to enact consumer legislation, starting in the late 1950s with rules requiring uniform price disclosures for new cars.[73]

Unfortunately for consumers, these rights provided little protection in the absence of mechanisms for private enforcement. In New York, for example,

65. FLEMING, *supra* note 18, at 141–42.

66. *Id.* at 159.

67. *See supra* note 53 and 55.

68. Wallace P. Mors, *State Regulation of Retail Installment Financing-Progress and Problems I*, 23 J. BUS. U. CHI. 199 (1950).

69. Benjamin F. Stapleton, *Administration and Enforcement of State Food and Drug Laws*, 10 FOOD DRUG COSM. L.J. 794, 795 (1955).

70. Marian Moser Jones & Isidore Daniel Benrubi, *Poison Politics: A Contentious History of Consumer Protection Against Dangerous Household Chemicals in the United States*, 103 AM. J. PUBLIC HEALTH 801, 808 (2013).

71. [insert dates for UCC state adoption] On how the UCC provision led to the reinvigoration of common law unconscionability, see Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor"*, 102 GEO. L. J. 1383 (2014).

72. On state laws, William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 743–44, 749-750 (1971). The Federal Trade Commission (FTC) also had the power to police UDAPs. But the federal law, enacted in 1938, did not provide a private right of action. The state laws were often modeled on the FTC Act, but many provided a private right of action.

73. Automobile Information Disclosure Act, 72 Stat. 325 (1958).

the state adopted landmark retail installment sales legislation in 1957, which mandated that certain disclosures be provided to consumers and also imposed price caps on finance charges.[74] But the law lacked mechanisms for private enforcement.[75] Any individual claim would yield a small damage award, meaning that individual consumers would not find it worthwhile to sue. Noting this defect, one of the law's key supporters proposed additional legislation that would offer treble damages, lower barriers to suing in small claims court, and allow consumer class actions to proceed. None of these proposals came to fruition, however.[76]

Some states did relax their rigid approach to consumer class actions in the 1960s. Both California and Illinois allowed class suits by consumers, in contrast to states such as New York that continued to follow their line of prior procedural decisions.[77] The seminal case in California was *Daar v. Yellow Cab Co.,* in which a consumer brought a class suit against a taxicab company to recover overcharges made in violation of the cab rates set by the local public utilities commission.[78] Although the state's class action statute followed the Field Code model, as in New York, the California Supreme Court interpreted it quite differently in *Daar*. The court allowed the class suit to proceed, noting that no individual victim would likely recover at all if the class suit were dismissed. "[A]bsent a class suit, recovery by any of the individual taxicab users is unlikely," it observed.[79] "The complaint alleges that there is a relatively small loss to each individual class member. In such a case separate actions would be economically unfeasible."[80] An Illinois trial court similarly allowed a class action to proceed against Montgomery Ward by a class of charge account customers who alleged that Ward's had charged them for credit life insurance without their permission in violation of the state's deceptive trade practices law.[81]

In contrast, New York remained hostile to consumer class actions. In 1970, the state's highest court had the opportunity to revisit its class action jurisprudence in light of recent decisions in other states and the changing consumer marketplace. The class of consumers in *Hall v. Coburn Corp.* alleged that they signed standardized sales contracts to buy carpet on credit and that the type size used in the contracts was too small, in violation of the

74. FLEMING, *supra* note 18, at 169.

75. The New York Attorney General (AG) and the state Banking Department both asserted public enforcement authority under the law. *Id.* at 170. The AG did not make much use of the law, instead prioritizing litigation against bait advertising and industry self-regulation. *Id*.

76. *Id.* at 169–70.

77. *See infra* note 78 and 79.

78. Daar v. Yellow Cab Co., 67 Cal. 2d 695, 699 (1967).

79. *Id.* at 738.

80. *Id.* at 715.

81. 3 CLEARINGHOUSE REV. 1, 14 (1969) (summarizing the court in Holstein v. Montgomery Ward & Company, Inc., No. 68CH275 (Ill., Cook County Cir. Ct., Ch. Div., filed Jan. 16, 1968)).

sale retail installment sales act. The defendant finance company, the Coburn Corporation, had purchased the credit contracts from the original carpet sellers. The class sought to recoup the penalty provided by the retail installment law, which was equal to the credit service charge each purchaser had paid, or approximately $100 to 200 per class member.[82]

A number of factors distinguished the *Hall* case from the pre-World War II class action claims where state courts had denied relief to the consumers. Most importantly, in addition to the changed social and economic context, the attorneys supporting class relief for the *Hall* consumers represented a different slice of the legal profession than the New York attorneys who had attempted to pursue class litigation on behalf of consumers in the 1940s. Class counsel, Phillip Schrag, worked at the National Office for the Rights of the Indigent (NORI), the new "poverty-law affiliate" of the NAACP Legal Defense Fund,[83] where he headed up their consumer litigation campaign, bringing test cases to try to shift legal doctrine in favor of consumers.[84] Rather than making money, Schrag aimed to remake the law.[85] Others in the legal profession supported this cause. The New York Attorney General and the Association of the Bar of the City of New York both joined the *Hall* case on the side of the consumers, submitting amicus briefs.[86]

In advocating for the class to be allowed to proceed, Schrag emphasized the same concerns that had motivated the California court in *Daar v. Yellow Cab Co.* to allow a consumer class. Schrag explained that, in the absence of class relief, consumers would have no redress. The size of each claim was tiny and no lawyer would accept an individual case expected to pay out less than $200.[87] The alternative to a class suit was not a multiplicity of suits, but none at all.

Schrag's argument did not move New York's highest court, however. The court's reasoning rested on its skepticism of the consumers' claims as well as its understanding of the state's existing class action jurisprudence. In refusing to allow the suit to proceed as a class action, the court opined that "[n]o significant public benefit is discernible from the acceptance of these present class actions."[88] In other words, the court saw little value in enforcing the type-size rules in the state retail installment sales law. It viewed the plaintiffs' statutory claims as a backdoor effort to remedy the real harm that they suffered: paying too much for credit. The court refused to alter New York's longstanding class action rules for a suit about the "technicality" of

82. FLEMING, *supra* note 18, at 205.
83. *Id.* at 201.
84. *Id.* at 201.
85. *Id.*
86. *Id.* at 207.
87. *Id.* at 206.
88. Hall v. Coburn Corp. of Am., 26 N.Y.2d 396,404 (1970)

type size.[89] As one commentator noted, "New York courts take the mechanical position that most actions for monetary recoveries turn on facts peculiar to each individual plaintiff."[90]

After *Hall,* it became apparent that change would not emanate from the courts. If state consumer law were to be enforced through private litigation, it would require enabling legislation. Accordingly, various groups urged the New York State legislature to update the state's class action law to keep pace with modern trends. The New York Judicial Conference and, later, the New York Court of Appeals, both called upon the state to act. Citing the *Hall* case, the state court justices noted that there was "urgency for early legislation" to broaden the scope of the class action, since "the existing restrictions" often meant "a total lack of remedy, as a practical matter, for wrongs demanding correction."[91] In 1975, the New York legislature finally passed a new rule that was modeled on Rule 23 of the Federal Rules of Civil Procedure, the federal class action law adopted less than a decade prior – in 1966.[92]

Although this 1975 change brought New York more closely in line with states like California, it did not overrule all aspects of the *Hall* decision. The legislature shared the New York courts' skepticism about small-dollar consumer claims. The new law provided that "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action," unless explicitly authorized by statute.[93] In other words, under the new class action law, the *Hall* consumer plaintiffs still could not have aggregated their claims for the statutory damages allowed by the state's retail installment sales act. The legislature would allow consumers to aggregate their claims in state court, so long as those claims arose out of quantifiable harms. But, unless the legislature made an exception, statutory penalties for what might be deemed "technical" violations of consumer rights could only be recovered through individual actions. This incremental change in class action procedure reflected New York's general reluctance to abandon its 19th century procedural rules. When other states modernized their rules to mimic federal procedures, New York judges and practitioners resisted.[94]

89. FLEMING, *supra* note 18, at 206.

90. Richard F. Jr. Dole, *Consumer Class Actions under Recent Consumer Credit Legislation*, 44 N.Y.U. L. REV. 80, 104–05 (1969).

91. FLEMING, *supra* note 18, at 207.

92. *Id.*

93. *Id.* at 208.The U.S. Supreme Court later ruled, in 2010, that this limitation does not apply to state law class suits brought in federal court. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.,* 559 U.S. 393 (2010).

94. Jack B. Weinstein, *CPLR's Genesis The CPLR at Fifty: Its Past, Present, and Future*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 647, 650 (2013) (noting that in the late 1950s and early 1960s, "the bar, the judges, and the legislature" rejected attempts to replace New York procedural rules with Federal Rules). Even today, some New York rules follow the federal model, but New York retains "a fair number of eccentricities." Vincent C. Alexander, *The CPLR at Fifty: A View from Academia*

IV. STATE CLASS ACTIONS AFTER FRCP 23

New York's 1975 change to its class action rule tracked a general trend in the states to amend their class action statutes to track Rule 23. By the mid-1980s, most states had amended their class action statutes.[95] California retained its older class action rule, but courts interpreted the rule to loosely follow the FRCP 23 requirements.[96] Among the states, only Mississippi and Virginia never adopted class action procedural rules.[97] These changes coincided with a rising tide of consumer activism, commonly dubbed the "third wave" of the consumer movement, which reached its height in the 1970s.

FRCP 23, as amended in 1966, ushered in a revolution in federal class action practice, but not for consumer cases.[98] Shortly after the Rule 23 amendments went into effect in 1966, the U.S. Supreme Court confirmed that small-dollar state law claims still could not proceed in federal court. In *Snyder v. Harris*, the Court held that class members could not aggregate their claims to reach the minimum "amount in controversy" requirement for diversity actions, which was then $10,000.[99] U.S. Senator Joseph Tydings observed, in advocating for a legislative reversal of the decision, "This ruling in effect makes the Rule 23 action, the most modern class action procedure in the United States, unavailable to the defrauded consumer who has a claim of less than $10,000, even if he can satisfy the necessary diversity of citizenship requirement for Federal jurisdiction."[100] Tydings's bill, to reverse *Snyder* and allow consumer class actions to proceed in federal court, failed.

Federal class actions did expand, however, because of new federal consumer legislation encompassing claims for violation of federal securities, antitrust, and employment discrimination laws. Consumers also brought class actions under federal consumer protection laws, most notably under the 1968 Truth in Lending Act (TILA).[101] But federal courts looked skeptically at TILA class actions, just as an earlier generation of state court judges did for state law claims based on technical errors in contractual fine print. As class

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The CPLR at Fifty: Its Past, Present, and Future, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 664, 665 (2013).

95. Robert A. Skirnick & Patricia I. Avery, *The State Court Class Action - A Potpourri of Differences*, 20 FORUM 750–772, 759 (1985).

96. NATIONAL CONSUMER LAW CENTER, CONSUMER CLASS ACTIONS App. C (California) (10th ed. 2020).

97. For the timing of state rule adoptions, see Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1544–51 (2008).

98. Skirnick and Avery, *supra* note 95 at 750. (noting that developments "have virtually knocked non-federal question class actions out of the federal arena")

99. Snyder v. Harris, 394 U.S. 332, 338 (1969); *see also* Zahn v. Int'l Paper Co., 414 U.S. 291, 291 (1973) (holding that multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount for suits in federal courts).

100. Joseph D. Tydings, *Private Bar – Untapped Reservoir of Consumer Power*, 45 NOTRE DAME L. REV. 483 (1970).

101. Marcus, *supra* note 1, at 629.

action historian David Marcus explains, TILA class claims "proliferated" but trial judges "overwhelmingly refused to certify TILA classes."[102] Prompted by business concerns over potentially "catastrophic judgments" against defendants, Congress capped class recoveries under TILA in 1974.[103] This reduced but did not eliminate TILA class suits.[104]

Although the general trend, post-1966, was of convergence between federal and state class action procedures, distinctions remained. California, for example, adopted an unfair and deceptive practices act that included its own class certification requirements. Unlike FRCP 23 or California's general class action statute, the California Consumers Legal Remedies Act did not require plaintiffs to prove the superiority of the class device or "substantial benefit to the public" for class certification.[105] Likewise, Illinois adopted a more permissive "superiority" standard for certifying a class under its state rule.[106] West Virginia explicitly rejected the more rigid federal approach to determining "predominance" for class certification purposes, instead adopting a balancing test.[107] In addition, although all states required notice to class members, some states granted class counsel greater flexibility in the method of notice required than was allowed under federal law.[108] Legal scholar Diego Zambrano has described these distinctions as a "growing procedural gulf between state and federal courts," with state courts drifting in a proplaintiff direction and federal courts leaning prodefendant.[109]

Conversely, post-1966, consumer litigants have occasionally been better off in federal court under federal class action standards than in certain state courts. For example, although New York state law has barred class actions for the recovery of statutory penalties, the U.S. Supreme Court has held that this prohibition does not apply if plaintiffs proceed in federal court.[110] Some states have also required plaintiffs to affirmatively opt-in to a class, rather than following the federal practice of binding class members unless they opted out, which reduces class size and overall recoveries.[111]

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102. *Id.* at 629–30.

103. H.R. Rep. No. 93-1429, at 37 (1974).

104. *See e.g.,* Hickey v. Great Western Mortgage Corp., 158 F.R.D. 603, 607-14 (1994).

105. NATIONAL CONSUMER LAW CENTER, *supra* note 94, at App. C (California).

106. *Id.* at App. C (Illinois).

107. Smith v. Bayer Corp., 564 U.S. 299, 311 (2011) (discussing difference between West Virginia and federal standards).

108. Skirnick & Avery, *supra* note 93, at 762–63. For a detailed analysis of state notification requirements as of 1980, see Zachary A. Smith, *Class Action: State Notification Requirements after Eisen*, 8 W. ST. U. L. REV. 1–20 (1980).

109. Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2164 (2019). See also Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 432–434 (2018) (tracking state court rulings on the "commonality" requirement after Wal-Mart v. Dukes).

110. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.,* 559 U.S. 393, 401-402 (2010).

111. SKIRNICK & AVERY, *supra* note 93, at 764–65.

Up until 1985, many state courts proved a more limited forum for consumers than federal courts in one further respect: their ability to adjudicate "multistate" class actions, meaning actions involving plaintiffs who resided in multiple states.[112] New York, for example, elected to employ an opt-in procedure for non-resident class members, to address concerns that exercising jurisdiction over such plaintiffs might otherwise be unconstitutional.[113] New Jersey and Pennsylvania similarly refused to exercise jurisdiction over non-resident class members.[114] Meanwhile, Kansas allowed multistate actions, setting a precedent later followed by Illinois.[115] Wisconsin, likewise, permitted a multistate class to proceed with adequate notice and representation.[116]

The U.S. Supreme Court removed any doubt about state court jurisdiction over multistate class suits in 1985. In *Phillips Petroleum Co. v. Shutts*, the Court held that class members need not have "minimum contacts" with a state in order for a state court decision to bind them.[117] Rather, in suits seeking predominantly money damages, due process merely required that class members receive adequate representation and notice of the suit, and have the right to opt-out. If state courts could limit the class to those subject to the forum state's law or resolve choice of law questions for non-resident plaintiffs, the way was clear for them to adjudicate suits involving a nationwide class. The number of multistate class actions rose accordingly.[118]

Consumer class actions, including those involving non-resident plaintiffs, thus remained the domain of state courts until 2005, when Congress adopted the Class Action Fairness Act (CAFA). CAFA expanded the scope of federal diversity jurisdiction to allow federal judges to hear most class actions where the class comprised at least 100 members, at least one plaintiff was a citizen of a state different from any defendant, and total class damages exceeded $5 million.[119] Even if the class did not file in federal court,

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112. *Multistate Plaintiff Class Actions: Jurisdiction and Certification Notes,* 92 HARV. L. REV. 718, 719 (1978).

113. SKIRNICK & AVERY, *supra* note 93, at 758.

114. Klemow v. Time Inc., 352 A.2d 12, 16 (Pa. 1976); Feldman v. Bates Mfg. Co., 362 A.2d 1177, 1182 (N.J. Super. Ct. 1976).

115. Shutts v. Phillips Petroleum Co., 567 P.2d 1292, 1308 (Kan. 1977); Miner v. Gillette Co., 87 Ill.2d 7 (1981).

116. Schlosser v. Allis-Chalmers Corp., 271 N.W.2d 879, 886 (Wis. 1978).

117. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).

118. NATIONAL CONSUMER LAW CENTER, *supra* note 94, at App. C. (observing that after *Shutts*, the "succeeding decade witnessed a significant increase in the number of multi-state class actions being adjudicated in the state courts."); Jesse T. Smallwood, *Nationwide, State Law Class Actions and the Beauty of Federalism Note*, 53 DUKE L.J. 1137, 1137–38 (2003). The Court's recent decision in Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017), concerned personal jurisdiction in a mass-tort case. Courts so far have not applied its reasoning to curtail jurisdiction in class actions. Daniel Wilf-Townsend, *Did Bristol-Myers Squibb Kill the Nationwide Class Action?,* 129 YALE L.J. 205, 226 (2019).

119. Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 4(a)(2)(A), 4(a)(5)(B), 119 Stat. 4, 9-10 (Feb. 18, 2005).

CAFA granted defendants the right to remove the case to federal court if it met the criteria for original CAFA jurisdiction. Despite the absence of empirical evidence of pro-class bias in state court,[120] CAFA's drafters assumed that federal courts would be more dispassionate than state courts in their review of class action cases and lamented state court "bias against out-of-State defendants."[121] Opinion among litigators and court watchers tracked the views of the CAFA drafters, that state and federal judges were differently disposed towards class actions.[122]

CAFA also reflected more general congressional distrust of the lawyers that brought class suits.[123] Several members of Congress disparaged plaintiffs' lawyers in their remarks in support of the bill.[124] Senator Chuck Grassley opined that "class action lawsuits are more likely to enrich the lawyers filing them than compensate the consumers who've been harmed."[125] These concerns persisted despite, or perhaps because of, the increasing size and sophistication of the plaintiffs' bar relative to its modest beginnings in the 1930s and 40s. A more sophisticated and substantial plaintiffs' bar emerged in the 1980s.[126] By the early 2000s, the leading plaintiffs' firms were not solo practitioners, but rather large firms staffed by attorneys experienced

120. See, e.g., Willy E. Rice, *Allegedly Biased, Intimidating, and Incompetent State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly Impartial and Competent Federal Courts - A Historical Perspective and an Empirical Analysis of Class Action Disposition in Federal and State Courts, 1925-2011*, 3 WM. & MARY BUS. L. REV. 419–574 (2012). *See also* THOMAS E. WILLIGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION 54 (2005) ("State forums were not typically more favorable for plaintiffs, and federal forums were not typically more favorable for defendants. … Attorney choice of forum may have been influenced by routine acceptance of a general set of preconceptions about the differences between state and federal courts.").

121. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4)(B), 119 Stat. 4, 5 (Feb. 18, 2005).

122. William R. Shafton, *California's Uncommon Common Law Class Action Litigation Developments in the Law: Complex Litigation in California and Beyond*, 41 LOY. L. A. L. REV. 783, 832 (2008); THOMAS E. WILLIGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION 29-30 (2005).

123. Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Pa. L. Rev. 1593, 1596 (2008) ("Taken together, the overall message of recent developments seems to be, 'in theory, class actions are fine, but in practice, don't trust the class action lawyers.'").

124. *Id.* at 1599-1601 (collecting legislators' statements expressing).

125. *Id.* at 1600 (quoting Grassley).

126. Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 111 (2006).

in complex litigation.[127] These attorneys were also better resourced than their predecessors and thus able to finance larger suits.[128]

For the first time, CAFA opened the federal courts to nearly every type of small-dollar consumer claim that class counsel might bring. Indeed, plaintiffs could be forced to litigate in federal court, even if they would prefer a state forum, unless one of the handful of CAFA removal exceptions applied.[129] Congress tailored these exceptions to allow truly intrastate disputes to remain in state courts. Under CAFA, plaintiffs had a limited menu of options for thwarting removal by defendants, such as limiting the aggregate class demand for damages to less than five million dollars.[130] A 2008 study by the Federal Judicial Center found that CAFA worked as intended. It observed a "dramatic increase" in the number of diversity class actions filed in federal court from an average of 11.9 per month to 34.5 per month.[131] At least one state, Illinois, may have bolstered this trend towards federal filings by refusing to exercise jurisdiction over multistate class actions unless they arose of out events with a "substantial nexus" to the state.[132]

Moreover, even for the small number of consumer class actions that could remain in state court under CAFA, other federal legal developments increasingly prevented state courts from adjudicating these claims. States could control their own substantive and procedural rules but could not opt out of the Federal Arbitration Act (FAA). Enacted in the 1920s to combat judicial hostility towards enforcement of commercial arbitration agreements, the FAA provided that a contract provision requiring settlement of disputes by arbitration would be fully enforceable, "[on] such grounds as exist at law or in equity for the revocation of any contract."[133] The FAA took on new significance at the close of the 20th century, when businesses discovered that

127. Morris Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 REV. LITIG. 757, 776 (2012) ("[T]he information that is available suggests that the leading plaintiffs' class action firms are large.").

128. Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 232 (2001).

129. Exceptions include for class actions where more than two-thirds of the class members are citizens of the state in which the case was originally filed, at least one defendant is a citizen of that state, and the "principal injuries" occurred in that state. 28 U.S.C. § 1332(d)(4)(A).

130. NATIONAL CONSUMER LAW CENTER, *supra* note 94, at 2.6 ("How to Keep a Class Action in State Court").

131. Emery G. Lee & Thomas E. Willging, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2008), at 1-2, https://www.fjc.gov/sites/default/files/2012/CAFA0408.pdf.

132. Justin Lee Heather, *A Higher Bar for Class Action Litigation in Illinois Civil Practice*, 95 ILL. B.J. 356 (2007). Such class actions might also be removable under CAFA, even if Illinois would entertain the case. *Id*. at 357.

133. Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 397 (2016).

boilerplate arbitration clauses in consumer contracts could prevent class-wide adjudication. As legal scholar Myriam Gilles described, "by far the most effective strategy implemented by class action opponents was drafting standard form consumer contracts to include arbitration provisions expressly waiving the right to any collective adjudication of claims."[134]

The U.S. Supreme Court adopted an expansive interpretation of the FAA that squelched state efforts to push back against boilerplate arbitration clauses and preserve state jurisdiction over class actions. In a victory for plaintiffs, California state courts deemed arbitration clauses that included a class action waiver to be per se unconscionable and therefore unenforceable.[135] The U.S. Supreme Court, however, invalidated this line of decisions, ruling that a state could not deem an entire class of arbitration clauses to be unenforceable. The California approach ran afoul of the FAA.[136] A few years later, the Court doubled down on its broad interpretation of the FAA, holding that a court could not invalidate an arbitration agreement on the grounds that it would be cost-prohibitive for plaintiffs to proceed through individual cases.[137]

As a result of these federal developments, consumer class actions have become increasingly difficult to maintain in state courts. Defendants have the right to remove most class actions to federal court under CAFA, which also encourages class plaintiffs to file in federal court at the outset to avoid the cost and delay of removal. Moreover, even if CAFA does not apply, under federal arbitration law as interpreted by the Supreme Court, a class of consumers may be left with no judicial forum – state or federal – if they signed boilerplate arbitration agreements.

CONCLUSION

Looking back in time to the 1930s and 1940s, the present landscape of consumer class action litigation appears both radically different and strangely familiar. The differences are striking: now, consumers can pursue class claims, arising under both state and federal substantive law, in federal court. Then, they could not – and would not acquire this right for some time. Now, the consumer class action is a controversial but established form of litigation, supported by a vigilant, experienced and sophisticated plaintiffs' bar. Then, no one specialized in class representation; indeed, would-be class counsel struggled to convince courts that aggregation of claims did not violate attorney ethics rules.

134. *Id.*

135. Discover Bank v. Superior Court, 30 Cal. Rptr. 3d 76, 79, 85, 88 (2005) New Jersey aligned with California, but other states upheld these waivers. Neal H. Klausner, *Are Consumer Class Action Waiver Provisions Enforceable*, 124 BANKING L.J. 113, 114-15 (2007).

136. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

137. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238-39 (2013).

But these stark differences can also obscure the similarities between the present and the earliest days of consumer class litigation. First, today, as in the past, the strength of consumer rights cannot be measured without taking account of the procedural mechanisms for enforcing those rights through private lawsuits, which includes rules governing the class action device. Meaningful enforcement of substantive consumer law depends on the existence of procedural rules that allow the aggregation of small-dollar claims. In the absence of class actions, consumers must rely on public enforcement, free legal aid, or the goodwill of businesses to receive redress for small injuries.

Second, today, as in the past, consumer class actions provoke heightened scrutiny from judges and legislators. For much of the 20th century, such suits arose out of state substantive law and were pursued in state courts, but the underlying anxieties do not differ much in the present. Earlier generations of judges fretted that class counsel drummed up disputes in order to generate fees and that allowing them to aggregate consumers' claims would threaten businesses with potentially ruinous liability for technical legal violations. Relatedly, some judges also worried that procedural aggregation thwarted the intention of the legislature in creating the underlying substantive consumer rights, turning minor penalties into major sanctions against defendants. These apprehensions persist today among legislators and political pundits, while they more commonly remain under the surface of judicial reasoning.

In sum, the current moment – of heightened hostility to consumer class actions and concern among advocates that consumer rights lack meaningful remedies – shares much in common with the earliest days of class action practice in state courts. For proponents of consumer class litigation, this decline is dispiriting. But understanding the deeper and richer history of consumer class actions, which dates back before 1966, may offer some reason to be hopeful.

The longer arc of this history is not one of mere decline, but in fact resembles a pendulum swinging back and forth – of rising and falling support for class actions since the 1930s. In the 1930s and 1940s, consumer rights were still in their infancy and judges perceived enterprising lawyers' attempts to aggregate these claims as a danger to the reputation of the legal profession and finances of the business community, rather than as a boon to aggrieved consumers. By the late 1960s and 1970s, however, the volume of consumer legislation had grown alongside evidence of real consumer injuries caused by business practices, and the consumer movement was once more ascendant. Moreover, consumer advocates, judges, and legislators had become better attuned to the need for procedural mechanisms for private vindication of small-dollar consumer harms. When political and judicial hostility to class actions climbed in the more business-friendly climate of the 1990s and early 2000s, it was partially in response to the very success of plaintiffs' lawyers in deploying the procedural tools they had gained in the 1960s and 1970s.

Whether the fortunes of the consumer class action will reverse course once more will depend on public perception of the plaintiffs' bar, as well as the perceived importance of protecting consumer rights and ensuring their enforcement against the business community through private litigation.