Printed in U.S.A.
Vol. 115, No. 3

Note

A NEW APPROACH TO PLAINTIFF INCENTIVE FEES IN CLASS ACTION LAWSUITS

Jason Jarvis

ABSTRACT—Because modern litigation is time-intensive and expensive, a consumer has no monetary incentive to sue over a low-value claim—even when the defendant has clearly violated that consumer's legal rights. But the defendant may have harmed many consumers in the same way, causing significant cumulative damage. By permitting the aggregation of numerous small claims, class action lawsuits provide a monetary incentive for lawyers and plaintiffs to pursue otherwise low-value suits. Often, an important part of this incentive is the "incentive fee," an additional payment awarded to the named plaintiffs as compensation for the time they spend and risks they assume in representing the class. But such fees have the potential to create dangerous conflicts of interest—named plaintiffs may be "bought off" with a large incentive fee to give their approval to an otherwise unfair settlement. To avoid this problem, courts must review and approve requests for incentive fees. Unfortunately, courts do not adequately evaluate the dangers of incentive awards and balance these dangers against the justifications for such awards. This Note proposes a new test to better guide courts in assessing the propriety of incentive fees. Specifically, courts should look at (1) the amount of time and effort that the plaintiff expended in pursuing the litigation; (2) risks that the named plaintiff faced in bringing and advancing the litigation; and (3) evidence of conflicts of interest that might prejudice the class.

AUTHOR—J.D., Northwestern University Pritzker School of Law, 2020; B.S., University of Illinois at Urbana-Champaign, 2014. Thank you, Professor Adam Hoeflich, for your guidance and feedback on this Note. Thank you to the entire staff of the *Northwestern University Law Review* for all your hard work. Special thanks to Joe Blass and Argie Mina for encouraging me to pursue publication and to Arian Soroush, Greg Devaney, and Kimberly Railey for your thoughtful and invaluable comments throughout the editing process.

INTRODUCTION

Imagine that you wake up one morning to a phone call from an unfamiliar number. You answer the call only to be greeted by a prerecorded message telling you that you have won a free cruise. Many people receive such calls, think of them as minor annoyances, and go on about their day. Now imagine getting that same call and several years later walking out of a courtroom with $25,000.[1] Consumer-protection statutes and the incentive-fee doctrine in class action lawsuits make this large award possible. While $25,000 for a telemarketing call may seem excessive, courts have found that a "named plaintiff"[2] in a class action lawsuit is entitled to such an award if the facts and circumstances of the case support it.[3]

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[1] *See* Craftwood Lumber Co. v. Interline Brands, Inc., No. 11-CV-4462, 2015 WL 1399367, at *6 (N.D. Ill. Mar. 23, 2015) (granting plaintiff's motion for $25,000 incentive fee).

[2] Named plaintiffs are those members of a class action lawsuit who actively represent the other members of the class. MARGARET M. ZWISLER, CHRISTOPHER S. YATES, WILLIAM R. SHERMAN, WILLIAM H. RAWSON & WILLIAM J. RINNER, OVERVIEW OF CLASS/COLLECTIVE ACTIONS AND CURRENT TRENDS 403, https://www.lw.com/thoughtLeadership/TheClassActionsGuide-US [https://perma.cc/7PZY-HLS3].

[3] *See infra* Part II. Because these fees are awarded mostly in settlement agreements and are uncontested by the parties, they are often approved in unpublished opinion orders, even when the amount is quite large. *See, e.g.*, Benzion v. Vivint, Inc., No. 12-61826, ¶ 14 (S.D. Fla. Feb. 23, 2015) (approving

Recently, attorneys and named plaintiffs have pushed the boundaries on incentive fees. Plaintiffs typically receive incentive fees somewhere in the area of $5,000,[4] but in a recent high-profile case, class counsel requested a $50,000 incentive fee for the sole named plaintiff.[5] The court cut the incentive fee in half to bring the award on par with what was awarded in a similar case in the district.[6] But litigants will likely continue to push the boundaries on incentive fees because all parties advancing the litigation have the potential to benefit by doing so at the expense of the class members at large. This is because class counsel and defendants have an incentive to strike collusive settlements where defendants pay less to settle, class counsel gets a larger attorney's fee, and the cost of buying the plaintiff's approval of the collusive settlement is relatively modest.[7]

This Note argues incentive fees are necessary in certain contexts to meaningfully enforce the law, but that some requests for incentive fees are excessive and should be reduced. Unfortunately, the prevailing framework for assessing the appropriateness of an incentive fee obscures important issues for courts to consider and is too confusing for courts to apply in any consistent, meaningful way. Currently, a majority of federal courts assess the appropriateness of incentive fees using a factor test set forth by the Seventh Circuit.[8] The factors include: the actions the named plaintiff has taken to protect the interests of the class, the degree to which the class benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.[9] Unfortunately, these factors fail to account for conflicts of interest that may arise between the named plaintiff and other class members, and so courts fail to consistently protect the interests of the class as a whole. New guidance would help ensure that district courts do not

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$20,000 incentive fee); Desai v. ADT Sec. Servs., Inc., No. 11-CV-01925, ¶ 20 (N.D. Ill. June 21, 2013) (approving a $30,000 incentive fee to each of two named plaintiffs).

[4] Redman v. RadioShack Corp., 768 F.3d 622, 629 (7th Cir. 2014) (noting the "modest compensation" request of $5,000 as in line with what "named plaintiffs typically receive"). *But see, e.g.*, Butler v. Am. Cable & Tel., LLC, No. 09-CV-5336, 2011 WL 2708399, at *9 (N.D. Ill. July 12, 2011) (finding incentive award requests of $5,000 to be excessive).

[5] Charvat v. Valente, No. 12-CV-05746, 2019 WL 5576932, at *10 (N.D. Ill. Oct. 28, 2019); *see also* Porter Wells, *Cruise Lines Get Final OK for $12.5 Million Robocall Settlement*, BLOOMBERG L. (Oct. 29, 2019, 4:42 PM), https://news.bloomberglaw.com/class-action/cruise-lines-get-final-ok-for-12-5-million-robocall-settlement [https://perma.cc/4NJN-8SSF].

[6] *Charvat*, No. 12-CV-05746, 2019 WL 5576932, at *10.

[7] *See infra* Section II.D.2.

[8] *See infra* notes 86–88 and accompanying text.

[9] Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998).

grant excessive incentive fees that could cause significant conflicts of interest between the named plaintiff and other class members.

Part I of this Note explains how class action lawsuits and incentive fees are crucial to the enforcement of consumer-protection statutes. Part II discusses the current inadequate state of the law regarding incentive fees. Part III proposes a new framework that should guide courts in determining whether an incentive fee is proper.

I. CONSUMER-PROTECTION LAWS, CLASS ACTION LAWSUITS, AND INCENTIVE FEES

Before discussing incentive fees, it is important to understand the class action mechanism and the types of cases in which incentive fees play an important role. While incentive fees can be awarded in any type of class action,[10] incentive fees are particularly important for the enforcement of consumer-protection statutes.[11]

Section I.A overviews the origins and underlying purposes of consumer-protection statutes. Section I.B discusses the role of the class action lawsuit in ensuring that attorneys have adequate economic incentives to pursue consumer-protection claims. Subsection C identifies the need for incentive fees to ensure the participation of named plaintiffs (a requirement for every class action lawsuit). Subsection D briefly describes the mechanics of the consumer class action lawsuit.

A. The Purpose of Consumer Class Action Laws

Congress has passed consumer-protection laws to protect consumers from certain business practices perceived as unscrupulous. One such law, the Telephone Consumer Protection Act (TCPA), protects consumers from unwanted, intrusive solicitations by making it unlawful for anyone to make robocalls for telemarketing purposes without prior consent from the recipient.[12] Another such law, the Fair Debt Collection Practices Act (FDCPA), explicitly states that it was enacted to stop debt collectors from

[10] *See generally* 2 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 6:28 (16th ed. 2019) (describing the legal parameters of class action lawsuits).

[11] *See infra* Section I.C.

[12] 47 U.S.C. § 227; Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 268 (3d Cir. 2013) (stating that Congress "passed the TCPA to protect individual consumers from receiving intrusive and unwanted calls"); *see also* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2343–44 (2020) (upholding the TCPA's restriction on robocalls to cell phones).

engaging in harmful behavior.[13] The FDCPA prohibits debt collectors from using any tactic considered to be abusive, deceptive, or unfair in connection with the collection of an alleged debt.[14]

Both the FDCPA and TCPA allow claimants to bring a civil lawsuit against a defendant for allegedly violating the statute.[15] In most civil cases, the plaintiff is required to prove that they suffered damages in order to recover money from the defendant.[16] However, because the TCPA, FDCPA, and similar consumer-protection laws prohibit activities that many would consider to be mere annoyances—often resulting in little discernible monetary harm[17]—many of these statutes specify the exact dollar amount plaintiffs may recover in damages.[18] Thus, by providing for statutory damages, these laws remove an important obstacle to the plaintiff's recovery: proving specific damages resulting from the defendant's unlawful conduct.

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[13] 15 U.S.C. § 1692(a)–(b) ("There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors . . . . [and] [e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers.").

[14] *Id.* § 1692e. The statute enumerates several specific examples of problematic behavior. *See, e.g.*, *id.* § 1692e(2) (communicating false information as to the amount of the debt or the debt collector's financial interest in its collection); *id.* § 1692e(4) (telling a debtor that nonpayment would result in imprisonment); *id.* § 1692e(8) (communicating false credit information, including not disclosing that the consumer has disputed the debt).

[15] 47 U.S.C. § 227(b)(3) ("A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring [an action] in an appropriate court of that State."); 15 U.S.C. § 1692k(a) ("[A]ny debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person.").

[16] *See, e.g.*, Morsey v. Chevron, USA, Inc., 94 F.3d 1470, 1476 (10th Cir. 1996) (establishing that a plaintiff bears the burden of proving temporary damages).

[17] Many people find telemarketing calls to be annoying but would probably be hard-pressed to articulate how they lost money by merely receiving such calls. At first glance, it may appear that unfair debt-collection practices could cause discernible monetary harm, but the circumstances in which harm would arise from such practices are narrow. If a debt is valid, and the debt collector employs high-pressure tactics to collect the debt, the debtor cannot argue that they suffered monetary harm because the consumer incurred the debt of their own will and has a legal obligation to pay it. And unless the conduct was "extreme and outrageous . . . beyond all bounds of decency," the debtor would not have a claim for emotional distress. THOMPSON REUTERS, PLAINTIFF'S PROOF OF A PRIMA FACIE CASE § 19:12 (2020). The illustrative case of harm arising from unfair debt-collection practices is when a credit agency sends a credit report to a prospective lender but fails to report that a consumer has disputed a debt on that credit report, which results in the consumer being turned down for a loan. However, aside from the fact that other factors may have played a role in the consumer being denied a loan, the consumer would still need to show that the denial of this specific loan caused them harm, which would require the plaintiff to establish that they had no alternate means of financing and that the lack of funds resulted in damage to them that could have otherwise been avoided.

[18] *See, e.g.*, Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3) (providing for $500 in damages per violation); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2)(A) (providing for up to $1,000 in damages per cause of action).

Essentially, consumer-protection laws like the TCPA and FDCPA serve a gap-filling function. They prohibit conduct perceived as detrimental to consumers that, although unworthy of criminal punishment, was not deterred by traditional civil law mechanisms.[19] By explicitly prohibiting certain conduct and removing barriers to recovery, these laws make it easier for consumers to hold businesses accountable for conduct deemed harmful by the legislature.[20]

B. The Representation Problem in Consumer Class Actions

Consumer-protection statutes like the TCPA and FDCPA are enforced largely through private lawsuits[21] whereby an attorney representing a consumer (i.e., the plaintiff) will file a complaint with the court alleging that the plaintiff is entitled to recover damages against the defendant.[22] Plaintiffs'

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[19] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394, 2394 (noting that telephone calls are a nuisance and that the restrictions provided for in the TCPA are necessary to address this nuisance); Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (stating as part of a congressional finding of and declaration of purpose that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers").

[20] Scholars and others argue whether these consumer-protection laws are unwise as a matter of public policy. *See, e.g.*, Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 NEB. L. REV. 70, 72 (2011) (arguing that the benefits of certain provisions of the TCPA are outweighed by the harm they cause to small businesses). The merits of these arguments—and the merits of consumer-protection laws in general—will not be addressed here. For better or worse, consumer-protection laws such as the TCPA and FDCPA are on the books, and courts should not assume that Congress passed essentially unenforceable laws. Therefore, the common law surrounding consumer-protection statutes must be developed to render them enforceable, thus making the incentive-fee doctrine necessary. *See infra* Section I.C. One may argue that Congress has disfavored incentive fees by passing the Private Securities Litigation Reform Act (PSLRA), which bans incentive awards in securities class action lawsuits. *See* Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 960 n.4 (9th Cir. 2009). However, securities class actions are of a different nature than consumer class actions because large shareholders presumably stand to recover a significant sum if the suit is successful, thus obviating the need for an incentive award. *See, e.g.*, *In re* Cont'l Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992), *as amended on denial of reh'g* (May 22, 1992). In fact, what the PSLRA did was to put the onus on courts to select the best representative for the class, which courts have determined to be the person with the largest financial stake in the litigation. Although Congress *expressed concern* that incentive fees could be abused when it passed the Class Action Fairness Act of 2005, *see Rodriguez*, 563 F.3d at 960 n.4, Congress did not *ban* the practice of awarding incentive fees, which indicates that Congress did not intend to repudiate the practice of awarding incentive fees in class actions, other than in securities class actions specifically.

[21] *See Court Finds Private Cause of Action in Florida TCPA Suit* Condon v. Off. Depot, 7 ANDREWS TELECOMM. INDUS. LITIG. REP. 10 (2003); Marjorie Wengert, *Cause of Action for Violation of Fair Debt Collection Practices Act [15 U.S.C.A §§ 1692-1692*o*]*, *in* 29 CAUSES OF ACTION SECOND SERIES (2d ed. 2020) (noting that a defendant can be civilly liable to "any person" who is harmed by that defendant's violation of the FDCPA (quoting 15 U.S.C. § 1692k(a))).

[22] *How Does a Lawsuit Work? Basic Steps in the Civil Litigation Process*, STOEL RIVES LLP (Jan. 24, 2012), https://www.stoel.com/legal-insights/article/how-does-a-lawsuit-work-basic-steps-in-the-civil-litigation-process [https://perma.cc/89SQ-U42R].

attorneys in these cases are typically compensated by receiving a percentage of the recovery obtained for the plaintiff.[23] Because the damages provided by consumer-protection statutes are typically small,[24] a lawyer will never have a sufficient monetary incentive to represent an individual plaintiff.[25] The TCPA, for example, provides that an individual can recover $500 for each robocall they receive without prior consent.[26] Assume that a plaintiff wants to bring a lawsuit against a telemarketer after receiving ten such calls, and that an attorney charges a fee of 25% of the recovery for bringing a successful TCPA action.[27] If successful at trial, the plaintiff would be awarded $5,000. The attorney would be entitled to $1,250 of this award, which is significantly less than the minimum cost of $18,000 to try the case.[28] Moreover, the attorney might lose, resulting in no recovery at all.[29] Because of the inherent risks of bringing a lawsuit to trial, parties in a lawsuit overwhelmingly choose to settle the claims rather than gamble on an expensive trial.[30] Such settlements account for the risk of failure at trial and

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[23] Silvers, Langsam & Weitzman, PC, *What Is a Plaintiff's Attorney?*, HG.ORG, https://www.hg.org/legal-articles/what-is-a-plaintiff-s-attorney-6728 [https://perma.cc/6JTV-MED3].

[24] *See, e.g.*, Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3) (providing for $500 in damages per violation); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2)(A) (providing for up to $1,000 in damages per cause of action).

[25] It costs $400 just to file a complaint in federal court, which does not even account for the time it takes to draft the complaint, fill out the other applicable forms, serve a summons, or take any additional action that follows if the defendant responds to the complaint. U.S. DIST. CT. W.D. WASH., A PRO SE GUIDE TO FILING YOUR LAWSUIT IN FEDERAL COURT 10–16 (2015), https://www.wawd.uscourts.gov/sites/wawd/files/ProSeManual4_8_2013wforms.pdf [https://perma.cc/8QD3-W2UX].

[26] 47 U.S.C. § 227(b)(3).

[27] This percentage is comparable to the typical attorney fees that courts have allowed in TCPA class actions. *In re* Cap. One Tel. Consumer Prot. Act Litig., 80 F. Supp. 3d 781, 797 (N.D. Ill. 2015) ("[I]f the published empirical data discussed above accurately reflect the fees awarded in TCPA class actions, it is fair to conclude that class members would have negotiated an across-the-board fee somewhere between 20% and 24% of the settlement fund." (citing Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010))); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUDIES 248 (2010); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004); Hashw v. Dep't Stores Nat'l Bank, 182 F. Supp. 3d 935, 951 (D. Minn. 2016) ("The Eighth Circuit has instructed that fee awards in the 20–25% range are reasonable.").

[28] The plaintiff's total cost of a trial can range from $18,000 to $109,000. *See* Paula Hannaford-Agor & Nicole L. Waters, CASELOAD HIGHLIGHTS 5 (2013), http://www.courtstatistics.org/__data/assets/pdf_file/0020/25337/csph_online2.pdf [https://perma.cc/B2WT-RQBG].

[29] *See* Silvers, Langsam & Weitzman, PC, *supra* note 23.

[30] *See* Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 747 (2010) ("[T]rials are an increasingly small part of the daily routine of the federal trial courts. Most district courts now try very few civil or criminal cases . . . ."). A government survey released in

result in plaintiffs receiving less than they would have been entitled to if they were successful at trial. If the attorney in our hypothetical TCPA action settled for, on average, one-fifth of the claimed damages to avoid the costs of a trial, the attorney could expect to recover $150, not even enough to pay for the time spent drafting the complaint.[31]

The solution to this representation problem is the class action lawsuit, which allows multiple similar claims to be aggregated into a single cause of action.[32] An attorney has no incentive to bring a lawsuit against one defendant for making ten calls to one person in violation of the TCPA. However, if that same defendant placed one million calls to several hundred thousand individuals, that same attorney would win a $500,000,000 judgment if successful at trial.[33] Thus, the aggregation mechanism of the class action lawsuit incentivizes attorneys to represent a class where they otherwise would not have represented individuals.[34] The class action lawsuit is the only effective mechanism for private enforcement of consumer-protection statutes like the TCPA and FDCPA where individual recoveries tend to be small.[35] Some statutes like the FDCPA have solved the attorney-representation problem by providing that attorneys can recover reasonable fees for bringing successful actions under the statute.[36] But this only works sometimes under the FDCPA because one individual may not be harmed enough by a debt-collection practice to sue individually. Thus, providing for

2004 estimated that trial dispositions represent only 3% of all general civil matters. Press Release, Bureau of Just. Stat., Plaintiffs Won 55 Percent of Civil Trials in the Nation's 75 Most Populous Counties During 2001 (Apr. 18, 2004), https://www.bjs.gov/content/pub/press/ctc_mmt01.cfm [https://perma.cc/Y48W-SEEH].

[31] Based on one firm's fee request, an attorney would have to complete the entire case in half an hour for this hypothetical suit to make economic sense. *See* Vandervort v. Balboa Cap. Corp., 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014) (accepting hourly rates between $300 and $400 as a cross-check for analyzing a fee request in a TCPA class action).

[32] *See* Eubank v. Pella Corp., 753 F.3d 718, 719 (7th Cir. 2014) ("The device is especially important when each claim is too small to justify the expense of a separate suit, so that without a class action there would be no relief, however meritorious the claims.").

[33] At $500 per TCPA violation, 47 U.S.C. § 227, one million violations would add up to $500,000,000 in damages.

[34] *Pella*, 753 F.3d at 719; *see also What Is a Class Action Lawsuit?*, CLASSACTION.ORG, https://www.classaction.org/learn/what-is-a-class-action [https://perma.cc/7YB9-XE6N] ("Class actions, by aggregating the legal rights of hundreds or even thousands of people, level the playing field between individuals and corporations. Because the settlements and verdicts in class actions can be quite large, this type of lawsuit provides a strong financial incentive for skilled attorneys to represent individuals in class actions.").

[35] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))).

[36] 15 U.S.C. § 1692k(a)(3).

attorney's fees under the TCPA would not address the plaintiff problem discussed below.

C. The Plaintiff Problem in Consumer Class Actions

Even if an attorney is willing to bring a class action lawsuit under the TCPA or FDCPA, another important element must be satisfied before bringing the suit. In a class action lawsuit, one or more class members must serve as class representatives,[37] or so-called named plaintiffs.[38] Named plaintiffs are the class members responsible for participating in the litigation on behalf of the absentee class members.[39] The responsibilities of named plaintiffs include sitting for depositions, approving any settlement terms, and generally monitoring and corresponding with class counsel.[40] The problem is that, although these duties are often modest,[41] the prospect of recovering as little as $20[42] is not sufficient to induce a rational person to assume them. To make matters worse, named plaintiffs also expose themselves to attacks on their character[43] and to liability if, for example, the court finds the lawsuit frivolous.[44] To solve this problem, attorneys began negotiating incentive-fee clauses into settlement agreements.[45] The incentive fee is paid to the named

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[37] Espenscheid v. DirectSat USA, LLC, 688 F.3d 872, 876 (7th Cir. 2012) (stating lawyers "still have to find someone who is a member of the prospective class to agree to be named as plaintiff, because a suit cannot be brought without a plaintiff"); *see also* FED. R. CIV. P. 23. Both individuals and entities can serve as named plaintiffs. *Compare* Morlan v. Universal Guar. Life Ins. Co., No. Civ. 99-274-GPM, 2003 WL 22764868 (S.D. Ill. Nov. 20, 2003) (four individual named plaintiffs), *with* Craftwood Lumber Co. v. Interline Brands, Inc., No. 11-CV-4462, 2015 WL 1399367 (N.D. Ill. Mar. 23, 2015) (one corporate named plaintiff).

[38] *See* Senne v. Kan. City Royals Baseball Corp., 114 F. Supp. 3d 906, 910 (N.D. Cal. 2015) (referring to class representatives as "named Plaintiffs").

[39] Most of the efficiency advantages of class action litigation would be defeated if every class member were required to participate in the litigation.

[40] Donald Daucher, *Fair and Adequate Representation Under Rule 23(a)(4), Independence and Improper Relationships and Arrangements Between Named Representatives and Class Counsel*, 37 W. ST. U. L. REV. 135, 136 (2010) ("[A class representative] may be expected to spend time and/or money on behalf of the class learning about or even controlling the case; responding to discovery; supervising counsel; and, in some instances, being responsible for the costs of the litigation, including notice to the class.").

[41] *See Espenscheid*, 688 F.3d at 876.

[42] *See* Gehrich v. Chase Bank USA, N.A., 316 F.R.D. 215, 228 (N.D. Ill. 2016) (noting that the typical recovery in TCPA cases is approximately between $20 and $140).

[43] *See* Daucher, *supra* note 40, at 136 (noting that defense counsel will investigate the "character, intelligence, and physical health" of the named plaintiff for adequacy (footnotes omitted)).

[44] *Espenscheid*, 688 F.3d at 876 (noting that a plaintiff could be responsible for paying a defendant's attorney's fees if the suit is held to be frivolous).

[45] *See* 5 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 17:2 (5th ed. 2019) (noting that the practice of providing for incentive awards predates courts' reference to them).

plaintiffs[46] for their work on behalf of absentee class members during the litigation, for the risks that they assume in acting as named plaintiffs, and for serving as "private attorneys general" to enforce civil law.[47]

The Seventh Circuit has held that incentive fees are justified when necessary to induce individuals to become named plaintiffs.[48] Class action lawsuits for violations of consumer-protection statutes are a paradigmatic example.[49] Because individual class members stand to recover only modest amounts, it makes no economic sense for any one of them to go through the time and effort of serving as a named plaintiff.[50] As a result, absent an incentive fee, a multimillion-dollar consumer class action case might not be brought for want of a named plaintiff. Therefore, when individual recoveries are small, incentive fees provide a necessary enforcement mechanism for consumer-protection statutes.[51]

D. The Mechanics of the Class Action Lawsuit

In order to clarify the role of incentive fees within consumer class action lawsuits for damages, this Section will briefly describe the mechanics of these class action suits. For purposes of this discussion, the parties involved in a class action lawsuit consist of the attorneys for the plaintiffs (class counsel), the named plaintiffs (class representatives), absentee class members (unnamed plaintiffs), and defendants.[52] As previously noted, a lawsuit commences with the plaintiff's attorney filing a complaint, and the

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46 *Id.*

47 *Id.* (quoting *In re* Continental/Midlantic S'holders Litig., No. 86-6872, 1987 WL 16678, at *4 (E.D. Pa. Sept. 1, 1987)); *see also* Jed S. Rakoff, *The Cure for Corporate Wrongdoing: Class Actions vs. Individual Prosecutions*, N.Y. REV. BOOKS (Nov. 29, 2015), https://www.nybooks.com/articles/2015/11/19/cure-corporate-wrongdoing-class-actions/ [https://perma.cc/Y2HM-NXBV] (discussing the origins of the concept of the private attorney general and its evolution into class action litigation).

48 *In re* Synthroid Mktg. Litig., 264 F.3d 712, 722–23 (7th Cir. 2001) (noting that incentive fees are proper when the lawsuit would not have been brought "without the lure of an incentive award" (internal quotation marks omitted)).

49 One study found that between 2006 and 2011, incentive awards were granted in over 90% of consumer class actions. RUBENSTEIN ET AL., *supra* note 45, § 17:7.

50 *See supra* Section I.C.

51 *See* Espenscheid v. DirectSat USA, LLC, 688 F.3d 872, 876 (7th Cir. 2012) (noting that "damages per class member tend to be slight" in consumer class actions and that an incentive award can be sufficient to motivate a named plaintiff to serve as class representative); *see also* Clinton A. Krislov, *Scrutiny of the Bounty: Incentive Awards for Plaintiffs in Class Litigation*, 78 ILL. BAR J. 286, 286 (1990) ("[P]ublic policy favoring private civil litigation as a means to promote certain important social values often fails to provide adequate compensation or incentive for plaintiffs to take on this burden simply on principle.").

52 *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 44 (1991).

class action lawsuit is no exception. Federal Rule of Civil Procedure (FRCP) 23 governs class action lawsuits in federal courts.[53]

There are four basic prerequisites to bringing a class action suit in federal court:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.[54]

Additionally, a consumer class action lawsuit for damages can only be maintained if the court determines that the class action mechanism is the best method for resolving the dispute.[55] The next step is for the court to either issue a class-certification order or deny class certification and dismiss the suit.[56] The certification order must define the class and the class claims, issues, or defenses, and must appoint class counsel.[57] Even if the court grants class certification, the court is able to review and amend this decision until the action is complete.[58] After certification, the next step is to notify the absent class members of the action.[59] The court can also order that notice be provided to absent class members with respect to any subsequent step in the action.[60] Unlike a normal lawsuit, where the parties can agree to voluntarily settle and dismiss the action, the terms of any proposed settlement must be

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[53] FED. R. CIV. P. 23. Rules regarding class actions brought in state court are governed by the procedural rules of that particular state.

[54] FED. R. CIV. P. 23(a).

[55] *See* FED. R. CIV. P. 23(b)(3) (requiring that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy"). Class action lawsuits can alternatively be brought under Rule 23(b)(1) or Rule 23(b)(2). *Id.* Rule 23(b)(1) would only apply if individuals could be expected to bring separate lawsuits. Since individual lawsuits are never expected in consumer class actions, Rule 23(b)(1) is not a realistic basis for consumer class action lawsuits. Rule 23(b)(2) applies to cases seeking injunctive (i.e., nonmonetary) relief to stop ongoing harms. It does not allow a class to seek damages. *See* FED. R. CIV. P. 23(b)(2).

[56] FED. R. CIV. P. 23(c)(1)(A).

[57] FED. R. CIV. P. 23(c)(1)(B). The appointment of class counsel will generally be the attorneys who have filed the complaint on behalf of the class and thus have invested the most time and effort into the case to date. *See* FED. R. CIV. P. 23(g)(1)(C)(i) (requiring the court to consider the time that counsel has spent identifying and investigating the claims).

[58] FED. R. CIV. P. 23(c)(1)(C).

[59] FED. R. CIV. P. 23(c)(2).

[60] FED. R. CIV. P. 23(d)(1)(B)(i).

approved by the court.[61] Before this happens, absent class members must be provided notice of the settlement[62] and be given an opportunity to object to any of the terms of the settlement with the court.[63] In order to approve a settlement, the court must find the settlement to be "fair, reasonable, and adequate."[64]

A class action settlement will specify how much the defendants will pay (the recovery) and how much of the recovery will go to attorney's fees, incentive fees, and to the class members.[65] Attorney's fees are often assessed as a percentage of the recovery, with fees in a typical TCPA class action, for example, ranging between 20% to 24% of the recovery.[66] In contrast to attorney's fees, incentive fees are rarely large enough to have a meaningful impact on the class recovery.[67] Incentive awards, however, are still significantly larger than the typical pro rata recovery in a consumer class action.[68]

If the class wins at trial rather than settling, it is less clear whether there is a valid legal basis for awarding incentive fees, although some courts have granted such post-verdict awards.[69] As a matter of policy, post-verdict incentive awards would make sense because without them a named plaintiff would never have a monetary incentive to go to trial, even if going to trial

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[61] FED. R. CIV. P. 23(e)(1)(A).

[62] FED. R. CIV. P. 23(e)(1)(B).

[63] FED. R. CIV. P. 23(e)(4)(A).

[64] FED. R. CIV. P. 23(e)(1)(C).

[65] In "common-fund" settlements, the amounts that the defendant will pay and what the parties receive is known at the time of settlement. In "claims-made" settlements, the amount made available for payment is specified, but the amounts actually paid to class members and for attorney's fees are contingent on the number of claims filed. MCLAUGHLIN, *supra* note 10, § 6:24. However, in either type of settlement, the amount paid for incentive fees will be known at the time of settlement because settlements that provide for incentive fees as a percentage of the recovery are "disfavored, if not altogether forbidden." RUBENSTEIN ET AL., *supra* note 45, § 17:16.

[66] *In re* Cap. One Tel. Consumer Prot. Act Litig., 80 F. Supp. 3d 781, 797–98 (N.D. Ill. 2015) ("[I]f the published empirical data discussed above accurately reflect the fees awarded in TCPA class actions, it is fair to conclude that class members would have negotiated an across-the-board fee somewhere between 20% and 24% of the settlement fund.").

[67] A study of 374 opinions issued between 1993 and 2002 showed that the average incentive fee award constituted only 0.16% of the class recovery. Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1303 (2006).

[68] Gehrich v. Chase Bank USA, N.A., 316 F.R.D. 215, 228, 239 (N.D. Ill. 2016) (noting that the typical pro rata recovery in TCPA cases is approximately between $20 and $140, while $5,000 incentive awards in TCPA cases are "routinely granted").

[69] *See* Elisabeth M. Sperle, *Here Today, Possibly Gone Tomorrow: An Examination of Incentive Awards and Conflicts of Interest in Class Action Litigation*, 23 GEO. J. LEGAL ETHICS 873, 874 (2010) (collecting cases and discussing the legal basis for post-verdict incentive awards).

was in the best interest of the class.[70] Certainly, though, just like any losing party, a named plaintiff is entitled to no recovery—and no incentive fee—if the lawsuit is unsuccessful.

II. The Law of Incentive Fees

While there is no uniform law amongst the federal circuits for how district courts should treat incentive fee requests, there is "near-universal recognition" that incentive fees are sometimes appropriate.[71] This Part discusses courts' views about the propriety of incentive fees in general and then, if a fee is justified in a given case, how to assess whether the amount of an incentive fee is appropriate.

A. The Propriety of Incentive Fees in General

There are two prevailing views on the propriety of incentive fees, both recognizing that incentive fees are appropriate in some circumstances. The first is that incentive fees are justified merely on the basis of named plaintiffs' service to the class.[72] The second is that incentive fees are justified when necessary to induce individuals to participate as named plaintiffs.[73] As previously discussed, the small recoveries characteristic of consumer class actions provide no monetary incentive for individual class members to assume the responsibilities of a named plaintiff.[74] Therefore, under either of

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70 *Id.* at 880–81.

71 McLaughlin, *supra* note 10, § 6:28.

72 *See, e.g.*, Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 958–59 (9th Cir. 2009) (holding that incentive awards "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general"); *see also* Berry v. Schulman, 807 F.3d 600, 613 (4th Cir. 2015) (citing *Rodriguez*, 563 F.3d at 958–59); Humphrey v. United Way of Tex. Gulf Coast, 802 F. Supp. 2d 847, 868 (S.D. Tex. 2011) (same); Sauby v. City of Fargo, No. 3:07-CV-10, 2009 WL 2168942, at *2 (D.N.D. July 16, 2009) (same).

73 *See, e.g.*, *In re* Synthroid Mktg. Litig., 264 F.3d 712, 723 (7th Cir. 2001) (holding that incentive fees are proper when the lawsuit would not have been brought "without the lure of an 'incentive award'"); *see also* Muransky v. Godiva Chocolatier, Inc., 922 F.3d 1175, 1197 (11th Cir. 2019), *reh'g en banc granted, opinion vacated*, 939 F.3d 1279 (11th Cir. 2019); Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P., 888 F.3d 455, 467 (10th Cir. 2017); Baptista v. Mut. of Omaha Ins. Co., 859 F. Supp. 2d 236, 244 (D.R.I. 2012); *Humphrey*, 802 F. Supp. 2d at 869. Additionally, there appears to be another prerequisite to awarding an incentive fee: absent class members must be notified that the award is being sought and given the opportunity to object to it. *See* Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 410 (7th Cir. 2000) (upholding district court's decision to reject incentive fee where class counsel did not provide adequate information regarding incentive fee in notice issued to class members). It is important for absent class members to be given notice of an award and an opportunity to object to it, because objectors play a critical role in ensuring that class action settlements are fair to absent class members.

74 *See supra* Section I.C.

these views, incentive fees will always be appropriate in successful consumer class action lawsuits.[75]

The minority view is that courts should be highly skeptical of incentive awards. This is the view of the Sixth Circuit, which has permitted incentive awards in some circumstances, but has expressed more general discomfort than other circuits in allowing incentive fees.[76] The Sixth Circuit has not articulated any principled criteria for when incentive fees are appropriate, but the minority view differs from the majority view by emphasizing the dangers of, rather than the justifications for, incentive fees.[77]

B. The Cook Test to Determine the Appropriateness of an Incentive Fee

Determining whether an incentive fee is proper does not answer the question of whether the amount requested is appropriate. An incentive fee of $5,000 may be considered excessive in one case and far below what a plaintiff is entitled to in a different case, even within the same jurisdiction.[78] It is easy to conclude that an incentive fee is proper in a consumer class action, but it is not so straightforward to determine whether the dollar amount of a proposed fee is appropriate.

Only one case at the federal appellate level, *Cook v. Niedert*, has formulated criteria for evaluating the dollar amount of a proposed incentive fee.[79] In *Cook*, the Seventh Circuit conceived a factor test (the *Cook* test), which has also been adopted by both the Eighth and Ninth Circuits, to guide district courts in assessing whether the amount of an incentive fee is

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[75] The Seventh Circuit follows the stricter inducement standard. *Synthroid*, 264 F.3d at 723. And in the Seventh Circuit, incentive fees are routinely granted in TCPA class actions. Gehrich v. Chase Bank USA, N.A., 316 F.R.D. 215, 239 (N.D. Ill. 2016). Theoretically, if a named plaintiff were willing to bring the case on principle alone, then a fee would not be appropriate in that circumstance. However, if principle was the plaintiff's sole motivation, then the plaintiff would have no reason to request an incentive fee in the first place. In other words—without clear evidence to the contrary—it is appropriate to infer that a named plaintiff who requested an incentive fee needed a monetary incentive to serve as a named plaintiff.

[76] Hadix v. Johnson, 322 F.3d 895, 897–98 (6th Cir. 2003) (noting that "there may be circumstances where incentive awards are appropriate"); *see also* RUBENSTEIN ET AL., *supra* note 45, § 17:3 (noting the Sixth Circuit's skepticism regarding the proliferation of incentive fees). The Sixth Circuit is the only circuit to adopt the minority view. It is not clear whether any district courts outside of the Sixth Circuit have adopted this position.

[77] See *infra* Section II.D for discussion of the dangers of and justifications for incentive fees.

[78] *Compare, e.g.*, Butler v. Am. Cable & Tel., LLC, No. 09-CV-5336, 2011 WL 2708399, at *9 (N.D. Ill. July 12, 2011) (finding incentive award requests of $5,000 to be excessive), *with* Craftwood Lumber Co. v. Interline Brands, Inc., No. 11-CV-4462, 2015 WL 1399367, at *6 (N.D. Ill. Mar. 23, 2015) ("An incentive award of $25,000 is reasonable in this case.").

[79] 142 F.3d 1004, 1016 (7th Cir. 1998). Federal district courts have proposed a few other tests. *See* RUBENSTEIN ET AL., *supra* note 45, § 17:13.

appropriate.[80] According to *Cook*, courts should consider three factors: "(1) the actions the [named] plaintiff has taken to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; and (3) the amount of time and effort the [named] plaintiff expended in pursuing the litigation."[81]

Prior to *Cook*, at least one federal district court employed a different five-factor test: "(1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation and; (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation."[82] New York district courts have looked at time and effort, personal risk, the "ultimate recovery" obtained by the class, and "any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim."[83] Many of these factors map closely onto the *Cook* test. The remaining factors—other than risk—have no obvious connection to the justifications and dangers that are important to consider in assessing incentive fees and therefore serve no useful purpose.[84]

C. The Inadequacies of the Cook Test

Most federal circuit courts have not provided clear guidance to district courts for reviewing incentive fees.[85] The best guidance available is the Seventh Circuit's *Cook* test, which has been adopted by the Eighth Circuit[86] and Ninth Circuit[87] and cited by district courts in every other circuit.[88] This

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80 *Id.*

81 *Id.* (citing *Cook*, 142 F.3d at 1016).

82 Van Vranken v. Atl. Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995); *see also* Humphrey v. United Way of Tex. Gulf Coast, 802 F. Supp. 2d 847, 869–70 (S.D. Tex. 2011) (applying the *Van Vranken* test).

83 *See, e.g.*, Roberts v. Texaco, Inc., 979 F. Supp. 185, 200 (S.D.N.Y. 1997).

84 *See infra* Section II.D.

85 *See* RUBENSTEIN ET AL., *supra* note 45, § 17:13 (noting a single test used in the Seventh Circuit and adopted only by the Eighth and Ninth Circuits). There are thirteen federal circuits in total. *Court Role and Structure*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure [https://perma.cc/UC9P-8B4P].

86 *See, e.g.*, *In re* U.S. Bancorp Litig., 291 F.3d 1035, 1038 (8th Cir. 2002).

87 *See, e.g.*, Staton v. Boeing Co., 327 F.3d 938, 977 (9th Cir. 2003) (citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)) ("The district court must evaluate [incentive] awards individually, using [the *Cook* factors].").

88 *See, e.g.*, Scovil v. FedEx Ground Package Sys., Inc., No. 1:10-CV-515-DBH, 2014 WL 1057079, at *6 (D. Me. Mar. 14, 2014) (First Circuit); Marsh v. Tauck, Inc., No. 3:04-CV-220-WWE, 2008 WL 11471097, at *4 (D. Conn. Oct. 30, 2008) (Second Circuit); Good v. Nationwide Credit, Inc., 314 F.R.D. 141, 160 (E.D. Pa. 2016) (Third Circuit); Shealy v. Dixon Hughes, PLLC, No. 2:10-CV-714-DCN,

Section illustrates the need for better guidance by explaining that the *Cook* test was poorly conceived, is redundant, and does not address the primary concerns that courts should focus on when evaluating incentive fees. As a result, *Cook* obscures important concerns involving incentive fees, which causes judicial inefficiencies and may result in injustice.

1. Poorly Conceived

The *Cook* court discussed the incentive fee issue in a single paragraph at the end of the opinion.[89] After setting forth the factors, the opinion stated that "these factors [were] readily satisfied" by citing a few terms of the settlement agreement and some circumstances surrounding the litigation.[90] But the court failed to explain *why* these factors were satisfied. And the application of the second factor in particular is not self-explanatory—how should a court assess the "degree to which the class has benefited from [the named plaintiff's] actions"? When evaluating this factor, the *Cook* court appeared to focus exclusively on the ultimate recovery obtained for the class,[91] and this is what many district courts appear to do.[92] But does the end result say anything about how effective the named plaintiff's actions were? Perhaps the named plaintiff was a bumbling fool whose deposition was terrible, but the case was so strong that the class recovered in spite of the plaintiff's ineptitude. Or perhaps a named plaintiff was extremely competent and added value to the class, but the class recovery was reduced by

2011 WL 13323837, at *6 (D.S.C. Oct. 24, 2011) (Fourth Circuit); Slipchenko v. Brunel Energy, Inc., No. H-11-1465, 2015 WL 338358, at *13 (S.D. Tex. Jan. 23, 2015) (Fifth Circuit); NILI 2011, LLC v. City of Warren, No. 15-CV-13392, 2018 WL 5264236, at *5 (E.D. Mich. Oct. 23, 2018) (Sixth Circuit); O'Brien v. Airport Concessions, Inc., No. 13-CV-01700-CMA-BNB, 2015 WL 232191, at *6 (D. Colo. Jan. 16, 2015) (Tenth Circuit); Swift v. BancorpSouth Bank, No. 1:10-CV-00090-GRJ, 2016 WL 11529613, at *13 (N.D. Fla. July 15, 2016) (Eleventh Circuit); Kifafi v. Hilton Hotels Ret. Plan, 999 F. Supp. 2d 88, 105 (D.D.C. 2013).

89 *See* Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998).

90 The full discussion from the opinion is as follows:

> Here these factors are readily satisfied. Cook brought a suit that resulted in structural reforms to the Health & Welfare Fund as well as a cash recovery of more than $13 million. In findings that were well-supported by the evidence, Special Master McGarr noted that Cook spent hundreds of hours with his attorneys and provided them with an "abundance of information." Most significantly, the special master found that, in filing the suit, Cook reasonably feared workplace retaliation. In light of the benefit Cook bestowed on his class, the risks he faced in bringing the case and the time he spent pursuing it, Judge Manning did not err when she approved a $25,000 incentive award.

Id.

91 *See id.*

92 *See, e.g.*, Kaufman v. Am. Express Travel Related Servs., Co., No. 07-CV-1707, 2016 WL 806546, at *3 (N.D. Ill. Mar. 2, 2016), *aff'd* 877 F.3d 276 (7th Cir. 2017) (noting that the incentive fee requested is unusually high for a case with such a small individual recovery).

circumstances beyond the named plaintiff's control, such as errors committed by class counsel. In any event, if the class recovery is what courts should look to, why did the second factor say "benefit[] from [named plaintiff's] actions" instead of "the recovery obtained by the class"?[93]

In addition to not explaining why the three factors were satisfied, the court cited a missing "fourth" factor as the most decisive: "[T]he risks [Cook] faced in bringing the case."[94] The specific risk mentioned in *Cook* was the threat of workplace retaliation, but it was not made clear whether courts should only consider this specific risk or the issue of risks to the plaintiff more broadly as later articulated in *Espenscheid v. DirectSat USA, LLC*.[95] If risk is supposed to be assessed more broadly under one of the three factors, it is not clear which factor it falls under.[96] Because the court declined to explicate its three factors and explain how risk fits into the articulated factors, lower courts have little guidance when applying the test.

2. Redundant

Beyond the gaps detailed above, the first factor of the *Cook* test does not appear to address anything that the other two factors do not already cover. The first factor indicates that courts should look not just to the *results* of the plaintiff's actions but also to "the actions [that] the [named] plaintiff has taken to protect the interests of the class."[97] Because the third factor specifically asks the court to consider the "time and effort" that the named plaintiff expended in pursuing the litigation,[98] *Cook* must have ascribed a particular meaning to "actions" beyond simple time and effort; otherwise, the first factor would be rendered superfluous. In other words, it is unclear what is relevant to the named plaintiff's "actions" if the time and effort that the plaintiff spent performing these "actions" is considered part of the third factor. The opinion does not provide an answer.[99] Given this lack of clarity, few district court opinions explicitly address this first factor when applying the test. For instance, in *Craftwood Lumber Co. v. Interline Brands, Inc.*, the

[93] One factor used by New York district courts does explicitly refer to the ultimate recovery obtained by the class. *See supra* note 83 and accompanying text.

[94] *Cook*, 142 F.3d at 1016 (noting that the risk Cook faced in bringing the lawsuit was the most important consideration in awarding the incentive fee).

[95] *See* 688 F.3d 872, 876 (7th Cir. 2012).

[96] Alternatively, if *Cook* intended to articulate a four-factor test that included risk to the plaintiff in general, courts and commentators have missed the point. *See, e.g.*, Staton v. Boeing Co., 327 F.3d 938, 977 (9th Cir. 2003) (citing one of the *Cook* factors as "reasonabl[e] fear[s of] workplace retaliation"); RUBENSTEIN ET AL., *supra* note 45, § 17:13 (citing *Cook* as a three-factor test).

[97] *Cook*, 142 F.3d at 1016.

[98] *Id.*

[99] *See id.*

court approved a $25,000 incentive award based solely on the fact that the named plaintiff "spent several hundred hours working on this case" (third factor), which resulted in a "significant recovery" (second factor).[100] Furthermore, because of this redundancy and lack of clarity, district courts bound to follow *Cook* sometimes do little more than cite the test and provide their own separate justifications for approving the award.[101]

Because the term "actions" provides little help in deciphering the meaning of the first factor, the important consideration must be how those actions "protect the interests of the class." Fortunately, the *Cook* test is not the only area of class action law that refers to protecting the interests of the class: under the FRCP, in order for a class to be certified, the court must determine that the class representatives will fairly and adequately "protect the interests of the class."[102] Because courts have ascribed meaning to this phrase in the context of class certification, these decisions may provide insight into the intended meaning of the *Cook* test's first factor. In one Seventh Circuit case, the court was concerned that the class representatives may not have been in a position to protect the interests of the class because it appeared that the named plaintiffs may have had a conflict of interest with the class.[103] The court explained that even the mere possibility of a conflict of interest might indicate that the named plaintiff cannot be relied upon to protect the interests of the class.[104] However, if the *Cook* test was meant to address conflicts of interest with the first factor, there are few—if any—cases that explicitly make this connection.

D. Primary Concerns Regarding Incentive Fees

The primary concerns involving incentive fees can be thought of as falling under two broad categories: (1) justifications and (2) dangers. Justifications for incentive fees are generally thought to be based on a theory of restitution;[105] they compensate named plaintiffs for the time and effort of serving as a named plaintiff and for any risk that they incur in pursuing the

[100] No. 11-CV-4462, 2015 WL 1399367, at *6 (N.D. Ill. Mar. 23, 2015) (citing no other facts in justification of the award).

[101] *See, e.g.*, Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc., No. 07-CV-2898, 2012 WL 651727, at *16 (N.D. Ill. Feb. 28, 2012) ("As Settlement Class Plaintiffs stress, they were subjected to Liberty's threats of litigation and the Objectors' accusations of corrupt behavior.").

[102] FED. R. CIV. P. 23(a)(4).

[103] *In re* Sw. Airlines Voucher Litig., 799 F.3d 701, 713–14 (7th Cir. 2015).

[104] *Id.* at 715.

[105] *See* MCLAUGHLIN, *supra* note 10, § 6:28 (noting that the award of *any* type of fee from a class action settlement is restitutionary).

litigation.[106] However, incentive fees can pose a danger when they create a conflict of interest between the named plaintiffs and the class.[107] While the third *Cook* factor does address restitution for the named plaintiffs' time and effort, the *Cook* test fails to explicitly address these other two considerations: risk and conflicts of interest.

1. Justifications

All plaintiffs face risks in litigation, and the most basic risk is the risk of failure. In a normal lawsuit, an individual plaintiff bears the risk that they will have wasted their time in pursuing litigation if it is unsuccessful.[108] The difference in a class action context is that named plaintiffs alone bear this risk on behalf of all absent class members, who are essentially "free rider[s]" in any damages recovery and will have invested no time and effort in the litigation if it is unsuccessful.[109] In other words, named plaintiffs must work with class counsel from the first step in the litigation (i.e., filing the complaint) all the way to its conclusion, whether by settlement or adjudication.[110] In contrast, absent class members are simply notified that the class action is in process and merely have to submit a claim form for damages, unless they want to opt out of the class and pursue litigation as part of another lawsuit—which should rarely happen in a consumer class action.[111] Indeed, once a settlement has been reached, class members rarely have to do much of anything in order to share in the recovery.[112] Thus, one

106 Espenscheid v. DirectSat USA, LLC, 688 F.3d 872, 876–77 (7th Cir. 2012).

107 *Id.* at 876.

108 Jack Walsh, *Being a Plaintiff Isn't Bad; It's Different*, SMITHAMUNDSEN (June 10, 2016), https://www.salawus.com/insights-alerts-BeingAPlaintiff.html [https://perma.cc/9D5P-X95Y] (noting that time and effort on the part of the client is the most significant cost of preparing for litigation). The risk of failure in litigation may even lead plaintiffs to accept a settlement that is below its expected value because of an aversion to risk. *See* ROBERT B. CALIHAN, JOHN R. DENT & MARC B. VICTOR, THE ROLE OF RISK ANALYSIS IN DISPUTE AND LITIGATION MANAGEMENT 25 (2004), https://www.litigationrisk.com/Paper%20on%20Risk%20Analysis%20for%20ABA%20Forum%20on%20Franchising.pdf [https://perma.cc/U9RQ-CDWF].

109 *See* Robert Jones, *The Ethical Impact of Payments to Named Plaintiffs*, 21 GEO. J. LEGAL ETHICS 781, 787–88 (2008).

110 *See Espenscheid*, 688 F.3d at 876 (stating "a suit cannot be brought without a plaintiff"); Eubank v. Pella Corp., 753 F.3d 718, 722 (7th Cir. 2014) (discussing the role of the named plaintiffs in reviewing and approving the settlement).

111 *See Pella*, 753 F.3d at 728 ("Virtually no one who receives notice that he is a member of a class in a class action suit opts out."). *But cf.* Redman v. RadioShack Corp., 768 F.3d 622, 628 (7th Cir. 2014) ("The bother of submitting a claim, receiving and safeguarding the coupon, and remembering to have it with you when shopping may exceed the value of a $10 coupon to many class members.").

112 Gehrich v. Chase Bank USA, N.A., 316 F.R.D. 215, 232 (N.D. Ill. 2016) (noting that claimants only needed to "check a box and sign their names" in order to submit a claim in that case). In contrast, if the claims process is unduly burdensome, the court is unlikely to receive the settlement favorably. *See*,

justification for incentive fees is that absent class members risk practically nothing if the litigation is unsuccessful while named plaintiffs bear all the risk that their time is wasted if the lawsuit fails.[113] And if the lawsuit is successful, named plaintiffs would have invested more time and effort than absent class members but, without an incentive fee, would be entitled to no larger a recovery than these absent class members.[114]

Named plaintiffs face additional risks beyond wasting their time. They are subject to discovery, and their reputations and credibility are fair game for attacks by defendants. And in some cases, the defendant may threaten to countersue named plaintiffs and expose them to liability.[115] However, when there is little risk of failure, courts have recognized that it may be appropriate to reduce or deny an incentive award.[116]

2. Dangers

Critics of incentive awards are mainly concerned with the conflicts of interest that these additional payments can create between the named plaintiffs and the absent class members. For example, thirty years ago Clinton Krislov identified the risk of named plaintiffs being "bought off" at the class's expense and noted that courts should scrutinize incentive fees accordingly.[117] These conflicts of interest are similar to those that are inherent between class counsel and the class members due to the economic incentives created by the class action mechanism.[118] To understand these incentives, it is important to examine the interests of each of the parties in a consumer class action lawsuit. Intuitively, named plaintiffs, absentee class members, and class counsel want to maximize their respective recoveries from the

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e.g., *Pella*, 753 F.3d at 725–26, 729 (reversing district court's approval of a settlement that included an overly complicated and burdensome claims process).

[113] *See* Jones, *supra* note 109, at 788 (stating that the "free rider problem presents a serious obstacle to class action litigation").

[114] *Cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625–26 (1997) ("A class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977))).

[115] Krislov, *supra* note 51, at 286 (citing a securities class action lawsuit where the named plaintiff faced "public threats by defendants designed to intimidate him . . . including a threat of a $5 million countersuit"); *see also Espenscheid*, 688 F.3d at 877 (addressing risks of failure including personal liability). Other risks may arise in certain contexts or circumstances, such as the risk that a named plaintiff in an employment class action will be retaliated against by their employer for actively participating in the suit. Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998).

[116] *See, e.g.*, *In re* Synthroid Mktg. Litig., 264 F.3d 712, 723 (7th Cir. 2001) (affirming district court decision to deny incentive awards to corporate named plaintiffs who joined in the middle of the case when those plaintiffs were "clear winners" from the start and faced the prospect of a significant recovery).

[117] Krislov, *supra* note 51, at 287.

[118] *See* Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69, 71 (2004).

defendant with the least amount of effort. For named plaintiffs, this means increasing the incentive fee because the individual recoveries in consumer class actions tend to be small.[119] For the typical absentee class member, this means doing as little as possible because the marginal benefit of increasing the individual recovery—from say $20 to $30—is worth much less than any time invested to do so.[120] For class counsel, this means increasing their attorney's fees while minimizing their labor on the case. In contrast, the defendant's primary goal in the litigation is simply to pay as little as possible. As a result, the interests of the defendants and class counsel—who are normally adversaries—may converge at the expense of the interests of the class.[121] In other words, class counsel may benefit by offering a settlement where defendants pay less money overall but pay more of that money to class counsel.[122] These types of collusive settlements do not present a problem in individual litigation because the plaintiff has a significant stake in any recovery (otherwise the case would not have been brought in the first place).[123] Moreover, the individual plaintiff has leverage to make sure that the attorney advocates strongly for her interests with the threat of two simple words: you're fired.

But in a consumer class action, the individual plaintiff is replaced with the named plaintiff, who lacks the authority to fire class counsel.[124] Even worse, the class counsel seeking a collusive settlement can buy the named plaintiff's acceptance by offering a larger incentive fee. With the named plaintiff's blessing, the collusive settlement looks more legitimate in the eyes of the court. Named plaintiffs win in this scenario because any reduction in their pro rata recovery for the class will be insignificant in comparison to the increased incentive fee that class counsel and defendants can offer. Because named plaintiffs can best serve their interests at the expense of the class, the conflicts of interest between named plaintiffs and class members are similar to those between attorneys and class members.[125]

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119 *See supra* Section I.C.

120 For absentee class members to have any meaningful leverage in this negotiation, they would have to formally object to the settlement with the court.

121 *See* Eubank v. Pella Corp., 753 F.3d 718, 720 (7th Cir. 2014) ("The defendant cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class. From the selfish standpoint of class counsel and the defendant, therefore, the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees.").

122 *See* 7B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1797.1 (3d ed. 1999) (noting that class counsel may have "bias toward settlements in which the class attorney agrees to trade off a smaller total award by the defendant for a larger fee").

123 *See supra* Section I.C.

124 This authority rests with the court. FED. R. CIV. P. 23(g)(1).

125 Richard A. Nagareda, *Restitution, Rent Extraction, and Class Representatives: Implications of Incentive Awards*, 53 UCLA L. REV. 1483, 1484 (2006) (discussing the similarities).

To illustrate this idea, suppose that a fair settlement in a hypothetical case would require defendants to pay $12 million, with $2 million going to attorney's fees, an incentive fee of $5,000, and the remainder going to a class of 100,000 individuals for a pro rata recovery of approximately $100. Hoping to strike a collusive settlement, class counsel agrees to terms where defendants pay $11 million, with $3 million going to attorney's fees, an incentive fee of $10,000, and the remainder going to those same 100,000 class members for a pro rata recovery of approximately $80. Class counsel has made an extra $1 million and defendants have saved $1 million. The named plaintiff has increased his recovery by $4,980, while the individual class members are the only losers. And most of them likely have no idea that a fair amount would be $20 higher. This shows how easy it is for defendants and class counsel to buy a named plaintiff's approval of a collusive settlement[126] and illustrates why judicial review of settlements is necessary to ensure that class action settlements are fair, reasonable, and adequate.[127]

However, conflicts of interest are not limited to situations where the dollar figure of the incentive fee appears excessive. Courts have identified other circumstances in which problematic conflicts of interest can arise with incentive fees. For example, incentive fees become more of a concern where there are long-standing relationships between class counsel and named plaintiffs.[128] Usually, a named plaintiff will serve as a class representative once in their lifetime, but there are certain named plaintiffs who serve as class representatives on a recurring basis.[129] Defendants often attack these "professional plaintiffs" as opportunistic—the insinuation being that they are capitalizing on the incentive-fee doctrine to cash in by serving as named plaintiffs in multiple suits.[130] Many courts have found no issue with repeat plaintiffs, reasoning that such individuals act as "private attorneys general" to enforce consumer-protection laws.[131] However, if a professional plaintiff

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[126] Some attorneys, brazenly enough, have even sought settlements that specifically award incentive fees only to the named plaintiffs who approved the settlement. Not surprisingly, courts readily reject these provisions. *See infra* notes 133–134 and accompanying text.

[127] Krislov, *supra* note 51, at 287 ("[F]or settlements, courts scrutinize the entire agreement to determine whether the named plaintiff has been 'bought off' at class expense.").

[128] *See, e.g.*, *In re* Sw. Airlines Voucher Litig., 799 F.3d 701, 714–16 (7th Cir. 2015) (finding that class counsel and named plaintiff serving as co-counsel on another case raised conflict-of-interest concerns significant enough to hear the issue for the first time on appeal); *see also* Redman v. RadioShack Corp., 768 F.3d 622, 638 (7th Cir. 2014) (stating that there should be a "genuine arm's-length relationship between class counsel and the named plaintiffs" that is not influenced by family ties or friendship).

[129] *See* Murray v. GMAC Mortg. Corp., 434 F.3d 948, 954 (7th Cir. 2006).

[130] *See id.*

[131] *See id.* (noting that one advantage of repeat plaintiffs is that they "may be better able to monitor the conduct of counsel"); Cunningham v. Rapid Response Monitoring Servs., Inc., 251 F. Supp. 3d 1187,

is represented by the same counsel on multiple occasions—or if they have previously worked together—the relationship may be less akin to an attorney–client relationship and more akin to a relationship between business partners. Courts may become concerned about these close relationships between professional plaintiffs and class counsel, particularly if the parties do not properly disclose important details regarding their relationships.[132]

When there are multiple named plaintiffs in a lawsuit, unequal treatment of named plaintiffs is another area of concern—particularly when incentive awards are granted only to named plaintiffs who approve the settlement.[133] This practice is designed to induce the named plaintiffs' approval by improperly using an incentive award as leverage and is generally disfavored by courts.[134]

At least one federal circuit has expressly disavowed "incentive agreements" where class counsel and the named plaintiffs agree to the structure and mechanics of the incentive fees at the outset of the litigation as opposed to at the end of the litigation.[135] Among other things, the court was concerned that, by structuring the incentive fee ahead of time as a percentage of the recovery, the named plaintiffs had a disincentive to pursue injunctive or nonmonetary relief as part of settlement negotiations even if such relief was in the best interests of the class members.[136] The court was also concerned that such agreements could result in potential named plaintiffs shopping around for counsel who offered the best deal rather than counsel best positioned to represent the class.[137]

A final concern—expressed by then-Judge Richard Posner of the Seventh Circuit—is that a named plaintiff may have a conflict of interest

1195 (M.D. Tenn. 2017) (noting that there is no "amateurs only" rule in litigation). But there is a school of thought that these so-called professional plaintiffs are undesirable, at least in some circumstances. *See, e.g.*, Stoops v. Wells Fargo Bank, N.A., 197 F. Supp. 3d 782, 803 (W.D. Pa. 2016) (noting that a plaintiff who bought multiple cell phones simply so that she could seek out TCPA violations lacked standing to sue). Because Congress was concerned that professional plaintiffs could be harmful in the context of securities class actions, it passed the Private Securities Litigation Reform Act (PSLRA), which bars so-called professional plaintiffs from serving as named plaintiffs in securities class actions. *See Murray*, 434 F.3d at 954.

[132] *See, e.g.*, *Sw. Airlines*, 799 F.3d at 715–16 (reversing named plaintiff's incentive fee because named plaintiff failed to disclose that he had served as co-counsel with class counsel on other cases).

[133] *See, e.g.*, Eubank v. Pella Corp., 753 F.3d 718, 723 (7th Cir. 2014) (criticizing a settlement agreement that provided incentive awards only to representatives who supported the settlement).

[134] *Id.*

[135] Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 954–55 (9th Cir. 2009). Awards, as opposed to agreements, are generally sought after a settlement or verdict has been achieved. *Id.* at 959.

[136] *Id.* at 960.

[137] *Id.*

with the class if the incentive fee is too large as a percentage of the total recovery.[138] Some commentators have suggested that courts are reluctant to grant an incentive award that is greater than 1% of the total recovery.[139] However, courts can vary widely in their application of this standard.[140]

III. FIXING THE INCENTIVE-FEE DOCTRINE

Primary concerns regarding incentive fees can be summarized in three key points: (1) incentive fees are necessary in consumer class actions, (2) they are justified to compensate named plaintiffs, and (3) they have the potential to create conflicts of interest that could prejudice the class. Against the backdrop of these primary issues is the *Cook* factor test, which inadequately addresses many of these concerns and obscures the important issues. Two of the three factors are so amorphous that they cannot be understood in any meaningful way.[141] Possibly because the test was ill-conceived when the Seventh Circuit created it in 1997, a Westlaw search returns no instances where the Seventh Circuit cited the test in any subsequent decisions.[142] However, district courts within the Seventh Circuit are still bound to apply this test[143] despite indications that courts should look to other criteria when deciding whether to approve incentive fees.[144] This Note proposes a new three-factor test involving incentive fees that is consistent with the justifications and dangers discussed in the previous Part. It is clear enough to understand and broad enough to account for unforeseen circumstances that could arise in future litigation. This new test mirrors the concerns collected from the case law[145] and is contrasted with *Cook* below.

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138 *See* Espenscheid v. DirectSat USA, LLC, 688 F.3d 872, 877 (7th Cir. 2012) (citing examples).

139 *See, e.g.*, MCLAUGHLIN, *supra* note 10, § 6:28 ("Proposals to allocate amounts in excess of one percent of the common fund will almost certainly be rejected even if the dollar figure itself is within the standard range.").

140 *Compare, e.g.*, Kaufman v. Am. Express Travel Related Servs. Co., 264 F.R.D. 438, 447–48 (N.D. Ill. 2009) (denying $7,000 in incentive awards equivalent to 0.23% of a $3 million settlement), *with* Vandervort v. Balboa Cap. Corp., 8 F. Supp. 3d 1200, 1208 (C.D. Cal. 2014) (approving $10,000 in incentive awards equivalent to 0.3% of a $3.3 million maximum settlement fund).

141 *See supra* Sections II.A–II.B.

142 If the test had merely needed clarification, the Seventh Circuit could have taken opportunities in subsequent cases to explain the test rather than ignore it. *See, e.g.*, *In re* Synthroid Mktg. Litig., 264 F.3d 712, 722–23 (7th Cir. 2001) (reviewing an incentive fee); Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 410 (7th Cir. 2000) (same).

143 *See, e.g.*, Craftwood Lumber Co. v. Interline Brands, Inc., No. 11-CV-4462, 2015 WL 1399367, at *6 (N.D. Ill. Mar. 23, 2015).

144 *See supra* Section II.D.

145 *See supra* Section II.D.

TABLE 1: OLD *COOK* FACTOR TEST VS. NEW PROPOSED FACTOR TEST

Old *Cook* Factor Test	**New Proposed Factor Test**
1. The actions the plaintiff has taken to protect the interests of the class;	1. The amount of time and effort the plaintiff expended in pursuing the litigation;
2. The degree to which the class has benefitted from those actions; and	2. Risks that the named plaintiff faced in bringing and advancing the litigation; and
3. The amount of time and effort the plaintiff expended in pursuing the litigation	3. Evidence of conflicts of interest that might prejudice the class

A. Time and Effort

The time-and-effort factor is the most well-conceived aspect of the *Cook* test. Time and effort maps perfectly to the primary justification for incentive awards—restitution to the named plaintiff[146]—and therefore should be the first and most important factor courts consider when deciding whether to approve the amount of an incentive fee. It is also straightforward to apply since courts can readily determine the hours worked by a named plaintiff.[147] Courts have permitted awards at an average hourly rate of around $100,[148] which provides a useful point of reference.

Critics of professional plaintiffs—who often request larger fees and claim to have done a larger amount of work—may be concerned about the apparent ease with which a plaintiff could overstate hours to support a larger fee award. But courts have tools to mitigate this problem. At a high level, judges understand that lengthier, more complex litigation is likely to involve more work on the part of a named plaintiff. In other words, judges can estimate a reasonable range of hours that a professional plaintiff could be expected to work on a given case. When a professional plaintiff claims to have worked a number of hours that falls outside of these expectations,

146 *See supra* Section II.D.1.

147 In a typical case where the incentive award requested is a few thousand dollars, courts will usually accept a sworn affidavit from the named plaintiffs attesting to how many hours they spent on the litigation. RUBENSTEIN ET AL., *supra* note 45, § 17:12.

148 *See Craftwood*, 2015 WL 1399367, at *6 (granting named plaintiff a $25,000 incentive fee after working "nearly 200 hours" on the case); Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998) (awarding a $25,000 incentive fee to named plaintiff who spent hundreds of hours working with the attorneys).

courts can request additional supporting evidence, such as detailed timesheets. Additionally, because defendants in class actions typically dislike professional plaintiffs,[149] defendants might challenge the accuracy of a named plaintiff's hours estimate. In other words, defendants can signal to the court—by disputing or not disputing the named plaintiff's hours—whether it should scrutinize the incentive award more carefully.[150]

B. Risk

The most important issue that the *Cook* court considered was the risk to the named plaintiff even though the court did not explicitly list risk in its three-factor test.[151] Because named plaintiffs should be compensated for assuming this risk on behalf of all absentee class members,[152] courts should always consider the risks that a named plaintiff faced in bringing the litigation. For reasons discussed below, the new "risk" factor should replace the *Cook* factor that calls for an examination of the benefit obtained by the class.

1. Applying the New "Risk" Factor

Courts should consider both litigation and nonlitigation risks as relevant to the incentive award.[153] In this context, litigation risk refers to the risk that a lawsuit will fail on its merits. The primary risk of failure is that the named plaintiff will have wasted the time they spent building the case.[154] Economically rational named plaintiffs will be discouraged from investing more time and effort into the case as the odds of success decrease.[155] This reluctance could harm the class if the named plaintiff can increase the litigation's odds of success by investing more time into it. Therefore, to properly incentivize the named plaintiff to act in the best interests of the class (i.e., invest the necessary time), the named plaintiff needs to be compensated

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[149] *See supra* note 130 and accompanying text.

[150] Even in collusive settlements, a defendant could object to the incentive fee. By expressing disapproval to a small aspect of the settlement, the defendant is signaling to the court that the defendant is not fully satisfied and thus the settlement is not collusive. So, while the court should take such objections seriously, it should still be vigilant in considering conflict-of-interest issues surrounding the incentive fee.

[151] *See supra* note 94 and accompanying text. At least one district court has used the *Cook* factors and added its own additional risk factor. Scovil v. FedEx Ground Package Sys., Inc., No. 1:10-CV-515-DBH, 2014 WL 1057079, at *6 (D. Me. Mar. 14, 2014).

[152] *See supra* notes 44–47 and accompanying text.

[153] *See supra* notes 82–83, 94 and accompanying text.

[154] *See* CALIHAN ET AL., *supra* note 108, at 25.

[155] This assumes that named plaintiffs are rational economic actors. It is possible that someone would serve as a named plaintiff for other reasons, such as personal disdain for the defendant, but this scenario is unlikely.

for assuming the litigation risk with an appropriate risk-multiplier. So, for example, if a $10,000 reward is appropriate in a case that is a clear winner, then $20,000 would theoretically be appropriate in that same case if the odds of success were only 50%.[156] The $20,000 is appropriate because the named plaintiff would expect to receive the incentive fee only 50% of the time, giving the named plaintiff an expected value of $10,000.

There is a valid concern that this type of risk-multiplier would produce undesirable results if applied proportionally to lawsuits with little chance of success. This could happen because plaintiffs would be emboldened to bring so-called "strike suit[s]"—lawsuits that have little chance of success and marginal social value—where plaintiffs have significant leverage to force defendants into a settlement due to the considerable costs of modern litigation.[157] It would not be difficult to imagine a scenario where an opportunistic plaintiff has an opportunistic lawyer file a strike suit and negotiate an early settlement with a minimal amount of work. The plaintiff could do $1,000 worth of work and justify a $10,000 incentive fee by claiming that the suit only had a 10% chance of success. To address this concern, courts should have the discretion to adjust the risk-multiplier downward when a suit is highly likely to fail. Another possibility would be to define "success" as something other than the odds of the class being certified. If success were defined as the odds of reaching a settlement prior to and without certification, then named plaintiffs in strike suits would have a 100% chance of success and be entitled to no risk-multiplier. In other words, the probability of success can be thought of in terms of how vigorously the defendant contests the litigation.

Nonlitigation risk is also important to consider in certain contexts. Nonlitigation risk can include things ranging from reputational damage to retaliation by an employer against a named plaintiff employee. Workplace retaliation, which arises in the context of employment-related class actions, is the greatest of these risks.[158] Courts in those cases should carefully analyze such risks as related to individual plaintiffs and defendants on a case-by-case basis. Named plaintiffs in consumer class actions face significantly less

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156 In practice, a court cannot accurately assess the strength of a case into a precise percentage chance of success or failure, particularly without the benefit of factfinding at trial. Regardless, courts are routinely asked to perform these assessments when reviewing other areas of settlements. *See, e.g.*, Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 963 (9th Cir. 2009) (noting that in reviewing the fairness, reasonableness, and adequacy of a settlement, courts should consider, among other things, "the strength of [the] plaintiffs' case" and "the risk, expense, complexity, and likely duration of further litigation").

157 Rakoff, *supra* note 47.

158 *See supra* note 90 (discussing the named plaintiff's justified fear of workplace retaliation in an employment class action suit).

nonlitigation risk, which is typically limited to the modest possibility of facing personal liability.[159] However, a court could consider the reputational harm that repeat named plaintiffs face by being derided as opportunistic "professional plaintiffs"[160] and other risks that any named plaintiff might face in unique circumstances.

2. Discarding the "Benefit" Analysis

The reason for assessing whether the incentive fee is disproportionate to the benefit received by the class is to determine whether a settlement is collusive—that is to say, whether the class is prejudiced by a conflict of interest.[161] The benefit analysis does not serve as a yardstick for measuring the incentive fee to which a plaintiff would be entitled in a given case.[162] Because the third factor of the new test addresses conflicts of interest, and the benefit analysis can lead courts astray, it should be discarded.

Some may argue that the benefit analysis provides a useful benchmark for assessing whether an incentive fee is fair, because it is easy to calculate the dollar value of the total recovery and to assess the incentive fee as a percentage of the total recovery. Courts often use a similar percentage-of-recovery method to examine the appropriateness of attorney's fees.[163] However, unlike attorney's fees, incentive fees represent a very small proportion of the total recovery.[164] Class counsel—not named plaintiffs—is primarily responsible for increasing the recovery for the class, which is why time and effort is a more ideal measure for the plaintiff incentive fee, and the

159 *See* Espenscheid v. DirectSat USA, LLC, 688 F.3d 872, 877 (7th Cir. 2012) (noting that the risk of facing personal liability is remote).

160 *See supra* note 130 and accompanying text.

161 Even courts that disagree as to the propriety of incentive fees in general agree on this point. *See In re* Dry Max Pampers Litig., 724 F.3d 713, 722 (6th Cir. 2013) (rejecting an incentive award because the negligible recovery for the class showed that the named plaintiffs had "no interest in vigorously prosecuting the [interests of] unnamed class members"); Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 959–60 (9th Cir. 2009) (rejecting a sliding-scale incentive arrangement that was tied to the ultimate recovery because it put the named plaintiffs "into a conflict position from day one").

162 Doing so would essentially ask courts to measure the appropriateness of the fee as a percentage of the recovery, which is a disfavored practice when it comes to incentive fees. *See supra* notes 135–136 and accompanying text.

163 *See supra* note 66 and accompanying text. Alternatively, the "lodestar method"—which assesses attorney's fees based on hours worked—is not as ideal for consumer class actions. *See* Kolinek v. Walgreens Co., 311 F.R.D. 483, 501 (N.D. Ill. 2015) ("[F]ee arrangements based on the lodestar method require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis, something a class of nine million lightly-injured plaintiffs likely would not be interested in doing.").

164 *See supra* notes 66–67.

percentage-of-recovery method is more suited to attorney's fees.[165] Looking at the incentive fee as a percentage of the recovery does not address any of the justifications (i.e., time and effort and risk) for incentive fees. Indeed, the only time when the percentage may be relevant is when the fee is unusually high as a percentage of the recovery. In these cases, courts can look at the size of the fee in the context of the third proposed factor to determine if it suggests a conflict of interest. In any case, the benefit factor is becoming increasingly irrelevant. For example, in a case where the class obtained a *full recovery*, the Seventh Circuit reversed incentive fees because of other signs of conflicts of interest.[166]

Furthermore, using the benefit factor may give some named plaintiffs the impression that they will be better off by trading injunctive or nonmonetary relief—which is often more meaningful in consumer class actions—for monetary relief because it is easier to value the benefit of money. So, in addition to having limited utility, the benefit factor can also create a perverse incentive that ultimately prejudices the class.

C. Conflicts of Interest

The first two proposed factors provide a framework for arriving at a risk-adjusted measure of appropriate compensation for a named plaintiff in normal circumstances, and they directly address the theoretical justifications for incentive awards. However, even if an incentive fee is justified based on these two factors, stopping here would ignore the primary concern regarding incentive fees—the potential for those awards to create prejudicial conflicts of interest.[167] Several of these conflicts of interest—such as business relationships between class counsel and named plaintiffs—have already been addressed by courts and should influence the court's analysis of this factor.[168] Additionally, a proper conflict-of-interest analysis would also address, in many situations, an important consideration raised by scholars: monitoring the effectiveness of class counsel.[169]

Some may argue that it is redundant to consider conflicts of interest at this stage of the case because courts already consider conflicts of interest at

[165] It is worth noting that courts do not assess attorney's fees using a percentage-of-recovery method *and* the lodestar method. They use one or the other. When both are used, the lodestar is simply brought in as a "cross-check" for reasonableness. *See Kolinek*, 311 F.R.D. at 500 (listing the options).

[166] *In re* Sw. Airlines Voucher Litig., 799 F.3d 701, 715–16 (7th Cir. 2015).

[167] The adequacy inquiry under FED. R. CIV. P. 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997).

[168] *See supra* Section II.D.2.

[169] *See, e.g.*, Harel & Stein, *supra* note 118, at 103; Nagareda, *supra* note 125, at 1487–91.

earlier stages. For example, courts are supposed to look at whether a class representative is adequate to represent the class,[170] which is a decision made at the class-certification stage—prior to any determination as to whether the amount of an incentive fee is appropriate.[171] However, conflicts of interest are not black and white but rather operate in shades of gray. Some conflicts of interest must be tolerated in order for current class action lawsuit mechanisms to function.[172] Thus, for example, there may be indicators of a conflict of interest that do not rise to the level which would justify denying class certification but may still justify a reduction of the incentive award. An important illustration of this notion is the professional plaintiff. Recall that one of the responsibilities of the named plaintiff is to monitor class counsel.[173] By virtue of their experience, professional plaintiffs are generally in a better position to assess the performance of class counsel and monitor them effectively[174] as opposed to first-time plaintiffs who may serve merely as "figurehead[s]" and have little ability to monitor class counsel.[175] The named plaintiff's ability to monitor class counsel increases with that named plaintiff's exposure to different attorneys on different cases. If the professional plaintiff is represented by the same counsel over and over, the plaintiff will have no other frame of reference for assessing the performance of counsel. Being represented by the same counsel repeatedly also means a familiar relationship, which is one indicator that the named plaintiff may have a conflict of interest.[176] At the same time, such repeat representation would likely not, by itself, lead the court to determine that the named plaintiff is an inadequate class representative. For example, the Seventh Circuit indicated that named plaintiffs could be disqualified on the basis of familial or personal relationships.[177] But in another case where nondisclosure of a

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170 *Amchem*, 521 U.S. at 625.

171 FED. R. CIV. P. 23(e) ("The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval.").

172 *See* Harel & Stein, *supra* note 118, at 71 (discussing the inherent conflicts between class counsel and the class members).

173 *See supra* note 40 and accompanying text.

174 Murray v. GMAC Mortg. Corp., 434 F.3d 948, 954 (7th Cir. 2006).

175 Nagareda, *supra* note 125, at 1488 ("A familiar insight in the literature—one voiced vividly by . . . scholars—holds that the class representative is often a mere figurehead, such that class counsel frequently operate free from conventional client monitoring.").

176 *See supra* notes 128–132 and accompanying text.

177 *See* Redman v. RadioShack Corp., 768 F.3d 622, 638 (7th Cir. 2014) (stating that there should be a "genuine arm's-length relationship between class counsel and the named plaintiffs" that is not influenced by family ties or friendship).

relevant business relationship signaled a conflict of interest, the court did not remove the named plaintiffs but merely denied their incentive awards.[178]

Although consistent repeat representation by the same counsel likely would not disqualify a named plaintiff, it does create familiarity that both reduces the named plaintiff's value as a monitor of class counsel and increases the possibility of collusive behavior. Because a greater variety of representation is related to the professional plaintiff's value to the class as a monitor, the central inquiry in the conflict-of-interest analysis should be how often the professional plaintiff has been represented by the same counsel as opposed to different counsel.[179] A more valuable named plaintiff (i.e., one represented by many different attorneys) would be entitled to a higher incentive fee, while a less valuable plaintiff (i.e., one with a familiar relationship to a specific attorney) would be entitled to a lower fee.

The court's conflict-of-interest analysis should also identify circumstances that courts have already recognized as problematic in the incentive-fee context. Specifically, when there are multiple named plaintiffs, provisions that provide for incentive fees only to those named plaintiffs who approve the settlement are generally disallowed because they give rise to conflicts of interest.[180] Those provisions should be struck from the settlement agreement, and the court should scrutinize all other aspects of the proposed incentive fees more closely for conflicts of interest.

Finally, because identifying conflicts of interest is integral to so many decisions involving class action litigation generally, it is useful to provide a final opportunity for trial courts to examine a proposed settlement for conflicts of interest, particularly when the settlement involves a large incentive fee. This final review for potential conflicts of interest may uncover something that the court was not aware of in the class-certification stage but that would justify denying final approval of a settlement or even reconsidering class certification.[181] Thus, this final "conflicts of interest" factor as applied to incentive fees can be valuable to the court's assessment of the class action in other contexts.

Conflict-of-interest issues cannot be eliminated from class action lawsuits as currently constituted. Professors Alon Harel and Alex Stein have proposed radical changes to the system to address these conflicts,[182] and these

[178] *In re* Sw. Airlines Voucher Litig., 799 F.3d 701, 715 (7th Cir. 2015).

[179] *Cf.* Nagareda, *supra* note 125, at 1488 ("Ideally, incentive awards should reward high-quality monitoring but not low-quality monitoring.").

[180] *See supra* notes 133–134 and accompanying text.

[181] A court has the power to alter its class-certification decision until the litigation is complete. FED. R. CIV. P. 23(c)(1)(C).

[182] *See* Harel & Stein, *supra* note 118, at 108–09.

radical changes could result in unforeseen collateral consequences. Most scholars focus on addressing conflicts of interest by analyzing attorney's fees, which is a significant issue. While this is an important consideration, incentive fees have been largely overlooked as an area of concern and of potential in addressing conflict-of-interest issues. The framework proposed here addresses these concerns by directly identifying problems with conflicts of interest in incentive fees—many of which have been identified piecemeal by courts—into one central analysis. This proposed framework also adds a new dimension, which is a repeat plaintiff's continued representation by the same counsel. If repeat plaintiffs are on notice that there is a chance that their incentive awards may be reduced by repeatedly being represented by the same counsel, then they will be incentivized to seek more varied representation. This not only reduces the probability of collusion, but also diversifies those plaintiffs' experiences, making them more effective monitors of counsel in service to the class.

CONCLUSION

Regardless of one's feelings about federal consumer-protection statutes, Congress passed these laws with an expectation that they would be enforced, and the class action mechanism is necessary for meaningful enforcement of these laws. But in order for the class action mechanism to operate, at least one class member must have adequate financial incentive to step forward and agree to be a named plaintiff. Without the "lure of an 'incentive award,'" rationally self-interested class members are not motivated to step forward based on the insignificant pro rata recovery in most of these cases.[183] Multimillion-dollar consumer class actions would be foregone simply for want of a named plaintiff. And as a result, harms that Congress meant to address by passing these laws would go unremedied. For example, without the deterrence of potential class action liability, one might expect to receive twice the current number of robocalls. For these reasons and more, incentive fees are necessary and justified in consumer class action lawsuits.

However, this does not mean that incentive awards come without risks. Courts should not overlook incentive-fee provisions when reviewing settlement agreements and need an adequate framework to guide them in doing so. Unfortunately, the prevailing framework does not adequately address the justifications for and dangers of incentive awards, which can cause confusion among district courts when assessing these awards. Even when district courts do identify the important considerations—as detailed in

183 *In re* Synthroid Mktg. Litig., 264 F.3d 712, 722–23 (7th Cir. 2001).

this Note—the real issues remain obscured by the ill-conceived *Cook* test. Federal courts can work more efficiently and effectively on the issue of incentive awards with better guidance. This Note suggests a new framework that would better assist district courts in assessing the appropriateness of incentive fees to ensure that they are justified and do not pose a danger to the interests of the absent class members. This framework would also encourage repeat named plaintiffs to seek more varied representation, making them more effective monitors of class counsel.