

THE IRONY OF PRIVACY CLASS ACTION LITIGATION

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In the past few years, publicized privacy violations¹ have regularly spawned class action lawsuits in the United States,² even when the company made a good faith mistake and no victim suffered any quantifiable harm. Privacy advocates often cheer these lawsuits because they generally favor vigorous enforcement of privacy violations, but this essay encourages privacy advocates to reconsider their support for privacy class action litigation. By its nature, class action litigation uses

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1. SCU's Markkula Center for Applied Ethics received \$500,000 of cy pres money from the Google Buzz settlement. In re Google Buzz Privacy Litigation at 6, No. C 10-00672 JW (N.D. Cal. May 31, 2011), *available at* <http://www.jdsupra.com/post/fileServer.aspx?FileName=53e758fe-3dc9-4c01-a93a-99361822dd32.pdf>. Independently, SCU's High Tech Law Institute submitted an unsuccessful request for an allocation of those funds. Although lawsuits over data security breaches raise similar issues as online privacy lawsuits, this essay focuses on the latter.

2. This essay focuses exclusively on the United States, in part because of its comparatively unusual rules for class action litigation.

tactics that privacy advocates disavow. Thus, using class action litigation to remediate privacy violations proves to be unintentionally ironic.

I. THE IRONIC ATTRIBUTES OF PRIVACY CLASS ACTION LITIGATION

Class action lawsuits create numerous well-known problems.³ This section will enumerate some of those problems, and then show how, in the context of privacy violation enforcements,⁴ they create ironic outcomes for privacy advocates.

A. *Class Actions Typically Are Opt-Out*

Most privacy advocates prefer business practices that require consumers to “opt-in” rather than “opt-out,”⁵ i.e., consumers must affirmatively grant permission to a business’ collection or use of their data rather than take action to prevent such collection or use. From the perspective of privacy advocates, opt-outs misinterpret consumers’ silence as consent,⁶ and they make consumers act to preserve the status quo—which, due to consumer acquiescence to default settings, means that consumer opt-out rates are low.⁷

3. See, e.g., Daniel Fisher, *The Shaky Basis for Class Actions*, FORBES, Feb. 8, 2010, at 20, available at <http://www.forbes.com/forbes/2010/0208/opinions-law-constitution-courts-ideas-opinions.html> (discussing Prof. Martin Redish’s criticisms); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71 (2007); Richard A. Epstein, *Class Actions: Aggregation, Amplification and Distortion*, 2003 U. CHI. LEGAL F. 475 (2003); DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 401-505 (2000).

4. For a general discussion about privacy class action lawsuits, see generally Andrew B. Serwin, *Poised on the Precipice: A Critical Examination of Privacy Litigation*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 883, 943-62 (2009) (discussing the basic legal doctrines applicable to privacy class action lawsuits).

5. See, e.g., David Goldman, *I Always Feel Like Someone Is Watching Me: A Technological Solution for Online Privacy*, 28 HASTINGS COMM. & ENT. L.J. 353, 379 (2006); Dennis W.K. Khong, *An Economic Analysis of Spam Law*, 1 ERASMUS L. & ECON. REV. 23, 41 (2004), available at <http://www.eler.org/archive/2004/eler-2004-1-23-khong.pdf>; Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2100 (2004); Mike Hatch, *The Privatization of Big Brother: Protecting Sensitive Personal Information from Commercial Interests in the 21st Century*, 27 WM. MITCHELL L. REV. 1457, 1498-1500 (2001); Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1101 (1999) (“those who do not value privacy are likely to prefer an opt-out system, while privacy advocates can be expected to favor an opt-in system”).

6. See, e.g., Hatch, *supra* note 5, at 1498 (“An opt-out system places a cumbersome burden on consumers to inform a company that they do not want personal information shared, which they reasonably expect should remain confidential, when the burden should rest with the company to obtain consumers’ consent before disclosing highly personal information”); Sovern, *supra* note 5, at 1101-03; Kent Walker, *The Costs of Privacy*, 25 HARV. J. L. & PUB. POL’Y 87, 116 (2001) (“privacy advocates argue that opt-out approaches put too much of a burden on consumers to protect their privacy”).

7. See, e.g., Matthew Creamer, *Despite Digital Privacy Uproar, Consumers Are Not Opting Out*, ADVER. AGE, May 30, 2011, at 4, available at

Yet, class action lawsuits are typically opt-out, not opt-in, with those same downsides. Typically, if the class is certified, class members are automatically bound by the lawsuit's outcome unless they opt-out.⁸ Thus, just like opt-outs in the commercial setting, consumers must affirmatively act if they do not agree with the lawsuit, and like commercial opt-outs, the class action mechanism treats silence as consent.⁹

Furthermore, empirically, consumers rarely opt-out of class action lawsuits.¹⁰ Indeed, opt-out rates for class actions are often substantially lower than privacy opt-out rates in commercial settings. As one study found:

Opt-outs from class participation and objections to class action resolutions are rare: on average, less than 1 percent of class members opt-out and about 1 percent of class members object to class-wide settlements The opt-out rate for thirty-nine consumer class action cases is less than 0.2 percent.¹¹

Thus, privacy advocates should dislike the opt-out architecture of class action litigation just like they dislike it in commercial settings.

B. Consumers Lack Meaningful Notice or Choice About Class Action Lawsuits

Notice and choice are foundational principles of consumer privacy,¹² but class action procedures do a poor job of providing consumers with notice or choice.¹³

<http://adage.com/article/digital/digital-privacy-uproar-consumers-opting/227828/> (consumers clicked on behavioral ad targeting icon only 0.002% of the time, and only 10% of the consumers who clicked through then opted-out); W.A. Lee, *Opt-Out Notices Give No One A Thrill*, AM. BANKER, July 10, 2001, at 1 (“5% opt-out rate . . . has been circulating as the unofficial industry figure” for Gramm-Leach-Bliley Act opt-outs).

8. FED. R. CIV. P. 23(c)(2)(B). Depending on the timing, class members may have an additional right to opt-out of any settlement. FED. R. CIV. P. 23(e)(4).

9. See Leslie, *supra* note 3.

10. Theodore Eisenberg & Geoffrey P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1533-34 (2004) (calling opt-outs and objections “extremely uncommon” and the rates “trivially small”). See BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, *MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES* 20 (2005), available at [http://www.ftc.gov/public/pdfs/nsf/lookup/ClassGde.pdf/\\$file/ClassGde.pdf](http://www.ftc.gov/public/pdfs/nsf/lookup/ClassGde.pdf/$file/ClassGde.pdf) (“The typical class action settlement notice will most likely yield an apathetic response, and few objectors or opt-outs.”).

11. Eisenberg & Miller, *supra* note 10, at 1532.

12. See, e.g., *Fair Information Practice Principles*, FED. TRADE COMM’N, <http://www.ftc.gov/reports/privacy3/fairinfo.shtm> (last visited Jul. 16, 2012).

13. See generally Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002) (discussing the due process challenges of class adjudication); Leslie, *supra* note 3 (explaining why consumers’ lack of objection to

Inadequate Notice. Commercial privacy policies are routinely criticized for being unreadable and incomprehensible.¹⁴ Yet, disclosures about class action lawsuits garner the exact same criticisms.¹⁵ So, just as we doubt consumers understand their privacy choices in commercial settings, we should doubt that consumers understand their choices about the litigation.

Of course, that assumes consumers get notice of the class action lawsuit at all. Yet, it may be difficult or impossible to provide individualized notice to all—or even some—privacy class members because no one knows their exact identity (such as in the cookie cases). In those circumstances, inevitably, some consumers' legal rights will be affected without their knowledge.¹⁶

Even when it is possible to reach class members individually, some class members may view the use of their contact information to provide an unrequested (and inscrutable) notice of the litigation as another privacy invasion.¹⁷

Lack of Choice. Consumers often lack any meaningful choice when presented with privacy opt-outs in commercial settings. If the consumers choose to opt-out, the business may simply provide them fewer, or less functional, services, and consumers who refuse to provide any information at all may lack meaningful competitive alternatives that will

class settlements does not signal their true views about the settlement).

14. See, e.g., FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: PROPOSED FRAMEWORK FOR BUSINESSES AND POLICY MARKERS iii (2010), available at <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf> ("the notice-and-choice model, as implemented, has led to long, incomprehensible privacy policies that consumers typically do not read") (hereinafter "FTC Protecting"); Aleecia M. McDonald & Lorrie F. Cranor, *The Cost of Reading Privacy Policies*, 4 J. OF L. & POLICY FOR THE INFO. SOC'Y 543 (2009); FELICIA WILLIAMS, INTERNET PRIVACY POLICIES: A COMPOSITE INDEX FOR MEASURING COMPLIANCE TO THE FAIR INFORMATION PRINCIPLES (Sept. 2006), available at <http://www.ftc.gov/os/comments/behavioraladvertising/071010feliciawilliams.pdf>.

15. "Traditional notices are often hard to read and are uninviting." Todd B. Hilsee et al., *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform*, 18 GEO. J. LEGAL ETHICS 1359, 1381 (2005). To remediate this problem, Congress amended Federal Rule of Civil Procedure 23(c)(2) in 2003 to require that class action notices be written in "plain, easily understood language." It is not clear this goal is being achieved. See, e.g., Shannon R. Wheatman & Terri R. LeClercq, *Majority of Class Action Publication Notices Fail to Satisfy Rule 23 Requirements*, 30 REV. LITIG. 53 (2010); Aashish Y. Desai, *Confirmation Class*, L.A. LAW., July-Aug. 2008, at 31 ("Factual uncertainty, legal complexity, and the complications of litigation make it increasingly difficult for practitioners to comply with this requirement—and trial courts, for the most part, are not demanding compliance. Thus, class notice, particularly in state court, tends to be overly legalistic and practically incomprehensible to members of the general public.").

16. Cf. George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258 (1996) (discussing the interplay between notice to class members and Due Process requirements).

17. See Jeff Kosseff, Note, *The Elusive Value: Protecting Privacy During Class Action Discovery*, 97 GEO. L.J. 289 (2008).

do business with them on a more private basis.

Similarly, consumers who opt-out of class action lawsuits often lack viable alternatives.¹⁸ Opting-out typically preserves the consumer's right to bring an individual lawsuit, but that option is not meaningful to most consumers.¹⁹ An individual lawsuit can be expensive—in many cases, costing more than the maximum possible financial relief available to a successful litigant (sometimes called “negative value” lawsuits)—and pursuing the suit may require time and expertise that the consumer does not have. Thus, even if consumers understand their rights to opt-out of the class, it is rarely an attractive option.

Additionally, even consumers who opt-out of the class may be affected by the lawsuit's outcome. First, while the consumer could theoretically obtain non-monetary relief that differs from the non-monetary relief obtained by the class action lawsuit, subsequent judges will be reluctant to order any conflicting relief. Thus, the class action's resolution imposes a *de facto* limit on the remedies available to class members who opt-out and pursue their own lawsuits.

Second, to the extent the class action leads to an order or settlement requiring behavioral changes by the defendant, such as changed data management practices, the opting-out consumer will be subject to those changes as well.²⁰

Third, if the defendant must make payments that are not covered by insurance, the opting-out class member bears any increased fees the business imposes on consumers.²¹ Or, if the payment is financially ruinous to the defendant, the opting-out class member loses the service entirely.

18. Opt-out can occur in a couple of different ways. Class members can opt-out of the lawsuit entirely. If the lawsuit settles, the class member may be given a second opt-out opportunity. Or, in the case of settlements, class members can remain in the class and object to the settlement terms, although doing so is typically futile. *See* Leslie, *supra* note 3, at 97-101. This essay focuses only on the first opt-out option, but the analysis largely applies equally to a settlement opt-out or an objection to the settlement.

19. *See, e.g.,* Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (“The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”); 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))); Leslie, *supra* note 3, at 97-101; Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1134-55 (2010).

20. This could apply even if the opting-out consumer has terminated his/her business relationship with the defendant, e.g., if the defendant changes its practices for data the defendant has legitimately retained about the departed consumer.

21. Thomas B. Leary, Commissioner, Fed. Trade Comm'n, *The FTC and Class Actions*, at the Class Action Litigation Summit (June 26, 2003), available at <http://www.ftc.gov/speeches/leary/classactions Summit.shtm>.

C. *Consumers Lack Autonomy Over the Lawsuit*

Privacy advocates are often concerned about how privacy violations hinder individual autonomy.²² Yet, by its nature, class action litigation strips class members of their autonomy. Class members typically do not choose the lawyers purportedly advancing their interests.²³ Class counsel is effectively self-appointed²⁴ until the judge appoints counsel.²⁵ Furthermore, the lawyers, not the class members, drive all of the key decisions in the litigation.²⁶ As the maxim goes, “class counsel controls the litigation.”²⁷ Thus, to the extent litigation over privacy violations is designed to vindicate consumer autonomy, the procedure counterproductively undermines that goal.

D. *Class Action Lawyers Maximize Their Own Financial Interests, Not the Class’ Interests*

Privacy advocates often object to businesses unfairly profiting from consumers’ private data.²⁸ Often, privacy advocates see privacy as a “zero-sum” game, where businesses win (via profits) by making consumers lose (via privacy violations). Yet, privacy class counsel and class members may unexpectedly be in a “zero-sum” relationship as well. Just like privacy-invading companies, class action lawyers often advance their own financial interests at the expense of the class members’ interests.²⁹

For example, class counsel might pursue settlements that maximize their payout, even if the settlement does not provide any financial relief to the class.³⁰ Indeed, we have seen numerous privacy lawsuit

22. See, e.g., James S. Taylor, *Privacy and Autonomy: A Reappraisal*, 40, S. J. PHILOSOPHY 587, 587, 601 n.1 (2002) (“it has been widely held in both the legal and the philosophical literature that a violation of one’s privacy will necessarily also undermine one’s autonomy The claim that a violation of one’s privacy will also serve to undermine one’s autonomy is repeated almost ad nauseum in the literature on privacy.”).

23. See Leslie, *supra* note 3, at 76. Typically, class counsel picks the named class representatives. See, e.g., Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 196 (1990).

24. Leary, *supra* note 21.

25. FED. R. CIV. P. 23(g).

26. As Prof. Leslie points out, the collective action problem motivating class adjudication means that typically no one, not even the named representatives, supervises or manages class counsel. Leslie, *supra* note 3, at 80-81.

27. Eisenberg & Miller, *supra* note 10, at 1533.

28. See, e.g., Schwartz, *supra* note 5.

29. Leary, *supra* note 21; Leslie, *supra* note 3, at 77 (“Whereas the interests of the class and its attorneys may diverge, class counsel and defendants may have goals that can be aligned, even if they are seemingly at odds.”).

30. See, e.g., *Graybeal v. Am. Sav. & Loan Ass’n*, 59 F.R.D. 7, 13 (D.D.C. 1973) (“In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain.”); Leslie, *supra* note 3.

settlements that have provided minimal or zero financial relief for class members,³¹ even though the lawyers took substantial payments for themselves.³² A few examples (not an exhaustive list!) of recent online privacy lawsuits where class members got de minimis or no cash, unlike their lawyers:

Facebook Beacon. Facebook launched a service where third party websites reported back information about Facebook users' activities, and Facebook displayed that information in users' newsfeeds without the users' explicit permission. Facebook settled the resulting lawsuits for \$9.5 million,³³ of which over \$2.3 million went to the plaintiffs' lawyers³⁴ and about \$25,000 went to class representatives. The remaining funds are slated for a new privacy foundation.

Google Buzz. Google launched a new social network, Google Buzz, which disclosed private information from users' Gmail accounts. Google settled the resulting lawsuits for \$8.5 million,³⁵ of which the plaintiffs' lawyers could claim up to 30% (over \$2.5 million) and class representatives got up to \$2,500 each.³⁶ The remaining funds went to consumer education and privacy organizations.³⁷

NebuAd. NebuAd provided behavioral advertising technology to Internet access providers which allegedly violated various privacy laws.

31. Shortly, I will address the argument that cy pres funds deliver value to class members.

32. *Cf.* Sasha Romanosky et al., *Empirical Analysis of Data Breach Litigation*, http://papers.ssrn.com/sol3papers.cfm?abstract_id=1986461 (Feb. 19, 2012) (In data breach litigation settlements, the "mean value of settlements awarded to plaintiffs was about \$2,500 per plaintiff (min=\$500, max=\$15,000, n=19) with most awards being a nominal amount of around \$500 and often awarded to named plaintiffs only. Attorney fees, on the other hand, were substantially larger, with a mean sum of \$1.2M (min=\$8,000, max=\$6.5M, n=15)). We have not seen many recent "coupon" settlements to privacy class action lawsuits, but due to low redemption rates, coupons typically provide consumers with little financial relief as well. *See, e.g.*, Thomas A. Dickerson & Brenda V. Mechmann, *Consumer Class Actions and Coupon Settlements: Are Consumers Being Shortchanged?*, 12 *ADVANCING THE CONSUMER INTEREST* 2 (2000), available at <http://www.classactionlitigation.com/library/dcoupon.html>. Congress recently enacted 28 U.S.C. § 1712 to curb some abuses of coupon settlements.

33. Findings of Fact, Conclusions of Law, and Order Approving Settlement at 7, *Lane v. Facebook*, No. C 08-3845 RS (N.D. Cal. Mar. 17, 2010), available at <http://www.scribd.com/doc/28530843/Lane-v-Facebook-N-D-Cal-Order-Approving-Settlement>.

34. Order Re Attorney Fees at 4, *Lane v. Facebook*, No. C 08-3845 RS (N.D. Cal. May 24, 2010), available at <http://www.scribd.com/doc/31994873/Lane-v-Facebook-N-D-Cal-Order-re-Attorneys-Fees>.

35. Settlement Agreement at 6, *In re Google Buzz User Privacy Litigation*, No. 5:10-CV-00672-JW (N.D. Cal. Sept. 3, 2010), available at <http://www.scribd.com/doc/37115894/Google-Buzz-Settlement-Agreement>.

36. Wendy Davis, *Google Settle Buzz Class-Action Privacy Suit*, *MEDIAPOST* (Sep. 7, 2010 5:05 PM), <http://www.mediapost.com/publications/article/135325/>.

37. Notice of Pendency of Class Action and Proposed Settlement in the U.S. District Court at 3, *Valentine, et al. v. NebuAd, Inc.*, No. 3:08-cv-05113 (N.D. Cal. Sep. 20, 2011), available at http://www.nebuadsettlement.com/Documents/NAV0001/NAV_NOT.pdf.

NebuAd settled the resulting lawsuits for \$2.4 million, of which up to \$800,000 went to the plaintiffs' lawyers and seven class representatives got between \$1,000 and \$5,000.³⁸ The remaining funds went to various privacy organizations.³⁹

Overall, the financial payoffs of class action litigation can lead to undesirable strategic behavior. For example, if multiple class action cases are filed and are not consolidated, settlement of one lawsuit moots the others—meaning the settling lawyers get paid and the other lawyers get zilch. This enables the defendant to conduct a “reverse auction,”⁴⁰ where the lawyers compete with each other to settle at a cheaper price to the defendant because the lowest-bidding lawyer will be the only lawyer to get paid (the auction has an implicit minimum price: the minimum amount the judge will approve). In a winner-takes-all situation like this, the interests of class members hardly take precedence.

Even if the defendant does not conduct a reverse auction, it can still take advantage of the lawyers' financial incentives to derogate the interests of class members. Instead of fighting the class action lawsuit, a defendant can choose to *embrace* it as an expeditious way to resolve questions about its practices. In this situation, for the price of the settlement, the defendant can eliminate all past legal liability and potentially obtain judicial approval for its current business practices across all consumers. Because the plaintiffs' lawyers will get paid from the settlement, the lawyers representing the class may be pliable in their negotiations. Once a settlement is struck, both the defendant and the plaintiffs' lawyers have strong financial incentives to jointly persuade the judge to accept the deal. Effectively, then, a class action lawsuit can help the defendant and the plaintiffs' lawyers collude with each other to advance their financial interests, with the judge (and any objecting class members) being the only line of defense to protect consumers' interests.

38. Wendy Davis, *NebuAd Settles Lawsuit Over Behavioral Targeting Tests*, MEDIAPOST (Aug. 16, 2011, 5:26 AM), <http://www.mediapost.com/publications/article/155980/>.

39. *Id.*

40. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370 (1995). As Prof. Leslie summarizes:

In extreme situations, the defendant who anticipates class action litigation will shop for class counsel to initiate litigation and then negotiate a sweetheart settlement with those plaintiffs' attorneys. Even in an ongoing class lawsuit, the class counsel may fear standing up to a defendant who offers a sweetheart deal, lest that defendant solicit another class counsel to file a competing class action in another jurisdiction, settle the latter case immediately, and wipe out the first class action altogether, leaving the original class counsel on the hook for its costs and without any recovery at all.

Leslie, *supra* note 3, at 80 (footnote omitted).

II. IMPLICATIONS

Let us assume this essay is correct, and privacy class action litigation creates irony. Privacy advocates *still* might consider privacy class action litigation an acceptable tool, despite the irony, because the ends justify the means or the alternatives are not any better.

Ends Justify the Means. Even if class action litigation is not an ideal way to advance consumer interests, privacy advocates could nevertheless decide that its virtues trump its disadvantages. Class action litigation remediates specific privacy violations on an ex post basis, especially when individual litigation is not cost-justified for any one affected consumer. Even if consumers do not get the cash, defendants may make behavioral changes that benefit consumers (voluntarily or through an injunction). And cy pres payouts are supposed to provide indirect benefits to consumers generally,⁴¹ although critics have strongly questioned this.⁴²

Furthermore, the specter of potential privacy class action litigation encourages companies to avoid privacy violations ex ante.⁴³ Still, it is hard to isolate the ex ante effects of class actions compared with the ex ante effects of other enforcement mechanisms (such as government enforcement)⁴⁴ and adverse consequences from negative publicity.⁴⁵

Finally, in theory, litigation payoffs motivate class action lawyers to research and discover privacy violations that otherwise would go undiscovered.⁴⁶

41. See, e.g., Thomas A. Doyle, *Residual Funds in Class Action Settlements: Using "Cy Pres" Awards to Promote Access to Justice* *Federal Lawyer*, FED. LAW., July 2010, at 26.

42. See, e.g., Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010); U.S. CHAMBER INST. FOR LEGAL REFORM, *CY PRES: NOT SO CHARITABLE CONTRIBUTION TO CLASS ACTION PRACTICE 1* (Oct. 2010), available at http://www.instituteforlegalreform.com/sites/default/files/cypres_0.pdf ("Cy pres awards in class actions engender a multitude of ethical and conflict of interest problems for judges, defendants, plaintiffs and absent class members"). The allocation of privacy litigation cy pres funds, and possible conflicts of interest in that process, have raised even more questions. See, e.g., Pamela A. MacLean, *Competing for Leftovers*, CAL. LAW., Sept. 2011, available at <http://www.callawyer.com/Clstory.cfm?eid=917690>.

43. See, e.g., Schwartz, *supra* note 5, at 2107-09; cf. Jared Jennings et al., *The Deterrence Effects of SEC Enforcement and Class Action Litigation*, at 25 (Aug. 10, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868578 (arguing that class action litigation against one company for securities law violations has a deterrence effect on peer firms).

44. See Jennings, *supra* note 43, at 25 (in the context of securities law violations, "For targets that are subject to only litigation [and not government enforcement], there is overall evidence of significant deterrence . . . but no incremental deterrence in competitive industries").

45. See, e.g., *In Re Pharmatrak, Inc. Privacy Litigation*, 329 F.3d 9, 12 (1st Cir. 2003) (after a web analytics company experienced a relatively minor privacy violation, all of its customers dropped it and the company went bankrupt).

46. In the online privacy context, we may not be realizing this benefit. Many online

However, these benefits do not come for free. Privacy class action litigation is redistributive. It often enriches only a small coterie of lawyers and cy pres recipients at the expense of everyone else: the defendants' stockholders or insurance companies, employees and service providers terminated or not hired due to the lawsuit's financial impact, and ultimately consumers—the class members who the lawyers are supposedly representing!—who pay more (or get worse services) because the litigation payoffs are not being invested in better services at lower prices. Worse, when privacy class action lawsuits fail in court—a startlingly frequent outcome⁴⁷—the defense costs harm class members without any countervailing benefits at all.

So are the ex post and ex ante benefits of privacy class action lawsuits worth the costs imposed on the system plus the intrinsic ironies of class action litigation? There are not easy answers, but it is a question privacy advocates need to thoughtfully consider.

While doing so, privacy advocates should recognize a further irony of the “ends justify means” rationale. After all, companies routinely use the same rhetoric to justify their activities, arguing that their privacy practices are in the consumers' “best interest.” Do privacy advocates really want to embrace this sophistry? Especially for privacy advocates who believe privacy is a fundamental right, it seems like it should be a non-starter to embrace disavowed tactics to “protect” those fundamental rights.

Enforcement Alternatives Are not Better. Even recognizing class action litigation's defects, privacy advocates might still feel it is a better enforcement mechanism than the alternatives. The truth is that all privacy enforcement mechanisms have serious downsides. Competitor enforcements do not advance consumer interests directly, and many competitors may fear that their own practices are not clean. Certification bodies face their own conflicts-of-interest as enforcers; an enforcement action typically means the certifier is suing one of its paying customers.⁴⁸

privacy lawsuits respond to alleged violations already publicized by privacy/security researchers or journalists, including most notably the *Wall Street Journal's* “What They Know” series. See *What They Know*, WALL ST. J., <http://online.wsj.com/public/page/what-they-know-digital-privacy.html>.

47. See, e.g., *Tyler v. Michaels Stores, Inc.*, No. 11-10920-WGY, 2012 WL 32208, at *12 (D. Mass. Jan. 6, 2012); *Del Vecchio v. Amazon*, No. C11-366-RSL, 2011 WL 6325910, at *7 (W.D. Wash. Dec. 1, 2011); *Low v. LinkedIn*, No. 11-CV-01468-LHK, 2011 WL 5509848, at *6 (N.D. Ca. Nov. 11, 2011); *Robins v. Spokeo, Inc.*, No. 10-CV-05306 (C.D. Cal. Sept. 19, 2011), available at <http://www.scribd.com/doc/65697244/Robins-v-Spokeo-Dismissal>; *In re Facebook Privacy Litigation*, No. C 10-02389 JW, 2011 WL 2039995, at *718 (N.D. Cal. May 12, 2011); *La Court v. Specific Media, Inc.*, No. 8:10-cv-01256-GW-JCG, 2011 WL 2473399, at *7 (C.D. Cal. April 28, 2011); see generally Jill Redhage, *Privacy Suits Fail to Garner Victory*, S.F. DAILY J., Feb. 24, 2012, at 4.

48. For example, the certification body TRUSTe has been criticized for its lackadaisical enforcement against its customers. Wayne Porter, *TRUSTe Answers The Challenge and Asks*

Government enforcers (e.g., the Federal Trade Commission, State Attorneys General and international Data Protection Agencies) usually face fewer conflicts-of-interest,⁴⁹ but government agencies typically bring enforcement actions only in egregious situations or for its precedent value.⁵⁰

Implications. In the end, almost every ex post mechanism to enforce privacy violations is not completely satisfying to privacy advocates. This explains why the FTC is so anxious to get companies to make privacy-savvy ex ante decisions.⁵¹ If privacy class action litigation actually gets businesses to make better ex ante privacy decisions than alternative enforcement mechanisms, perhaps the ends do justify the means. This is an empirical question that would benefit from additional research.

CONCLUSION

This essay identifies a quandary facing privacy advocates. So much privacy scholarship focuses on the substantive scope of privacy protection, but if enforcement will undercut the ideals encoded in the underlying privacy rights, perhaps privacy advocates are not making real progress towards their normative objectives. Additional research into optimal enforcement mechanisms for privacy violations may be a productive endeavor.

Mr. Edelman To Do The Same ..., REVENews (Oct. 2, 2006), <http://www.revenews.com/affiliate-marketing/truste-answers-the-challenge-and-asks-mr-edelman-to-do-the-same/>; Tim Clark, *Truste Clears Microsoft on Technicality*, CNET (Mar. 22, 1999, 6:45 PM), <http://news.cnet.com/2100-1023-223374.html>.

49. But they are not free from conflicts-of-interest. For example, government decision-makers exercising prosecutorial discretion may be more interested in maximizing their own career trajectory or personal reputation instead of advancing the public good.

50. For a discussion of other challenges to government enforcement of privacy violations, see Joel R. Reidenberg, *Privacy Wrongs in Search of Remedies*, 54 HASTINGS L.J. 877, 885-89 (2003).

51. FTC Protecting, *supra* note 14.

