Restitutionary Theory of Attorneys’ Fees in Class Actions

Charles Silver

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation
Charles Silver, Restitutionary Theory of Attorneys’ Fees in Class Actions, 76 Cornell L. Rev. 656 (1991)
Available at: http://scholarship.law.cornell.edu/clr/vol76/iss3/3

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
A RESTITUTIONARY THEORY OF ATTORNEYS’ FEES IN CLASS ACTIONS

Charles Silver†

Issues regarding attorneys’ fees in class actions consumed an extraordinary amount of federal judges’ time in the 1980s.1 The Supreme Court shouldered its share of the burden,2 by addressing the following questions, among others: Is it proper to negotiate the merits and attorneys’ fees simultaneously when settling class actions?3 Can a class action settlement waive the right to a fee award in a fee-shifting case?4 Should the amount of money a class receives affect the size of the fee an attorney is paid?5 Should private attorneys and legal aid attorneys who run class actions be paid at the same rates?6 Can judges enhance fee awards to offset the risk of losing and forfeiting all compensation when attorneys wage class actions on a contingency basis?7

† Assistant Professor, University of Texas Law School. J.D. Yale, 1987; M.A. University of Chicago, 1982.

Samuel Issacharoff and Douglas Laycock read and critiqued several drafts of this Article, and I thank them for their help and advice. Neal Devins, John Dzienkowski, Richard Epstein, Robert Hamilton, Calvin Johnson, Charles Johnson, Lewis Kornhauser, Richard Posner, Jack Ratliff, and Marsha Silver also provided written comments and other valuable assistance. I am also grateful for suggestions from Mark Gergen, Steven Goode, William Powers, Louise Weinberg, and the rest of my colleagues who attended a colloquium I offered at the University of Texas Law School. Finally, I wish to acknowledge research assistance from Jane Enzminger, John Fahle, and Veronique Kellow.


2 Thomas D. Rowe, Jr., The Supreme Court on Attorney Fee Awards, 1985 and 1986 Terms: Economics, Ethics, and Ex Ante Analysis, 1 GEO. J. LEGAL ETHICS 621, 621 (1988) (“Over the past decade, the Supreme Court has progressed from hearing an occasional case on attorney fee awards to deciding at least a few such cases virtually every Term.”) (footnote omitted). Not all fee-related cases decided by the Court involve class actions or even attorney fees. For example, the Court recently agreed to determine whether expert witness fees can be included in awards of attorneys’ fees under 42 U.S.C. § 1988; West Virginia Univ. Hosp., Inc. v. Casey, 885 F.2d 11 (3d Cir. 1987), cert. granted, 110 S. Ct. 1294 (1990).


4 Id.


6 Hensley, 461 U.S. 424.

7 Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air, 483 U.S. 711 (1987) (Delaware Valley II). Because citizens’ groups waged Delaware Valley II, it was not a
Simply by posing these questions one assumes that attorneys who win class actions are entitled to be paid. For example, in Blum v. Stenson, the Supreme Court asked whether the size of the fund a class recovers should affect the amount of money an attorney is paid. The question need not be asked unless an attorney who represents a class successfully is entitled to compensation. If no entitlement exists, no fee should be paid, and the amount recovered should not affect the result.

There can be no rational system of regulating fee awards until there is a coherent theory explaining why class action attorneys are entitled to be paid. Nevertheless, the Supreme Court continues to put the cart before the horse. It continues to ask "How much?" without first explaining "Why?" Although two possible answers to the latter question have been suggested, neither enjoys the support of the Court.

The first answer argues that attorneys are entitled to be paid because class members are enriched at the attorneys' expense. This restitutionary theory was first expressed in Central Railroad & Banking Co. v. Pettus. In Pettus, the Court upheld a supplemental award of fees to a group of attorneys who helped secure a common fund for a creditor class. After being paid by the named plaintiffs, the attorneys applied for and received additional compensation from the common fund. On appeal, several class members argued that the attorneys had no right to payment from the common fund, but the Justices disagreed. They reasoned that the fee paid by the class action proper. I discuss it here because it creates law that applies to fee awards in all cases, including class actions.

---

class action proper. I discuss it here because it creates law that applies to fee awards in all cases, including class actions.

9 Id. at 900 n.16.
10 The word "restitutionary" appears in the RESTATEMENT OF RESTITUTION 5 (1937) [hereinafter RESTATEMENT (FIRST)] ("The earliest proceedings in common law courts were restitutioinary in nature."). However, no dictionary lists it. One scholar once opined against the word, but, after encountering many instances of its use, changed his mind. Compare BRYAN Garner, A DICTIONARY OF MODERN LEGAL USAGE 480-81 (1987) ("restitutioinary" not a recognized adjective) with Bryan Garner, The Missing Common-Law Words, in THE STATE OF THE LANGUAGE 241 (Christoper Ricks & Leonard Michaels eds. 1990).

One can also question the propriety of using the word "restitutionary" to describe claims seeking compensation to cure unjust enrichment. In some countries, persons demand restitution only when they seek to recover items they once possessed. The word has a broader meaning in the United States, encompassing both claims for return of specific items and claims for compensation grounded in notions of unjust enrichment. Douglas Laycock, The Scope and Significance of Restitution, 67 TEX. L. REV. 1277, 1279 (1989).

11 113 U.S. 116 (1885).
12 A common fund case brings a fund of money, to which a number of persons are entitled, within the jurisdiction of a court. Typically, funds are created when defendants make damage or settlement payments to a court.
named plaintiffs failed to cover the reasonable value of the attorneys' time, that the class members profited at the attorneys' expense, and that the attorneys could therefore recover from the common fund the difference between the reasonable value of their services and the fee they had already received.¹³ Denying the attorneys a supplemental award would have left the class members unjustly enriched at the attorneys' expense, in violation of the equitable principle that persons who are unjustly enriched must make restitution.

The second answer reasons that attorneys who run class actions are entitled to be paid because fee awards encourage them to protect class members' rights. This theory, which is invoked mainly but not exclusively in fee-shifting cases,¹⁴ treats lawyers as economically motivated actors who wage socially beneficial private attorney general actions for selfish reasons.¹⁵ Because the second answer focuses on incentives, I will refer to it as the economic theory of fee awards.

Again, neither the restitutionary theory nor the economic theory enjoys the unqualified support of the Supreme Court. The restitutionary theory thrived for about ninety years after its announcement in Pettus in 1885.¹⁶ During that period, lower court judges applied the theory in increasingly novel ways, often aided and encouraged by the Supreme Court.¹⁷ In the mid-1970s, however, two events signalled the theory's demise. The first was the Supreme Court's decision in Alyeska Pipeline Service v. Wilderness Society.¹⁸ Alyeska neither overruled Pettus nor invalidated the notion that fee awards are needed to cure unjust enrichment. Alyeska did draw a bright line, however, by forbidding judges from taxing fees against

---

¹³ Pettus, 113 U.S. at 126-27.
¹⁴ In a fee-shifting case, a defendant can be made to pay attorneys' fees and other expenses incurred by a class. See, e.g., 42 U.S.C. § 1988 (1988) (authorizing fee shifting in favor of prevailing parties in civil rights cases).
¹⁵ See, e.g., Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 ("the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the 'private attorney general' for the vindication of legal rights"), reh'g denied, 446 U.S. 947 (1980).
defendants in the absence of statutory authorization. 19 In so holding, *Alyeska* contrasted sharply with the Court's prior cases, which generally supported lower court judges' efforts to expand their equitable powers to grant fee awards. 20 *Alyeska* put the world on notice that the Court had reached the limit of its enthusiasm for the restitutonary approach.

The second event that signalled the demise of the restitutonary theory occurred when John P. Dawson, an outstanding scholar of restitution, published three articles in the *Harvard Law Review* debunking *Pettus*. 21 Dawson argued that attorneys have no right to compensation from common funds. 22 He agreed that attorneys are entitled to fees from named plaintiffs, because named plaintiffs sign contracts to which they can properly be held. 23 But absent plaintiffs sign no agreements. Consequently, Dawson concluded, absent plaintiffs have no duty to pay attorneys, even when the attorneys' efforts make them better off. 24

Dawson's claim was simple, yet carried impressive force. His articles persuaded almost everyone who read them. 25 It seems fair to say that because of Dawson few modern academic writers take the restitutonary theory seriously. 26 In that respect, academic writers

19  *Id.* at 268-71.
23  *Id.*
24  *Id.* at 851-54.

However, academic writers no longer discuss fee awards in class actions from a restitutonary perspective. In other words, they no longer think fee awards are needed
and judges are much alike. Although judges still occasionally cite Pettus and related cases, they do not seriously believe that justice is on the side of plaintiffs' lawyers who seek fees. They are more likely to regard plaintiffs' lawyers as bounty hunters whose ethics are dubious and without whom society would generally be better off, but whose services are sometimes needed and who must therefore, however reluctantly, be paid.

The Supreme Court confirmed the demise of the restitutorian theory in 1986 when it decided Evans v. Jeff D. The question in Jeff D. was whether a settlement could waive a class's right to a fee award even though class counsel would thereby be denied a fee. Six Justices answered affirmatively and the settlement was allowed to cure unjust enrichment. Instead, their concern is to design fee award practices that align the interests of lawyers and plaintiffs in hope of encouraging lawyers to better protect plaintiffs' interests and rights. The leading exponent of this view is John C. Coffee, Jr. See John C. Coffee, Rethinking the Class Action: A Policy Primer on Reform, 92 IND. L.J. 625 (1987) [hereinafter Coffee, Rethinking]; John C. Coffee, The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. CHI. L. REV. 877 (1987) [hereinafter Coffee, Entrepreneurial Litigation]; John C. Coffee, Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 COLUM. L. REV. 669 (1986) [hereinafter Coffee, Plaintiff's Attorney]; John C. Coffee, Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 MD. L. REV. 215 (1983) [hereinafter Coffee, Private Attorney General].

Intuitions relating to unjust enrichment still occasionally influence judges. See, e.g., Marek v. Chesny, 473 U.S. 1, 11 (1985) (denying fees for services that do not benefit plaintiffs); Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) (degree of success obtained in a lawsuit may affect the size of the fee a lawyer is paid). Hensley kept alive a legal doctrine rooted in cases that predate the demise of the unjust enrichment approach. See, e.g., Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974); Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973). But the legal doctrine and the theory that spawned it have been detached. There is no explicit discussion of unjust enrichment in Hensley or any other recent Supreme Court case tying fee awards to benefits received.

Not all commentators are as impressed as I am by the change in the tenor of judges' thinking. See, e.g., William Lynk, The Courts and the Market: An Economic Analysis of Contingent Fees in Class-Action Litigation, 19 J. LEGAL STUD. 247, 256 (1990) ("the language and terminology adopted by most courts is more directly connected to concepts like justice and fairness than economic efficiency"). Part IV of this Article reveals Lynk's mistake. More and more often, judges use explicitly economic terms. See Bryant Garth, Ilene H. Nagel & S. Jay Plager, The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation, 61 S. CAL. L. REV. 353, 361-66 (1988); Rowe, supra note 2, at 622.

Garth, Nagel & Plager, supra note 27, at 360-66. 28

stand, even though the fee waiver provision enabled the absent plaintiffs to enrich themselves at their attorneys' expense. The result, and the failure of all the Justices, including the dissenters, to mention the problem of unjust enrichment, strongly suggest that the restitutionary theory is dead.\footnote{See also Jeff D. v. Evans, 743 F.2d 648, 651 (9th Cir. 1984) (citing Hall v. Cole, 412 U.S. 1 (1973); Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939)).}

There is more life left in the economic theory, but it too was dealt a heavy blow in \textit{Jeff D}. The economic theory justifies fee awards on the ground that they encourage lawyers to act as private attorneys general on behalf of otherwise helpless victims. The conflict between the economic theory and the use of fee waiver agreements is evident: fee waivers deter lawyers from acting as private attorneys general by weakening the incentives fee awards create. The conflict had little effect on the Justices who formed the majority of the \textit{Jeff D}. Court, however. They perceived only a "remote" possibility that the fee waiver agreements would cause lawyers' willingness to handle class actions to decline.\footnote{Jeff D., 475 U.S. at 741 n.34; see infra text accompanying notes 257-84 (Court's reasoning in \textit{Jeff D}. analyzed in greater detail).} To reach that conclusion, the Court had to reject the central premise of the economic theory of attorneys' fees: that lawyers respond to incentives.

The decision in \textit{Jeff D}. thus undermined the two major theories of attorneys' fees in class actions, thereby leaving an entire area of law theory-deprived. One can now explain the practice of compensating lawyers who wage class actions only by saying that it has been in place for more than one hundred years. That is too slim a justification for a practice that places millions of dollars in lawyers' pockets year after year.\footnote{Absent plaintiffs own the common funds that class actions produce. Boeing Co. v. Van Gemert, 444 U.S. 472 (1980). Fee-shifting statutes typically place the right to recover fee awards in plaintiffs' hands. \textit{Jeff D}. , 475 U.S. at 730. Even so, fee awards typically consume between 20\% and 30\% of absent plaintiffs' gains in common fund cases, with several awards in the range of 50\% on record. See H. \textsc{Newberg}, supra note 1, §§ 2.08, 2.31-.32; Robert T. Mowrey, \textit{Attorney Fees in Securities Class Action and Derivative Suits}, 3 J. Corp. L. 267 (1978). Fee awards in fee-shifting cases can also be impressively large. See, e.g., Robinson v. Ariyoshi, 705 F. Supp. 1412 (D. Haw. 1989) ($2,335,936 awarded in fees and interest).}

Nor, if recent cases can be taken as a guide, is the Supreme Court likely to produce a coherent account of attorneys' fees in class actions anytime soon. Fee award cases tend to split the Court into factions, none of which manage to win all the time. As a result, the doctrine has evolved in inconsistent ways. For example, in \textit{Philadelphia v. Delaware Valley Citizens' Council for Clean Air} (\textit{Delaware Valley II}),\footnote{483 U.S. 711 (1987).} the Supreme Court divided 4-4-1 over the permissibility of
contingency enhancements, with a plurality, joined by Justice O'Connor, holding that fees can be enhanced in cases where plaintiffs have difficulty securing representation. After Delaware Valley II, a lawyer who convinces a judge that no lawyer would have agreed to represent a group of plaintiffs at a regular hourly rate can receive an enhanced fee.\(^{34}\) This seems to reestablish the connection between fees and willingness to wage private attorney general actions that was severed in Jeff D. Because Jeff D. undermines the theory Delaware Valley II seems to embrace, it is difficult to reconcile cases in a theoretical way.

Jeff D. and Delaware Valley II demonstrate that the law of attorneys' fees in class actions is falling into disarray. In hope of preventing further deterioration, this Article will attempt to breathe new life into the discarded restitutionary approach. A sound restitutionary theory would help unify fee award law, which is now divided. One body of law governs fee awards in common fund class actions; another governs fee awards in class actions where fee shifting is allowed.\(^{35}\) However, from a restitutionary perspective, common fund cases and fee-shifting cases are essentially alike. Both force one to ask why it is right to give a lawyer money that could otherwise be placed in plaintiffs' hands. The answer does not depend on the route money travels. Whether a lawyer is paid from a fund a class acquires by winning a claim for damages at trial or from a fund a class acquires by enforcing its right to demand a fee award from a defendant, the answer is the same. A lawyer is entitled to be paid when and because class members are enriched at that lawyer's expense.\(^{36}\)

Because attorneys' claims for compensation have the same basis in common fund and fee-shifting class actions, it follows that judges should subject fee issues in all class actions to a single set of principles and rules. If a judge rightly awards an attorney one million dollars in a common fund class action, then the judge should also be


\(^{35}\) See, e.g., Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984) (in common fund cases "a reasonable fee is based on a percentage of the fund bestowed on the class," while in fee-shifting cases under 42 U.S.C. § 1988 "a reasonable fee . . . reflects the amount of attorney time reasonably expended on the litigation").

\(^{36}\) To clarify, a fee-shifting case produces a grant of monetary or equitable merits-based relief and a common fund large enough to yield a fee award. The absent plaintiffs own the fee award fund, just as they own common funds in general. In both common fund cases and fee-shifting cases, the question is therefore whether absent plaintiffs can properly be required to share common funds they own with lawyers who wage class actions.
right to award one million dollars in an otherwise identical fee-shifting case. The fees should be equal in the two cases because the attorneys’ claims would be the same.

The possibility of unifying the law of fee awards in class actions is one strong reason for reconsidering the restitutionary approach. Another reason is simply that the law of restitution is the right body of law to apply. The practice of granting fee awards forces class members to pay for services and benefits they neither request nor, in many cases, are free to reject. In other words, it requires them to participate in exchanges without their consent. Because the law of restitution regulates forced exchanges of this kind, it is appropriate to subject granting fee awards in class actions to the requirements of that body of law.37

I think the law of restitution, and the larger principles it embodies, support the practice of paying attorneys who win class actions. My aim in Parts I and II will be to prove this claim by arguing that the practice of paying attorneys who win class actions satisfies restitution’s basic impulse to allocate benefits fairly without exceeding limits the law rightly imposes on judges’ power to award compensation.38 In Part III, I will refute Dawson’s argument that attorneys have no right to compensation on restitutionary grounds. Dawson’s critique rests on misconceptions about class action practice; he probably would have endorsed the restitutionary theory had he known more about class actions. Finally, in Part IV I apply the restitutionary theory to Jeff D. and Delaware Valley II. My aim in doing so will be to show that the theory has bite. It enables judges to decide practical issues in coherent and defensible ways.

I

THE DESIRE FOR DISTRIBUTIVE JUSTICE

It is difficult to explain why absent plaintiffs are obligated to pay attorneys who represent plaintiff classes for the same reason it is difficult to explain why it is proper to tax people in order to pay the salaries of government officials. In both instances, people are charged without their consent. They are forced to pay even though, if asked, they might and probably would prefer to keep the money for themselves.

People sometimes attempt to justify taxation by arguing that forced exchanges of money and governmental services leave citizens

37 Levmore, supra note 25, at 67 (“Restitution occupies the crucial ground between ... tort and contract. Restitution deals with nonbargained benefits; tort law with nonbargained harms; contract law with bargained benefits and harms.”).

38 Richard J. Arneson’s excellent article, The Principle of Fairness and Free-Rider Problems, 92 Ethics 616 (1982), has greatly influenced the theory presented in Part I.
better off. The underlying premise is that the benefits citizens receive are more valuable than the taxes they pay.\textsuperscript{39} Unfortunately, this simple argument is inadequate to generate an obligation on the part of absent class members to pay attorneys’ fees as restitution. The law of restitution disfavors forced exchanges, even exchanges that leave the parties better off.\textsuperscript{40} Although the mandate to cure unjust enrichment is clear,\textsuperscript{41} a basic principle of restitution is that a person who receives a benefit voluntarily conferred in the absence of mistake, coercion, request, or emergency is not unjustly enriched and has no obligation to pay.\textsuperscript{42} The presumption is that recipient $R$ incurs a duty to pay provider $P$ only when $P$ bargains for compensation in advance and $R$ agrees to pay.\textsuperscript{43} The presumption would survive a showing that a forced exchange of benefits for compensation would leave $R$ better off.

Absent plaintiffs do not hire attorneys; the truth is more nearly the reverse.\textsuperscript{44} Attorneys acting for named plaintiffs draw absent plaintiffs into class actions involuntarily and absent plaintiffs cannot always extricate themselves once they are joined. Nor do absent plaintiffs exert much control over the way class actions are run. In many cases, they cannot even reject the benefits class actions provide. Absent plaintiffs are passive parties who “sit back and allow the litigation to run its course.”\textsuperscript{45}

Given the passivity of absent plaintiffs, the law of restitution would presume that they have no obligation to pay for the benefits class actions provide. A restitutionary theory of attorneys’ fees in class actions must overcome that presumption. It must show that “accepting or even simply receiving the benefits of a [class action] can . . . obligate an individual to contribute” toward the expenses of litigation, “even though the individual has not actually consented” to pay in advance.\textsuperscript{46}

This Part shows that, according to the law of restitution, it is appropriate to require absent class members to pay attorneys’ fees

\textsuperscript{40} See 2 George E. Palmer, Law of Restitution § 10.1 (1978) (noting “judicial disapproval of unsolicited intervention . . . where the intervener expects compensation”); Restatement (Second) of Restitution § 2, at 34 (Tent. Draft No. 1 1983) [hereinafter Restatement (Second)] (“no one should be empowered to thrust a benefit on another and by that means become his creditor”).
\textsuperscript{41} See Restatement (First), supra note 10, § 1.
\textsuperscript{42} Id. § 112.
\textsuperscript{43} Levmore, supra note 25, at 65; G. Palmer, supra note 40, § 10.1.
\textsuperscript{44} See sources cited infra note 94 (examples of client solicitation in class actions).
\textsuperscript{46} Arneson, supra note 38, at 623.
when all of the following conditions are met:

(1) It is impracticable for a group of absent plaintiffs to organize a group lawsuit by voluntary means;

(2) As a result of successful class litigation, absent plaintiffs enjoy benefits they would not otherwise receive;

(3) Absent plaintiffs do not receive the benefits as gifts;

(4) Absent plaintiffs either voluntarily accept the benefits they receive or have no opportunity to decline them; and

(5) Absent plaintiffs are better off receiving benefits and paying attorneys’ fees than doing without the benefits entirely.

I contend that when these conditions are met, the law of restitution requires absent plaintiffs to pay attorneys’ fees. They have a duty to compensate attorneys who litigate class actions for them because, under the circumstances, it is just and practicable to require them to pay.

The claim I am making is restitutionary in both the substantive sense and the remedial sense. The presence of unjust enrichment both generates the obligation to compensate class counsel and provides the measure of how much absent plaintiffs ought to pay.

When unjust enrichment is used substantively, "[t]he focus of inquiry is on the meaning of [the word] ‘unjust.’" Why would it be unjust to decline to compensate an attorney whose efforts enrich a class? The justness of a particular allocation of resources necessarily depends on the conception of justice employed. The conception relevant to restitution is that of justice as reciprocity or fair requital. This conception requires a person who benefits from another’s efforts or sacrifices—who reaps where another has sown—to offer something of appropriate value in return. Because attorneys help produce the gains absent plaintiffs enjoy, the conception of jus-

\[^{47}\text{Conditions (1) through (5) are adaptations of the conditions Arneson builds into his principle of fairness. Id. at 621-22. Conditions (1) through (5) have analogs in the law of restitution as well, as I show when discussing the conditions below. On reflection, that is not surprising. Arneson aims to make plausible the existence of fairness-based obligations to help pay for unsolicited, collectively provided benefits. The law of restitution is likewise concerned with assigning liability for benefits received in the absence of contractual agreements, and an important purpose of the class action is to facilitate the supply of benefits to groups.}^{51}\]

\[^{48}\text{See generally Laycock, supra note 10 (discussing substantive and remedial senses of restitution).}^{49}\]

\[^{49}\text{Id. at 1285.}^{50}\]

\[^{50}\text{I will not defend the conception of justice as reciprocity or fair requital, other than by observing that the conception informs both the common understanding of justice and the law of restitution. No more defense is needed. This Article merely applies the law of restitution to a problem that properly falls within its ambit. I therefore take at face value the moral impulse the law of restitution embraces.}^{51}\]

\[^{51}\text{This conception of justice has played a role in the thinking of many philosophers. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 112 (1971); H.L.A. Hart, Are There Any Natural Rights?, 64 PHIL. REV. 175 (1955).}^{50}\]
tice as reciprocity or fair requital obligates absent plaintiffs to offer reasonable fees in return.\textsuperscript{52}

It is hardly novel to observe that justice sometimes consists of abstaining from consumption of the products of others and in paying compensation when one enjoys the fruits of others' labors without their consent. The Bible tells us that it is "an hard man" who reaps where another has sown.\textsuperscript{53} Locke opined that a person who coveted land improved by another where ample land remained unappropriated "desired the benefit of another's Pains, which he had no right to."\textsuperscript{54} The point of Lockean property rules is to frustrate such illegitimate desires and to "guarantee to individuals" the "fruits of their own labour and abstinence."\textsuperscript{55}

It is, then, a common moral notion that people are entitled to keep for themselves the things they produce, except when they confer rights of enjoyment on others in exchanges or as gifts.\textsuperscript{56} An equally common correlative notion is that a person who enjoys the fruits of another's labor without acquiring a right of enjoyment ought to pay compensation sufficient either to disgorge the gain or to ensure the produce against loss.\textsuperscript{57}

The conception of justice as reciprocity informs the law of restitution as well. Consider the common-law rule that a cotenant who makes an improvement to a jointly held asset can recover the value added by the improvement from the price the asset fetches when it is sold.\textsuperscript{58} According to Dawson, the rule reflects the belief that it would be wrong to permit the "nonimprover . . . to profit by the improver's contribution."\textsuperscript{59} The same sentiment initially led judges to grant fee awards in class actions. The Supreme Court upheld a supplemental payment of fees in \textit{Pettus} because the absent plaintiffs

\textsuperscript{52} The conception of justice as reciprocity or fair requital is a distributive notion. It focuses on the allocation of benefits rather than their total amount. As a distributive notion, the conception of justice as fair requital contrasts with aggregative principles, like the principle of wealth maximization, that focus on "the total amount of want-satisfaction among the members of a reference group." Brian Barry, \textit{Political Argument} 43 (1965); see Richard A. Posner, \textit{The Economics of Justice} 60ff (1981) (discussion of wealth maximization).

\textsuperscript{53} "Lord, I knew thee that thou art an hard man, reaping where thou hast not sown, and gathering where thou hast not strawed." Matthew 25:24 (King James).

\textsuperscript{54} John Locke, \textit{Two Treatises of Government} 333 (Peter Laslett ed. 1963), quoted in Arneson, \textit{supra} note 38, at 627-28.

\textsuperscript{55} Arneson, \textit{supra} note 38, at 628 (quoting John Stuart Mill, \textit{Principles of Political Economy}, in 2 Collected Works 208 (1965)).

\textsuperscript{56} Arneson calls this notion the Lockean "self-benefit principle." Id. at 625-26.

\textsuperscript{57} There is room to disagree over the amount of compensation that ought to be paid. Parts III and IV of this Article address the appropriate remedy in class actions.

\textsuperscript{58} John P. Dawson & George E. Palmer, \textit{Cases on Restitution} 62 (2d ed. 1969); Dawson, \textit{Intermeddler}, \textit{supra} note 21, at 1422-27; Levmore, \textit{supra} note 25, at 70.

\textsuperscript{59} Dawson, \textit{Intermeddler}, \textit{supra} note 21, at 1424; see also id. at 1424 n.39 (cases supporting proposition).
"accepted the fruits of their [attorneys'] labors."\(^{60}\)

One could cite other decisions awarding compensation on the theory that people who enjoy the fruits of others' labor without first acquiring an entitlement to do so should pay for the benefits they receive.\(^{61}\) But there is no need to multiply examples. The point I want to make here is that the conception of justice as reciprocity has long informed the law of restitution. It explains why people who confer benefits on others can sometimes secure compensation, even when recipients are themselves innocent of wrongdoing.\(^{62}\) Obviously, the circumstances in which the law requires recipients to pay must be, and are, much more sharply defined than the conception of justice as fair requital standing alone would suggest. Mere receipt of a benefit does not by itself generate a legal obligation to pay.\(^{63}\) The purpose of the following Part is to identify certain requirements that limit the obligation to make restitution and to show that, in class actions, those requirements generally are met.

II

CONSTRAINTS ON THE PURSUIT OF DISTRIBUTIVE JUSTICE

To say that the law of restitution embodies a principle of distributive justice is not to say that the law strives for justice in all contexts or at all costs. To the contrary, the law often withholds compensation in cases where people reap what others have sown. For example, when it is feasible for parties to bargain, restitution is typically denied to providers who confer benefits without negotiating for payment in advance.\(^{64}\) Courts also resist claims for compensation when benefits are difficult to value and when there is a significant risk that "a recipient may genuinely not want a benefit . . . , even though its market value may be greater than the amount of restitution sought by the provider."\(^{65}\) Restitution thus frowns on providers who attempt to substitute courts for markets and on claims that present a sizeable risk that a recipient will be forced into

\(^{60}\) Central R.R. & Banking Co. v. Pettus, 113 U.S. 116, 125 (1885).


\(^{62}\) Restatement (Second), supra note 40, comment b.

\(^{63}\) Graham Douthwaite, Attorney's Guide to Restitution 22 (1977); Restatement (First), supra note 10, § 1 comment c.

\(^{64}\) Dan B. Dobbs, Remedies 301-05 (1973); G. Palmer, supra note 40, § 10.1, at 360-61 ("Courts start with the premise that one should not be compensated for intervening in the affairs of another without request").

\(^{65}\) Levmore, supra note 25, at 77.
a disadvantageous exchange. In these contexts, courts sacrifice distributive justice for the sake of competing aims. Distributive justice is thus neither the only goal embodied in the law of restitution nor, arguably, even the goal that body of law most consistently serves. It is a goal to be pursued when alternative principles are inactive or outweighed, so that the desire for distributive justice can safely be put into play.

The cotenancy example highlights this interplay of goals. A co-tenant who improves a jointly held asset cannot hold another co-tenant personally liable for a share of the cost. An active co-tenant can, however, recover the value an improvement adds to a jointly held good by invoking the right to partition. The remedy of partition typically requires that a jointly owned asset be sold and its proceeds divided in shares.

A policy of strict distributive justice would reject the ban on personal liability and enable active cotenants to force passive cotenants to pay for unwanted improvements. For example, such a policy would allow an active co-tenant to install an expensive swimming pool and charge a passive co-tenant with a share of the cost. But a passive co-tenant who dislikes swimming or has a limited budget might not want a pool. Moreover, the added property value attributable to a pool might not cover the passive co-tenant’s loss.

The policy limiting active cotenants to the partition remedy avoids this unfairness to passive cotenants. When a jointly owned asset is sold and the value added by an improvement is deducted from the sales price, the money remaining reflects the value the asset had before the improvement was made. Therefore, when that amount is divided, the passive co-tenant’s share equals the value of his or her portion of the unimproved asset. From an economic point of view, the passive co-tenant is no worse off than he or she would have been if the improvement had not been made.

Recognizing active cotenants’ claims for compensation in the context of proceedings for partition also permits judges to act efficiently. The law of property permits cotenants to seek partition whenever one of them wants to dissolve the joint ownership. When a request for partition is filed, “a court must as a matter of course ascertain the value of the property in question . . . . [E]valuating the improvement [made by one co-tenant] will probably require little ad-

---

66 See, e.g., Restatement (First), supra note 10, §§ 40-42, 112.
67 For example, suppose the property was worth $25,000 with the pool and $20,000 before the pool was added. On partition, the sale of the property would bring in $25,000, $5000 of which would go to the active co-tenant as the value added. The remaining $20,000 would equal the value the property had without the pool, and the passive co-tenant’s share of that amount would have the same economic value as his share of the unimproved asset.
ditional work .... Once valuation is under way the law can afford to recognize the provider of nonbargained benefits." The administrative cost of dividing benefits fairly, given that benefits must be divided, is acceptably low. The cotenancy example shows that the law of restitution allows courts to act on the desire for distributive justice in contexts where a decision to grant compensation would not disserve other important goals. Insofar as the law of restitution is concerned, the courts' power to require absent class members to pay class counsel is and ought to be similarly constrained. A policy that seeks to do distributive justice in class actions is defensible on restitutionary grounds only if the policy respects the diverse goals the law of restitution traditionally seeks to serve. It is for that reason that the five conditions set out above must be met. Each condition addresses a concern which would force one to question the propriety of a court's decision to require absent plaintiffs to pay attorneys' fees in a class action. A restitutionary theory must embrace the long-standing desire to allocate benefits fairly, but it must also explain and accommodate competing considerations that have traditionally limited judges' power to grant compensation.

A. Absent Plaintiffs Cannot Practically Organize Voluntary Litigation Groups

The law of restitution often requires judges to deny claims for compensation filed by providers who fail to bargain with recipients for payment in advance. When provider $P$ and recipient $R$ can bargain over the terms of compensation before a good or service is supplied, $R$ incurs no obligation to pay if $P$ acts in the absence of an agreement. A provider's failure to bargain in a context where a recipient could have consented tends to show that the recipient would have refused to pay if asked.

The effect of withholding compensation in contexts where parties can bargain is to demonstrate a preference for voluntary exchange. However, when impediments that have nothing to do with the desirability of an exchange make it difficult for parties to bargain, the law of restitution sometimes authorizes judges to grant compensation to providers who act without securing recipients' prior consent. In these cases, a denial of compensation would merely leave an unjust allocation of benefits intact. It would not encourage providers to bargain with recipients in markets because, by assumption, bargaining cannot occur.

---

68 Levmore, supra note 25, at 70.
69 See supra text accompanying note 47.
70 D. Dobbs, supra note 64, at 301-02; Restatement (First), supra note 10, § 112 comment a, illustrations 1-3 (absent agreement, construe transfer as gift).
Consider the classic case, admittedly extreme, in which a doctor cares for an unconscious patient. Because the doctor and the patient cannot bargain, the failure to bargain is not disqualifying. The law of restitution permits doctors to recover, but in keeping with the preference for negotiated exchanges, the limit of a doctor's claim to restitution is reached when a patient's ability to communicate is restored. The law encourages doctors to bargain with patients who are *compos mentis*, but allows doctors to treat patients who need care and are incapable of consenting, and to charge them without securing their agreement. The arrangement encourages doctors to price their services in markets when feasible, but does not flinch from forcing exchanges in contexts where parties cannot bargain.

The law also allows providers to claim compensation in cases that are more mundane. A landlord who protects property left behind by a tenant is entitled to compensation for storage expenses if the tenant reclaims the property, as long as the landlord was unable to contact the tenant at the time a decision to store the goods had to be made. Likewise, a person who attends to a stranger's remains can recover funeral expenses if a need arises to care for a body before an appropriate relative of a decedent can be located and advised.

In none of the cases just mentioned would it be strictly correct to say that bargaining is impossible. A doctor might secure an unconscious patient's consent by waiting for the patient to revive or by finding a relative or an agent authorized to act on the patient's behalf. A landlord could wait for a tenant to return or expend the time and effort needed to track down a tenant. A corpse could remain unburied until a decedent's relatives were found. In each case, the problem is not the literal impossibility of bargaining, but the inability to tolerate delay. Emergency medical care must be given immediately. Goods left exposed have to be stored quickly because they may otherwise be stolen or destroyed. A corpse requires prompt attention because a decaying body is an affront to common morality and a threat to public health.

In some cases, the problem is more nearly undue expense than delay. The cost of contacting a former tenant who left to visit a foreign land may exceed the value of the goods the tenant left behind.

72 *Restatement (First)*, supra note 10, §§ 114, 116.
73 G. Palmer, supra note 40, § 10.3; *Restatement (First)*, supra note 10, § 117 comment b, illustration 1.
74 *Restatement (First)*, supra note 10, § 115 comment b.
Or the cost may simply be greater than a landlord is willing to bear. But if the goods are worth protecting because their value exceeds the cost of storing them safely until the tenant returns, they ought to be stored instead of being disposed of or allowed to waste because the tenant will gain even after storage charges are paid. By requiring a tenant who reclaims stored property to pay the freight, the law reallocates benefits in a fair way and recognizes the importance of bargaining expense.

It is helpful to think about expense when considering the possibility that absent plaintiffs might form voluntary litigation groups. In *Smith v. Swormstedt*, an 1853 Supreme Court case, the defendant pressed for dismissal on the ground that the plaintiff failed to join all interested persons as parties. Justice Nelson, writing for the Court, met the defendant's contention by noting that "[w]here the parties . . . are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing." To prevent "a failure of justice," the Court held that some victims could sue on behalf of all. To talk of the "inconvenience" of joining parties voluntarily is to talk of expense.

Similarly, in *Pettus*, the first case in which lawyers were paid directly from a common fund, the Court observed that "[c]o-operation among" the members of the class "was impracticable" because the plaintiffs resided in many states. The Justices also noted that "[i]f some [plaintiffs] did not move, the interests of all would have suffered," apparently because the assets would have been placed beyond the class members' reach. Again, the judgment rested at least partly on undue expense. It may have been possible in principle to join the absent plaintiffs voluntarily, but the named plaintiffs could not do so in the time allowed at an acceptable cost. A rule requiring voluntary joinder would have served only to make the absent plaintiffs worse off.

In a more recent case, *Phillips Petroleum Co. v. Shutts*, the Court concluded that a class action was the only feasible means of proceeding for "most of the plaintiffs" because of the small size of their claims. The implication is twofold. First, the plaintiffs would have found it uneconomical to sue individually. Second, they would also

75 57 U.S. (16 How.) 288 (1853).
76 Id. at 303.
77 Id.
79 Id.
81 Id. at 809. The claims averaged about $100 per plaintiff. Id.
have found it impracticable to coordinate a group lawsuit by voluntary means. The cost of locating all the plaintiffs, contracting with them, and bringing a group lawsuit together rendered a voluntary group suit unprofitable.82

Free-riding may also hinder the formation of voluntary litigation groups. When groups of plaintiffs sue to produce nonexclusive goods83 like school desegregation, legislative reapportionment, or prison reform, benefits necessarily flow to all victims, not merely to those who actually participate in group suits. Consequently, many victims lack incentives to join litigation groups. Why help pay for a lawsuit when one can enjoy the benefits of litigation without the expense?84

The obstacles to organizing group lawsuits are thus severe, and they are similar in kind to the obstacles that impede collective actions of other sorts. However, voluntary collective actions often occur despite the existence of impediments. It therefore seems reasonable to expect many litigation groups to form spontaneously as well, and they do. Plaintiffs actually wage voluntary group lawsuits far more often than class actions, and the number of plaintiffs represented in such suits can be surprisingly large.85

In most voluntary group suits pre-existing organizations are plaintiffs.86 For example, in International Union, United Automobile, Aerospace and Agricultural Implement Workers v. Brock,87 the United Automobile Workers challenged certain eligibility restrictions that prevented some of its members from receiving federal aid. The Secretary of Labor argued that the union lacked standing to sue on its members’ behalf and that the members had to proceed as a class, which they failed to do.88 A majority of the Justices rejected that contention, extolled the virtues of suits brought by voluntary membership organizations, and allowed the union to proceed.89

Union-led suits are only the tip of the iceberg. Far more nu-

---

82 In some cases the difficulty of joining plaintiffs voluntarily arises because their identities are unknown. See, e.g., Holland v. Steele, 92 F.R.D. 58 (N.D. Ga. 1981). In so-called “future class actions” it can be impossible in principle to identify absent plaintiffs because their relationship to the defendant or their injury has not arisen yet. Robert F. Schuwerk, Future Class Actions, 39 Baylor L. Rev. 63 (1987).

83 I describe nonexclusive goods in greater detail below. See infra text accompanying notes 138-39.

84 Free-riding is a standard obstacle to the voluntary organization and maintenance of collective endeavors. See generally Russell Hardin, Collective Action 114-15 (1982).

85 See Stephen C. Yeazell, Collective Litigation as Collective Action, 1989 Ill. L. Rev. 43, 63-64.

86 Id. at 62-63.


88 Id. at 288.

89 Id. at 281-90.
merous are suits by corporations, partnerships, pension funds, social clubs, homeowners’ associations, political interest groups, and other organizations. The number of organizations that sue on behalf of their members is astonishingly large.90

Even so, the scope of organizational activity is limited if only because in many situations where group lawsuits might be feasible no suitable pre-existing organization can be found. No group may have enough members who are adversely affected by an actual or threatened unlawful act to move the organization to sue. Or an organization may be willing to sue but may be able to protect only its members’ interests, so that an organizational lawsuit would leave many victims without relief. Organizations can and do underwrite class actions in contexts like these,91 but they might not do so if they were denied the power to spread costs among the nonmembers they serve. The power to force nonmembers to share costs reduces the burden an organization must bear and gives an organization a reason to include nonmembers in a group suit.92

Entrepreneurial lawyers pick up some cases organizations miss.93 These lawyers are experienced in the arts of client recruitment and litigation finance, and they can make a go of group lawsuits in some contexts where organizations and individual plaintiffs cannot.94 But lawyers confront obstacles as well. Four that could easily be removed are rules of professional ethics that restrict attorneys’ ability to solicit clients,95 to underwrite litigation,96 to pay for referrals,97 and to split fees.98 Although the magnitude of the ef-

90 For other kinds of cases, see Yeazell, supra note 85, at 60-63; Note, From Net to Sword: Organizational Representatives Litigating Their Members’ Claims, 1974 U. ILL. L.F. 663 (authored by Dale Gronmeit).
92 See infra text accompanying notes 109-25 (discussion of the possibility of using suits brought on behalf of some victims in place of class actions).
93 See generally Coffee, Entrepreneurial Litigation, supra note 26 (role of lawyers in initiating class actions). See also R. Hardin, supra note 84, at 35-37 (role of entrepreneurs in organizing collective actions).
94 Mass solicitation of clients occurred in the famous Agent Orange litigation, in the wake of the Bhopal disaster, and in many other cases. Peter Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts 51-52 (1987); Coffee, Entrepreneurial Litigation, supra note 26, at 885-86; Coffee, Rethinking, supra note 26, at 632; Deborah L. Rhode, Solicitation, 96 J. LEGAL EDUC. 317, 319 (1986); David T. Austern, Is Lawyer Solicitation of Bhopal Clients Ethical?, Legal Times, Jan. 21, 1985, at 16.
96 In re Mid-Atlantic Toyota Antitrust Litig., 93 F.R.D. 485 (D. Md. 1982) (denying class certification on ground that attorneys improperly advanced costs of litigation for named plaintiffs). The Kutak Commission recommended that attorneys be permitted to advance expenses, the repayment of which may be contingent on the outcome of litigation. Model Rules of Professional Conduct Rule 1.8(e) (1983).
fects these restrictions have on lawyers' ability to organize litigation groups is unclear; they certainly make the task more difficult than it would otherwise be.

Even when a suit clears these hurdles, other problems remain. Lawyers often find it unprofitable to organize group lawsuits when victims' claims are small, because of the prohibitive cost of identifying, locating, and contacting victims. Moreover, attorneys cannot contract with potential group members who have yet to be victimized, although such individuals may be numerous and their presence may be needed to maintain a viable lawsuit. Finally, entrepreneurial lawyers cannot overcome free-rider problems in cases where the benefits of litigation automatically flow to all victims, including those who decline to pay.

The most basic obstacle, however, is expense. It is costly to contract with large numbers of plaintiffs individually and, after contracting, to finance complex, large-scale lawsuits. Lawyers are understandably reluctant to shoulder these burdens. They know that reimbursement will come, if it comes, many years down the road and they find it economically unwise to extend themselves. Why incur the costs and risks that attend group litigation when one can do a brisk business in conventional lawsuits instead?

Although the prospects for organizing litigation groups voluntarily are thus often poor, in the end they turn on facts that vary from case to case. Consequently, whenever a class action is proposed, the possibility exists that a group lawsuit could be organized by voluntary means. Judges are supposed to consider that possibil-

---

99 Coffee has suggested that lawyers who wage class actions often ignore these restrictions. Coffee, Entrepreneurial Litigation, supra note 26, at 896-99.
100 For a general discussion of obstacles to solicitation in class action litigation, see Herbert Newberg, Newberg on Class Actions § 15.04 (1985). Rhode points out that lawyers who solicit clients en masse have been censured by the bar. Rhode, supra note 94, at 322-23 (California trial lawyers voted to censure attorneys who solicited clients in the wake of the disaster in Bhopal, India; the American Council of Trial Lawyers passed a similar resolution concerning soliciting in general); Brian J. Waid, Ethical Problems of the Class Action Practitioner: Continued Neglect by the Drafters of the Proposed Model Rules of Professional Conduct, 27 Loyola L. Rev. 1047 (1981).
101 See Sosna v. Iowa, 419 U.S. 393 (1975) (mootness avoided by defining class in an open-ended way, thereby continually adding new plaintiffs who remained subject to the one-year residency requirement at issue in the case).
102 Free-riding is also a significant problem in cases where damages are sought, though in such cases free-riding attorneys rather than their clients are to blame. An attorney who represents an individual client in a "tag-along" action, a lawsuit consolidated with but separate from a class action, earns more at the margin than a lawyer whose client litigates as part of a class. Consequently, lawyers often encourage their clients to opt out of class actions in the hope of protecting their fees. Coffee, Entrepreneurial Litigation, supra note 26, at 907-15.
ity before permitting class actions to proceed. The federal and state rules that govern class actions authorize involuntary joinder only when it is impracticable to include all class members by other means.\textsuperscript{103} Although this requirement is ambiguous and has been interpreted in a variety of ways,\textsuperscript{104} clearly relevant factors include the absolute number of plaintiffs, their geographic locations, the ease with which they can be identified and contacted, and the sizes of their claims.\textsuperscript{105} Certification of a class justifies an inference that a voluntary group lawsuit on behalf of all victims could not proceed.

The modern class action is thus a vehicle for an otherwise impracticable group proceeding. Its purpose, in part, is to enable victims to enjoy benefits of group litigation that lie beyond their reach.\textsuperscript{106} The class action makes group litigation possible by eliminating the need to secure victims' consent. A lawyer who wishes to initiate a class suit can do so by signing a single client and filing a class action complaint. In effect, a lawyer can enlist an unlimited number of absent plaintiffs with the stroke of a pen.

The prospects for bargaining with absent plaintiffs may and often do improve once a class action is underway. For example, in class actions brought primarily to secure monetary relief, it may become practicable to send form contracts to absent plaintiffs after a favorable ruling on liability is won.\textsuperscript{107} This appears to have been
done with considerable success in *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 108 where fewer than ten percent of the absent plaintiffs failed to sign representation agreements before fees were paid. This relieved the district court of the bulk of the responsibility for awarding and apportioning fees. When it becomes practicable to regulate fees contractually during the pendency of a class action suit, a restitutionary theory of fee awards encourages the use of private fee agreements.

In the class action context, it is difficult for attorneys and clients to bargain face-to-face. Consequently, the law of restitution neither does nor should automatically bar attorneys who wage class actions successfully from seeking compensation. When bargaining impediments are severe, a lawyer who fails to bargain for compensation before providing a service to a class has a claim to be paid. Withholding compensation would not encourage the use of markets; it would merely deny compensation to a lawyer who provided valuable services for others and leave an unjust allocation of benefits intact.

B. Involuntary Group Litigation Provides Absent Plaintiffs Benefits They Would Not Otherwise Receive

There can be no *unjust* enrichment unless there is enrichment first. 109 The law of restitution generates no obligations to support lost causes. It requires people to pay compensation only when benefits actually are received. Equally, the restitutionary theory of attorneys’ fees obligates class members to bear litigation expenses only when class actions secure relief. In that respect, the theory is in accord with existing law which conditions the payment of fees on success in litigation. 110 The contingent fee nature of class action practice flows naturally from the restitutionary approach.

Even when a class prevails and absent plaintiffs receive benefits,
one could object to the payment of attorneys' fees if absent plaintiffs would have enjoyed the same benefits without a class action being brought. The fact that a group of plaintiffs would find it impracticable to organize a joint lawsuit voluntarily does not establish that an involuntary proceeding is the only way to protect all victims' interests and rights. A lawsuit waged by a single plaintiff or by a few plaintiffs suing jointly might protect all victims at once. And if a single plaintiff or a small group of plaintiffs would find it profitable to sue alone, one might reasonably ask why all victims should be required to share the cost of an involuntary group suit. When the self-interest of a single person or of a few is adequate to support the provision of a good for an entire group, there is no need to strengthen incentives by spreading costs. It may therefore be appropriate to claim that no fee should be awarded unless the absent plaintiffs would not have received the benefit but for the success of the class suit.

The possibility that individuals may find it economically rational to provide goods for groups is well known to scholars of collective action. In seeking to benefit themselves, people acting alone and in small groups often serve others as well. By mowing yards, painting homes, staying free of communicable diseases, reporting crimes, driving safely, and doing thousands of other things for primarily

---

111 For example, a lawsuit brought to reapportion a state legislature or modify a system of electing judges may protect all persons whose rights are violated by the unlawful voting scheme.

112 Arneson agrees that no obligation to support a collective action arises when a single person or a small coalition of individuals finds it advantageous to supply a benefit for a group in the absence of contributions from others. See Arneson, supra note 38, at 622. By contrast, my colleague Calvin Johnson would allow judges to require absent plaintiffs to contribute even when named plaintiffs might sue alone, on the ground that the quantity and quality of litigation would otherwise be suboptimal. Johnson points out, correctly, in my view, that named plaintiffs rarely if ever find it economically rational to spend as much money on lawsuits as groups of plaintiffs would if they could act in their collective interest. Consequently, named plaintiffs sometimes fail to act when a joint lawsuit would be economically beneficial for a group, and when they do sue, they invest fewer resources than a group would find it economical to spend. Letter from Calvin Johnson to Charles Silver (Sept. 24, 1990).

113 R. Hardin, supra note 84, at 42. Russell Hardin recounts the actual case of billionaire Howard Hughes, whose tastes ran to watching westerns and aviation movies on television from midnight to 6:00 a.m. When he moved to Las Vegas where the local television station went off the air at 11:00 p.m., his aides badgered the station's owner to schedule movies through the night until the owner finally challenged a Hughes emissary: "Why doesn't he just buy the thing and run it the way he wants to?" Hughes obliged, paid $9.8 million for the station, and ran movies until 6:00 a.m. The potential audience for these movies was a quarter of a million people.

_Id._
selfish reasons, people confer benefits on society at large. Self-seeking actions taken by individuals often have positive external effects.

In most instances where persons acting self-interestedly provide goods for entire groups, the law does not require beneficiaries to pay. I cannot require my neighbors to share the cost of painting my house or beautifying my yard, even though they benefit from my investments of money and time. The law of restitution denies me the option of spreading costs, in part because I can be expected to maintain the appearance of my property without my neighbors' help.\(^{114}\)

Because victims sometimes sue alone in contexts where class actions can be brought,\(^{115}\) and because lawsuits brought by individuals sometimes yield class-wide relief, it may not always be appropriate to require absent plaintiffs to share the expense of group litigation. When a conventional suit can protect the rights of an entire class and individual plaintiffs have adequate incentives to sue, a truly restitutionary theory might free class members from the burden of sharing costs. It might allow them to enjoy the benefits of group litigation for free, because even without group litigation the same benefits would be received.

An economist would be inclined to criticize the policy just described on the ground that it encourages a suboptimal supply of benefits. Even when self-interest moves people to act in ways that benefit others, they may not be motivated to supply benefits in the quantities or qualities others want. For example, I would maintain the grounds surrounding my home in better condition than I now do if I could require my neighbors to share my costs, and they might be happier with the improvements, even after contributing, than they are now. A policy requiring beneficiaries to share producers' costs may make both producers and beneficiaries better off.

A philosopher might criticize the policy on fairness grounds. If justice requires people to pay compensation when they enjoy the fruits of others' labors without others' consent, then a policy that allows beneficiaries to profit from the self-interested conduct of others without charge is unjust.

The law's reluctance to grant restitution to self-seeking people whose actions benefit others as well as themselves probably reflects practical considerations rather than any inherent dislike of fairness or economic efficiency. A policy allowing me to recover part of the cost of maintaining my yard from my neighbors, and allowing them to recover a portion of their costs from me, would engender signifi-

\(^{114}\) See generally Dawson, Intermeddler, supra note 21 (discussing sufficiency of self-interest).

\(^{115}\) Coffee, Entrepreneurial Litigation, supra note 26, at 904-30.
cant administrative costs and would require judges to address formidable problems of valuation. It may be better to tolerate a degree of suboptimality in the production of benefits and a degree of unfairness than to ask judges to rectify the situation.

Practical considerations, including valuation problems, that might weigh against the payment of attorneys' fees in class actions are addressed in later sections. The point to be made here is that class actions often yield desirable third-party effects that conventional lawsuits tend not to produce. In contexts where class actions are waged, it is usually not the case that absent plaintiffs would gain even if only conventional lawsuits were waged.

Consider Pettus, where the named plaintiffs held about one-sixth of the bonds owned by the class. Their stake was sufficient to move them to contact attorneys and, we can assume for the moment, it may even have been large enough to move them to sue alone or in the company of a few other bondholders with large claims. However, if the named plaintiffs had sued alone or with a few other plaintiffs, they would have had no incentive to seek class-wide relief. Their interest would have been to protect themselves and any other bondholders who helped pay for the suit. In fact, the named plaintiffs in Pettus did seek to limit the scope of the lawsuit to include only bondholders "who should come in and contribute to the expenses of the litigation." They were content to represent only bondholders who agreed to pay. Because few bondholders refused to join after the case was won, as a practical matter the lawsuit benefitted the entire class. But the named plaintiffs were not forced to seek a class-wide grant of relief. They did so apparently only because they hoped to spread the cost of maintaining the suit.

Conventional damages actions, actions for money brought by individuals, are thus poor substitutes for class actions because they have limited third-party effects. All my neighbors benefit automatically when I beautify my property, but successful lawsuits for damages do not put cash in bystanders' hands. They may create precedents and res judicata effects that bystanders can use in subsequent suits, but the immediate benefits of litigation flow to only plaintiffs who actually sue.

By contrast, individual lawsuits seeking broad-based injunctive reforms or declaratory judgments sometimes substitute well for

116 The facts do not support this assumption.
119 In other words, a person who maintains a house produces a nonexclusive good, whereas a person who sues for damages produces an exclusive good. See infra text accompanying notes 137-39.
class actions. For example, a lawsuit brought by a single plaintiff could prevent a state from denying unemployment benefits to an entire class of persons.120 Similarly, a suit maintained by a single plaintiff to enforce relevant laws could protect everyone interested in environmental preservation.121

Alas, the fit between conventional injunctive and declaratory cases and class actions is imperfect. Judges have only limited authority to grant class-wide relief at the behest of individual plaintiffs, and they are sometimes reluctant to exercise the powers they possess.122 As a general matter, the law appears to permit judges to grant injunctions just wide enough to relieve the plight of those plaintiffs who actually participate in a case.123

An additional difficulty that makes individual lawsuits poor substitutes for class actions is that victims often lack incentives to sue in contexts where injunctive and declaratory actions can be brought. For example, victims of civil rights violations can rarely afford to hire attorneys. Moreover, when victims are entitled to only or primarily nonmonetary relief, traditional contingent fee arrangements cannot successfully be employed. Partly to remedy this deficiency, Congress enacted fee-shifting statutes that enable plaintiffs in civil rights cases to hold losing defendants liable for expenses and fees.124 Without such statutes victims would often fail to sue.

Because fee-shifting statutes sometimes make it economically feasible for individuals to wage conventional lawsuits seeking broad-based relief, it may seem difficult to justify an attorney's right to compensation when an injunctive or declaratory fee-shifting class action is waged instead of a conventional suit. When a conventional lawsuit is both feasible and, for all practical purposes, as good as a class action, an obligation on the part of absent plaintiffs to pay attorneys' fees cannot be justified on restitutionary grounds even if a class action is certified by a judge. Under the circumstances, it

121 See Yeazell, supra note 85, at 62 (observing that organizations often sponsor individual actions that seek broad-based relief in an effort to protect the interests of a class of beneficiaries).
122 See Hurley v. Ward, 584 F.2d 609 (2d Cir. 1978) (for judge to grant class-wide injunctive relief, class must be indistinguishable from individual plaintiff in all respects); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 229 (1985) (citing Hurley).
123 Zepeda v. United States Immigration and Naturalization Serv., 753 F.2d 719 (9th Cir. 1985).
would be wrong to say that absent plaintiffs would not have benefitted but for the class suit.

On inspection, the problem turns out not to be fatal to the project at hand. In the circumstances described, there is no need to base an attorney's right to payment on restitutionary grounds. One can rely on the contract between an attorney and a named plaintiff instead. The contract suffices because, in a fee-shifting case, a named plaintiff is entitled to recover all reasonable litigation expenses, including the cost of suing on behalf of a class, even when expenses greatly exceed the size of a named plaintiff's stake in a case. In cases where fee-shifting statutes enable plaintiffs to wage conventional lawsuits that can supplant class actions, the need to extract fees from absent plaintiffs disappears even if a class action is waged. The restitutionary theory fails, but there is no loss because there is no call for its application.

In sum, in all but a few cases, lawsuits waged by individuals are poor substitutes for class actions. Moreover, when the fit is good, individuals often lack incentives to sue. Fee-shifting statutes help matters by enabling solitary plaintiffs to wage some broad-based suits. But these statutes also eliminate the need to tax absent plaintiffs because they enable named plaintiffs to finance class suits alone. Speaking realistically, absent plaintiffs pay attorneys' fees only when conventional lawsuits cannot replace class actions, because only then do they actually contribute something to a group suit. The practice of taxing them then is defensible on restitutionary grounds because class actions are the only means of providing absent plaintiffs with relief.

C. Absent Plaintiffs Do Not Receive Benefits As Gifts

A person who enjoys a benefit can usually escape paying for it by showing that the benefit came as a gift. A donee has no obligation to compensate a donor because a donee is not unjustly enriched. For example, a tenant has no obligation to compensate a landlord who, when storing the tenant's goods, had no intent to charge. Nor, in general, are volunteers entitled to compensation for services they provide. Similarly, a lawyer who acts with donative intent when serving a class has no right to compensation. Absent plaintiffs are not obligated to pay for services offered as gifts.

125 See City of Riverside v. Rivera, 477 U.S. 561 (1986) (upholding fee award of $245,456.25 in civil rights case against police force brought by eight plaintiffs who recovered only $33,350 in damages).
126 D. Dobbs, supra note 64, § 4.9; Restatement (Second) supra note 40, § 2 comment c.
127 Restatement (First), supra note 10, § 117 comment b.
128 D. Dobbs, supra note 64, § 4.9.
With some justification, one could contend that lawyers who wage class actions often lack the intent to charge. Judges do not conscript attorneys to serve as class counsel. Attorneys volunteer for the job. Sometimes they even compete with other attorneys who also want to be appointed. Because attorneys nominate themselves, it may be fitting to say that they act with donative intent or that they cannot reasonably expect to be paid.

The argument is most persuasive when class actions are run by legal aid attorneys. Consider Evans v. Jeff D. The lawyers who handled Jeff D. were salaried employees of Idaho Legal Aid Services, Inc. (ILAS). ILAS is a publicly supported legal aid agency whose mission is to serve clients who are too poor to purchase legal care. In keeping with its mission, ILAS did not require the named plaintiffs in Jeff D. to pay fees. Nor did ILAS write a clause into its retainer agreements barring the named plaintiffs from waiving the defendants' liability for fees. In addition, when the defendants proposed a partial settlement, ILAS did not object to a provision in the agreement that freed the settling defendants from the obligation of paying its fees. Only when the final settlement was proposed did ILAS protest. Under the circumstances, it may be reasonable to infer that ILAS volunteered, that it did not initially intend to charge for the work its employees performed, and that only in the later stages of the settlement process did it decide to seek a fee.

At the most basic level, the classification of attorneys as volunteers or fee-seekers turns on facts. Do they intend to charge for their services or not? It is clear that many attorneys offer themselves for the role of class counsel precisely because they hope to be paid. John C. Coffee, Jr., a leading commentator on damages class actions, believes that the pursuit of fees often drives these lawsuits from start to finish.

It seems likely that the belief that legal aid attorneys are volunteers influenced the Supreme Court's decisions in Jeff D. and Delaware Valley II. See Evans v. Jeff D., 475 U.S. 717, 721 nn.2-3, reh'g denied, 476 U.S. 1179 (1986); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 728 n.10 (1987) (Delaware Valley II) (White, J., plurality opinion).

Jeff D., 475 U.S. at 726-30 (arguing that attorneys who handle class actions have strong economic incentives to settle cheaply and to support collusive settlements that offer large fees but little relief on the merits).

See, e.g., Coffee, Plaintiffs' Attorney, supra note 26.

For example, the civil rights bar actively supported the Civil Rights Act of 1990, H.R. 4000, S. 2104, 101st Cong., 2d Sess., 136 Cong. Rec. S1018 (daily ed. Feb. 7, 1990), which contained a number of provisions that would make it easier for lawyers to
The factual nature of the inquiry notwithstanding, there are two reasons for believing that courts should presume that class action attorneys intend to charge. First, it is well recognized that "[t]he fact that [a] person acting is in the business of supplying the things or is acting in the course of his profession, is evidence of an intent to charge." All attorneys act in their professional capacities when they handle class actions. It is therefore appropriate to presume that all attorneys who act as class counsel expect to be paid. Nor does the fact that legal aid lawyers are in the business of providing free legal services invalidate the presumption with respect to them. Although the law generally obligates legal aid organizations to refrain from charging the clients they represent, it permits them to accept fee awards from defendants on their clients' behalf, and legal aid agencies typically use contracts to acquire the right to recover fees their clients are entitled to receive. It is therefore more accurate to describe legal aid lawyers and organizations as contingent fee practitioners who work for fee awards than as donors who provide services without intending to charge. Courts should presume that legal aid attorneys intend to charge when they handle cases that generate the kinds of fees the law permits them to accept.

The second reason for presuming that lawyers who wage class actions intend to charge is that there is no background understanding that lawyers work for free, as, for example, there is a background understanding that a person who hosts a party will not charge for the refreshments he or she provides. The vast bulk of legal services are provided through markets for paying clients. Although private lawyers do some pro bono work and public interest lawyers serve many clients for free, the conventional wisdom is surely not that lawyers are volunteers. If there is a convention, it is that lawyers expect to be paid for their time, except when they expressly indicate a desire to work for free in advance. When they do express such a

---

133 RESTATEMENT (FIRST), supra note 10, § 114 comment c; D. DOBBS, supra note 64, § 4.9.
134 Delaware Valley II, 483 U.S. at 729 n.10.
135 For example, any fee award granted in Jeff D. would have been paid to ILAS. Jeff D., 475 U.S. at 721 n.2-3. See Robert V. Percival & Geoffrey P. Miller, The Role of Attorney Fee Shifting in Public Interest Litigation, 47 LAW & CONTEMP. PROBS. 233 (Winter 1984) (argument for granting fee awards to legal aid offices).
wish, they have no right to fees, but such cases are the exception, not the default.

D. Absent Plaintiffs Either Voluntarily Accept Benefits or Have No Opportunity to Decline Them

Courts sometimes fault providers who seek restitution for failing to withhold benefits from recipients. For example, if I sought compensation after lending a friend my truck, a court might deny my claim on the ground that I should have withheld permission to use the truck until my friend agreed to pay. However, a court would be wrong to condemn a provider in a case where access to a benefit was beyond a provider's ability to control. I cannot prevent my neighbors from breathing oxygen produced by trees on my land. Consequently, if I were to ask them to pay for the benefits they enjoy, a court would be wrong to fault me for failing to keep the oxygen to myself.\textsuperscript{137}

The enjoyment of some benefits can be regulated, but the enjoyment of others cannot. Where it is practicable to restrict access, goods are said to be "exclusive." Exclusive goods can be supplied to one person at a time. For example, hamburgers are exclusive goods. By contrast, access to "nonexclusive" goods is difficult to control. All members of a relevant population can enjoy them at the same time. National defense is a nonexclusive good. All citizens enjoy the security it provides when any do.\textsuperscript{138}

To say that a nonexclusive good must be supplied to all members of a group is not to say that all members must consume it. Only some nonexclusive goods have the property of forced consumption. For example, a radio broadcast is a nonexclusive good which lacks the quality of forced consumption. When a signal goes out, everyone within the broadcast area can receive it, but no one is forced to tune in. Listeners have a choice. In that respect, radio broadcasts differ from national defense, which benefits all citizens automatically, including citizens who may prefer to do without protection. I will call nonexclusive goods like radio broadcasts that can be rejected "collective goods." Nonexclusive goods like na-

\textsuperscript{137} This example appears trivial, but its appearance may be deceiving. A study conducted at Michigan State University, the results of which were summarized in a newspaper report, determined that during a 50-year lifespan a single tree produces $31,250 worth of oxygen and $62,000 worth of pollution control. \textit{Austin American-Statesman}, Apr. 11, 1990, at F1. More than 50 trees surround my house. If the report can be taken at face value, my neighbors and I share about $93,250 in benefits produced by my trees each year.

Because the enjoyment of public goods is forced, people do not really accept benefits that flow from public goods. "One cannot voluntarily accept a good one cannot voluntarily reject." The benefits of public goods are merely received. By contrast, collective goods and exclusive goods can be accepted because consumers choose to enjoy them or not.

The differences between exclusive, collective, and public goods matter. A person who seeks restitution after supplying an exclusive good like a hamburger can be faulted for failing to withhold the good in the absence of an agreement to pay. A person who supplies a collective good by sending a radio signal is immune to this criticism because access to broadcasts is difficult to control. The same is true of a person who supplies a public good by being inoculated against a contagious disease. People cannot supply themselves with collective goods without making them available to others as well.

Consumers can, however, decline to use collective goods. Consequently, they can be faulted for failing to reject collective goods when they have the chance. The same is true of people who consume exclusive goods. Acceptance of exclusive and collective goods can therefore logically serve as the basis for obligations to pay. By contrast, no fault can attach to the consumption of public goods, because recipients cannot reject benefits public goods provide. Nor can producers be faulted for failing to limit access to public goods, since they lack the power to do so. If obligations to pay for public goods ever exist, mere receipt of benefits is all that can be required.

Traditionally, the degree of fault a person bears, either from accepting a benefit that could have been rejected or failing to limit access to a benefit that could have been withheld, has affected the strength of claims for restitution. As a general rule, a person who fails to restrict access when it is practicable to do so, that is, a person who freely supplies an exclusive good, will be denied restitution. For example, a person who performs a service (i.e., an exclusive good) in the mistaken belief that an agreement has been made is not entitled to restitution. The provider's failure to withhold the service pending an actual agreement is fatal to the claim. By contrast, a provider can secure payment from a recipient who knows of the pro-

---

139 My terminology follows that of Arneson, supra note 38, at 619. Arneson develops the connections between the properties of goods and the conditions under which people can be obligated to pay for goods. Id. at 620-21.

140 Id. at 619.

141 RESTATEMENT (FIRST), supra note 10, §§ 40, 71.
vider's mistake and allows the service to be supplied. The recipient's fault in accepting the service offsets the provider's failure to withhold.

Now consider an example drawn from a time when debts were less freely assignable than they are today. B paid money owed by A to C to protect A's good name. Under the law prevailing at the time the Restatement of Restitution was drafted, B had no claim to repayment from A. Now suppose B paid A's debt because B held a junior mortgage on A's property and feared that C, the senior mortgagee, would foreclose if not paid, in which event the value of B's interest would sharply decline. B would then have been entitled to reimbursement from A on the theory that B could not withhold a benefit from A and protect the junior interest at the same time. Because B could not exclude A, B's failure to exclude A was excused.

Notice also that in the preceding example A's receipt of a benefit was forced. The same was true in the cotenancy example. The passive cotenant automatically benefitted when the property was improved. Neither A nor the passive cotenant could easily have avoided their gains. Nevertheless, the law grants the active cotenant a remedy in the form of the right of partition, just as it allowed B a remedy above. In general, the fact that a recipient could not avoid a benefit does not bar a grant of restitution, nor should it. The conception of justice as reciprocity connects the enjoyment of benefits to the payment of compensation. It does not limit restitution to cases where recipients could choose to reject the benefits they receive.

Absent plaintiffs are often entirely blameless, in the sense of being unable to reject benefits they receive. When class actions produce public goods like reapportionment, environmental protection, and institutional reform, absent plaintiffs receive benefits they have little choice but to accept. Their conduct is therefore entirely above reproach. By contrast, in cases that produce damage awards, absent plaintiffs can reject benefits. They need merely refrain from filing claims. Even so, the act of accepting benefits increases absent plaintiffs' culpability only slightly. All that can be inferred from the fact of acceptance is that an absent plaintiff would rather have a benefit.

142 Id.
143 Id. § 112 comment a, illustration 1; id. § 43 comment a.
144 Dawson, Intermeddler, supra note 21, at 1437-38.
145 If B could have protected the junior interest without benefitting A, B would have had difficulty securing compensation from A. Id. at 1440-41.
146 See supra text accompanying notes 67-69.
than not. One cannot draw the stronger conclusion that absent plaintiffs agree to pay for benefits they willingly accept.

Plaintiffs' attorneys who win class actions are, however, also blameless. The law gives named plaintiffs the right to initiate class suits, and class actions can be efficacious means of vindicating named plaintiffs' claims. By filing class actions, in other words, lawyers perform actions calculated to benefit their clients. Once class actions are certified, lawyers cannot restrict access to the benefits they help produce. All absent plaintiffs are entitled to enjoy the benefits class actions provide. Classwide damage awards are therefore collective goods: all absent plaintiffs can benefit, yet they can also reject a benefit by failing to file a claim. Classwide injunctions, however, are public goods: all absent plaintiffs benefit automatically. Because attorneys cannot limit absent plaintiffs' access to relief, they cannot be faulted for failing to withhold benefits from absent plaintiffs who decline to pay.

The situation in a class action is thus that attorneys are blameless for failing to restrict absent class members' access to benefits, because counsel cannot restrict supply. The law of restitution should therefore recognize attorneys' requests for compensation, even though claims brought by people who allow others access to goods are often barred. The propriety of paying attorneys is clearest in damages actions because class members have the power to reject benefits and to avoid incurring obligations to pay fees by refraining from filing claims in damages cases. In damages class actions, the existence of an obligation to pay attorneys' fees can and should be made contingent on a class member's decision to accept a payment. By contrast, the obligation to pay fees in injunctive and declaratory class actions is conditioned on the receipt of benefits alone. Class members cannot reject the benefits these class actions supply. Obligations therefore arise in the absence of acceptance merely because class members reap what their attorneys sow. They pay fees, even though their conduct is blameless, because that is the distributively just result.

E. Absent Plaintiffs Are Better Off Receiving Benefits and Paying Attorneys' Fees than Doing Without Benefits Entirely

Judges often decline to compensate providers when by doing so they risk forcing recipients into disadvantageous exchanges. If a judge ordered me to pay one hundred dollars to the gardener who

---

147 See supra notes 109-25 and accompanying text.
148 See Levmore, supra note 25, at 69-72 (discussing judges' disinclination to tackle valuation problems).
tends my neighbor's yard, I could reasonably protest that the benefits I receive are worth less than that amount. It would be impossible to disprove my complaint. Condition (5) takes my complaint seriously. It limits the existence of obligations to cases where, even after paying compensation, recipients are unambiguously better off.

Many cases support condition (5). Judges typically deny claims for restitution presented by people who provide unsolicited services in part because they perceive that:

[frequently it would be unfair to the person benefitted by services to require payment since, although benefitted, he may reasonably be unwilling to pay the price; he does not have the opportunity of return, which usually exists in the case of things received, nor the definite and certain pecuniary advantage which ensues where money has been paid.\(^\text{149}\)"

The difficulty judges perceive is the problem of wealth dependency;\(^\text{150}\) a person's willingness to purchase an item can be affected by his or her level of wealth. Suppose homeowner \(A\) purifies the water in an aquifer by removing a tank from which pollutants had been leaking. \(A\)'s action automatically benefits other homeowners, including \(B\), who also use wells. \(A\)'s act makes \(B\) better off, but, even so, \(B\) may be unwilling to pay; it may be that \(B\) would not have paid anything at all to have the tank removed himself:

\[B\] may genuinely not want [the] benefit that is forced upon him, even though its market value may be greater than the amount of restitution sought by [\(A\)]. [\(B\) . . . can maintain that the value of purification is wealth dependent. If he were wealthier [he] would include water purification among his basket of purchases, but at his present income level the benefit is almost worthless.\(^\text{151}\)

\(B\) could truthfully assert that at his present level of income he would not have paid a positive price to have the tank removed.

Because the preceding example may seem farfetched—surely \(B\) would pay something for clean water!—consider another based on Goldberg v. Kelly,\(^\text{152}\) a famous due process class action that entitled welfare recipients to hearings prior to the termination of aid. Suppose that after Goldberg, welfare recipients received bills for attorneys' fees. They could rightly complain that at their income level they would not have purchased the benefits they received. A pretermination hearing, although valuable, may be a luxury for which a welfare recipient cannot afford to pay.

\(^{149}\) \text{Restatement (First), supra note 10, § 40 comment a.}

\(^{150}\) The problem of wealth dependency is discussed in Levmore, supra note 25, at 74-79.

\(^{151}\) \text{Id. at 77.}

Tenants who fail to collect all their possessions could lodge the same complaint if landlords could charge them for storage costs.\textsuperscript{153} They could plausibly contend that they would rather forsake the forgotten goods than pay the required fee. For that reason, the law offers tenants a choice. They can reclaim forgotten goods and pay reasonable storage costs or they can disclaim goods entirely and leave landlords with the bills.\textsuperscript{154} Because tenants are given the option of rejecting forgotten goods, we can be sure they are better off when they decide to recover goods despite having to bear storage expenses.

Giving recipients the option of rejecting benefits is just one of many techniques judges use to handle problems of wealth dependency. Recall the example in which an active cotenant installed a swimming pool for which a passive cotenant refused to help pay.\textsuperscript{155} A judge would not allow the active cotenant to hold the passive cotenant personally liable for a share of the cost, because the passive cotenant could then reasonably complain that he or she would have "preferred other expenditures over the improvement to the tenancy" regardless of the price.\textsuperscript{156} But a judge would recognize a claim for compensation if the active cotenant were to seek partition. The active cotenant could then recover the value the pool added to the sales price of the land. This approach recognizes the validity of the active cotenant's claim and preserves the passive cotenant from economic loss. If the judge assesses the pool's value accurately, the passive cotenant's share of the sales price should equal the amount he or she would have received if the land had been sold without the pool. The remedy of partition thus reduces the risk that a passive cotenant will be forced to pay for an unwanted improvement.

The policy of compensating doctors who provide emergency care is the exception that tests the rule.\textsuperscript{157} Patients who are ordered to pay doctors can complain that they would have declined offers of assistance if they had been conscious at the time. This complaint would have special force if made by a patient who would have recovered in any event, or if made by the estate of a decedent who was beyond help at the time medical assistance was supplied.

Nevertheless, the law orders patients to pay physicians on the ground that emergency care is worth more than a doctor's going rate when there is any chance that a patient can be saved.\textsuperscript{158} That

\textsuperscript{153} See supra text accompanying notes 126-28 (discussion of landlord/tenant example).

\textsuperscript{154} \textit{Restatement (First)}, supra note 10, § 117 comment d, illustrations 6-7.

\textsuperscript{155} See supra text accompanying notes 146-47.

\textsuperscript{156} Levmore, \textit{supra} note 25, at 78.

\textsuperscript{157} See supra note 109.

\textsuperscript{158} "Where the services of a physician have been rendered to an unconscious person
conclusion seems right. Most people are willing to spend money to save their lives. In a particular case, the assumption that a patient would have solicited a doctor's assistance may be incorrect, because some people have idiosyncratic tastes. But experience suggests that the number of exceptions is extremely small.

Alas, lawyers lack the power to heal; by waging class actions, they rarely save absent plaintiffs' lives. Therefore, lawyers should not be able to hold absent plaintiffs personally liable for fees. Indeed, lawyers cannot bill absent plaintiffs directly. They can recoup fees and expenses only by means that generally comport with condition (5).159

In Pettus, for example, creditors had to contribute five percent of the value of their claims in payment of attorneys' fees when claiming their share of the judgment. Creditors were therefore free to decide whether the benefit was worth the price, an easy decision given that the assets secured by the judgment were sufficient to pay all creditors in full. Because creditors were given a choice, one can be confident that those who joined the case were better off even after paying fees.

Condition (5) is also satisfied in cases where fee-shifting statutes require losing defendants to pay plaintiffs' fees. Absent plaintiffs are unambiguously better off in fee-shifting cases, because they receive relief and suffer no out-of-pocket expense. Absent plaintiffs can "hardly claim that they would be better off without the bonanza that remains after a fee to the provider is subtracted."163

Finally, when attorneys' fees are paid from common funds, fees and expenses are paid off the top and absent plaintiffs share what remains. Again, absent plaintiffs' personal assets remain intact. They receive an unambiguous benefit in the form of an addition to wealth that would not have occurred but for the class action.

Some forced exchanges of fees for relief can make absent plaintiffs worse off, even when the mechanisms described above are employed. When class actions settle, absent plaintiffs lose the right to sue, a right that may be more valuable to them than the relief they

in an emergency it is assumed that, if properly rendered, the one receiving them benefits by having had a better chance of recovery although in fact no recovery is effected." Restatement (First), supra note 10, § 155 comment d.

159 H. Newberg, supra note 100, § 14.02.
160 The fear of forcing absent plaintiffs to pay more than they deem benefits to be worth also offers an alternative explanation of the practice of paying only lawyers who win. Absent plaintiffs can reasonably complain that services of losing attorneys are worth nothing to them.
162 Id. at 126.
163 Levmore, supra note 25, at 97.
receive. It is therefore possible for absent plaintiffs to complain that they would rather do without the benefits class actions provide than purchase those benefits at the required price.

Pettus-type mechanisms are immune to this complaint, but it nonetheless states a real concern. There is reason to fear that absent plaintiffs with high value claims may fare worse in class actions than they do suing alone, apparently because weak claims dilute the appeal of class actions and drive down per capita recoveries. Responsibility may also rest with plaintiffs' lawyers who shortchange absent plaintiffs with high value claims. Finally, it is often difficult and unacceptably expensive for judges to take all differences among plaintiffs into account when fashioning plans of relief. They ignore many differences that might plausibly affect plaintiffs' recoveries in separate suits. The problem of prejudice to absent plaintiffs with high value claims is most acute in damages cases, but it occurs in injunctive cases as well. There is no way to guarantee that class actions will secure reforms that make absent plaintiffs as well off as they would have been had they waged individual suits.

In order to assess the problem of inadequate returns, let us first set aside cases in which the problem is unlikely to arise. Inadequate benefits cause no difficulties when absent plaintiffs' claims are uniformly small. When no plaintiff's claim is large enough to support a conventional suit, the expected value of all claims outside a class action is nil. Any relief won in a class action is therefore a net benefit for all plaintiffs.

A surprising number of class suits fall into this category. Nevertheless, many class actions, perhaps most, involve some plaintiffs who could sue on their own. These cases fall into one of two groups: those in which damages are claimed and those brought mainly for injunctive relief. In damages cases, absent plaintiffs who

---

164 The mechanism used in Pettus required absent plaintiffs who wished to participate to opt into the class. Absent plaintiffs who believed they could fare better on their own could easily protect themselves by remaining passive.

165 Coffee, Entrepreneurial Litigation, supra note 26, at 906-07. For general discussions of conflicts of interest in class actions, see Derrick Bell, Serving Two Masters: Integration Ideals and Client Interest in School Desegregation Litigation, 85 YALE L.J. 470 (1976); Julius Chambers, Class Action Litigation: Representing Divergent Interests of Class Members, 4 U. DAYTON L. REV. 353 (1979); Rhode, supra note 94.

166 Coffee, Entrepreneurial Litigation, supra note 26, at 917.

167 See In re Corrugated Container Antitrust Litig., 1981-1 Trade Cas. (CCH) ¶ 64,114, at 76,718 (S.D. Tx.), aff'd, 659 F.2d 1322 (5th Cir. 1981).

168 See, e.g., In re Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974) (six dollar average recovery per plaintiff after trebling); In re Cuisinart Food Processor Antitrust Litig., 1983-2 Trade Cas. (CCH) ¶ 65,680, at 69,467 (D. Conn. 1983) (alleged damages ranged from $32 to $75 per plaintiff); Buford v. American Fin. Co., 333 F. Supp. 1243 (N.D. Ga. 1971) (alleged damages of one dollar per plaintiff).

169 Coffee, Entrepreneurial Litigation, supra note 26, at 906.
hold large claims can protect themselves by opting out and preserving their right to file independent suits.\footnote{Fed. R. Civ. P. 23(c)(2). Rule 23(c)(2) applies only to class actions certified under Rule 23(b)(3).} It is therefore fair to say that large-claim plaintiffs who fail to exclude themselves assume the risk of inadequate returns.\footnote{The decision to remain in a class, despite the prospect of receiving inadequate returns, may be rational. Class actions offer advantages as well as disadvantages, the chief advantage being reduced per capita litigation costs. In conventional lawsuits, attorneys' fees typically consume from 33 1/3% to 40% of plaintiffs' gains. H. Newberg, supra note 1, § 2.08, at 52-53. Attorneys' fees in class actions usually fall in the 20% to 30% range. Id. § 2.08, at 52. Reduced costs may offset reduced gains.} That is not to say that the problem of inadequate returns in damages cases can safely be ignored. Ideally, per capita recoveries in class actions should equal or exceed the amounts plaintiffs win in individual suits. But there can be no guarantees; rough justice is always the rule in class actions because class actions necessarily reduce the amount of attention individual claims receive. That is the risk assumed by absent plaintiffs who decide to stay in a class; the risk that some meaningful attributes of individual claims may be ignored.\footnote{To be clear, the common law of class actions does not counsel imperfection. The law requires judges to approve only class action settlements that are "fair, reasonable and adequate from the perspective of the absent class members." Plummer v. Chemical Bank, 91 F.R.D. 434, 438 (S.D.N.Y. 1981), aff'd, 668 F.2d 654 (2d Cir. 1982). The law also requires judges to consider the relative size and strength of absent plaintiffs' claims when dividing settlement funds among the members of a class. H. Newberg, supra note 100, ch. 11. These requirements attempt to ensure that absent plaintiffs are treated fairly. They counsel perfection, but perfection cannot be achieved.} 

Because absent plaintiffs cannot exclude themselves from class actions that seek primarily injunctive relief,\footnote{Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), cert. denied, 421 U.S. 1011 (1975).} they do not assume the risk of inadequate returns in injunctive cases. Still, in injunctive cases, absent plaintiffs with high value claims have little cause for complaint. Even if they could exclude themselves on demand, they could not prevent other plaintiffs from suing as a class and could not insulate themselves from the effects of prior or contemporaneous class suits. Suppose a prisoner were to opt out of an institutional reform class action and then file a separate suit. The prisoner's suit would probably be consolidated with the class action.\footnote{See Fed. R. Civ. P. 42.} The two suits would then proceed together, the class action in the lead and the independent suit tagging along. The result reached in the class action would inevitably dictate the outcome of the prisoner's suit. Similarly, if the prisoner were to file suit after the class action had come to an end, a victory for the class would alter the terms of the prisoner's incarceration, because the prison itself would be reformed. Consequently, the class action relief would alter the pris-
oner's position and perhaps render her claim moot. If the class were to lose, adverse precedents and possibly even the preclusion doctrine would limit the prisoner's ability to press an independent claim. In cases seeking structural relief, the fates of all victims necessarily intertwine.

The problem of inadequate returns in injunctive class actions is thus more illusory than real. The value of individual injunctive suits changes when class actions are filed. But plaintiffs who prefer to sue alone cannot complain, because they have no right to prevent others from adjudicating their rights as a group. The relevant comparison is between the relief plaintiffs actually receive from class actions and the relief they would receive if they were permitted to opt out of injunctive class actions and file separate suits. In all likelihood, the relief enjoyed by individual victims would be roughly the same.

F. Interim Conclusion: Fee Awards in Successful Class Actions Are Justified on Restitutionary Grounds

The practice of paying attorneys who win class actions is generally consistent with the law of restitution and its underlying principles. Absent plaintiffs benefit from the services attorneys provide. Consequently, the conception of justice as reciprocity or fair requital requires absent plaintiffs to pay reasonable compensation in return. However, that simple statement by itself does not suffice. The law does not order recipients to pay restitution when providers fail to take advantage of opportunities to bargain; when providers have adequate incentives to supply goods without beneficiaries' help; when providers confer benefits as gifts; when providers can withhold benefits from recipients who decline to pay; or when beneficiaries can plausibly claim that forced exchanges of benefits for compensation leave them worse off. None of these exceptions presents an obstacle to granting fee awards in successful class actions. Therefore, the desire for distributive justice can properly be put into play.

III
RESPONDING TO DAWSON

John P. Dawson, a leading scholar of the law of restitution, criticized the idea that attorneys who handle class actions are entitled to compensation from absent plaintiffs. This Part defends the argu-

176 "Structural injunctions attempt to restructure institutions that are systematically violating the law or whose very structure is unlawful. School desegregation cases and antitrust divestiture cases are typical examples." D. Laycock, supra note 122, at 239 (citing Owen M. Fiss, The Civil Rights Injunction 8-12 (1978)).
ment of the preceding Part from the attack Dawson waged. The

time is ripe to reconsider Dawson's views. In Blum v. Stenson, the

Supreme Court stated in dictum that attorneys who win common

fund class actions are entitled to a percentage of the gains they help

produce. At the time, lower court judges had abandoned percent-

age formulas in favor of the hourly-rate based, lodestar approach. Recently, however, fee award practices have begun to change, and

some judges now support a return to the percentage approach. Dawson resolutely opposed percentage fees and thought they could not be justified on restitutionary grounds. If his reasons are sound, judges would be right to stay with the lodestar approach.

As stated earlier, the Supreme Court first recognized an attorney's right to claim compensation from a common fund in Central Railroad & Banking Co. v. Pettus. Dawson condemned that decision in no uncertain terms. He thought that the Supreme Court "was quite unaware of what it was doing" when it decided the case and he called the lawyers' request for additional compensation "far-fetched." Dawson attributed the positive reception given Pettus in the lower courts to "the strong fellow-feeling of judges for brothers in the guild.

Given Dawson's antipathy toward Pettus, it may seem surprising that he endorsed an earlier, related Supreme Court decision, Trustees v. Greenough, where the Court held that the named plaintiff, Vose, was entitled to repayment from a common fund for fees and expenses he paid when suing on behalf of a class. Vose was entitled to reimbursement because the absent plaintiffs were enriched at his expense.

Given Dawson's support of Greenough, it is difficult to see why Pettus caused him so much concern. The net effect of reimbursing Vose, who paid attorney fees in advance, was to transfer money from the absent plaintiffs to the lawyers. It seems a matter of indifference whether lawyers receive compensation directly from com-


178 D. Laycock, supra note 122, at 864.

179 See, e.g., In re Activision Sec. Litig., 723 F. Supp. 1373 (N.D. Cal. 1989) (announcing flat 30% fee in securities cases).

180 See generally Dawson, supra note 20; Dawson, Fees from Funds, supra note 21.

181 113 U.S. 116 (1885).

182 Dawson, Fees from Funds, supra note 21, at 1653.

183 Id. at 1604; see also Dawson, Intermeddler, supra note 21, at 1458 ("It seems unlikely that anyone other than a lawyer would have the temerity to suggest that, having received . . . the return he agreed to accept, he should secure from a stranger an extra reward.").

184 Dawson, Fees From Funds, supra note 21, at 1653.

185 105 U.S. 527 (1881). For Dawson's remarks on Greenough, see Dawson, supra note 20, at 849-54; Dawson, Fees from Funds, supra note 21, at 1652-53.

186 Greenough, 105 U.S. at 532.
mon funds or indirectly by requiring money to pass through named plaintiffs' hands.\(^{187}\) Dawson was, however, hardly indifferent. He denounced Pettus in righteous terms because he believed the practice of paying lawyers directly reflected the widespread but mistaken "conception . . . that the litigating lawyer is an independent, profitmaking entrepreneur."\(^{188}\) Dawson viewed attorneys not as entrepreneurs but as agents who are contractually obligated to serve the clients they represent (i.e., named plaintiffs).\(^{189}\) For that reason, he firmly believed that lawyers who help create common funds are entitled to only the amount of compensation their clients agree to pay. The Restatement of Restitution declares that "[a] person who, incidentally to the performance of his own duty . . . confer[s] a benefit upon another, is not . . . entitled to contribution."\(^{190}\) Because lawyers are contractually obligated to represent their signed clients, including named plaintiffs, Dawson believed lawyers have no right to additional compensation from nonclients, including absent plaintiffs, who benefit when lawsuits create common funds.

The heart of Dawson's position is that a person who acts pursuant to a contract has no right to restitution from an incidental beneficiary.\(^{191}\) As a general matter, that is surely correct. The gardener who tends my neighbor's yard has no right to compensation from me, even though I enjoy gazing at my neighbor's beautiful lawn. My neighbor has to pay because he hired the gardener, but I do not. Because I benefit incidentally from the gardener's performance of a contractual obligation, the law of restitution denies the gardener the option of collecting from me.\(^{192}\) Dawson argued that class counsel have no right to compensation from absent plaintiffs because counsel bear the same relation to absent plaintiffs as my neighbor's gardener does to me.

If one strictly construes established restitutionary doctrine, one must condemn the result in Greenough. Section 106 of the Restatement of Restitution, on which Dawson relied when inveighing against attorneys' claims for compensation from incidental beneficiaries, also denies compensation to persons who provide benefits to others "incidentally . . . to the protection or the improvement of [their] own things."\(^{193}\) Vose, the named plaintiff in Greenough, sought pri-

\(^{187}\) Levmore, supra note 25, at 96.

\(^{188}\) Dawson, supra note 20, at 854.

\(^{189}\) Id.; see also Berger, supra note 25, at 318 (similar opinion offered as a reason for compensating attorneys on an hourly rate basis).

\(^{190}\) Restatement (First), supra note 10, § 106.

\(^{191}\) Dawson, Fees from Funds, supra note 21, at 1603-08; Dawson, Intermeddler, supra note 21, at 1410-12.

\(^{192}\) Restatement (First), supra note 10, § 106 comment a, illustration 3.

\(^{193}\) Id. § 106.
arily to protect his own interests by waging that suit. If the Restatement is gospel, it would seem that the absent plaintiffs who shared in the fund Vose helped create were entitled to a free ride at Vose's expense.

Nevertheless, Dawson thought that Vose was rightly repaid. He believed that because the existence of the common fund derived from Vose's outlays for attorneys, the basic requirement of restitution, enrichment at another's expense, was met in that case. Dawson also believed that Vose's case satisfied the other relevant requirements imposed by the law of restitution. Vose was justified in attempting to enforce his own rights, he could not do so without helping others at the same time, and he did not offer his services as a gift. Moreover, the absent plaintiffs contributed nothing to their own enrichment: they merely sat back while Vose sued. Finally, no practical considerations rendered a decision in Vose's favor unwise, because the common fund was necessarily within the control of the court. For these reasons, Dawson concluded that the payment to Vose "merely distributed his loss" in an appropriate way.

Dawson's reasons for endorsing Greenough are remarkably similar to the reasons offered here in Parts I and II in support of the practice of paying attorneys who win class actions. Since Dawson and I agree on the essential content of the law of restitution, and since he was willing to ignore the strict language of the Restatement when arguing that named plaintiffs are entitled to reimbursement when they pay attorneys' fees in advance, why do we differ as to whether attorneys are entitled to be paid directly from common funds? We disagree because we answer the question "Do contracts between attorneys and named plaintiffs establish the reasonable value of attorneys' time?" in different ways.

Dawson answered "yes." He believed that the attorneys who waged Pettus were fully compensated when they received the contract price from the named plaintiffs, because that was what they agreed to accept when they took the case. The attorneys therefore suffered no loss, according to Dawson, and could not plausibly claim that the absent plaintiffs benefitted at their expense.

Dawson is making an analytical claim: one who agrees to perform a service in return for a payment of a specified size is necessarily made whole upon receipt of the contract price. Is that true? The Pettus Court did not think so. Uncontroverted evidence convinced the Court that the attorneys intentionally charged the named plain-
Attorneys' fees a subnormal rate in hopes of winning the case and securing additional payments from the absent plaintiffs.\textsuperscript{196} Taking the attorneys' normal billing rate as the baseline, the Court concluded that the contract undercompensated the attorneys and that the attorneys were entitled to a supplemental wage.

The Court's assessment is entirely plausible. Although most fee agreements reflect the reasonable value of attorneys' time, contracts used in class actions typically do not. In securities and antitrust class actions, attorneys commonly "waive fees for individual clients," so that the amount pledged by named plaintiffs is effectively nil.\textsuperscript{197} In mass tort cases, the market value of attorneys' time often greatly exceeds the size of named plaintiffs' claims, let alone the amounts named plaintiffs agree to pay.\textsuperscript{198} The same is true in civil rights and other cases where classes seek broad-based injunctive relief.

By giving named plaintiffs discounts, attorneys react to named plaintiffs' reluctance to sign contracts obligating them to pay thousands, or even millions, of dollars in fees, and to reimburse substantial expenses in the event of loss. The numbers would frighten anyone, even if there were little prospect that such contracts would be enforced. Why subject potential named plaintiffs to such uncertainty when fees will ultimately be drawn from common funds? It seems better to hold named plaintiffs liable for nominal amounts, so as to satisfy the requirement of having clients, and to allow lawyers to apply directly to courts for fee awards.\textsuperscript{199}

The evidence in Pettus suggests that the attorneys saw the wisdom of the strategy just described. They offered the named plaintiffs a subnormal rate to secure a few clients and gain control of the case. Then they won the class action and applied for a supplemental award, believing, correctly as it turned out, that a judge would see things their way. Thus, an attorney who runs a class action may incur a loss even when paid the amount promised by a named plaintiff. Payment from a named plaintiff may not reflect the reasonable value of an attorney's time, where "reasonable value" is defined as an at-

\textsuperscript{197} H. Newberg, supra note 1, § 2.10, at 58.
\textsuperscript{198} Consider In re Agent Orange Product Liability Litigation, 611 F. Supp. 1296 (E.D.N.Y. 1985), aff'd in part, rev'd in part, 818 F.2d 226 (2d Cir. 1987), where fees in excess of four million dollars were awarded. No plaintiff ever agreed to pay that amount, nor was any plaintiff's claim large enough to support such a commitment.
\textsuperscript{199} Even Dawson would have permitted attorneys to bypass named plaintiffs and claim directly against common funds as "a shortcut" to save named plaintiffs the aggravation of paying fees first and then claiming reimbursement. However, he would have limited lawyers to the amounts named plaintiffs agreed to pay. Dawson, supra note 20, at 853-54.
toruey's customary billing rate.\textsuperscript{200} That is uniformly true in class actions today.\textsuperscript{201}

Dawson thus misunderstood the nature of bargaining in class actions;\textsuperscript{202} he believed that attorneys and named plaintiffs negotiate and settle on normal or reasonable rates. Since that does not happen, there is no reason to believe that contracts between attorneys and named plaintiffs accurately value attorneys' time. Moreover, if judges relied on contracts when awarding fees, attorneys and named plaintiffs might simply collude by entering into agreements entitling lawyers to excessive fees. Fees would, after all, still be drawn from common funds. Because named plaintiffs would be spending absent plaintiffs' money, contracts entered into by named plaintiffs would be unreliable guides to the value of attorneys' time.\textsuperscript{203}

Dawson saw that collusion could occur, and therefore subjected attorneys' fees to two caps. An attorney was to be paid the lesser of the contract price or the reasonable value, defined as the market rate, of an attorney's time.\textsuperscript{204} Because a judge would assess reasonable value,\textsuperscript{205} Dawson's proposal differs little from current fee award practice. Judges would routinely assess the reasonable value

---

\textsuperscript{200} Professor Berger has observed that:
[a]n attorney may agree to take a case on a basis that will not fully compensate the time and effort to be expended because of the expectation that the lawsuit will create or preserve a fund for the benefit of a broader class. To the extent the contract . . . affords the attorney less than the market value of his or her time and effort, the attorney has incurred a loss . . . [that] is the measure of the unjust enrichment to the nonclient beneficiaries.

Berger, supra note 25, at 299-300. Berger not only failed to see the conflict between his view and Dawson's, he cited Dawson with approval. Id. at 298-99.

\textsuperscript{201} In general, contracts between attorneys and named plaintiffs are not worth the paper on which they are written. For example, although contracts routinely obligate named plaintiffs to reimburse litigation expenses in the event of loss, no one really expects named plaintiffs to pay. The contractual language exists purely to satisfy the ethical rule barring attorneys from bearing ultimate liability for expenses and costs.

\textsuperscript{202} An interesting difference of opinion existed between Dawson and his casebook collaborator, George E. Palmer. J. Dawson & G. Palmer, supra note 58. Palmer wrote that "[the most persuasive case] for awarding attorneys' fees as restitution is where there is a relatively large number of potential plaintiffs . . . . In many such instances it would not be economically feasible for the client to pay the full value of the lawyer's services. As a practical matter, if the claim is to be pursued, the lawyer's compensation must come out of the fund recovered.

2 G. Palmer, supra note 40, § 10.8. Palmer thus appreciated what Dawson did not, namely, that named plaintiffs may be unable to pay lawyers' customary rates.

\textsuperscript{203} Cf. Kirchoff v. Flynn, 786 F.2d 320, 323 (7th Cir. 1986) (Easterbrook, J.) (private plaintiffs in civil rights litigation, because of fee-shifting statute, do not negotiate with their own money on the line). Dawson agreed that "[t]he fee fixed in the contract of the attorney with his own client . . . clearly should not control." Dawson, Fees from Funds, supra note 21, at 1608 (footnote omitted).

\textsuperscript{204} Dawson, supra note 20, at 851.

\textsuperscript{205} Dawson, Fees from Funds, supra note 21, at 1608.
of attorneys' time, and attorneys would generally receive the
amounts judges decided should be paid. This is what happens in
class actions today. Only attorneys who failed to collude with
named plaintiffs would feel the bite of Dawson's proposal, and it is a
safe bet that few attorneys would make that mistake.

Dawson's reliance on section 106 of the Restatement of Restitution
reveals the breadth of his misunderstanding of class actions. The
Restatement denies compensation to persons whose actions benefit
others "incidentally." Absent plaintiffs are not incidental benefi-
ciaries; they are intended beneficiaries. This claim is borne out by
the law of class actions, which makes absent plaintiffs' welfare the
central focus of concern. Unless absent plaintiffs are adequately
represented, they cannot be bound by the judgments class actions
produce. For that reason, courts have developed a variety of
means for ensuring that attorneys who run class actions give due
regard to absent plaintiffs' interests and rights. For example, the
primary obligation of an attorney who runs a class action is to pro-
tect absent plaintiffs, even when the only way an attorney can do so
is by setting the interests and rights of a named plaintiff, the attor-
ney's actual client, to one side. The duties of office outweigh an
attorney's contractual and ethical obligations to a signed client
when a conflict arises.

There is nothing magical or mysterious about class counsel's
legal obligation to represent absent plaintiffs. Fiduciary duties often
arise in the absence of express agreements, as, for example, when
judges appoint guardians to care for wards. Nor is it odd that a
court-appointed fiduciary has a right to compensation. Historically,
court-appointed fiduciaries have been entitled to repayment for a
variety of expenses and costs, even when appointments were made
without beneficiaries' consent.

Because absent plaintiffs are the intended and legally desig-
nated beneficiaries of attorneys' efforts, it seems inappropriate to

206 Restatement (First), supra note 10, § 106.
207 Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808 (1985); Hansberry v. Lee,
311 U.S. 32, 41 (1940).
(at pretrial stages, counsel owes greater duty to absent class members than to class rep-
representatives), aff'd, 577 F.2d 1132 (5th Cir. 1978).
209 For discussions of the powers and responsibilities of class counsel, see Manual
for Complex Litigation (Second) §§ 20.22, 30, 30.15 (1985); H. Newberg, supra note
100, §§ 9.34-35.
210 William F. Fratcher, Powers and Duties of Guardians of Property, 45 Iowa L. Rev. 264,
320-29 (1960).
211 The history of the common law regulating the compensation of trustees, guardi-
ans, executors, and other court-appointed fiduciaries is discussed in 2 Frederic
k Thomas White & Owen Davies Tudor, Leading Cases in Equity 434-73 (1859).
apply section 106 of the Restatement to the relationship between an attorney and a class. Rather, the relationship between an attorney and a group of absent plaintiffs more closely resembles a quasi-contractual exchange.\footnote{212} Judges appoint attorneys to serve absent plaintiffs and require absent plaintiffs to return the favor by paying reasonable fees.

But how much should absent plaintiffs pay? Although the percentage-of-the-gain formula is enjoying renewed popularity, Dawson strongly opposed it. He thought the percentage formula produced arbitrary results that bore no relation to the time and effort litigation required.\footnote{213} It is certainly true that the amount of time and effort attorneys invest in litigation bears no necessary relation to the size of the funds their efforts produce.\footnote{214} Easy cases can produce magnificent returns. Further, it is not immediately obvious that the amounts class members recover should affect the amounts attorneys are paid.

Quasi-contractual damages usually equal the reasonable or market value of the service provided. In the words of one commentator, “[q]uasi-contract proceeds on the fiction of an implied promise to pay .... If there were a real promise, it would probably be to pay the market value, and the implied promise is analogized to that.”\footnote{215} It seems appropriate to pay market rates in class actions as well. Unjust enrichment occurs in class actions because absent plaintiffs enjoy the fruits of an attorney’s labor without purchasing the right to do so. The remedy should therefore require absent plaintiffs to pay an amount which, if offered in advance, an attorney would willingly accept.\footnote{216} The best guess at that amount is an attor-
ney's usual and customary rate.\textsuperscript{217}

One could dispute the claim that lawyers would agree to wage class actions in return for the same fees they receive in conventional cases by observing that the mix of risks and opportunities present in class actions differs from the mix in conventional cases.\textsuperscript{218} The problem with encouraging judges to tailor fees in light of risks is that judges often cannot know whether, in a given case, the balance is relatively favorable to an attorney or not. And even if a judge were fairly sure that the balance tipped one way or the other, the magnitude of the difference between a conventional case and a class action might still be unclear.\textsuperscript{219} There is moreover the likelihood of encouraging litigation over the risks class actions entail. Given judges' limitations and the desire to avoid fee disputes, the simplest solution may also be the best, and the simplest solution is to assume the adequacy of prevailing rates.\textsuperscript{220}

Judges usually equate a provider's customary rate with the amount a provider actually charges. Courts rely on evidence of normal billings unless a recipient can show that a particular provider is considerably out of line with the local market.\textsuperscript{221} Judges often em-

\textsuperscript{217} It seems reasonable that the price would fall somewhere between the total amount a class stands to gain and an attorney's opportunity wage, \textit{i.e.}, the amount of income an attorney could earn by working on other cases. \textit{See} Kirchoff v. Flynn, 786 F.2d 320, 326 (7th Cir. 1986); Paul A. Samuelson, \textit{Economics} 474-75 (10th ed. 1976). It is difficult to say much more, however, because the combinations of risks and opportunities that class actions present vary greatly from case to case.

\textsuperscript{218} The peculiar risks and advantages of class actions are discussed in H. Newberg, \textit{supra} note 100, ch. 2.

\textsuperscript{219} The difficulties that arise when judges attempt to adjust prevailing rates are well known. \textit{See} Laffey, 746 F.2d at 18-25; Leubsdorf, \textit{supra} note 25, at 485-88.

\textsuperscript{220} Reliance on prevailing or customary rates can also be justified on the ground that such rates provide the best measure of attorneys' real opportunity costs. \textit{Laffey}, 746 F.2d at 24 ("established rates represent the opportunity cost of what the firm turned away in order to take the litigation; they represent the lawyers' own assessment of the value of their time"). Laycock observes that in some cases "enrichment is unjust only to the extent of [a] plaintiff's cost" and that in those cases "compensatory damages may sometimes be the appropriate remedy for a substantive liability based in unjust enrichment." Laycock, \textit{supra} note 10, at 1285-86. If the aim of fee awards is to prevent absent plaintiffs from benefitting at attorneys' expense, compensatory awards based on attorneys' opportunity costs should suffice.

\textsuperscript{221} \textit{See}, e.g., \textit{Restatement (Second), supra} note 40, § 3 comment a, illustration 1 (hospital that admits unconscious patient entitled to "the amount of its usual and reasonable charge").
ploy the same technique when sizing fee awards. When attorneys who wage class actions also represent plaintiffs in conventional cases at established hourly rates, judges base fee awards on those rates. For example, an attorney who routinely receives $150 per hour when representing clients privately is ordinarily deemed to have a $150 hourly rate.

However, only a minority of attorneys who represent plaintiffs in conventional cases bill by the hour. Most charge contingent percentage fees. In class actions and other cases waged by contingent fee practitioners, courts must decide whether to base fee awards on the percentage an attorney normally charges, on a percentage otherwise derived, or on a surrogate hourly rate. Not all of these options are available in every case. It is impossible to use percentages in declaratory judgment and injunctive reform class actions. The full range of options exists only when plaintiffs win monetary relief.

But suppose a class were to win a damage award of ten million dollars. Could a judge properly base a fee award on an attorney's normal contingency percentage? For example, if the attorney routinely takes cases on a forty percent contingency, could the judge be right to award four million dollars in fees? The answer is "yes," even though, as Dawson points out, the fee awarded may bear no relation to either the effort the attorney invested in a case or the effective hourly rate the attorney usually earns. In cases waged by contingent fee practitioners, it is inappropriate to focus on effec-

---


223 See Note, supra note 26, at 461-72.

224 F.B. MacKinnon, Contingent Fees for Legal Services 64 (1964); Kevin M. Clermont & John D. Currivan, Improving on the Contingent Fee, 63 Cornell L. Rev. 529, 531 n.2 (1978).

225 Each approach has supporters. For example, in Kirchoff v. Flynn, 786 F.2d 320 (7th Cir. 1986), the district court judge had adopted the percentage found in the contract signed by the plaintiffs, apparently in the belief that the percentage was reasonable and that it reflected the attorney's normal rate. Id. at 322. On appeal, Judge Easterbrook, writing for the Second Circuit Court of Appeals, remanded the case on the ground that an adjusted percentage might have been deemed appropriate if the particular features of the case had been taken into account. Id. at 326. Professor Coffee also recommends adjusted percentages in class actions. Coffee, Plaintiff's Attorney, supra note 26, at 717-18. The Supreme Court requires the use of hourly rates in fee-shifting cases. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). As indicated, however, in common fund cases the Court appears to have endorsed the use of percentage formulas. Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984).

226 For example, a $1,000,000 fee would yield an effective hourly rate of $250 if the attorney invested 4000 hours in the case. Likewise, if 10,000 hours were invested, the effective rate would fall to $100 per hour. The first rate might be higher than the overall effective hourly rate a contingent fee practitioner usually earns. The second rate might be lower.
tive hourly rates *ex post*; the effective hourly rates actually earned by contingent fee practitioners are irrelevant. What is important, from a restitutionary perspective, is to pay attorneys on terms they would probably accept in an *ex ante* bargain, before the outcome of litigation is known.

The effective hourly rate a contingent fee practitioner earns in a given case will be higher or lower than the attorney's average effective hourly rate. An attorney's average effective hourly rate reflects the fact that some cases require less work than others or generate greater rewards, thus yielding relatively high hourly rates. It also reflects the fact that other cases absorb a relatively large number of hours or generate small awards, thus yielding low effective hourly rates. In neither event is the result unjust from a restitutionary perspective. Neither an attorney nor a client has a claim of unjust enrichment, whatever the attorney's effective hourly rate may turn out to be in a given case, because both freely assume the risks associated with contingent percentage fees. The situation in class actions is analogous. When class actions settle quickly or for large amounts, attorneys may earn extraordinarily high effective hourly rates. When class actions become protracted or yield small settlements, attorneys' effective hourly rates are low. Even so, the result in both contexts may be correct from a restitutionary perspective, as long as compensation is regulated on terms attorneys would accept if offered prior to litigation. If an attorney would have demanded a forty percent contingency at the outset because the attorney normally represents fee-paying clients on such terms, then the fee awarded at the conclusion of class litigation may properly reflect that, even if the effective hourly rate seems unusually high or low.

Thus, Dawson errs in concluding that restitutionary principles bar judges from basing fee awards on gains. Rather, restitution permits such awards in cases waged by attorneys who ordinarily charge contingent percentage fees, because percentage-based fee awards would generally secure attorneys' hypothetical consent. Nevertheless, there is a widespread perception that this method results in unnecessarily (and even unconscionably) high fee awards in cases in which the fund recovered is extraordinarily large. This opinion may reflect little more than disdain for plaintiffs' lawyers or unfamiliarity with the size of the cases made possible by Rule 23 of the Federal Rules of Civil Procedure. Still, where class actions produce

227 Garth *et al.* report that class actions run by private contingent fee practitioners have remarkably high failure rates. *See* Garth, Nagel & Plager, *supra* note 27, at 378-80.

228 Percentage formulas offer advantages like predictability, ease of administration, and beneficial alignment of incentives that should not be ignored.

229 H. Newberg, *supra* note 1, § 2.09.
economies of scale, lawyers may be overcompensated if paid on the basis of prevailing rates. It may also be important to spare judges the embarrassment that large fee awards often cause. It does not follow, however, that judges should eschew the use of percentages altogether. Judges could simply adjust percentages to take economies of scale into account.

Judges cannot regulate percentages with much precision because they possess insufficient knowledge and information to assess the economies class actions actually produce. Instead, they should apply uniform sliding scales to all cases across the board. For example, judges might rely solely on attorneys’ prevailing percentages in cases where less than ten million dollars is recovered. For awards between ten and twenty million dollars, fees might be set at eighty percent of an attorney’s prevailing rate, with further reductions at the margin for still higher recoveries. This method reserves a portion of any economies for the benefit of absent plaintiffs.

The sliding scale method also has the fairness advantage of telling attorneys how their fees will be calculated in advance. Ratemaking should not be an ad hoc procedure left to a judge’s discretion. Such an approach would enable judges to punish attorneys whom they dislike, complicate the settlement process by making it difficult for parties to estimate plaintiffs’ lawyers’ legal fees, and generate litigation. More fundamentally, it would prevent attorneys from knowing the terms of the hypothetical bargain.

There is no deep division between Dawson and myself. While we differ over facts surrounding class actions, our understanding of the law of restitution is fundamentally the same. Dawson probably would have endorsed the practice of allowing attorneys to dip into common funds if he had interpreted the facts as I do. Despite my

---

230 Id.
231 Id. Relatedly, Coffee discusses the effects of fee structures on collusion in Coffee, Plaintiff’s Attorney, supra note 26, at 717-18.
233 The Third Circuit Task Force proposed that judges appoint representatives to negotiate contingent fee agreements with plaintiffs’ counsel on class members’ behalf. Task Force Report, supra note 26, at 21-24. This proposal would adequately inform plaintiffs’ counsel of the terms of representation. However, it might also be counter-productive. If all attorneys who wished to do so were allowed to bid on class actions, the incentive to investigate wrongdoing would be reduced, because attorneys would risk losing cases they discovered to attorneys willing to charge lower rates. But if bargaining were initiated after the appointment of class counsel, attorneys would lack incentives to offer competitive rates. For an instance where a bargaining procedure like that recommended by the Task Force was used, see In re Oracle Sec. Litig., 22 Sec. Reg. & L. Rep. (BNA) No. 34, at 1292 (N.D. Cal. Aug. 3, 1990).
arguments, however, Dawson would probably not alter his position on the permissibility of percentage fees. Nevertheless, restitutionary principles do not entirely foreclose the option of basing fee awards on percentages. The percentage option is appropriate where it comes closest to securing lawyers’ hypothetical consent.

IV
APPLICATIONS

Answers to many practical questions flow directly from the restitutionary theory. Absent plaintiffs bear no personal liability for fees because the imposition of personal liability could force them into disadvantageous exchanges. Attorneys have restitutionary claims against absent plaintiffs only when negotiations are impracticable, not when attorneys merely fail to bargain, or attempt to bargain and are rebuffed. Attorneys are entitled to be paid only when they win because only then are absent plaintiffs enriched. Other questions require more extended analysis. This Part will address two issues judges now face: the permissibility of fee waiver agreements in fee-shifting class actions and the propriety of enhancing fees to offset the risk of nonpayment in class actions taken on contingency. The restitutionary theory bars the use of fee waiver agreements and supports the availability of fee enhancements.

Before elaborating on these claims, it is helpful to contrast the restitutionary approach with the economic theory of fee awards. Judges no longer think in restitutionary terms when considering fees. They tend to rely on economic theories and arguments instead, even to the point of building economic models of the litigation process on which to base fee award decisions. The cases discussed in this Part, Evans v. Jeff D. and Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air (Delaware Valley II), exemplify judicial use of economics. At least with respect to fee awards, judges would be wise to begin thinking again in traditional restitutionary terms. In particular, they should ignore the larger social consequences fee award decisions may have, apply standard restitutionary doctrines and principles in appropriate ways, and otherwise let the chips fall where they may. The consequences of judicial decisions are important, but judges are more likely to produce good consequences by doing justice on a case-by-case basis than by seeking directly to benefit society at large. Although many judges try to

\[\text{See supra notes 26-27 and accompanying text.}\]
anticipate the more extended consequences of their actions and take those consequences into account when deciding cases, judges lack the information and other resources needed to make accurate predictions. As a result, judges often make mistakes, neither helping society at large nor even doing justice in the cases they decide.\textsuperscript{239} By contrast, judges often do justice and produce desirable social consequences when they merely recognize and enforce equitable and legal rights in the standard common-law way, because their decisions to reallocate resources in favor of deserving parties encourage nonparties to act in socially desirable ways. In other words, judges make good policies as a by-product of case-by-case adjudication.

Reconsider the cotenancy case.\textsuperscript{240} The law entitles a cotenant who makes an improvement to demand partition and recover the value the improvement adds to a jointly held asset. An economist might explain the rule by pointing out that it encourages active cotenants to make improvements that increase an asset's value by more than their cost.\textsuperscript{241} The rule enables active cotenants to reap the gains improvements produce and saddles them with the cost of improvements that turn out to be bad bets. Because it forces active cotenants to take both costs and benefits into account, it encourages them to make only cost-efficient improvements. The economic analysis explains why judges' decisions in cotenancy cases might have economically beneficial consequences for society at large, and thereby supplies a reason for retaining the rule allowing cotenants to recover. The economic analysis cannot, however, replace the rule. It is one thing for judges to apply rules and principles that have economically beneficial side-effects, but it is quite another for

\textsuperscript{239} Consider the law of standing, which restricts access to the federal courts in part because of the fear that litigants would flood the courtrooms if no strictures were imposed. In fact, the available evidence suggests that relaxed standing requirements have little effect on the workload of the courts. \textsc{Kenneth Culp Davis}, \textit{Administrative Law Treatise} § 24.06 (2d ed. 1983). If judges err when dealing with matters of judicial administration, they are unlikely to guess correctly when dealing with sociological matters about which they have no particular expertise.

\textsuperscript{240} See supra text accompanying note 58.

\textsuperscript{241} Law-and-economics commentators have said surprisingly little about restitution. D. Laycock, \textit{supra} note 122, at 468; Levmore, \textit{supra} note 25, at 69. What they have said suggests that they would reduce the law of restitution to the incentives it creates. \textit{See}, \textit{e.g.}, Judge Posner's opinion in Taylor v. Meirick, 712 F.2d 1112, 1120 (7th Cir. 1983) (allowing copyright owner to recover profits in excess of loss discourages infringement and encourages infringers to negotiate instead of bypassing markets). Levmore employs economic reasoning, but not all of his analytical techniques are tied to an economic theory of the law of restitution. Even if the law of restitution were to promote goals other than efficiency, it might be sensible for the law to take valuation difficulties and problems of wealth-dependency into account. Obstacles like these make errors likely; they create risks that judges will fail to achieve the goals the law of restitution obligates them to pursue. Levmore, \textit{supra} note 25, at 69-79.
them to apply economic theory directly. Suppose judges discarded the rule and attempted to decide cotenancy cases in economically beneficial ways. The change in styles of adjudication would add an incredible amount of complexity to cotenancy cases. For example, the law of restitution prevents active cotenants from holding passive cotenants personally liable for the cost of improvements. To recover, absent plaintiffs must move for partition and seek an equitable division of the proceeds of sale. The law thus enables judges to dismiss quickly any claims involving the personal liability of passive cotenants that active cotenants might bring. By contrast, judges applying economics could not summarily reject such claims. They would need to know the costs and benefits of a decision granting compensation. They would need to know, for example, whether a denial of restitution would weaken active cotenants' incentives to make desirable improvements. The answer to that question might be unclear. A decision to deny restitution might have little or no measurable effect. It might even encourage cotenants to mend relationships or to divide assets themselves, thereby avoiding litigation.

A jurisprudence based on economics rather than rules "completely eliminates the factor which makes rules necessary, namely [judges'] ignorance." Judges are not omniscient. They are no better than the rest of us at predicting the larger social consequences of actions or at ranking options according to their propensity to enhance social welfare, utility, or wealth. One reason why judges should employ principles and rules as guides is "because [they do] not know what all the consequences of a particular action will be." Even economists disagree over the consequences alternative legal arrangements are likely to have. Consider the matter of contract remedies, a topic long discussed by economists of law. Judge Posner once argued against damages in excess of expected profits because such damages deter parties from making efficient breaches. Some other economically inclined writers dispute that opinion, and Judge Posner appears to have softened his stand. He now leaves open the possibility of applying more severe sanctions in cases involving what he calls "opportunistic" breaches.
Judges are poorly placed to handle problems economists have difficulty figuring out. With notable exceptions like Judge Posner, they lack the requisite skills and time. Judge Posner himself has observed that the pressure on federal judges to process cases is now sufficiently extreme to threaten the quality of their decisions. The recently issued *Report of the Federal Courts Study Committee* reiterates this concern. Judges lack the leisure scholars have to ponder problems at length.

Even if judges had more time, training, and resources, the burden of applying economics in fee award cases would still be more than they could bear. In *The Forms and Limits of Adjudication*, Professor Lon Fuller imagined a society in which wages and prices were set by courts. He concluded that such an arrangement would be intolerable because "the forms of adjudication cannot encompass and take into account the complex repercussions that may result from any change in prices or wages." Fuller likened an economy to a spider's web: "A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole." Judges can neither trace the economic ramifications of price and wage changes nor maintain an economy in its optimal state.

The fundamental problem with the suggestion that judges should apply economics in fee award cases is that it asks judges to do what they cannot, namely, keep an economy that supplies legal representation in balance by regulating wages. The core of the economic approach, the idea that fee awards influence the level of litigation and, ultimately, the level of respect for legal rights, may indeed be sound. But it is preposterous to think that judges could maintain an optimal level of respect for legal rights by fine tuning the amounts lawyers are paid. Neither judges nor anyone else could accomplish that task.

The suggestion that judges should apply restitutionary principles and rules takes into account judges' limited resources and abilities. Rules reduce the number of factors judges must consider, thereby conserving their time and enabling them to focus on information they are likely to have at hand. The recommendation that...
judges apply established rules and principles also maintains the oft-noted tendency of the common law to accrete rules and principles that help organize society in desirable ways.\textsuperscript{255} The common law, which encompasses the law of restitution, grows and evolves in a piecemeal fashion as judges decide cases. When a rule or principle proves to have undesirable social consequences, judges can reform it. The process is imperfect; there is no guarantee that all undesirable rules and principles will be weeded out. Over time, however, the process tends to shape rules and principles in socially desirable ways.\textsuperscript{256} The benefit of these refinements are lost when judges forsake rules and principles in favor of intuitive economic reasoning because judges are often mistaken about the way the world works.

A. Fee Waiver Agreements: \textit{Evans v. Jeff D.}

In \textit{Evans v. Jeff D.},\textsuperscript{257} the Supreme Court upheld a settlement waiving the class's right to demand a fee award from the defendants. Because the fee award was the only potential source of compensation for the legal aid agency whose attorneys handled the case, the decision to uphold the settlement ensured that, although the absent plaintiffs would be enriched, no fee would be paid.

\begin{flushleft}
\textit{F. Hayek, supra} note 242, at 8.
\end{flushleft}

\textsuperscript{255} One school of thought, epitomized in the works of Hayek and Fuller, holds that desirable rules are worked into the common law by judges who draw upon existing social practices, primarily practices relating to exchange, when deciding cases. \textit{See generally 1 Friedrick A. Hayek, Rules and Order: Law, Legislation and Liberty} (1973); Fuller, \textit{supra} note 251. Another, more economically oriented school of thought holds that more efficient rules replace inefficient common-law rules in an essentially random fashion over time. George Priest, \textit{The Common Law Process and the Selection of Efficient Rules}, 6 J. Legal Stud. 65 (1977).

\textsuperscript{256} For example, the principles that governed fee awards in class actions between 1958 and 1979 appear to have produced efficient results, even though most of the period preceded the use of explicitly economic reasoning by judges. Lynk, \textit{supra} note 27, at 256-59.

\textsuperscript{257} 475 U.S. 717, \textit{reh'g} denied, 476 U.S. 1179 (1986).
The Jeff D. majority never considered the justness of the result. Instead, they asked whether fee waiver agreements would increase the settlement rate, enhance victims' welfare and, in general, encourage respect for civil rights. The majority concluded that fee waiver agreements would in fact further the stated aims. No evidence supported this conclusion. The Court derived its holding from an economic model of the litigation process instead. Unfortunately, there is little reason to trust either the conclusion or the model itself. The model posits that "defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package." From the model, the majority drew the intermediate conclusion that fee waivers facilitate settlements by providing certainty and by reducing defendants' costs. The majority further opined that settlements containing fee waiver agreements make victims better off: they avoid delays and increase the amount of relief victims receive. Taking victims' welfare as the ultimate concern of the civil rights laws, including the fee-shifting statute, the majority concluded that use of fee waiver agreements encourages respect for civil rights and should be approved.

The most obvious objection to the majority's view is that permitting fee waiver agreements may actually make victims worse off on the whole by making it harder for them to find lawyers willing to help them enforce their rights. The decision may embody a trade off: some victims, those who can sue, do better, while others, those denied representation, do worse. The majority opinion cites no evidence tending to show that the former gain more than the latter lose and offers no guidance on how to compare the effects on the two groups.

To be fair, the majority did point out that the plaintiffs offered no evidence to show that the use of fee waiver agreements would

258 Id. at 730-38. According to the majority, Congress wished to further these three ends when it authorized fee-shifting in civil rights cases. Consequently, the majority believed the same ends had to be considered when deciding whether settlements waiving fee awards could be approved.

259 Id. at 734.

260 Id. at 734-36.

261 Id. at 741.

262 Id. at 741-42.

ATTORNEYS' FEES

711

diminish lawyers' willingness to take civil rights cases. But if the Court should ignore unsupported concerns, then the majority broke its own rule. No evidence supported the majority's assertion that "there surely is a significant number" of cases that will settle only if fee waivers are permitted. Nor did any evidence prove the accuracy of the economic model of the decision to litigate or settle. The majority adopted these views because they seemed sensible, not because evidence showed them to be correct. If good sense is enough, though, the complaint that fee waivers may discourage lawyers from taking civil rights cases cannot be denied. Fee waivers that prevent lawyers from being paid weaken lawyers' incentives to protect victims' rights. If the majority can properly invoke low-level economic intuitions, so can the dissent.

If both sides employ economic arguments based on intuition, the correct outcome remains a mystery. In the absence of information on the extent to which fee waivers deter lawyers from taking civil rights cases, one cannot know whether fee waivers make victims as a group better or worse off. If fee waivers "seriously impair the ability of civil rights plaintiffs to obtain legal assistance," as Justice Brennan feared, then the Court should prohibit them. But if lawyers' willingness to take civil rights cases remains largely intact, as the majority believed, the Court should permit fee waiver agreements. Finally, if the supply of representation shrinks by only a middling amount, it may be impossible to know whether the use of fee waiver agreements raises or lowers respect for civil rights on the whole.

---

264 Jeff D., 475 U.S. at 741 n.34.
265 Id. at 734.
266 The accuracy of the model is in fact the subject of disagreement. The nature of the disagreement and some empirical evidence are discussed in Linda Stanley & Don Coursey, Empirical Evidence on the Selection Hypothesis and the Decision to Litigate or Settle, 19 J. LEGAL STUD. 145 (1990).
267 The view that fee awards motivate attorneys' behavior is a fundamental tenet of the economic analysis of law. See Miller, supra note 263 (example of the standard economic approach). The empirical evidence suggests that the effects fees have on lawyers are often more subtle than one would initially suspect. Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 CORNELL L. REV. 641 (1987); Garth, Nagel & Plager, supra note 27; Stewart Schwab & Theodore Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 CORNELL L. REV. 719 (1988). The difficulty of predicting how lawyers will respond to incentives is especially great in class actions, as John Coffee's work insightfully reveals. See articles cited supra note 26.
268 Jeff D., 475 U.S. at 759 (Brennan, J., dissenting).
269 Id. at 741 n.34.
270 The truth does in fact appear to fall somewhere between the extremes. My preliminary research on the actual affect of the Jeff D. decision suggests that plaintiffs' lawyers have developed a number of strategies to protect themselves and enjoy considerable, though far from uniform, success. My research consists of questionnaires...
The Court's conclusion that fee waiver agreements make victims better off is, then, entirely conjectural. So is the claim that fee waivers facilitate settlements. Neither the parties nor the Court offered any evidence to support that claim, and the model of the litigation process on which it was based was radically incomplete. Although both sides must agree to a settlement, the court's model considered only the effects fee waiver agreements have on defendants.

Class actions are often lawyers' cases, as Jeff D. evidently was. Moreover, plaintiffs' lawyers generally dislike fee waiver and fee reduction demands, as the lawyers who ran Jeff D. evidently did. Such demands may therefore alienate plaintiffs' lawyers and retard the settlement process. If plaintiffs' lawyers regard fee waiver and fee reduction demands as hostile acts, as signs that their opponents are failing to cooperate or are attempting to manipulate them in strategic or opportunistic ways, they may deem it wise to respond in kind. For example, they may expand the scope of litigation, move for summary judgment, or take cases to trial. They may refuse to cooperate on the timing of depositions and may contest requests for extensions. They may propound expensive discovery requests or attempt to embarrass defendants in the press. Plaintiffs' lawyers can make life difficult for defendants and defense counsel. They often refrain from doing so because as a general matter it is to their advantage to cooperate. But removing the incentive to cooperate may cause cooperation to cease. Instead of greasing the gears, fee waiver and fee reduction demands may cause them to grind.

submitted to and interviews with civil rights attorneys at the 1989 NAACP LDF Lawyers' Training Institute.

271 See, e.g., Miller, supra note 263, at 213-14 (In class actions and derivative suits, "[t]he attorney exercises virtually plenary control over the litigation, including the decision whether to settle.").

272 Jeff D. was a lawyers' case. The lawyers, not the absent plaintiffs, kept the fee waiver issue alive by appealing the decision of the district court. The absent plaintiffs had no interest in challenging the waiver.

273 See Christopher T. Lutz, Planning Fees Fights, 13 LITIGATION 41, 41 (Fall 1986) (commenting on the emotional intensity of fee disputes). Perhaps the best evidence in support of the claim that plaintiffs' lawyers dislike fee waivers and reductions is the fact that the civil rights bar has strongly supported the proposed Civil Rights Act of 1990, which would have undone the decision in Jeff D. See supra note 132. Civil rights lawyers at the 1989 NAACP LDF Lawyers' Training Institute indicated to me that they have begun to screen clients more carefully and to use other methods to protect their claims to fees.


275 Geoffrey Miller points out that "[l]itigation is a form of bilateral monopoly," and
The claim that fee waiver agreements facilitate settlements is thus entirely speculative. Although settlements occur when defendants and plaintiffs bargain to agreement, the model offered by the majority examined fee waiver agreements from only the defendant's perspective. There is no reason to think predictions based on the model are right.

What of the claim that fee waiver agreements make plaintiffs better off by enabling them to trade fee entitlements for additional merits-based relief? That claim also rests on debatable empirical assumptions, but for the sake of argument I will assume the claim is correct. The more important question is "So what?" Plaintiffs would always be better off if they could keep money that is ordinarily paid to lawyers as fees or use that money to purchase additional concessions from defendants. Lawyers' fees always reduce the value of the benefits plaintiffs receive, but even so, lawyers are paid.

Suppose that after a class won a damage award of ten million dollars, an absent plaintiff appeared in court and asked that no fees be paid to the attorneys who handled the case. The reason? The absent plaintiffs would be better off if they kept the entire ten million dollars for themselves. Surely the argument would fall on deaf ears. Judges have never regarded the fact that fee awards diminish absent plaintiffs' gains as a reason for denying fees entirely. They have considered it a reason for exercising caution and moderation instead. Their attitude is correct. Withholding fees entirely in successful damages class actions would unjustly enrich absent plaintiffs at their attorneys' expense.

The concern for absent plaintiffs' welfare is no weightier in injunctive class actions like Jeff D. than in damages cases. An attorney who helps a group of plaintiffs secure a package of injunctive reforms thereby makes the plaintiffs better off. Consequently, the concept of justice embodied in the law of restitution requires the plaintiffs to offer something of appropriate value in return. The obligation of paying fees makes the absent plaintiffs worse off, but even so the obligation remains. Unfortunately, the decision in Jeff D. had the effect of canceling the absent plaintiffs' obligation outright.

---

276 One assumption is that defendants actually offer additional relief in return for fee waiver agreements, instead of making such demands simply to put plaintiffs' lawyers in an ethical box. Another assumption is that the prospect of having to waive fees has no effect on the zealousness with which an attorney negotiates on behalf of a class. If that is not so, a policy permitting the use of fee waiver agreements may diminish the amount of relief class members receive.
The plaintiffs in *Jeff D.* had only the right to a fee award to offer as compensation. The fee waiver agreement placed that right beyond the attorney's reach. It enabled the plaintiffs to trade the money the right might have generated for additional injunctive reforms from the defendant. That settlement does not differ in practical effect from the absent plaintiffs' request to keep the whole common fund in the damages action example set out above. Since the latter arrangement violates the restitutionary theory, fee waivers in injunctive class actions do so as well.

That a group of plaintiffs would be better off if allowed to keep monies earmarked for their lawyers does not excuse the plaintiffs' obligation to pay. Nor does the possibility that plaintiffs could use fee waivers to secure additional merits-based relief. Once one determines that an obligation to pay exists because plaintiffs have been enriched at their lawyers' expense, it matters little that plaintiffs would be better off if they could escape the obligation. People often find obligations disagreeable, but obligations are nonetheless enforced.

Admittedly, a timing difference distinguishes *Jeff D.* from the hypothetical damages class action. In the hypothetical, the fee waiver request arose after the class acquired the common fund, that is, after the class was enriched. In *Jeff D.*, the fee waiver provision was part of the settlement that enriched the class. In other words, the class waived fees and gained enrichment at the same time. Because obligations to pay usually arise only after benefits are received, it is possible to argue that a fee waiver would violate the class's obligation in the example but not in *Jeff D.*

The timing difference is a red herring. A judge presented with a settlement containing a fee waiver provision has two options. The judge can approve the proposal and leave the plaintiffs' lawyer unpaid or the judge can direct the parties to negotiate a new agreement that provides for a reasonable fee. By selecting the first option, a judge brings about a state of affairs in which a class is unjustly enriched at an attorney's expense. By choosing the second option, a judge ensures that a class, when enriched, will pay a reasonable fee. A judge, therefore, can help foster a distributively just state of affairs. Given that, it follows that a judge should choose

---

277 I am assuming here that the lawyer involved in a case does not wish to donate his or her time to a class. Nothing I have said prohibits the use of fee waiver agreements in cases where attorneys voluntarily renounce their claims to compensation.

278 I recognize that it may sometimes be difficult to settle class actions unless fees are waived or greatly reduced, because fees may constitute the largest part of a defendant's liability. However, I am not yet convinced that an exception for such cases should be carved into the general rule. An exception would invite litigation over the proper classification of a case and foster an environment of uncertainty that would not, in all
the second option because of the impropriety of using judicial powers to promote distributive injustice.

The foregoing conclusion comports with both the language and the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976,\(^{279}\) ("Fees Act") the statute that authorized fee shifting in *Jeff D*. The statutory language neither endorses the use of fee waiver agreements nor rules them out. The legislative history makes no mention of fee waivers either,\(^{280}\) but it does say that Congress enacted the Fees Act to undo the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*.\(^{281}\) That case barred lower court judges from using their equitable powers to hold defendants liable for plaintiffs' fees in the absence of statutory authorization.\(^{282}\) By enacting the Fees Act, Congress sought to restore the power *Alyeska* took away. It therefore follows that judges can use their equitable powers to prohibit fee waiver agreements in cases like *Jeff D*. Prior to *Alyeska*, judges shifted fee liability for two reasons: to encourage lawyers to act as private attorneys general and to cure unjust enrichment in cases that produced no common funds.\(^{283}\) *Alyeska* left both desires intact. It merely forbade judges from using defendants' money to satisfy those desires in the absence of statutory authorization. Because the Fees Act authorized fee shifting in *Jeff D.*, the Court was free to use the defendants' funds to prevent the absent plaintiffs from being unjustly enriched. But if the Court could put its equitable powers into play, then it could also have used those powers to prevent unjust enrichment by invalidating the fee waiver agreement.\(^{284}\)

B. Fee Enhancements: *Delaware Valley II*

In *Jeff D.*, the Court engaged in empirical theorizing on a grand scale. In *Delaware Valley II*\(^{285}\) the Justices counseled district court


\(^{281}\) 421 U.S. 240 (1975).

\(^{282}\) Id. at 268-71.

\(^{283}\) Dawson, supra note 20, at 888-907; Dawson, *Fees from Funds*, supra note 21, at 1601-12.

\(^{284}\) It is worth noting that both houses of Congress approved legislation, the Civil Rights Act of 1990, that would have undone the decision in *Jeff D.* as it applies to employment discrimination cases, had President Bush signed it into law. It is therefore difficult to make a convincing argument that a decision to prohibit fee waiver agreements in all fee-shifting cases would violate congressional intent.

judges to do the same. The Court heard *Delaware Valley II* to decide whether a district court judge abused his discretion by enhancing a lodestar fee award to account for the risk of nonpayment. In a 4-4-1 decision, with Justice O'Connor casting the swing vote, the Court upheld the use of contingency enhancements in general but invalidated the specific enhancement applied in the case.

According to Justice O'Connor's concurrence, which lower court judges appear to regard as establishing the law of the case, the general use of contingency enhancements is permissible because markets often reward attorneys for risks. However, the contingency premium attorneys receive may vary from case to case and from market to market. Consequently, a judge must identify the size of the contingency premium paid in a relevant market for a particular kind of case before applying a contingency enhancement to the lodestar. Unfortunately, the district court judge who handled *Delaware Valley II* failed to make the necessary findings. The judge particularly erred by failing to find that the enhancement granted was no larger "than necessary to bring the fee within the range that would attract competent counsel." Justice O'Connor therefore concluded that no risk enhancement could be allowed in the case.

Federal judges handling fee-shifting class actions after *Delaware Valley II* must speculate about several empirical matters. They must define relevant markets, assess the contingency premiums paid in those markets, and identify the smallest enhancements sufficient to entice attorneys to handle class actions. It is obvious that federal judges will have great difficulty completing these tasks and that their decisions will be unreliable. In *Blum v. Witco Chemical Corp.*, the Third Circuit Court of Appeals observed that the task of defining

---

286 *Id.* at 731-32 (O'Connor, J., concurring).
287 *Id.* at 734.
289 *Delaware Valley II*, 483 U.S. at 733 (O'Connor, J., concurring).
290 *Id.* Justice O'Connor thus agreed with the plurality led by Justice White that "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Id.* (quoting opinion of White, J., *id.* at 731).
291 It may even be that judges must define one market for the purpose of determining the contingency premium and a second market for the purpose of assessing the availability of representation for a particular kind of case. *Blum v. Witco Chem. Corp.*, 702 F. Supp. 493, 498 (D.N.J. 1988), *aff'd in part, rev'd in part*, 888 F.2d 975 (3d Cir. 1989); H. Newberg, *supra* note 1, § 32.09.
292 In *Blum v. Witco Chem. Corp.*, 829 F.2d 367 (3d Cir. 1987), the court wrote that: [The presentation required by *Delaware Valley II*] will most certainly require expert testimony from someone familiar with the economics of the
markets requires judges to hear expert testimony on the means by which plaintiffs secure legal assistance. To determine the size of contingency premiums paid in markets, judges will have to model markets in some way. To decide how large enhancements must be to enable potential plaintiffs to find representation, judges will have to estimate the supply curve for legal services. Each assessment will be expensive and time consuming to make, and each will necessarily be imprecise.293

The matter of identifying prevailing contingency premiums is actually even more difficult than the Third Circuit realized. Premiums paid in markets reflect both the risk that plaintiffs will lose, in which event no fees are paid, and the risk that plaintiffs will win amounts too small to compensate attorneys adequately for the time they invested in litigation.294 Statutory fee award cases do not present the latter risk because, upon winning these cases, plaintiffs’ attorneys are fully compensated for all hours reasonably invested, regardless of the amount a plaintiff receives.295 In order to fine tune the fee award process, one must determine the portion of the prevailing contingency premium that reflects only the risk that the client will lose. It would be wrong to apply the full prevailing premium as the Third Circuit mistakenly believed.296

Why strive for such precision? Delaware Valley II aims (if a decision consisting of two plurality opinions and a concurrence can be said to have an aim) to encourage judges to stimulate the supply of

---

293 Id. at 380-81 (citation omitted).
294 Id. at 494.
295 Id. at 380 n.14.
296 Id. at 381.
representation to just the right extent. Fee awards must be large enough to attract competent counsel but no larger, on the theory that judges should not award windfall fees.\textsuperscript{297}

Although attorneys should not be overpaid, the marginal price of exactness exceeds the benefit. Attorneys and clients bargaining over fees often spend little time negotiating. They realize that the cost of fine tuning compensation agreements quickly becomes excessive. The same holds true for the fee award process. Considerable room for error in the form of underpayments and overpayments will remain no matter how the process is designed. It is therefore absurd to insist on precision. The most one can reasonably demand is a reasonably accurate procedure that is easy to apply.

That is the kind of procedure judges would devise if they were to adopt a restitutionary point of view. They would begin by asking whether enhancements are needed to secure attorneys' hypothetical consent. The answer must assuredly be "yes," for the simple reason that a sure bet is worth more than an uncertain bet of equal size.\textsuperscript{298} Suppose an attorney regularly receives $200 per hour from reliable clients in noncontingent cases. Would a payment of $200 an hour on a contingency basis be sufficient to purchase the lawyer's hypothetical consent? Presumably not. Given the risk of nonpayment (the risk of losing) the offer would generate an expected fee of less than $200 per hour. There would be reason to believe that the lawyer would have declined the offer had it been presented at the beginning of the case.\textsuperscript{299}

To duplicate the fees lawyers normally accept, judges must apply contingency enhancements, but only when the risk of nonpayment is real. If a plaintiff were to agree to bear the entire expense of a class action, win or lose, the lawyer's fee would be guaranteed. In that event, the fee award should reflect only the lawyer's normal hourly rate in noncontingent cases.\textsuperscript{300}

In Delaware Valley II, Justice White opposed contingency enhancements for three reasons. First, they "force[] losing defendants to compensate plaintiff's lawyers for not prevailing against defend-

\textsuperscript{297} This sentiment is expressed most clearly in Part IV of Justice White's plurality opinion. Delaware Valley II, 483 U.S. at 726-27. Justice O'Connor did not join Justice White on this matter. Even so, the tenor of her opinion suggests that she shares his view. Id. at 733.

\textsuperscript{298} For example, the expected value of a $100 bet with a 100\% chance of success is $100. The expected value of a $100 bet with only a 50\% chance of success is $50.

\textsuperscript{299} To be clear, I am not claiming that hourly rate practitioners would decline to take class actions if no risk-of-loss enhancements were applied, however plausible that prediction might be. I claim only that it is fair to apply risk-of-loss enhancements because it is necessary to do so to bring fees in contingent fee cases in line with fees hourly rate practitioners ordinarily receive.

\textsuperscript{300} Justice Blackmun made this point in Delaware Valley II. 483 U.S. at 748.
ants in other cases," a state of affairs he found inconsistent "with Congress' decision to adopt the rule that only prevailing parties are entitled to fees."\textsuperscript{301} Second, although "some lawyers [would] decline to take cases" if enhancements were unavailable, there was little likelihood "that the bar in general [would] so often be unable to respond that the goal of the fee-shifting statutes [would] not be achieved."\textsuperscript{302} Finally, "[t]here are . . . severe difficulties and possible inequities involved in making upward adjustments for assuming the risk of nonpayment."\textsuperscript{303} In other words, even if contingency enhancements are justified in theory, judges would have difficulty regulating them appropriately in practice.\textsuperscript{304}

Justice White's second objection is a good example of empirical speculation.\textsuperscript{305} Instead of asking whether a contingency enhancement was needed to do justice in \textit{Delaware Valley II}, he opined on the effects a policy withholding enhancements would have on society at large. There is simply no reason to trust Justice White's impression. He may "doubt" that the bar will often fail to respond, but his opinion is pure conjecture.\textsuperscript{306}

Justice White's first objection makes better sense, but it too ultimately fails. It is somewhat anomalous to charge defendants more because plaintiffs' lawyers receive nothing when they lose. Why should losing defendants suffer because plaintiffs' lawyers sometimes wage ill-advised suits? The law of restitution provides a clear answer. A fee award should mirror the amount a plaintiffs' lawyer

\textsuperscript{301} \textit{Id.} at 725; \textit{see also} Leubsdorf, \textit{supra} note 25, at 489 ("the contingency bonus is extracted from [a] defendant in order to reward the plaintiff's bar for bringing similar but unsuccessful suits against other defendants").

\textsuperscript{302} \textit{Delaware Valley II}, 483 U.S. at 727. The goal of fee-shifting statutes is "to make it possible for those who cannot pay a lawyer for his time and effort to obtain competent counsel." \textit{Id.} at 725. Justice White's reasons for thinking that the goal would be served without risk-of-loss enhancements are (1) that some wealthy plaintiffs agree to pay lawyers win or lose, thereby eliminating the risk of loss in those cases; (2) that some plaintiffs have damages claims large enough to attract lawyers even in the absence of fee-shifting; (3) that some plaintiffs are represented by legal aid lawyers whose decisions to take cases turn on factors other than fees; and (4) that unemployed and underemployed lawyers would take cases without risk-of-loss enhancements. \textit{Id.} at 726.

\textsuperscript{303} \textit{Id.} at 728.

\textsuperscript{304} This is how Justice O'Connor interpreted Justice White's remark. \textit{Id.} at 732 (O'Connor, J., concurring).

\textsuperscript{305} Justice Blackmun, in his dissent, responded in kind. He predicted that a policy barring contingency enhancements would deter lawyers from taking statutory fee award cases. \textit{Id.} at 737-42. Justice Blackmun thus continued the tradition of applying economics from the bench. \textit{See also id.} at 741 (discussing the law of supply and demand).

\textsuperscript{306} Justice White carelessly relied on Leubsdorf, \textit{supra} note 25, at several points for support. Leubsdorf repeatedly declined to speculate about the affects risk-of-loss enhancements have on lawyers' willingness to take cases. \textit{See} Leubsdorf, \textit{supra} note 25, at 496 n.102, 507, 511, 512. "Legal reasoning cannot specify the precise effect of any fee award or practice on the amount of litigation that will be brought in the future." \textit{Id.} at 512.
ordinarily receives because of the reasonable inference that a lawyer would accept a usual and customary fee if a plaintiff class were to offer it in advance. The goal is not to compensate lawyers for cases they lose, but to duplicate bargains plaintiffs and lawyers actually strike when they negotiate over fees face-to-face.

Justice White’s third objection has the most force. Even if it would be sensible in theory to grant contingency enhancements, it must also be shown that judges can actually apply enhancements in an acceptable way. With respect to this claim, my position resembles Justice White’s. I have already said that judges should employ fee award procedures that are simple and routine. Therefore, if judges cannot assess contingency enhancements simply, objectively, and matter-of-factly, they should not do so at all.

In my judgment, the desire for simple procedures rules out the possibility that judges might tailor contingency enhancements case by case. To permit judges to do so would place unlimited discretion in their hands and require them to make extensive factual inquiries. Moreover, it is preposterous to think that judges could accurately assess case-specific risks. Judges cannot mimic markets precisely. At best, they can make only crude guesses about risks and the compensation lawyers considering risky cases would demand.

Given the theoretical propriety of contingency enhancements and the need for simple, objective procedures that can be applied routinely in cases across the board, judges should double all hourly-rate based fee awards in class actions. This rule is attractive in part because it eliminates the need for factual inquiries, limits judges’ discretion, and yields predictable results. The rule can also be defended in a theoretical way. Although judges can be confident that attorneys incur a risk of nonpayment whenever class actions are brought, judges cannot assess the riskiness of any given class action or the average level of risk in class actions across the board. Nor can they assess marginal differences in lawyers’ attitudes toward risk. Given their ignorance, the best they can do is assume that victory and defeat are equally likely ex ante and that lawyers are risk-neutral. Judges should therefore set the risk of nonpayment at

---

307 Justice O’Connor made this point persuasively when criticizing Justice Blackmun’s dissent. Delaware Valley II, 483 U.S. at 732.
308 Leubsdorf, supra note 25, at 485-88.
309 See King v. Palmer, 906 F.2d 762, 766-67 (D.C. Cir. 1990) (employing this approach); see also Leubsdorf, supra note 25, at 511-12 (same proposal defended on different grounds). Leubsdorf also proposes that the actual rate of success in litigation be studied and that the size of risk-of-loss enhancements be based on the results. Id. at 507-10. Implementation of this proposal exceeds the capacity of a court. Unless and until Congress, an administrative office, or a research center conducts such a study and keeps it current, judges should simply double fee awards.
310 The intuition behind my proposal is similar to that embodied in
0.5 and should double fee awards to offset that risk.\footnote{For example, assuming risk neutrality, to equal a guaranteed fee of $200 for an hour of work, the fee offered in a contingency arrangement where the odds of prevailing are 0.5 must equal $400 ($200 = 0.5(400)).}

**Conclusion**

The restitutionary theory entitles attorneys to compensation for the value of their time when their efforts benefit the members of a class and when the other requirements built into the theory are met. The theory thus develops in a rich way the idea of unjust enrichment that once served as the basis for fee awards but that has largely disappeared from current doctrine. The theory also has bite. It can help judges handle fee award problems that exist today.

The number and variety of fee award issues that can and do arise are, of course, far too great to treat in a single essay. So are the difficulties that may afflict the restitutionary theory itself. More conditions may need to be added to the theory, and the conditions already set out may need to be refined. My aims here have largely been to define the terms of future discussion by emphasizing differences between the restitutionary and economic theories of attorneys' fees in class actions and to clarify and defend the general structure of the restitutionary approach. Toward those ends, I hope that I have taken a step in the direction of greater clarity in fee award law.

\[\text{[t]he principle of insufficient reason first formulated by Jacob Bernoulli} \ldots, \text{[which] states in boldest terms that, if there is no evidence leading one to believe that one event from an exhaustive set of mutually exclusive events is more likely to occur than another, then the events should be judged equally probable.}\]

\textit{Robert Duncan Luce & Howard Raiffa, Games and Decisions 284 (1957).}

As Luce and Raiffa discuss, there is disagreement over the propriety of using the principle of insufficient reason as a basis for choice. Many of the problems they raise affect only the use of the principle by ideally rational choosers; fewer difficulties are encountered by real persons who make choices on the basis of limited rationality and in the face of significant informational constraints.