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Collective Justice or Personal Gain? An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs

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**COLLECTIVE JUSTICE OR PERSONAL GAIN?
AN EMPIRICAL ANALYSIS OF CONSUMER CLASS
ACTION LAWYERS AND NAMED PLAINTIFFS**

*Stephen Meili**

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I. INTRODUCTION

Class action named plaintiffs and their lawyers inhabit a unique position in U.S. jurisprudence. Authorized by federal and state rules to advocate on behalf of thousands, sometimes millions, of unidentified class members, they have the potential to wield considerable power and influence over named defendants as well as non-party corporations in a particular industry who choose to alter their behavior rather than face a similar lawsuit. The inherent power of the class action and its potential to provide broad-base relief to large numbers of persons influences the attitudes and behavior of plaintiffs' lawyers and named plaintiffs alike, creating a dynamic between the two far different than what is seen in typical individual cases.

Although class action lawsuits have been the subject of much scholarly research, the vast majority of that work has focused on the history and procedural aspects of class actions, narratives of particular cases, and debates surrounding their utility, cost, and the compensation of the lawyers who litigate them.¹ Little scholarly attention, however,

1. See, e.g., STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987); DEBRA R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000) [hereinafter HENSLER, CLASS ACTION DILEMMAS]; John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 50 VAND. L. REV. 995 (2005); John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 181 (Austin Sarat & Stuart Scheingold eds., 1998); Scott Barclay & Anna-Maria Marshall, *Supporting a Cause, Developing a Movement, and Consolidating a Practice: Cause Lawyers and Sexual Orientation Litigation in Vermont*, in THE WORLDS CAUSE LAWYERS MAKE:

has been paid to the comparative expectations and attitudes of lawyers and clients who actually participate in class actions.² And while the study of client and lawyer attitudes toward the litigation of individual disputes has been extensively analyzed, scant attention has been directed to the applicability of this voluminous research to class actions.

This article begins to fill these significant voids. Through a series of semi-structured interviews, it examines the expectations and attitudes of plaintiffs' lawyers and named plaintiffs in consumer protection class actions: why they filed the lawsuit, and whether their goals changed over time; the reasons for their satisfaction or dissatisfaction with the result in the case; and—regardless of the result—whether they felt that the litigation process itself was fair. The results of these interviews are then analyzed in order to determine whether they comport with two theories central to studies of the litigation process: dispute transformation and procedural justice. More specifically, this article analyzes the degree to which consumer class action plaintiffs' lawyers engage in the same kind of dispute transformation with representative plaintiffs that is well-documented in the literature involving individual litigants. It also investigates whether named plaintiffs (and the lawyers who represent them) exhibit the same attitudes toward process fairness that is well documented in the procedural justice literature pertaining to individual disputants. Moreover, given the politically progressive nature of much consumer protection litigation, this article examines the attitudes of class action participants through the frame of the cause lawyering literature. While the study focused on the participants in consumer class actions, many of its conclusions can be generalized to class actions more generally.

This study's findings include the following:

- An intriguing twist on the doctrine of dispute transformation. The typical model of such transformation, applied to disputes between individual parties, sees lawyers

STRUCTURE AND AGENCY IN LEGAL PRACTICE 171 (Austin Sarat & Stuart Scheingold eds., 2005) [hereinafter *THE WORLDS CAUSE LAWYERS MAKE*].

2. One notable exception to this lacuna is Bryant Garth's excellent 1992 study of plaintiffs' lawyers and named plaintiffs in thirty-seven class actions closed in the Northern District of California from 1979 to 1984. See Bryant Garth, *Power and Legal Artifice: The Federal Class Action*, 26 *LAW & SOC'Y REV.* 237 (1992) [hereinafter Garth, *Power and Legal Artifice*]. Garth's rich study focused on seven case studies of different types of federal class actions (antitrust, government benefits, and employment discrimination) to explore the extent to which named plaintiffs are empowered by their experience. The current study focuses on consumer protection class actions and is more concerned with the comparative attitudes of plaintiffs' lawyers and named plaintiffs toward their particular case and the class action process generally.

deflating the unrealistic expectations of their clients, minimizing them to the limited form of relief the legal system can deliver (usually monetary damages).³ In contrast, as this article demonstrates, consumer class action lawyers often deliberately *inflate* the expectations of their clients, encouraging them to look beyond individual monetary compensation and focus instead on relief for the entire class, which sometimes includes non-monetary awards. In this way, class action lawyers do more than merely manage their client's expectations, a well-documented process in individual litigation. Instead, they consciously urge their clients to expand those expectations. If their clients refuse to be so encouraged, the lawyers opt not to include them as named plaintiffs.

- Named plaintiffs bring a broad and complex array of motivations and expectations to their role. This is partly the result of their lawyers' transformational efforts noted above. Thus, most named plaintiffs in this study desired both individual and collective forms of justice, including monetary relief for themselves and the entire class, assurances that the defendant would cease its offending conduct, and some sense that justice had been done. But many named plaintiffs are looking for more: they hope, and frequently expect, that the class action to which they aligned themselves would demonstrate that the defendant was wrong and, by extension, change the behavior of actors throughout a particular industry. These broad expectations were more ambitious than those of most of the lawyers in the study, whose goals centered on relief strictly available through the class action mechanism, i.e., monetary damages and injunctions directed against the particular defendant in the lawsuit.
- The named plaintiffs also exhibited a wide and complex array of reasons for their feeling of satisfaction or dissatisfaction with the result of their class action. Nearly all of the cases discussed in this study yielded settlements

3. William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631, 645-47 (1980-1981); AUSTIN SARAT & WILLIAM FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS* 53-59 (1995). See generally JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990) [hereinafter WHITE, *JUSTICE AS TRANSLATION*].

requiring monetary payouts or specific performance by the defendant. While most of the named plaintiffs expressed satisfaction because of these concrete settlement terms, many also cited other reasons for satisfaction, including proving that the defendant was wrong and the plaintiffs were right, changing corporate behavior throughout the relevant industry, and helping non-profit organizations through cy pres awards. This nearly uniform sense of satisfaction with the case result contrasts with the empirical research on individual cases, which has demonstrated that despite their recovery of monetary damages, many individual plaintiffs are nevertheless disappointed because their “extra-legal” goals (apologies, public accounting, and the like) remain unfulfilled.⁴ The named plaintiffs in this study were satisfied for a number of reasons, including the fulfillment of “extra-legal” goals.

- The named plaintiffs equated fairness with result. In contrast to literature on process fairness, this study reveals little correlation between named plaintiffs’ involvement with, or control over, the lawsuit and their satisfaction with the result and assessment of the fairness of the process. On the contrary, even named plaintiffs who described a sense of detachment from the lawsuit nevertheless expressed significant personal satisfaction about the experience. They also tended to base their assessment of process fairness on the performance of their lawyers. These findings contradict central aspects of the procedural justice and process control theories, which post that clients evaluate fairness and result separately, and are more satisfied with disputing systems that permit them greater control.⁵ I found no such correlation in this study. Instead, the majority of named plaintiffs interviewed evaluated the fairness of the process according to the result in the case.

4. Tamara Relis, *It's Not About the Money!: A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT L. REV. 701, 705, 706 (2006) [hereinafter Relis, *It's Not About the Money!*]; See also TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS DEFENDANTS, PLAINTIFFS AND GENDERED PARTIES (2009)[hereinafter RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION].

5. See generally John Thibault & Laurens Walker et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974).

- The named plaintiffs felt a sense of empowerment regardless of their level of involvement with the case. This contradicts one of the core findings in Bryant Garth's study of class actions nearly two decades ago.⁶ Among other things, Garth found that class actions can be empowering for the named plaintiff, depending on the type of case and the level of client involvement with the litigation.⁷ My data reveals that for named plaintiffs in consumer class actions, a group which Garth's study did not examine, empowerment may have more to do with how clients perceive the lawsuit and what it hopes to accomplish than the client's role within it.
- The class action plaintiffs' lawyers in this study conflated client and cause. Much cause lawyering literature probes the conflict between a cause lawyers' duties to her individual client and her devotion to the larger cause she hopes to serve through that client.⁸ The lawyers in this study effectively eliminate any such conflict by consciously seeking out named plaintiffs already devoted to the cause, or who are willing to be convinced to do so.
- The class action lawyers were generally aware of their clients' collective justice goals. Studies of lawyers and clients in individual cases suggest that lawyers for both plaintiffs and defendants believe that their clients' primary interest at the start of a lawsuit is to recover money, and that that goal remains constant throughout the course of the litigation.⁹ By contrast, the lawyers interviewed for this study frequently described their clients' collective justice goals, including showing that the defendant was wrong, ensuring that others did not experience the same problems in the future, and wanting to see "justice done."¹⁰ Indeed, many of the lawyers actively encouraged their clients to develop and maintain these goals throughout the lawsuit in

6. See *supra* note 2.

7. See Garth, *Power and Legal Artifice*, *supra* note 2, at 239, 242-43, 259.

8. Barclay & Marshall, *supra* note 1, at 196; Corey Shdaimah, *Dilemmas of "Progressive" Lawyering: Empowerment and Hierarchy*, in *THE WORLDS CAUSE LAWYERS MAKE*, *supra* note 1, at 239, 241.

9. See generally, Relis, *It's Not About the Money!*, *supra* note 4; RELIS, *PERCEPTIONS IN LITIGATION AND MEDIATION*, *supra* note 4, at 33-61; SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN* (1990).

10. See *infra* notes 101 & 122 and accompanying text.

order to prevent them from being tempted by individual settlement offers that fail to compensate the rest of the class. The only collective justice goal about which the lawyers were less aware was the desire to change corporate conduct throughout the relevant industry.

These results highlight the unique lawyer-client dynamic in class actions. They also demonstrate that while class action lawyers consciously shape their clients' expectations, named plaintiffs—unlike individual plaintiffs—are usually willing participants in that shaping process. Most embrace it, because it encourages the collective justice expectations and extra-legal goals that other disputing processes repress.

The findings from this article are relevant to several different audiences described below.

A. Scholars

This article will enhance several areas of legal scholarship, including class actions, dispute resolution, cause lawyering, and the legal profession. Much of the literature in these areas assumes the motivations of class action participants, often based on economic and other predictive models. This study provides empirical data that both support and contradict many of these assumptions, and thus will sharpen the scholarly debate and recommendations for reforms that emanate from it.

In addition, this study examines the relationship between class action lawyers and named plaintiffs from the perspective of the participants themselves, rather than through a more detached analysis of class action statutes, rules, procedures, pleadings and results. And similarly, it provides space for named plaintiffs to articulate their expectations of, and reactions to, the class action process. As such, it provides empirical data to both support and challenge assumptions about class action participants.

B. Lawyers, Law Students, and the Professors Who Teach Them

This article includes important lessons for practicing lawyers and students preparing to enter the profession, regardless of whether they ever litigate class actions. For example, by reinforcing and expanding on earlier studies concerning the non-monetary motivations of individuals who utilize various dispute-resolution systems, this article underscores the need for lawyers and law students to ascertain their

clients' goals and remain cognizant of them (and how they might be changing) throughout the course of the representation. For while it is standard practice for students in law school clinics and lawyering skills courses (and presumably among practicing lawyers) to inquire about their client's goals at the start of the representation, lawyers too often fail to check in with their clients during the course of the litigation to ascertain if those goals have changed.¹¹ Such regular checking-in will make lawyers better able to monitor their clients' expectations throughout the course of the class action, and to respond to client concerns about whether those expectations are likely to be met.

For plaintiffs' attorneys, regardless of whether they represent individuals or groups of plaintiffs, this article reinforces the empirical observation that plaintiffs enter disputes with an overlapping variety of goals and expectations. And while this article cannot claim a cause and effect relationship between lawyer awareness of those various goals and client satisfaction with lawyers, it is certainly true that (1) most of the lawyers in this study knew about their clients' diverse motivations, and (2) most of the named plaintiffs had a positive impression of their lawyers. This study also demonstrates that the named plaintiffs' evaluation of the fairness of the litigation process often depends on the skill and effectiveness of their attorney who, after all, is the main (and often sole) link between the named plaintiff(s) and that process. For defendants' attorneys, this study supports the view that "slavish adherence to the . . . [idea] of zealous advocacy" may not be in a lawyer's self-interest, nor that of her client.¹² Indeed, as several interviewees (both lawyers and named plaintiffs) indicated, overzealous defense lawyers at the deposition table or other points in the litigation may only make it more difficult for a case to be settled.

Moreover, while this study demonstrates that some named plaintiffs equate a successful case and process fairness with financial compensation (the working assumption of many lawyers, according to past research on individual cases¹³), it also underscores that many named plaintiffs have a broader view of success and fairness, measuring them in terms of achieving social changes that extend beyond the defendant in their particular case.

11. See generally DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004).

12. See Rebecca Hollander-Blumoff & Tom Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 *LAW & SOC. INQUIRY* 473, 495 (2008) [hereinafter Hollander-Blumoff & Tyler, *Procedural Justice*].

13. See Relis, *It's Not About the Money!*, *supra* note 4.

Finally, the study reminds lawyers, law students, and their professors that lawyers exert considerable power over their clients and the framing of disputes that they present. This power can be exercised both by commission (e.g., informing the client of legal claims and remedies about which they were previously ignorant) and omission (e.g., failing to seek remedies the client desires but cannot obtain through the legal system). This power may be especially pronounced in the class action context, given (1) the broad scope of relief typically sought, (2) the named plaintiffs' initial ignorance of such potential relief, and (3) the named plaintiffs' relative lack of control over the process. The irony suggested by the data in this study is that while class action lawyers frequently create and must sustain the named plaintiff's desire for broad relief (i.e., beyond personal monetary compensation) in order for the case to continue (and the lawyer to earn a fee), many lawyers are unaware that those desires sometimes develop a life of their own, frequently extending beyond the contours of the legal system. Moreover, achieving these "extra-legal" goals is a major determinant of the named plaintiff's satisfaction with the case result. As such, it behooves lawyers to remain cognizant of those goals and discuss them with their client as the case progresses. In addition to the goodwill that typically flows from effective communication between lawyer and client, communicating about these extra-legal goals may help both lawyer and client devise alternate means of achieving them (e.g., via publicity about the lawsuit that, in and of itself, might deter others in a particular industry from engaging in the same conduct as the defendant). Such communication has multiple benefits, for, as Shestowsky and Brett note, "[L]awyer-client counseling protocols that take into account disputants' preferences can promote the democratic functioning of dispute resolution mechanisms and increase citizens' respect for the legal system as a means for effectively and respectfully reducing legal conflict."¹⁴ The interviews conducted for this article endorse the view that clients whose goals are taken into account came away with a positive attitude toward the dispute resolution process.

C. Policy Makers

This study's findings suggest at least one reform to improve the class action process: creating a standardized formula for compensating

14. Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63, 72 (2008).

named plaintiffs for the time and money they spend fulfilling that role. Most named plaintiffs spend considerable time preparing for, and enduring, a deposition that frequently contains questions completely unrelated to the claims in the lawsuit. Currently, incentive awards are provided on an ad hoc basis, usually ranging between \$1000 and \$1500 in consumer credit class actions.¹⁵ Calculating those awards according to a standardized formula, such as a percentage of the total payout to class members, would provide the named plaintiff with a better idea of what to expect should she be successful.

This article begins with a brief description of class actions and some of the controversy surrounding them. It then provides a description of its empirical methodology and continues with a description of the theoretical frame within which the empirical data is later analyzed. The bulk of the article is devoted to an analysis of the data on a number of fronts, including the goals of lawyers and named plaintiffs, their degree of satisfaction with the result of the lawsuit, and their evaluation of the fairness of the process.

II. BACKGROUND CONTEXT: CLASS ACTIONS IN THE UNITED STATES

Class actions stir passions like few procedural devices in American law. Supporters assert that they are the best means available to stop widespread corporate abuse in an age of governmental deregulation, and to vindicate or expand the rights of large groups of innocent and often lower income individuals, many of whom would otherwise be financially unable to assert their relatively modest claims in court.¹⁶ Others have noted that, regardless of the outcome on the merits of a particular case, class actions can mobilize individuals and social movements in order to increase political support for a particular cause.¹⁷ Critics decry the way they have been used to extort exorbitant settlements from innocent businesses and sublimate the interests of class

15. Theodore Eisenberg and Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study* 27 (New York University Law and Economics Working Papers, Paper No. 40, 2005), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1043&context=nyu_lewp.

16. NATIONAL CONSUMER LAW CENTER, CONSUMER CLASS ACTIONS 3-4 (7th ed. 2010); HERBERT B. NEWBERG ET AL., NEWBERG ON CLASS ACTIONS § 5:7, § 5:19, § 5:21 (2009); See also Garth, *Power and Legal Artifice*, supra note 2; John C. Coffee Jr., *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).

17. See Lynn Mather, *Conclusion: The Mobilizing Potential of Class Actions*, 57 IND. L. J. (1981-1982) (discussing the role court cases have played in social movements); MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 79 (1994).

members to those of greedy plaintiffs' lawyers who are only interested in obtaining hefty attorney's fee awards, sometimes by settling early.¹⁸ Other critics maintain that class actions frequently fail to solve the targeted problems, while alienating the plaintiffs and limiting social change opportunities by diverting energy and resources from more effective and client-centered advocacy efforts.¹⁹ Still others observe that since the 1970's the class action has been transformed from a sword for justice to a shield for defendants, permitting them to cap liability and appear as responsible corporate actors.²⁰

U.S. Supreme Court Chief Justice John Roberts recently noted that class actions are "a dramatic departure from the normal rules of litigation," and intimated that their main purpose is to provide leverage to the plaintiff in settlement negotiations.²¹ Seventh Circuit Court of Appeals Judge Richard Posner has noted that the certification of a class of plaintiffs can force "defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability."²² And in an attitude reflected in the responses of many of the plaintiffs' lawyers included in this study, one defense attorney has explained that the problem with class actions is not in the process itself, but with the judges who administer them:

A class action lawsuit is much like a game of Russian roulette. It depends almost entirely on the philosophy of the judge trying the lawsuit. If he thinks class action suits serve a useful social purpose, then he will find grounds for continuing the action. If, on the other hand, he thinks the particular case deals with a nit-picking problem of no social consequence, and if he joins that with a view that class action lawsuits unnecessarily clog court calendars, then he will probably dismiss the action.²³

18. Walter Dellinger, *The Class Action Fairness Act: Curbing Unfairness and Restoring Faith in our Judicial System*, Progressive Policy Institute Policy Report 3-4 (2003); HENSLER, CLASS ACTION DILEMMAS, *supra* note 1, at 4.

19. See generally, GERALD N. ROSENBERG, *THE HOLLOW HOPE* (2008) (arguing that using the courts as a means to bring social change has not been very effective); Derrick Bell, *Serving Two Masters: Integration Ideals and Clients Interests in School Desegregation Litigation*, 85 YALE L. J. 470 (1976); William Simon, *Visions of Practice In Legal Thought*, 36 STAN. L. REV. 469, 481 (1984).

20. Natalie C. Scott, *Don't Forget Me! The Client in a Class Action Lawsuit*, 15 GEO. J. LEGAL ETHICS 561, 565 (2002).

21. Adam Liptak, *Appellate Argument: An Artist's View*, N.Y. Times, Apr. 22, 2008, available at <http://www.nytimes.com/2008/04/22/us/22bar.html>.

22. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.).

23. HENSLER, CLASS ACTION DILEMMAS, *supra* note 1, at 16.

These critiques are top-down observations of the class action process as a social phenomenon that, depending on the perspective of the observer, is either an inspired, misguided, or counterproductive vehicle for social change. One assumes that this debate will continue to rage, leading to ever more tinkering with the procedures that govern class actions. But what do we know of how the participants view this procedural device and what role should those views have in the debate going forward? Moreover, what can those views teach us about the complementary and contradictory ways in which class action lawyers and their clients view not only the class action mechanism but the legal system generally? And finally, how might lawyers use their awareness of named plaintiffs' attitudes to become more effective and ethical advocates? This article seeks to answer these questions.

III. RESEARCH METHOD

As noted above, the purpose of this study is to examine the motivations and expectations that plaintiffs' lawyers and named plaintiffs bring to their involvement in consumer class action lawsuits. It also seeks to shed light on how the parties to class action suits manage their motivations and expectations through the course of often protracted cases. The research takes a qualitative approach, i.e., it seeks to understand the motivations and expectations of lawyers and clients in class action suits from their own points of view, and in their full complexity rather than in their distributional frequency. The methods were therefore inductive and consisted of semi-structured interviews with open-ended questions that focus on a set of key themes: why the interviewee became involved in the class action suit, whether initial motivations for becoming involved remained constant or changed during the course of the suit, the interviewee's level of satisfaction with the result of the case, and the interviewee's evaluation of the fairness of the litigation process. The interview questions for attorneys and representative plaintiffs are attached as Appendix A and Appendix B, respectively.

This methodology serves the objective of the research to capture the particularities of different cases and to identify the key themes they share. Because the study examines the key motivations and expectations that lawyers and clients bring to class action suits, the interview of thirty-three lawyers and twenty named plaintiffs is sufficient to reach

thematic saturation: the point at which no new themes emerge.²⁴ The interviews for this study took place between April 2008 and December 2009.²⁵ Interviews were conducted by me, as well as staff and students at the University of Minnesota Center for Survey Research, the University of Wisconsin Survey Center, the University of Minnesota Law School, and the University of Wisconsin Law School. Interviews were conducted either in person or via telephone. All interviews were audio taped.²⁶ Interviewees were guaranteed confidentiality as to all potentially identifying information, including the names of parties, attorneys, cases, judges, and courts.

The lawyers interviewed for the study specialize in litigating consumer class actions. Most were selected from the publicly available membership listing of the National Association of Consumer Advocates, a nationwide membership and advocacy organization of over 1500 attorneys²⁷. NACA's website states that "[a]s an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means."²⁸ The lawyers interviewed work in a total of seventeen states, from every major region of the country, with no more than four attorneys from any one state. Prior to each of these interviews, the lawyers were asked to identify a closed (no longer pending) class action lawsuit which they had litigated that would be the subject of most of the questions during the course of the interview. They were also asked to provide contact information for one or more of the named plaintiffs from that particular lawsuit. In many cases, the lawyer made the initial contact with the client in order to determine whether the client

24. Greg Guest et al., *How Many Interviews Are Enough?: An Experiment with Data Saturation and Variability*, 18 *FIELD METHODS* 59, 64-65 (2006); Michael W. Firmin, *Themes*, in *THE SAGE ENCYCLOPEDIA OF QUALITATIVE RESEARCH* 868 (Michael S. Lewis-Beck et al. eds., 2004). Because the goal of this research was to describe shared perceptions among two relatively homogenous groups (i.e., named plaintiffs in consumer class actions and their lawyers), this sample size was sufficient to achieve thematic saturation. See Guest et al., *supra*, at 76 ("If the goal is to describe a shared perception, belief, or behavior among a relatively homogeneous group, then a sample of twelve will likely be sufficient.")

25. Seven interviews of lawyers, which were part of a pilot study, were conducted in the spring of 2008. The pilot study consisted of email surveys followed by telephone interviews.

26. Interview tapes are on file with the author.

27. National Association of Consumer Advocates, <http://www.naca.net/>. (Last visited Mar. 14, 2010).

28. *Id.*

would be willing to participate in an interview about the class action.²⁹ This contact usually facilitated client willingness to participate in the study.

I focused on consumer class actions for a number of reasons. First, consumer law cases are a discrete, but not insignificant category of class action litigation in the United States. In 2006 and 2007, the most recent years for which data is available, consumer law cases (which include misrepresentation, fraud, failure to make required disclosures, and abusive debt collection practices) comprised 19% and 18%, respectively, of all federal court class action settlements across the country.³⁰ The only category of cases with a larger percentage of settlements during those years was securities law, at 40% and 35%, respectively.³¹ Second, consumer class actions almost always involve individual named plaintiffs, as opposed to securities class actions, where the named plaintiff is often a financial institution.³² Third, the individual named plaintiffs in consumer class actions typically have direct knowledge of, and interest in, the subject matter of the lawsuit, which may not be the case in other, more complicated class actions involving issues such as securities and antitrust law. And finally, because consumer class actions frequently seek both monetary and injunctive relief, they hold the potential for conflict between attorneys and clients over motivations for filing and continuing to litigate the lawsuit.³³

At first glance, this study's empirical focus on consumer class actions suggests that its conclusions are limited to the consumer law context. For example, less money is typically at stake in consumer class actions than in other types of class actions, particularly securities class actions.³⁴ Moreover, the named plaintiffs in consumer class actions have

29. See, e.g., Telephone Interview 30044 (Dec. 1, 2009); Telephone Interview 30034 (Sept. 25, 2009).

30. Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 107 J. OF EMPIRICAL LEGAL STUD. (forthcoming 2010), available at SSRN: <http://ssrn.com/abstract=1442108>, at 10. (CELS 2009 4th Annual Conference on Empirical Legal Studies Paper; Vanderbilt Public Law Research Paper No. 10-10; Vanderbilt Law and Economics Research Paper No. 10-06.) In his Study, Fitzpatrick provides data for class actions under two separate categories of "consumer" (in which he includes cases brought under the Fair Credit Reporting Act and consumer fraud) and "debt collection" (cases brought under the Fair Debt Collection Practices Act). I have combined his statistical findings under the general rubric of consumer law cases for purposes of their relevance to this article.

31. *Id.*

32. James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1616 (2006).

33. See Fitzpatrick, *supra* note 30, at 15.

34. In 2006 and 2007, the last years for which data has been compiled, the total ascertainable value in securities class actions was over \$16.7 billion and \$8 billion, respectively (the disparity

typically suffered relatively modest (if any) financial harm, as opposed to the named plaintiffs in employment, antitrust, or securities litigation.³⁵ And consumer class actions often seek relief that benefits society generally (e.g., injunctions barring similar conduct in the future), whereas other class actions seek only monetary recovery.³⁶ While these contextual differences suggest that research on named plaintiffs in other types of class actions is warranted, many of this study's conclusions apply to class actions generally.

A few particulars about the lawsuits selected by the attorneys interviewed for this study: approximately one half of the cases involved some form of misrepresentation, fraud, or breach of contract against mortgage companies, insurance companies, landlords and various product manufacturers. The other half involved abusive debt collection practices, credit reporting errors, or discriminatory credit terms. The class sizes ranged from less than 100 class members (a landlord/tenant case) to tens of millions (a product labeling case), with about one third of the cases under 1500. The duration of the cases ranged from one year to ten years, with the bulk between two and six years.

The methodology for this study is not without risk of bias. First, by allowing the lawyers to choose the case on which they wanted to focus in an interview, one would expect the only cases so selected to have been successful in the eyes of the attorneys and, perhaps, their clients. Most lawyers avoid telling “war stories” about unsuccessful cases. This proved to be true for most, but not quite all, of the lawyers interviewed: two lawyers opted to discuss proposed class actions that were never certified.³⁷ This tendency to choose “successful” cases might be seen as biasing perceptions of fairness, given the suggestion in the distributive justice literature that outcomes are a major determinant of disputants' views of the fairness of an adjudicative process.³⁸

However, by permitting attorneys to choose the case to be discussed, this study is actually *better* able to isolate and analyze perceptions of fairness. Insofar as one would expect attorneys and clients to equate success (usually identified in terms of resource allocation) with procedural fairness, to the extent that interviewees

between those two years is largely attributable to the settlement of litigation over the collapse of Enron). For those same years, the values in federal court consumer class actions was over \$525 million and \$735 million, respectively. See Fitzpatrick, *supra* note 30, at 18.

35. Eisenberg & Miller, *supra* note 16, at 19.

36. See Fitzpatrick, *supra* note 30, at 15.

37. Telephone Interview 2002 (Apr. 3, 2009); Telephone Interview 30013 (Oct. 25, 2008).

38. Shestowsky & Brett, *supra* note 14, at 90-91.

criticize the fairness of their class action, we will learn *more* about the ingredients of disputants' perceptions of fairness of process. And, sure enough, several interviewees have criticized the fairness of an outwardly "successful" class action, usually because it took too long, lacked an in-court hearing, put the named plaintiff through an unnecessarily grueling and demeaning deposition, or featured a judge who did not understand class action procedure.

Second, it is far easier to arrange interviews with lawyers than with named plaintiffs. Given my requirement that a case selected for the study must be closed, many of the lawyers had not been in touch with their clients for a significant period of time. Some of those clients have either moved or were otherwise unable or unwilling to be interviewed. As such, the study did not include a corresponding named plaintiff for each of the lawyers interviewed. Although this prevented a direct comparison between lawyer and client in each case, it nevertheless allowed for an examination of the range of viewpoints of plaintiffs' attorneys and representative plaintiffs toward the class action mechanism.

Third, while in individual cases the client chooses her lawyer, in many class actions the opposite is generally true, at least in situations where the lawyer has more than one potential named plaintiff from which to choose before filing suit.³⁹ As is evident from the interviews reviewed below, this means that many class action lawyers select as class representatives those plaintiffs whose goals toward the case reflect their own (or are willing to have their goals expanded to mirror the collective justice goals of their lawyer), and therefore go beyond mere financial reward. As such, one might expect the field of named plaintiffs in this study to harbor attitudes dissimilar to individual plaintiffs, and more like the lawyers who select them. This, however, was not the case. The main difference between the named plaintiffs in this study and individual plaintiffs analyzed in various studies over the years is that the named plaintiffs here were encouraged by their attorneys to maintain and even expand their non-monetary, collective justice goals throughout the course of the lawsuit. Individual plaintiffs learn to suppress such extra-legal goals because their lawyers have told them that they are unattainable.⁴⁰

39. Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 171 (1997).

40. See Relis, *It's not about the Money!*, *supra* note 4, at 702.

IV. THEORETICAL FRAME: DISPUTE TRANSFORMATION AND PROCEDURAL JUSTICE

The two components of the theoretical frame for this article are well known. The extensive literature on dispute transformation catalogues the various contexts within which lawyers shape their individual clients' expectations and goals to what is realistically attainable within the legal system.⁴¹ Indeed, this process involves not simply how lawyers frame a dispute for their clients, but which of the ever-expanding range of dispute-resolution mechanisms (e.g., litigation, mediation, arbitration, negotiation) they invoke.⁴²

In a recent study of litigants in medical malpractice cases, Tamara Relis described dispute transformation as a two-step process:

First, notwithstanding plaintiffs' dispute descriptions and initial expressed desires, lawyers condition clients on "legal system realities" and persuade them to aim for what they view as legally realistic. Attorneys then reframe litigants' dispute experiences, feelings and extra-legal aims to fit into legally cognizable compartments suitable for processing within the legal system.⁴³

Thus, while aggrieved clients often present themselves to lawyers with extra-legal, non-monetary goals that generally fall within the rubric of "justice being done" (e.g., the desire for an apology, an acknowledgement of wrongdoing from the defendant, or an assurance that the same harm will not befall others), their lawyers convert such aims into the kind of relief that the legal system *can* provide: money. This transformation process equates "doing justice" with recovering money from the defendant.⁴⁴ Stewart Macaulay made a similar finding in his seminal study of individual consumer protection lawsuits, observing that the plaintiffs in such disputes will receive only the remedy (i.e., statutory damages) that the lawyers deems available and appropriate.⁴⁵ This conversion process leads to disappointment with the legal system among many individual clients, given that their "extra-

41. See Felstiner et al., *supra* note 3, at 648; SARAT & FELSTINER, *supra* note 3; WHITE, JUSTICE AS TRANSLATION, *supra* note 3.

42. Jeffrey H. Goldfien & Jennifer K. Robbennolt, *What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes toward Mediation Styles*, 22 OHIO ST. J. ON DISP. RESOL. 277 (2007) (discussing different mediation styles and how lawyers select mediators for their clients).

43. See Relis, *It's Not About the Money!*, *supra* note 4, at 704-05.

44. *Id.* at 702.

45. Stuart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC. REV. 115, 156 (1979).

legal” goals remain constant, and thus unfulfilled, throughout the course of a lawsuit.⁴⁶ In his study of different types of class actions, Garth notes, “Dispute transformation in class actions, it seems, narrows the problem dramatically to get it before the court, and then the resulting settlements do not even provide much in the way of legal remedies.”⁴⁷ Despite this transforming process, Garth observes that in many contexts, particularly when the representative plaintiffs are actively involved throughout the litigation, the class action “at least *permits* significant empowering both of individuals and of the lawyers and the classes they represent.”⁴⁸ As noted later in this article, most of the named plaintiffs in this study exhibited a sense of empowerment regardless of their level of involvement with the litigation. This suggests that even if the class action lawyers in this study narrowed the plaintiffs’ problem to enable it to be filed in court, the broad scope of remedies achieved through settlement—and the many individuals to whom that relief applies—prevented the kind of alienation and frustration that such a transformation process frequently instills within individual plaintiffs.⁴⁹

Procedural justice theory posits that disputants generally privilege the fairness of a given adjudicative procedure over monetary results.⁵⁰ It contrasts with the theory of distributive justice, according to which participants assess the fairness of an adjudicative procedure by the distribution of rights or resources flowing from it.⁵¹ The work of John Thibault and Laurens Walker demonstrates that procedures matter profoundly to most participants because they believe that fair procedures produce fair outcomes.⁵² In a recent study of participants in a mediation setting, Rebecca Hollander-Blumoff and Tom Tyler found “no relationship between the experienced fairness of the negotiation process and the numerical outcome” of the dispute.⁵³ In other words, participants in adjudicative processes view the fairness of the process employed to resolve their dispute as “separate and apart from their interest in achieving a favorable outcome.”⁵⁴ Similarly, Donna Shestowsky has observed that “perceptions of how fair a procedure is

46. See FELSTINER & SARAT, *supra* note 3; Relis, *It’s Not About the Money!*, *supra* note 4, at 720-22.

47. See Garth, *Power and Legal Artifice*, *supra* note 2, at 259.

48. *Id.* at 267 (emphasis in original).

49. Felstiner et al, *supra* note 3, at 648.

50. Shestowsky & Brett, *supra* note 14, at 68.

51. *Id.*

52. Thibault & Walker, *supra* note 5, at 1285-86.

53. Hollander-Blumoff & Tyler, *supra* note 12, at 490.

54. *Id.* at 477.

tend to depend as much, if not more, on process characteristics than on whether particular disputants ‘won’ their case or were otherwise favored by the outcome.”⁵⁵

The procedural justice literature has also provided valuable insight into why plaintiffs decide to sue. For example, we know that plaintiffs often sue because of what they perceive as unfair or impersonal treatment.⁵⁶ They “care . . . about having neutral, honest authorities who allow [them] to state their views and who treat them with dignity and respect, and when they find such processes, they use and defer to them.”⁵⁷ They also “want to deal with people whose motives they trust.”⁵⁸ The core tenets of the procedural justice theory are applicable in a variety of individual case areas, including employment law, workers compensation, medical malpractice, torts, and prison sentencing.⁵⁹ And they appear to hold true for all individual plaintiffs, regardless of their income, race, or gender.⁶⁰

55. Donna Shestowsky, *Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 574 (2008). See also Adam Lamarello, *Incorporating the Procedural Justice Model into Federal Sentencing Jurisprudence in the Aftermath of United States v. Booker: Establishing United States Sentencing Courts*, 4 NYU J. L. & LIBERTY 112 (2009).

56. See Robert J. Bies & Tom Tyler, *The ‘Litigation Mentality’ in Organizations: A Test of Alternative Psychological Explanations*, 4 ORG. SCI. 352 (1993); E. Allen Lind et al., *The Winding Road from Employee to Complainant: Situational and Psychological Determinants of Wrongful Termination Claims*, 45 ADMIN. SCI. Q. 557 (2000); Gerald Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359 (1992); C. Vincent et al., *Why do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609 (1994); Howard Beckman et al., *The Doctor-Patient Relationship and Malpractice. Lessons from Plaintiff Depositions*, 154 ARCH. INTERN. MED. 1365 (1994).

57. Susan Silbey, *After Legal Consciousness*, 1 ANN. REV. LAW SOC. SCI. 323, 337 (2005); See also Tom Tyler & Edgar Lind, *A Relational Model of Authority in Groups*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY (Mark Zanna ed., 1992); Tom Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH (Michael Tonry ed., 2003).

58. Hollander-Blumoff & Tyler, *supra* note 12, at 492.

59. See Bies & Tyler, *supra* note 56; Lind et al., *supra* note 56; See also Karen Roberts & Karen Markel, *Claiming in the Name of Fairness: Organizational Justice and the Decision to File for Workplace Injury Compensation*, 6 J. OCCUPATIONAL HEALTH PSYCHOL. 332 (2001); Hickson et al., *supra* note 56; Vincent et al., *supra* note 56; Beckman, et al., *supra* note 56; Tom Tyler, *What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103 (1988); Tom Tyler, *The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Experience*, 18 LAW & SOC’Y REV. 51 (1984); Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC’Y REV. 483 (1988); Relis, *It’s Not About the Money!*, *supra* note 4.

60. See Tom Tyler & Robert Boeckmann, *Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC’Y REV. 237 (1997); Edgar Lind et al., *...And Justice for All: Ethnicity, Gender, and Preferences for Dispute Resolution Procedures*, 18 LAW & HUM. BEHAV. 269 (1994); Carol Kulik et al., *Understanding Gender*

A significant corollary to the procedural justice literature is the “process control” theory developed by Thibault and Walker.⁶¹ According to this theory, disputants evaluate the fairness of a given procedure according to the distribution of control that it offers, and prefer those procedures that allow them (as opposed to third parties like judges and mediators) to control the development and selection of information that will be used to resolve the dispute.⁶² Thus, an interesting question at the intersection of the process control and dispute transformation theories is whether disputants’ perceptions of process fairness is influenced by the degree to which their underlying dispute—and thus the information relevant to it—is shaped by their attorney, as opposed to a third party decision-maker. This is a particularly intriguing question in the class action context, given that the interviews conducted for this study suggest that most named plaintiffs (and certainly class members) have less control over the development and selection of information to be used in the case than their counterparts in individual lawsuits.

In one of several studies of the Victims Compensation Fund established after the attacks of September 11, 2001, Gillian Hadfield observes that procedural fairness not only plays an important role in individuals’ “willingness to cooperate as *objects* of governance” (i.e., as players in state-sanctioned decision-making processes), but also in situations where people see themselves as “*agents* of governance” (i.e., where the State provides them the opportunity to disseminate private information into the public domain, force accountability and prompt responsive change through litigation).⁶³ In a similar vein, Elizabeth Boyle notes that in “highly interpenetrated” societies that lack clear boundaries between the state and civil society, individuals can see themselves as “hav[ing] an obligation to act as agents for other individuals and for society” generally.⁶⁴ Indeed, Congress and many state legislatures promote the idea of agents of governance through fee-

Differences in Distributive and Procedural Justice, 9 SOC. JUST. RESEARCH 351 (1996); Tom Tyler & Yuen Huo, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002).

61. Thibault & Walker, *supra* note 5, at 1286.

62. Shestowsky & Brett, *supra* note 14, at 69.

63. Gillian Hadfield, *Framing the Choice between Cash and Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC’Y REV. 645, 674 (2008) (emphasis in original).

64. Elizabeth Boyle, *Is Law the Rule? Using Political Frames to Explain Cross-National Variation in Legal Activity*, 79 SOC. FORCES 385, 1200 (2000); see also Elizabeth Boyle, *Political Frames and Legal Activity: The Case of Nuclear Power in Four Countries*, 32 LAW & SOC’Y REV. 141 (1998).

shifting statutes which create so-called “private attorney[s] general” to enforce consumer protection laws.⁶⁵ Most of the named plaintiffs in this study embraced this role, seeing themselves protecting the public (or at least a portion of it) in addition to their individual interests. Such cause-oriented motivation is critical in class actions, given that the amount of individual recovery is typically insufficient to adequately compensate named plaintiffs for the time and energy required of that role.

Relis’ recent study of medical malpractice cases reveals that many plaintiffs’ lawyers are unaware of these well-documented client motives. She has concluded, based on interviews with the various players in such cases that, among other things, “most plaintiffs’ lawyers felt that money was plaintiffs’ primary litigation aim.”⁶⁶ Those lawyers either were ignorant of, or discounted, their clients’ non-pecuniary goals, including obtaining answers about what happened, acknowledgements of harm, apologies, defendants’ acceptance of responsibility, and retribution for insulting physician conduct.⁶⁷ Relis also found that despite lawyers’ best efforts to condition their clients to accept only what the legal system has to offer (i.e., monetary compensation), clients retain their extra-legal objectives throughout the course of a dispute.⁶⁸ The lawyers most likely remained ignorant of this consistently-held viewpoint because their clients stopped articulating their goals to them, and because their lawyers conditioned them into believing they were not attainable.⁶⁹

As the above review illustrates, the literature on dispute transformation and procedural justice provides extensive analysis of the behavior and attitudes of lawyers and litigants in individual cases. Far less attention, however, has been paid to such behavior and attitudes in the class action context. And as noted earlier in this article, research in the class action context would be of interest, and use, to a variety of audiences. For while there have been recent attempts to blunt the impact and some of the alleged abuses of class actions, most notably through passage of the Class Action Fairness Act (CAFA), there is no sign that class action filings are diminishing. Indeed, the recent ALI study referenced above found that much of the 46% increase in federal court class action activity between 2001 and 2006 was in federal question

65. Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988). See also James D. Jeffries, *Protection for Consumers Against Unfair and Deceptive Business*, 57 MARQ. L. REV. 559 (1974) (examining the statutes enacted in Wisconsin that promote consumer protection).

66. Relis, *It’s Not About the Money!*, *supra* note 4, at 718.

67. *Id.* at 702.

68. *Id.* at 735, 739.

69. *Id.* at 735, 741-42.

cases, and thus not attributable to the Class Action Fairness Act's diversion of diversity actions from state to federal court.⁷⁰ Moreover, many enterprising class action lawyers have responded to CAFA by seeking out the most plaintiff-friendly federal courts, thus replicating on the federal level one of the practices CAFA was intended to deter in state courts.⁷¹ Indeed, one of the lawyers interviewed for this study stated that "I think CAFA was seen as something that would not be good for class actions at first. But I think now it's turning out that it's not as bad as everybody first thought."⁷² And only one of the lawyers interviewed listed CAFA (or any of its provisions) as something they would change about the class action process.⁷³ Therefore, it is important from both a scholarly and public policy perspective to determine if what the literature tells us about lawyers and clients in individual cases also holds true in class actions. We now turn to the data that will help answer this question.

V. FINDINGS AND ANALYSIS

This section of the article is divided into the three general areas of inquiry that the open-ended interview questions explored: goals, satisfaction with result, and evaluation of fairness. Each such section analyzes the views of both the named plaintiffs and the attorneys, as well as the attorneys' perceptions of their clients' attitudes on each question.

A. Comparative Analysis of Named Plaintiffs' Goals

1. Named Plaintiffs' Goals

The named plaintiffs' responses to an open-ended question about why they had initiated their class action reveal a series of complex and overlapping sets of goals. Most named plaintiffs cited more than two goals.⁷⁴ Their responses fell into two broad categories that I have termed self-interest (personal recovery of money or other benefit, which was mentioned by thirteen of twenty named plaintiffs) and collective justice

70. Thomas Willging et al., *The Impact of the Class Action Fairness Act of 2005 on the Federal Court*, The American Law Institute 3 (2008).

71. Terry Carter, *A Step up in Class*, 22 A.B.A. J. 24 (2008).

72. Interview 30014, in Portland, Or. (Oct. 25, 2008).

73. Telephone Interview 30047 (Oct. 29, 2009) (One of the questions posed to lawyers was "If you could change the class action procedure in any way, what, if anything would you change?").

74. The average number of goals was 2.3, while the median and mode were each 2. One named plaintiff articulated six different goals. Telephone Interview 1018 (Dec. 12, 2008).

(goals that would benefit the class as a whole, and perhaps society generally, which was mentioned by seventeen named plaintiffs). The self-interest goals included receiving a personal refund, a repaired product, or some other form of specific performance directed only to the named plaintiff, as opposed to the entire class. Only three of the thirteen named plaintiffs who articulated a self-interest goal listed that goal as their sole motivation for filing the class action. Their responses were as follows:

I just wanted my car fixed.⁷⁵

My goal was to get full insurance coverage.⁷⁶

The [device I had to install on my own] cost \$100 to install. I just wanted to get the \$100 back.⁷⁷

These three named plaintiffs said nothing about helping others or society generally or making an example of the defendant. They only wanted their money back, their claims paid, or a new vehicle. However, they were atypical among the named plaintiffs in this study. The other ten named plaintiffs who mentioned self-interest goals also articulated one or more collective justice goals. Thus, most named plaintiffs in this study sought some form of justice for themselves as well as for the other members of the class.

The named plaintiffs articulated several collective justice goals. The most common was a desire to help others affected by the defendant's conduct, which was mentioned by half of the named plaintiffs.⁷⁸ The following response is typical:

My goal was to represent a class of people who probably didn't lose that much money, but were wronged.⁷⁹

Some named plaintiffs were particularly concerned about other class members who were vulnerable because of age or ethnicity. For example, one named plaintiff said she was motivated to serve as a class

75. Telephone Interview 30037 (Nov. 4, 2009) (class action against automobile manufacturer to repair a design defect involving the gas tank).

76. Telephone Interview 30039 (Nov. 24, 2009) (class action against insurance company for breach of contract over failure to pay property damage claim for damaged vehicle).

77. Telephone Interview 30036 (Nov. 3, 2009) (class action against appliance manufacturer for misrepresentation).

78. *See, e.g.*, Telephone Interview 30038 (Nov. 30, 2009); Interview 30034, *supra* note 29; Telephone Interview 30028, (Apr. 21, 2009); Telephone Interview 30033 (July 24, 2009); Telephone Interview 30030 (Apr. 1, 2009).

79. Interview 30038, *supra* note 78 (class action against bank for excessive mortgage closing fees).

representative in a class action challenging a standard form debt collection letter because many recipients would not be able to understand the contents of the letter:

I think I was angry at the time . . . it seemed like it [serving as a named plaintiff] was basically something that could help not just me but everyone else that was involved that maybe didn't understand a few things because you have different people that come from different backgrounds, you know, the languages or cultures or what have you and maybe some really didn't understand some of those things . . . until you have to sit and read and read and read.⁸⁰

The motivation to help others is an example of named plaintiffs assuming the role of agents of governance, seeing the class action as a means to call private entities to account in the way that an attorney general or other public official might.⁸¹ For these named plaintiffs, the class action is a vehicle for achieving justice for a large number of people affected by the same harm. It is also the means by which a “wrong” can be set right. This theme of righting wrongs appears consistently in the comments of the named plaintiffs, suggesting that they view the class action as one of the only areas where “little people” can take on large corporate interests.

In a similar vein, four named plaintiffs said that they were motivated by a desire to stop the activity giving rise to the lawsuit in the first place.⁸² The following statement from the named plaintiff in a class action against a credit card company for debt collection practices is illustrative:

My goals were to stop the company from doing that to people.⁸³

Another collective justice motivation was the desire to make a public statement about the defendant's conduct, which was mentioned by seven named plaintiffs.⁸⁴ The public statements envisioned by these named plaintiffs had two purposes. The first was a public accounting; i.e., a statement that the defendant's conduct was, quite simply, wrong.

80. Interview 30034, *supra* note 29.

81. See Hadfield, *supra* note 63, at 674.

82. Interview 1018, *supra* note 74; Interview 30028, *supra* note 78; Telephone Interview 30029 (May 5, 2009); Telephone Interview 30035 (Oct. 20, 2009).

83. Interview 30028, *supra* note 78 (class action against credit card company for abusive debt collection practices)

84. Telephone Interview 1017 (Dec. 3, 2008); Interview 30029, *supra* note 82; Interview 30030, *supra* note 78; Interview 30033, *supra* note 78; Interview 30034, *supra* note 29; Interview 30035, *supra* note 82; Telephone Interview 30043 (Sept. 30, 2009).

As one named plaintiff in a class action against a company offering tax refund anticipation loans put it:

I was pretty upset because at that point my kids were little—I'm a single parent—and that money was really needed for bills. And I was really upset with that. I didn't think it was fair that they could take money and pay a debt. And I felt if you are going to pay my debt, my rent was due at that point, 'pay that for me!' And I was left with like nothing. And I just wanted to make a stand saying you can't do that. You can't take people's money like that.⁸⁵

Another named plaintiff, this one in a lawsuit challenging a debt collector's standard form dunning letter, cited a similar motivation:

My main goal [was] to prove that you can't mistreat people and basically think that you can get away with it.⁸⁶

For these named plaintiffs, the class action provided an opportunity to publicly air private grievances in a way that most individual lawsuits do not allow. Their underlying assumption seems to be that that public airing will force the defendant to change its conduct, either through judicial intervention or public shaming. As such, they exhibit faith in the legal system's ability to bring about change, at least as it relates to the defendant's conduct.

The second purpose of these public statements of wrongdoing envisioned by named plaintiffs was to serve notice on other companies within the defendant's industry. For these named plaintiffs, the class action would compel these companies to change their behavior, as well. As one named plaintiff in a class action alleging misrepresentation in insurance rates stated:

[My goals were to] punish the defendant involved in this kind of fraud and serve notice to other insurers that they should not engage in this practice.⁸⁷

For this and other named plaintiffs, the class action assumes a power beyond merely forcing a particular defendant to pay money damages to harmed class members. Indeed, it is more powerful than the particular legal remedies available in a class action, which address only

85. Interview 30033, *supra* note 78 (class action against bank providing tax refund anticipation loans).

86. Interview 30034, *supra* note 29.

87. Interview 1017, *supra* note 84 (class action against auto insurance company for misrepresentations about rates).

the conduct of the named defendant. For these named plaintiffs, the class action assumes the role of public conscience or moral compass.⁸⁸

The other most common collective justice motivations articulated by named plaintiffs were anger/revenge, which was mentioned by ten named plaintiffs,⁸⁹ and obtaining information about the offending practice, which was mentioned by four.⁹⁰ I have included these responses within the rubric of collective justice because the named plaintiffs who articulated these goals coupled them with a desire to benefit others in the class or society as a whole. For example, named plaintiffs who sought truthful information about the defendant's practices or products wanted to use that information for the public good, as exemplified by the named plaintiff in a class action alleging misrepresentation by the manufacturer of an over-the-counter cold remedy:

My goals were, first of all, that the truth be known. There were a lot of misrepresented facts that [the defendant] was allegedly claiming were facts. I wanted the people to know that if they wanted to continue buying the product it's absolutely OK with me, but I just felt it would be a waste of people's money, and I wanted people to know that if there were unsatisfied people out there they [could] get their money back, which they did, so it was actually a successful goal. So that worked out very, very well. I understand the product is still being sold so it isn't completely shut down, but I wanted people to know that [the product] didn't work.⁹¹

88. This view of the legal system (or at least the class action mechanism) as a just arbiter between right and wrong contrasts with the views of many legal services clients, who, according to Corey Shdaimah, view the legal system as unjust. COREY S. SHDAIMAH, *NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE* (2009). While this study did not obtain demographic data about the named plaintiffs, it is safe to say that most of those who participated were within the ranks of the middle class and thus more well off than most legal services clients. This suggests that views of the ability of the legal system to achieve justice are in part determined by the socioeconomic status of the participant. This discrepancy in viewpoint is also likely the result of past experiences with the legal system. Although this study did not inquire about any such prior experience, it was apparent from the interviews that most had none.

89. Interview 1018, *supra* note 74; Telephone Interview 30026 (Apr. 7, 2009), Telephone Interview 30027 (Apr. 13, 2009); Interview 30028, *supra* note 78; Interview 30029, *supra* note 82; Interview 30033, *supra* note 78; Interview 30034, *supra* note 29; Interview 30035, *supra* note 82; Interview 30039, *supra* note 76; Telephone Interview 30040 (Nov. 30, 2009).

90. Interview 1018, *supra* note 74; Interview 30030, *supra* note 78; Interview 30034, *supra* note 30; Telephone Interview 30042 (conducted Sept. 30, 2009).

91. Interview 30030, *supra* note 78 (class action against manufacturer of an over-the-counter cold remedy).

The public good desired by information-seeking named plaintiffs came in the form of direct financial benefit (as the quote above indicates) or a more generalized vindication of public perceptions, as the following statement suggests:

From the beginning we wanted to find out what happened, and determine if it was willful negligence. I don't know if that is a correct phrase [laughter]. You know, whether they were just helpless boobs or whether they actually had malintent.⁹²

Similarly, those named plaintiffs who expressed anger towards, or a desire for revenge against, the defendant saw the class action as a way to channel that anger into something that would benefit others. Their anger typically resulted from a feeling that they (and other customers) were being disrespected. As one named plaintiff in a class action against the producer of agricultural products explained:

A lot of it was the fact that I don't like the way the companies were just shoving things down our throats saying "Oh, don't worry about it." Well, then we were supposed to take it in the shorts and that's not right It was like the company basically they thought we were a bunch of dumb hicks who like country music and who wear flannel shirts. That's how they actually were dealing with us and they would actually talk down to us. I think that motivated [my lawyer] and myself equally.⁹³

Another named plaintiff echoed the idea that the motivation for filing the class action was the dismissive way that the defendant (here, an insurance company) had treated its customers:

In my opinion, just my opinion, we're real people here and we're not worth dirt. That's what I'm saying. That's what the insurance companies make you look out to be. That [we're] not worth nothing, 'just give them this.' That's what they do. I'm sorry, but I have to say that.⁹⁴

This desire to avenge perceived disrespect overcame whatever reticence these named plaintiffs might have felt because of the small financial recovery at stake. As the named plaintiff in a class action against a mortgage company for misrepresentation observed:

92. Interview 1018, *supra* note 74 (class action against an Internet service provider for deficient service).

93. Interview 30040; *supra* note 89.

94. Interview 30039, *supra* note 76.

It was made clear up front [by my attorney] that it was just a small amount of money and it wasn't a lot but right afterwards I really had the conviction that I got screwed by, and I wasn't sure who, but I was convinced. The amount wasn't great enough to really do anything with but the feeling, and this was several years later, was still there. These jerks screwed me so it was kind of payback. But I knew the money was not, I mean, we got a little bit but that wasn't the motivation. It was more just kind of to fight back, I guess."⁹⁵

Many named plaintiffs offered an overlapping array of goals, as demonstrated by the following statement by a named plaintiff in a lawsuit against a landlord. She includes elements of helping others, stopping the offending conduct, anger, and shedding a public light on the problem:

I had moved out of the [apartment] complex because they had raised my rent I had a friend who read about [the lawsuit] in the paper I had all the paperwork that pertained to me . . . so I just called the lawyer and said "if you want this, maybe it will help your case," because I was so angry at the place. . . . I was really angry It was just really egregious. So, that was my motivation, was just bring this out into the open, let's see what's happening. The D.A. obviously wasn't going to go after these guys; they are going after some other big landlords in the city at the moment who are doing other things like this, but they didn't address [the defendant]. So, this class action seemed like a great idea."⁹⁶

Another named plaintiff, who sued an Internet service provider for poor service, combined self interest (though she was not aware of the possibility for financial recovery until after she had agreed to participate), helping others who had been harmed, and revenge:

I didn't go into it with the idea of getting any money at all, but when the promise of money is held out to you, you don't say no. But I went into it to represent the people who had been harmed. But I guess personal revenge was another aspect because of the personal agony I suffered."⁹⁷

In addition to illustrating the complex interconnectivity of named plaintiff goals, the first of these two statements is noteworthy because the named plaintiff initiated the idea of being a named plaintiff with the

95. Interview 30043, *supra* note 84.

96. Interview 30029, *supra* note 82 (class action against landlord for forcing lower income tenants to leave a renovated apartment building).

97. Interview 1018, *supra* note 74.

lawyer, which is the reverse of the more common pattern. In most cases included in this study, the named plaintiffs approached the lawyer with a problem affecting them individually, and agreed to serve as a named plaintiff only after the lawyer informed them that others were suffering the same harm.⁹⁸ Nevertheless, although the sample size is too small to justify a statistically accurate analysis, there was no correlation between the manner in which the named plaintiffs became engaged with the class action and his or her goals regarding the case. Those named plaintiffs who only became aware of the possibility of a class action after consulting with an attorney were just as committed to collective justice goals as those who approached the lawyers with a class action in mind. Indeed, as we will see later in this article, most plaintiff-side class action attorneys prefer named plaintiffs who are unaware of the class action possibility until the lawyer tells them about it.

Most of the named plaintiffs (fifteen out of twenty) stated that their goals remained constant throughout the course of the lawsuit.⁹⁹ And nearly all who reported a change in goals indicated that their feelings of collective justice grew stronger as the case progressed:

I think it crystallized and the more we learned the more we came to realize that it was more of a sacrifice. Not a big sacrifice because we learned stuff. We came to really see that we were fighting the good fight. If we did get certified as a class it would mean something. It became more important as it went on that we were doing the right thing for hopefully a lot of people.¹⁰⁰

The only thing that really bothered me about it and may have changed my goals was I was wanting the board of directors and the chief executive officers, the officers of the company, I was wanting them to have to fork up some money. They made money. . . . I was hoping along with me getting financial restitution that they would lose a little something but in the end they didn't. They had the insurance that settled everything. . . . I was just not satisfied that they didn't get hurt a little bit like we had been hurt.¹⁰¹

Indeed, one consistent theme from the interviews is that many named plaintiffs became angrier as the case progressed. In some cases, as noted above, this increased anger resulted from discovery about the

98. See, e.g., Interview 30036, *supra* note 77; Interview 30039, *supra* note 76.

99. See, e.g., Interview 30038, *supra* note 78.

100. Interview 30043, *supra* note 84.

101. Telephone Interview 30032 (July 28, 2009) (class action against fiduciaries of an employee benefit plan for breach of fiduciary duty).

defendant's conduct. In other cases, the named plaintiff's anger was stoked by the conduct of the defendant—or its attorneys—during the litigation itself, particularly during depositions. As the named plaintiff in the case against the Internet service provider described it:

The opposing side did this grueling deposition on me which was really agonizing. I mean really, they were asking me about stuff I did in elementary school and were obviously trying to dig up something in my background and either make it so unpleasant for me that I pull out of the case or find something that they could discredit my credibility. It was probably one of the worst experiences of my life I think they had two people in there but it was mainly just one guy, the Bulldog. . . . Coming out the other side I felt fine but in the middle of the process I was pretty upset I thought they were going to focus on stuff to do with the case. But they were trying to find out all the roommates I'd ever had in my life and I've had an interesting life. I'd like to find out about all his roommates.¹⁰²

The named plaintiffs' descriptions of their goals, and the extent to which those goals endured or intensified through the lawsuit is consistent with the extensive literature on motivations for initiating lawsuits and other types of formal disputes. For example, as noted earlier, many disputants sue because they perceive that they have been treated unfairly and/or impersonally.¹⁰³ Indeed, one lasting impression from the interviews of named plaintiffs in this study is that corporations could save themselves hundreds of millions of dollars in damages and attorneys' fees if they simply altered the tone of their dealings with their customers before conflicts intensify. Moreover, many named plaintiffs embrace the opportunity to act as "agents of governance," compelling accountability by offending companies and forcing them to change their conduct through litigation.¹⁰⁴ The role of agent of governance in the class action setting seems to be particularly appealing to many named plaintiffs, permitting them to seek remedies that the legal system does not actually provide (i.e., compelling all members of a particular industry, not merely the defendant, to change their practices). This sense of empowerment was evident in the responses of the following named plaintiffs, including one whose class action was not certified, leaving him to regret the lost opportunity to "be somebody":

102. Interview 1018, *supra* note 74.

103. See Bies and Taylor, *supra* note 56.

104. See Hadfield, *supra* note 63, at 674.

When you take on a company that big . . . I guess my old motto these days is money talks and horse manure walks. Yeah, I think we accomplished something. And I guess, I get tired whether it's politics or . . . when people don't say anything but when you got numbers it does work, instead of letting them walk on you.¹⁰⁵

[Not having the class certified] was a big disappointment for us because we were psyched to really go. It would have been in the newspaper. We could have been somebody.¹⁰⁶

The staying power of the named plaintiffs' goals is also consistent with the literature on individual cases. As Relis notes, individual plaintiffs continue to harbor non-monetary goals throughout the lawsuit, though they do not articulate those goals to their lawyers because the lawyers communicate the legal system's inability to fulfill them.¹⁰⁷ And while the interviews for this study suggest a similar constancy of motivation (and in some cases a deepened collective justice motivation), there was no suggestion by any named plaintiffs that they needed to keep those goals under wraps. Indeed, as we will see in the discussion of dispute transformation later in this article, many plaintiffs' class action lawyers see it as part of their professional responsibility to encourage the named plaintiffs to maintain and even expand on their collective justice motivations as the case proceeds.

2. Plaintiffs' Lawyers' Goals

Like most of the named plaintiffs, nearly all of the lawyers interviewed for this study articulated a variety of motivations for filing the lawsuit. Nearly all listed both obtaining monetary relief for the class and stopping or altering the defendant's behavior as their goal in pursuing the class action. As one lawyer put it, "Our goals were to get restitution for the class of the money that was seized [by a tax preparation company] and to stop the practice [debt collection] going forward."¹⁰⁸ The other responses articulated by more than two lawyers included obtaining attorneys' fees/getting paid, which was mentioned by five (of thirty-three), and affecting conduct throughout the relevant industry, which was mentioned by two lawyers. The following comments are representative of the latter goal:

105. Telephone Interview 30041 (Dec. 1, 2009) (class action manufacturer of agricultural product for misrepresentation).

106. Interview 30043, *supra* note 84.

107. See Relis, *It's Not About the Money!*, *supra* note 4, at 735, 741-42.

108. Telephone Interview 30050 (Apr. 1, 2009).

Our goals were at best to get back 100 cents on the dollar and to effectively stop the practice, which was endemic in the industry.¹⁰⁹

I wanted to impact the biggest player in the industry and their policies and hopefully tangentially affect the rest of the industry overall. I was secretly desirous in that case of getting a court to actually say you can't charge [a particular insurance fee] if it's not in the contract and I got it and that was an important thing for me.¹¹⁰

Among the less frequently articulated lawyer goals was resolving the case as efficiently and expeditiously as possible,¹¹¹ obtaining a jury award¹¹², championing the cause of the class of plaintiffs,¹¹³ and a desire to “get” the defendant.¹¹⁴ It is striking that this range of responses mirrors very closely the breadth and complexity of the goals articulated by the named plaintiffs, from personal financial recovery (individual compensation for the plaintiffs, attorneys fees for the lawyers) to righting a wrong, to the hope that the class action will affect corporate behavior beyond the defendant in the case.

Nearly all of the lawyers interviewed indicated that their goals remained constant throughout the course of the lawsuit. The most common exception to this pattern was when injunctive relief either became impossible (because the business shut down) or moot (because the defendant voluntarily altered its practices). In those cases, the lawyer's goal shifted to monetary compensation alone.¹¹⁵ In addition, one lawyer indicated that his desire to “get” the defendant increased as the case went on, while another stated that, as the case progressed, the objective of stopping the company's practices became more

109. Telephone Interview 1007 (Oct. 24, 2008) (class action against debt collection practices by retailers).

110. Telephone Interview 30020 (Feb. 3, 2009) (class action against insurance company for an unauthorized fee). This lawyer added, “I don't think my client cared much about the law being developed that way.” She was right. Her client's only stated goal was “to get full insurance coverage.” Interview 30039, *supra* note 76.

111. Telephone Interview 1003 (Oct. 21, 2008); Telephone Interview 1002 (Oct. 10, 2008); Telephone Interview 1007, *supra* note 109.

112. Interview 30020, *supra* note 110.

113. Interview 30049, *supra* note 132.

114. Interview 30012, in Portland, Or. (Oct. 24, 2008).

115. Interview 1008, in Portland, Or. (Oct. 24, 2008) (class action against Internet service provider for defective service); Telephone Interview 1016 (Nov. 26, 2008) (class action against real estate company for misrepresentation); Interview 30023 (Mar. 9, 2009) (class action against condominium developer for ordinance violations).

important.¹¹⁶ These reasons for intensification of collective justice goals are similar to those articulated by the named plaintiffs.

The plaintiffs' lawyers' stated goals are consistent with traditional notions of progressive cause lawyering. As Scheingold and Sarat note, "cause lawyers identify explicitly, and without apologies, with [objectives that transcend service to clients]."¹¹⁷ This observation assumes a distinction between service to clients and service to a larger cause. Indeed, much of the cause lawyering literature assumes that there is a bright line between the interests of the clients and the interests of the cause.¹¹⁸ This assumption is based on the general perception that most clients only care about obtaining monetary compensation or other forms of individual relief for the harm they have suffered, while cause lawyers strive for some larger social good. As one lawyer put it:

I think that all consumer protection lawyers take themselves and their role in society a lot more seriously than the clients generally do. That's just true. We do. We all consider ourselves like self-appointed regulators. I don't make apologies about it. I think it's a necessary role in society. I think there's nobody else doing it. I will say that our clients don't feel as strongly about that as we do.¹¹⁹

However, the data from this study suggest that this supposedly clear distinction between client and cause becomes obscured in the consumer class action context. Most of the lawyers interviewed did not recognize or articulate any need to transcend or ignore the goals of their clients, because they endeavor to ensure that those clients had goals beyond simply receiving monetary relief for themselves. In this way, service to the cause and service to the client by class action lawyers become one and the same. As a result, the normal tension between client and cause presumed by much of the cause lawyering literature is far less pronounced in the class action context than in individual cases.

116. Interview 30012, *supra* note 114 (class action against credit card company for abusive debt collection practices); Interview 1011 (class action against mortgage broker for illegal loans) (Nov. 13, 2008).

117. Scheingold & Sarat, *supra* note 8, at 6.

118. One exception to this pattern is Corey Shdaimah's *Intersecting Identities: Cause Lawyers as Legal Professionals and Social Movement Actors*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* (Austin Sarat & Stuart Scheingold eds., 2006), in which she observes that many legal services lawyers view serving their clients and pursuing the cause of social justice as one and the same.

119. Interview 30020, *supra* note 110.

3. Plaintiffs' Lawyers' Perceptions of Named Plaintiffs' Goals

The lawyers interviewed for the study were asked to describe the named plaintiffs' goals in filing the lawsuit. The most striking aspect of their aggregate responses is how closely they track the aggregate response of the named plaintiffs to the question about their own goals. Like the named plaintiffs themselves, most of the lawyers attributed multiple goals to their clients. The average number of named plaintiff goals identified by lawyers was 2.1, the median was 2, and the mode was 2 (the figures for the named plaintiffs' self identification of goals was an average of 2.3, a median of 2, and a mode of 2). Moreover, the lawyers attributed roughly the same distribution of individual and collective justice goals to their named plaintiffs as the named plaintiffs attributed to themselves. Thus, for example, twenty-four of the twenty-nine lawyers (83%) who specifically identified named plaintiff goals said that their clients harbored collective justice goals, while seventeen of twenty named plaintiffs (85%) self-identified collective justice goals. And while 48% of the lawyers attributed a combination of self-interest and collective justice goals to their clients, 50% of the named plaintiffs attributed such a combination to themselves. This correlation between the named plaintiffs' self-identification of goals and the attorneys' speculation as to those goals is also present when we look only at the responses of those attorneys whose clients were included in the study.¹²⁰

Lawyers' descriptive comments about named plaintiffs' goals underscore their awareness of the overlapping and complex array of those goals, particularly those relating to the named plaintiffs' desire for collective justice. They also demonstrate the attorneys' awareness of the named plaintiffs' anger towards the defendant:

They were really offended. This often happens with class representatives. They want to see justice done.¹²¹

Well, you know, she was kind of the ideal main plaintiff. Just really pissed off when she found out she had gotten screwed.¹²²

They were all upset. In these kinds of cases, almost all of the FD CPA [Fair Debt Collection Practices Act] class action litigation I've done . . . the plaintiffs are always upset and scared by the letters they get and

120. For example, the average number of named plaintiff goals identified by lawyers whose clients participated in the study was 1.9, the median was 2 and the mode was 2.

121. Telephone Interview 1015 (Nov. 24, 2008) (class action against bank for overcharging on car insurance).

122. Interview 1007, *supra* note 109.

then they're outraged when they find out that what the letters say is bogus. And so their goals are always, "We want to stop this." Now whether it's out of the sense of personal vindictiveness or the greater social good I couldn't tell you, but their goals are to stop this.¹²³

I think he was interested in it primarily for doing the right thing. He likes cars. He's kind of a car guy. He takes pride in this particular car and he felt that if there was a defect out there that could cause harm to people. And people had in fact been killed in this car, civilians and police officers because of high impact collisions that had caused fires. He felt that if there was something he could do about it and working with attorneys to do it he'd be interested in doing that."¹²⁴

And even where lawyers attributed a greater self-interest motive to their clients, they often placed it within the larger context of a desire for respect and fair treatment. As one lawyer noted:

I think [the named plaintiff] was mad as hell at his insurance company and that it had hurt him financially so it was very, very similar to the same kind of motivations you would see in an individual case as opposed to a class action case because there was so much money involved for him. Five grand was a lot and he was pissed He wanted his money. And he, more than anything, like so many people, it's just being disrespected and a lack of customer service that it's [about] hurt feelings And they don't like being told that they're insignificant and that what they have to say doesn't matter and that they can be pushed around.¹²⁵

This awareness of named plaintiff motivation is particularly noteworthy because most of the lawyers in the study said that they spend *less* time communicating with named plaintiffs than they do with their clients in individual cases. One lawyer attributed the relative infrequency of communication with named plaintiffs to the relatively modest individual monetary reward at stake in most class actions:

Well, typically in a class action the plaintiffs have less at stake economically or otherwise than they would in an individual case. So, if there's less at stake the person tends to be less involved, less concerned. It's not like their whole life turns around the resolution of the lawsuit. For example, if you represent someone in a personal

123. Interview 30017, in Portland, Or. (Oct. 26, 2008) (class action against debt collection company for standard form collection letters).

124. Telephone Interview 30046 (Nov. 4, 2009) (class action against car manufacturer for design defect). Interestingly, the named plaintiff in this case stated that his only goal was to get his own car fixed. Interview 30037, *supra* note 75.

125. Interview 30020, *supra* note 110.

injury case that's been in an automobile accident and they're trying to receive compensation for their medical expenses and to go on with their life they have a great deal of focus on the litigation. Whereas if you represent someone in a consumer class action where they might have been overcharged \$15 their stake in the litigation is not as great.¹²⁶

Another lawyer felt that communicating with the named plaintiff was often futile:

The other thing about communicating with clients around class actions that I find is often times you can give them all the details as to the ins and outs as to what's going on with the law and the case, and the statute, and the procedure and so on. . . . And sometimes you get the sense that it's going in one ear and out the other to some extent. Because they're not really familiar with everything but you try to break it down and explain it as best as you can.¹²⁷

One would expect this less frequent and sometimes frustrating communication between lawyers and class representatives to exacerbate the disconnect over client goals that Relis and others have observed between lawyers and clients in individual cases.¹²⁸ Why, then, do the class action lawyers in this study seem to be acutely aware of the range and complexity of the named plaintiff's goals, including the desire for justice that many lawyers in individual cases either ignore or try to repress in their clients?

The clearest explanation is that the lawyers usually *want* named plaintiffs with an array of goals, particularly collective justice goals, as well as a sense of anger or injustice directed towards the defendant. Such motivations render these named plaintiffs more likely to endure the lengthy litigation process and the temptation to accept early settlement offers that would provide them with individual compensation but leave the rest of the class without a recovery and their lawyer with only a modest fee. And because the lawyers are often able to choose from a number of potential named plaintiffs, they can typically find one who harbors collective justice goals.¹²⁹ The following statements from

126. Telephone Interview 30024 (Mar. 6, 2009) (class action against landlord for violation of rent control laws).

127. Interview 30046, *supra* note 124.

128. See Relis, *It's Not About the Money!*, *supra* note 4, at 734-35.

129. As one lawyer explained: "[F]rom the literally hundreds of people who had called us [about the defendant's practice] we selected some people to interview [as named plaintiffs]." Interview 1008, *supra* note 115.

lawyers suggest that this is exactly the kind of person they seek as a named plaintiff:

I want someone with a fire in the belly, because the money isn't in it.¹³⁰

The people who make the best class reps are people who have a sense of justice and care for something beyond their self-interest.¹³¹

I'm trying to gauge why the person is involved in the case. I don't have a problem with somebody who is looking to make money . . . But I'm also looking for some sort of spark: 'I've been pushed too far; I'm just not going to take it anymore . . . I want to stand up for myself and for some others.' Because I find that those plaintiffs are much more resolute in seeing a case through.¹³²

On the other hand, many of the lawyers expressed strong reservations about named plaintiffs who are certain from the beginning that they want to lead a class action:

If a guy walks in the office and says, 'ABC happened to me and, boy, is this a great class action. Let me tell you why,' as a lawyer your antenna goes up right away: 'Well, wait a minute. Is this guy angling for something?'¹³³

You don't want somebody that calls you up wanting to file a class action. I suppose there are exceptions to that rule, but I've had people call me and think they are going to get rich filing a class action, or they think that just because they got cheated somebody ought to have a class action filed against them. Lay people don't have much of a concept of what's involved.¹³⁴

[The named plaintiff] needs to not have a personal agenda.¹³⁵

Thus, it appears that in choosing a suitable class representative, consumer class action lawyers seek someone willing to represent large numbers of persons but who was unaware of such willingness before

130. Interview 30013, *supra* note 37 (class action against airline company to recover employee benefits).

131. Telephone Interview 1012 (Nov. 17, 2008) (class action against credit insurance company for excessive interest charges).

132. Telephone Interview 30049 (Sept. 18, 2009) (class action against agricultural products company).

133. Telephone Interview 1013 (Nov. 26, 2009) (class action against debt collection company for standard form dunning letter).

134. Interview 1012, *supra* note 131.

135. Interview 30050, *supra* note 108.

they talked to the lawyer. The lawyers find it easier to keep such named plaintiffs focused throughout the typically long class action process.

A second explanation for the lawyers' acute awareness of their clients' collective justice goals is that in many cases those goals are instilled and nurtured by the lawyers themselves. This nurturing process is a form of dispute transformation, though of a very different sort than the transformation that has been observed in individual disputes. As noted earlier, the dispute transformation theory posits that lawyers in individual cases condition their clients as to the "legal realities" of the litigation system so that those clients will be satisfied with monetary compensation for their injuries and abandon previously held desires for other forms of retribution or recourse.¹³⁶ The data gathered for this article suggests that class action lawyers engage in a form of dispute transformation markedly different from that associated with individual cases, but no less important for reaching an outcome that is mutually acceptable to both lawyer and client. Class action lawyers see themselves as needing to cultivate and encourage what they perceive as the collective justice goals of their clients, rather than discourage those goals by transforming them into purely financial objectives, which is the typical pattern in individual cases. For if the named plaintiff is—or becomes—only interested in personal financial gain, he or she would be easily attracted by a relatively small settlement offer and the class action—and the significant attorneys' fees that normally accompany it—would be jeopardized.

The interviews for this article suggest that this transformation process occurs at as many as three different stages throughout the course of a class action, depending on the nature of the case and the sophistication of the client. The first of these stages involves informing potential named plaintiffs that they have a legal claim and an opportunity for monetary damages in the first place. Many plaintiffs in consumer protection cases are initially unaware that they are entitled to monetary relief; their only goal is to stop the offending conduct as it is applied to them, be it a harassing debt collection phone call, the repossession of their car, or an erroneous entry on their credit report. Only after they consult with an attorney do they realize that the applicable law permits prevailing plaintiffs to recover statutory damages and attorneys' fees, regardless of whether they have actually sustained any direct financial harm as a result of the defendant's conduct. This is particularly true in the debt collection area, where Congress (as well as

136. Relis, *It's Not About the Money!*, *supra* note 4, at 704-05.

many state legislatures) recognized the need for statutory damages as a deterrent against abusive collection activities, even when the debtor could not prove any resulting monetary loss.¹³⁷

Two of the plaintiffs' lawyers described this first stage of dispute transformation as follows:

[The named plaintiff] really didn't know that she had been taken advantage of. I told her that.¹³⁸

[The named plaintiff] was aware that the purchase price that they paid for a vehicle was several thousand dollars more than the book value . . . I had had other clients who had . . . this issue with [the defendant] and I had brought several suits against them for doing this . . . [The named plaintiff's] complaint was that they thought they had overpaid for the car. In reality they did, but not nearly as much as they thought they did. The reason why the purchase price was higher was because of the inflated down payment . . . We would have brought them in and explained to them what happened and told them that the real harm here was the sales tax . . .¹³⁹

Once the named plaintiff is aware of a potential monetary recovery (having known of it previously or been so informed by her attorney), most of the lawyers in this study then move to the second phase of dispute transformation in the class action context: they transform the dispute from individual compensation to relief for the entire class, be it monetary or injunctive. In most cases, this stage is necessary because pursuing such a dispute on an individual level is financially unfeasible for the attorney:

I mean what they were looking for was legal help to get their money back. That's why they came asking for help. And we helped to channel that goal into a wider goal and when offered the possibility of helping others that had been similarly treated and ripped off they were very, very interested in doing that. That's not what they came in seeking, 'I want to file a class action.' No. They came in, 'I'm getting ripped off by someone.' And then when they learn that many others have . . . sought help and that there is a legal device available whereby they can through their own lawsuit help others in the same situation they were eager to proceed on that basis. So, I think there was a lot of

137. See Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. (2006); WIS. STAT. § 427 (2009).

138. Telephone Interview 1009 (Nov. 7, 2008) (class action against finance company for excessive re-financing fees).

139. Interview 1001 (Sept. 29, 2009) (class action against automobile dealership for excessive sales tax fee).

public interest on the part of the named plaintiff that they eagerly embraced despite the fact that that's not what brought them into the office in the first place.¹⁴⁰

According to this attorney, the named plaintiff harbored latent collective justice goals that the lawyer encouraged by discussing the possibility of a class action. Other lawyers similarly described this process of channeling their named plaintiff's desire for justice into a willingness to serve as a class representative:

Well, she filed the lawsuit because . . . in her case they [a rent-to-own company] were trying to repossess some furniture, a TV, and a computer from her and she felt like she had come to realize that she had been not fairly treated. And so that's why she showed up and we said, 'Look, you know doing your lawsuit for a few hundred bucks is just, you can't do it. It doesn't make sense. But we think that this company is violating the law with all of its customers like you and would you be willing to stand up as a class representative?' And she was.¹⁴¹

I think that my view of human nature is that most people want to do good. I mean they're interested in themselves, but they also want to do a broader good. They also want to have some meaning in their lives, and when you discuss with them the statistics, demonstrating that this is industry wide, this gives them a greater reason to go through this process.¹⁴²

I think that when the client first came to see me [about a dispute with a car dealership over a salvaged vehicle] she really had no idea that there was a class action potential [regarding excessive registration fees]. Now having said that, when I explained it to her, I think my client was very much motivated in seeking justice for everybody in her similar position because obviously she had been wronged by the dealership and she wanted to see justice done.¹⁴³

These statements reveal a deliberate, conscious, and unapologetic transformation of the clients' dispute by the plaintiffs' lawyers. They suggest that this stage of the dispute transformation process is a matter of appealing to the named plaintiffs' underlying, though perhaps

140. Interview 1016, *supra* note 115.

141. Telephone Interview 1014 (Dec. 2, 2008) (class action against rent-to-own company regarding repossession practices).

142. Interview 2002, *supra* note 37 (class action against a mortgage company for misrepresentation).

143. Telephone Interview 1005 (Nov. 26, 2008) (class action against automobile dealership for overcharging registration fees).

unstated, desire to seek justice for large numbers of persons. It also frequently involves the lawyers altering the underlying nature of the dispute (e.g., from individual concerns over the named plaintiff's salvaged vehicle to a class-wide dispute about excessive registration fees). And for the most part, the named plaintiffs interviewed for this study were willing recipients of those appeals. For example the client of the lawyer who made the latter statement said that she was only aware of the class action implications of her dispute when her lawyer brought it to her attention:

I think it was six months after I filed my lawsuit that's when my lawyer saw the need for a class action suit. I was like 'OK, let's get that money and return it to the people that they stole it from'; the registration fees.¹⁴⁴

Another lawyer described this channeling process as an effort to meld the named plaintiff's goals to his own. And if that effort is unsuccessful (and assuming the lawyer has other potential named plaintiffs from which to choose), the un-transformable client is rejected as a named plaintiff:

I think that our client's goals when they first contacted us were certainly different. They had no idea we were going to be talking about a class action. They had very little idea of what a class action was but I think that through my initial meeting process that our goals were the same. And my intake process is designed to achieve that result and if it doesn't then we don't go forward.¹⁴⁵

One attorney's response was particularly interesting in this regard because of his awareness that being a named plaintiff entails enduring a significant amount of time, effort, and abuse from defendant's counsel:

The system is set up so that you pretty much have to be an idiot to be willing to be a class rep. Well, in a consumer case anyway, where the amount at issue for any normal person is going to be fairly small whether its \$10 or \$100 or \$200 because it is really irrelevant. But people get angry and they feel like they want to do something. But the truth of the matter is that the amount of time that it's going to take them to do it and the near certainty that they'll have to spend a day giving a deposition and the possibility that they may have to testify in court or find documents that are difficult to find and take a lot of looking and they can't even conceive of why it has anything to do with

144. Interview 30027, *supra* note 89.

145. Interview 1001, *supra* note 139.

the case that they thought they had. And the fact that the cases go on for so long, which is just kind of inconceivable to an ordinary person unless they've had other exposure to litigation, and from some kind of purely rational economic sense even the possibility of an incentive award, which is uncertain of course. I mean it doesn't balance out all these disadvantages. And then, of course, you have to make them understand that if they file the case as a class action they have a responsibility on behalf of all class members that their case can't just be settled by using the class as leverage. And the only thing that's going to make them want to do it enough so that they're willing to serve is a desire to perform a public service for people. I've had pretty good luck persuading people of that.¹⁴⁶

This lawyer's detailed cost-benefit analysis illustrates why a purely economic model for named plaintiff behavior in the class action context falls short: it cannot measure the intangible value of wanting to see justice done for the public generally. Indeed, the named plaintiff in this case developed a sense of public service (buttressed by considerable anger) after her lawyers told her about what the defendant was doing to others:

I wanted blood. Particularly when I found out what [the defendant was] doing to the other class [members]. I didn't feel damaged but then when I heard about the elderly people. They were an awful company with huge interest rates and big late payments . . . they were horrible over the phone . . .¹⁴⁷

Other named plaintiffs expressed a similar sense of willingness to have their goals transformed, or widened, to include relief for the entire class:

[Our attorneys] made clear that their expectation of us was that we were going to go all the way with it and that they made clear that there was not going to be a lot of money in it. You're doing it for everybody not for your own glory or remuneration.¹⁴⁸

I started out and all I wanted was my \$8,000 and he said, "Well, that's not enough" so they went up to, I don't know what it was, 30 or 40 and next thing I know the last papers I looked at I was suing for \$225,000. Well, they ended up putting it all together in a class action suit which

146. Interview 30011, in Portland, Or. (Oct. 24, 2008) (class action against credit card company for abusive debt collection practices).

147. Interview 30028, *supra* note 78.

148. Interview 30043, *supra* note 84.

is fine, I didn't want \$225,000. I wanted the \$8,000 I was promised

...¹⁴⁹

None of the named plaintiffs in this study expressed the resentment that “transformed” clients feel in individual cases when their desires for justice are either ignored or channeled into monetary compensation.¹⁵⁰ Quite the contrary: whether they approach their attorneys with knowledge of the scope of the defendant’s conduct and a wish to prohibit it, or whether they were initially only concerned at the outset about their personal situation, they relish the idea of assisting a broad group of consumers. It plays into their sense of right and wrong, and illustrates their interest in being agents of governance. Those uninterested in adopting a broader view of the dispute are unlikely to be selected as named plaintiffs in the first place, assuming the lawyer has a choice in the matter.

The third phase of dispute transformation in the consumer class action context occurs when it is necessary for the lawyers to ensure that the named plaintiffs “stay the course” throughout the frequently protracted class action process. As described by the lawyers, this phase of the process resembles a form of cheerleading or encouragement, rather than transformation:

Their goals remain consistent but in a case like this [involving a standard form debt collection letter] they're not really required to have very much involvement. So the anger they had in 1996 when they got the letter is that they may have to be reminded about five years later when they have to make a decision about the case. I try to maintain contact with them to essentially get them to keep their head in the game. But they have their lives. I mean I'm spending hundreds of thousands of hours on these cases and they're spending 15 hours spread out over five years so they have their lives going on. They're very upset when they see me and whenever they think about the situation they get upset again, but they spend 99.9% of their life not thinking about the case which is not the same as me.¹⁵¹

Some of the lawyers consciously deal with this problem at the outset of the case, and whenever their clients become frustrated with litigation delays:

149. Interview 30040, *supra* note 89.

150. See SARAT & FELSTINER, *supra* note 3, at 93; Relis, *It's Not About the Money!*, *supra* note 4.

151. Interview 30017, *supra* note 123.

You know, I talk to the clients a lot. I let them know I'm available to them anytime they are frustrated with the process. Go ahead and give me a call and we'll talk about it. And I also try very hard at the beginning of the case, once someone has agreed to become a class representative, which I am really up front about in terms of what their responsibilities are going to be and that it is not a glorified position . . . And I try to tell them early on that this is going to seem like it grinds very slowly, and there is a chance that we could get derailed, you know, there could be something that happens on a motion to dismiss that either really hurts our side or really hurts their side, and the party that feels aggrieved by that decision decides to take it to the court of appeals. If that happens, the entire case can get sidetracked until the court of appeals decides whatever that issue is . . . So I try to get them to understand that, yeah, this could go a little bit sideways for a while. And that they've got to be patient. And then I feel my duty is to be available to them when they get frustrated with the system.¹⁵²

Sometimes these cases drag on or slow down that the second or third time I say it, it kind of reinforces, 'yeah, this is what I signed on for and it's really no surprise.' I also try to emphasize what brought them into the case in the front end that they were frustrated about something or they wanted to champion something larger than their own cause.¹⁵³

Another lawyer related a similar process of encouragement, linking it to the goal of ensuring that the representative plaintiffs not become attracted by "pick off" settlement offers (i.e., relatively modest offers usually proffered early in the case) that would more than compensate the named plaintiff for her monetary loss but would derail the class action by disqualifying her as inadequate under Federal Rule 23(a) or its state court equivalent:

When I talk to people from the first time forward, I try to lay out how this will be difficult. These cases take three to five years, that you'll be deposed, that the defendants will raise every procedural and other hurdle they can think of, that the defendants at some point down the road will offer you a bribe. They'll offer me a bribe, the bribe being individual settlement at a price well above the value of the individual settlement, or offering me costs and attorney's fees above what would possibly be reasonable for an individual case. So in other words, I try to get them this information in advance, so that when it does happen,

152. Telephone Interview 2007 (Apr. 8, 2008) (class action against trustees of a retirement benefit plan for breach of fiduciary duty).

153. Interview 30049, *supra* note 132.

. . . . ‘Here’s where they’re offering the bribe, and we’ve talked about this before, where do you stand on this?’¹⁵⁴

In this way, class action lawyers try to anticipate and counteract the tendency of litigation delays to, as Felstiner et al. put it, change disputants’ views of the process from “useful procedure” to “pointless frustration.”¹⁵⁵ This process of reminding the named plaintiffs about both the nature of the lawsuit they have agreed to steward, as well as the responsibilities of that stewardship, is also illustrative of the kind of control that the dispute transformation literature attributes to attorneys. In their review of the literature on this subject, Sarat and Felstiner note that in many practice settings, “lawyers exercise power by manipulating their clients’ definitions of the situation and of their role.”¹⁵⁶ This study provides ample evidence of this exercise of power by class action attorneys over named plaintiffs. Indeed, given that class action lawyers often have the luxury of selecting named plaintiffs who are willing to align their goals with the attorneys, this power is more pronounced in class actions than in individual cases, where the client normally chooses the lawyer.

As many of the comments above suggest, at the start of the process, many named plaintiffs are unaware of the nature and scope of the underlying case. And certainly most of them are ignorant of the duties of a class representative. Their lawyers fill those gaps in knowledge, thus transforming the clients’ “definition of the situation and of their role”¹⁵⁷ in a way that increases the likelihood that the case will achieve the results sought by the attorney and the client.

In addition, this conscious encouragement process is another way in which lawyers, according to Relis, “condition clients on ‘legal system realities.’”¹⁵⁸ But in the class action context, the purpose of this conditioning is less about persuading clients to minimize their aspirations of what they might be able to achieve through the legal system. Rather, it is just the opposite: to encourage them to maintain the broadly focused aspirations that made them willing to serve as a named plaintiff in the first place, often after first learning of the opportunity from their attorney.

154. Interview 2002, *supra* note 37.

155. See Felstiner et al., *supra* note 3, at 648.

156. See SARAT & FELSTINER, *supra* note 3, at 20.

157. *Id.*

158. See Relis, *It’s Not About the Money!*, *supra* note 4, at 704.

Despite this general awareness and conscious shaping of named plaintiff goals, there was one such motivation that the lawyers never mentioned: the desire to obtain information about the defendant's practices. Four named plaintiffs listed it as a goal, but none of the lawyers (including those who represented those four named plaintiffs) attributed it to their clients. While perhaps simply an anomaly of this particular study sample, one other explanation is that lawyers see information gathering as a regular part of the litigation process, the means to a successfully resolved case. It is not, however, an end in itself. Indeed, none of the lawyers identified it as one of their own goals in initiating their class action. Some named plaintiffs, on the other hand, see it differently. They, like their counterparts' individual cases, often want an explanation for the defendant's conduct and feel that a lawsuit is a good way to obtain it. Lawyers likely assume that they need no such explanation; they assume that the reason for the defendant's conduct is the desire to make a profit, sometimes illegally.

The majority of lawyers also felt that the named plaintiff's goals did not change throughout the course of the lawsuit, which accurately reflects the unchanging view of most of the named plaintiffs themselves. To the extent that the lawyers perceived such a change, for the most part they attributed it to the fulfillment of certain goals, the discovery of additional information about the defendant's actions giving rise to the lawsuit, or the conduct of the defendant or its attorney during the course of the litigation. Thus, for example, a lawyer representing a class of consumers who alleged breach of warranty for faulty brakes stated that the named plaintiffs were initially only interested in either a cash refund or new car. But as the case went on, he noted, "the plaintiff's goals changed to just getting justice. Money was less of a goal, though it was still important."¹⁵⁹ And another plaintiffs' attorney, who represented a class of consumers alleging that their former employer breached its fiduciary duty with respect to their retirement benefits, indicated that while at first the named plaintiffs were only interested in recovering the value of their benefits, they eventually wanted the defendant's corporate officers to go to jail once they became aware of a parallel criminal investigation.¹⁶⁰ Other attorneys indicated that the named plaintiffs became angrier as a result of what they perceived as being subjected to harassment during the course of the case, usually during the their deposition. One lawyer summarized this phenomenon as follows:

159. Interview 2003 (Mar. 28, 2008).

160. Interview 2007, *supra* note 152.

When they get [personally] attacked like that [in depositions] usually the clients will turn on the defendant and say, 'See, that's exactly that arrogance, that rude callous indifference to what you do to people and your actions is exactly why I'm bringing the class action against you. And now you ain't seen nothing yet.' And they'll start sticking to their guns and they'll get rougher and tougher the more that the case goes on. Which makes it kind of fun because it is sometimes very hard to get people to get motivated about consumer issues because they just don't tend to rip people's lives apart.¹⁶¹

In sum, this study's empirical data on goals suggest that named plaintiffs are similar to plaintiffs in individual cases in that they seek an array of outcomes from litigation that go beyond monetary compensation and fall within the general rubric of justice being done. They maintain and sometimes intensify these motivations during the litigation process. And, also similar to plaintiffs in individual cases, they sometimes seek remedies that a lawsuit cannot provide, such as changed corporate behavior throughout a particular industry. On the other hand, their lawyers are more aware of these non-monetary goals than lawyers in individual cases. Indeed, these class action lawyers actively seek out named plaintiffs willing to broaden their desire for individual relief into efforts to seek justice for all class members. The lawyers then nurture and encourage those collective justice goals throughout the course of the lawsuit. This nurturing process typically begins when the lawyers first discuss the possibility of a class action with the client, and continues through the duration of the lawsuit. The lawyers frequently remind the named plaintiffs of the larger social justice purpose behind the case to prevent the named plaintiff from losing interest. These conversations, even if less frequent than communications between lawyer and client in individual cases, both reinforce the named plaintiffs' collective justice goals and make the lawyers acutely aware of them.

B. Comparative Analysis of Satisfaction with the Case Result

The named plaintiffs' reasons for being satisfied with the result of their class action tracked their goals in filing it. However, the lawyers were not as fully aware of the range of these reasons as they were about the named plaintiffs goals.

161. Interview 30020, *supra* note 110.

1. Named Plaintiffs' Satisfaction

Most of the named plaintiffs expressed satisfaction with the result of the class action. This is not surprising, given that their lawyers selected the case that was the subject of the interview and, for the most part, selected cases featuring ostensibly successful results. However, the reasons for that satisfaction, as well as their lawyers' perceptions of the reasons for that satisfaction, are intriguing. Of particular note is the progression in attitudes and expectations from stated goals to reasons for satisfaction.

In the aggregate, the named plaintiffs' reasons for being either satisfied or dissatisfied with the result of the case mirrored their goals for pursuing the case. For example, while thirteen named plaintiffs included self-interest (such as monetary compensation or a repaired product) within their goals for pursuing the case, twelve named plaintiffs reported being satisfied with the result because of those reasons. Similarly, while seventeen named plaintiffs identified some form of collective justice as at least one goal in filing the class action, all twenty of the interviewed named plaintiffs cited collective justice reasons for being either satisfied or dissatisfied with the result.¹⁶² These collective justice reasons for satisfaction included monetary compensation for the entire class, stopping the offending practice, demonstrating that the defendants' conduct was wrong, and serving notice on other companies in the relevant industry that the offending conduct would not be tolerated. Similarly, while ten of the named plaintiffs articulated both self-interest and collective justice goals, eleven of the named plaintiffs were satisfied for a combination of these reasons. Not surprisingly then, the named plaintiffs' reasons for satisfaction or dissatisfaction were nearly as overlapping and complex as their goals. The average number of such reasons was 1.9, the median was 2, and the mode was 2. The corresponding figures for number of goals were 2.3, 2 and 2.

However, when we look inside these aggregate numbers, and compare them with the named plaintiffs' goals, interesting patterns emerge. First, while non-monetary collective justice goals (such as stopping the offending conduct) were listed by nearly twice as many named plaintiffs as monetary collective justice goals (i.e., obtaining

162. The three named plaintiffs who expressed dissatisfaction with the case stated collective justice reasons: two were disappointed that the class was not certified (even though they received a monetary settlement for their individual claims) and one wanted "a stiffer penalty" against the defendant company and its executives. Interview 30032, *supra* note 91; Interview 30042, *supra* note 90 (class action against mortgage company for misrepresentation; Interview 30043, *supra* note 84.

monetary compensation for the entire class), those proportions nearly reversed themselves when named plaintiffs articulated reasons for being satisfied with the results of the case: twelve cited monetary compensation as a reason for being satisfied or dissatisfied with the result, while eight cited non-monetary collective justice reasons. This is likely because class-wide monetary compensation was either the only, or the most noticeable, form of relief obtained in the case.

Second, tracking the shift from named plaintiffs' goals to reasons for satisfaction with the result reveals that named plaintiffs become more interested in collective justice than individual recovery as the case progresses. For example, of the eleven satisfied named plaintiffs who had expressed self-interest goals for initiating the lawsuit, only seven said that they were satisfied for self-interested reasons. The other four said they were satisfied for collective justice reasons. On the other hand, all of the fifteen satisfied named plaintiffs who had expressed collective justice goals were satisfied for collective justice reasons. Furthermore, of the ten satisfied named plaintiffs who had expressed a combination of self-interest and collective justice goals, six were satisfied for a combination of self-interest and collective justice reasons, and four were satisfied for purely collective justice reasons. None were satisfied for only self-interest reasons. Indeed, the only named plaintiff who was satisfied for purely self-interest reasons was one of the three named plaintiffs who had articulated only a self-interest goal. The other two were satisfied for a combination of self-interest and collective justice reasons.

This shift in focus from self-interest to collective justice is likely the result of a number of factors revealed through interviews, including a greater awareness of—and anger about—the defendant's conduct as information becomes available through discovery, the dispute transformation process alluded to above, and the sense of satisfaction at having helped to achieve a result that spreads relief among a large group of people.

A third notable observation in the responses regarding satisfaction is that many named plaintiffs believe that the class action produced results beyond the specific legal remedies sought in the complaint. One of these extra-legal remedies was influencing corporate conduct throughout a particular industry:

I was satisfied . . . the case was won. The point was made, and I'm quite sure that the next time around [debt collectors] will look more in depth at what they're sending out to others before they give it to them¹⁶³

They won a huge settlement. It was big enough to serve as a warning to other insurance companies not to engage in this practice.¹⁶⁴

[W]hat I found from this was . . . it made other companies...[s]tart rethinking what they were doing. When I went into [name of store] there was a big smile on my face because I was seeing the changes happening based on this lawsuit. It was a really great feeling to see the changes going on in the industry.¹⁶⁵

These statements reveal a faith in the class action as providing not only tangible relief to the members of a particular class, but justice to all consumers. Armed with the class action, these named plaintiffs exhibit a sense of empowerment at having participated in a process they believe brought about change throughout an entire industry. This is very different from the feelings of disappointment with the legal system that many individual litigants feel, even after an ostensibly successful resolution of their case. Indeed, even where one of the named plaintiffs was cynical about the ability of the legal system to permanently alter the behavior of corporations, he nevertheless felt a sense of pride in having used that flawed system to call the defendant insurance company to task:

I know that they'll do it again. This is America. You can get away with anything here. And they'll do it again Maybe a few years down the road but they'll do it again. I'm glad I brought it [the class action] about I'm just glad it happened the way it happened because an insurance company is an insurance company but when they do stuff against the American people as a conglomerate they shouldn't be able to get away with it. And it really stinks that we have to take them to court to do stuff like this.¹⁶⁶

As this statement suggests, named plaintiffs have a complex and somewhat conflicted view of the U.S. legal system in the class action context. On the one hand, they decry its inability to permanently prohibit corporations from abusing consumers. Yet, on the other hand,

163. Interview 30034, *supra* note 29.

164. Interview 1017, *supra* note 84.

165. Interview 30035, *supra* note 82 (class action against manufacturer of nutritional products for misrepresentation).

166. Interview 30039, *supra* note 76.

there is a resigned but almost patriotic sense that it is the only way to curb corporate misconduct. Some named plaintiffs thus become reluctant agents of governance, spurred into action because, in their view, someone has to hold corporations accountable.

The previous quote is also indicative of the other way in which many named plaintiffs see the class action providing relief beyond what is technically available under the law; i.e., as a means of demonstrating that the defendant was wrong. Indeed, for some named plaintiffs this sense of vindication was at least as satisfying as the material compensation for the class:

I did get almost all of what I asked for. And I guess the results were also that they sat there with, how do I say it, they had cake on their face when they got done because we were right and they were wrong. And I was very satisfied monetarily and the way it turned out.¹⁶⁷

We won. I'm very satisfied. I don't know about the dollar amount but I'm satisfied with what they found, that they were in the wrong totally.¹⁶⁸

It achieved my goal which was to get [the defendants] to recognize and justify and rectify a problem that they'd caused.¹⁶⁹

These comments suggest that many named plaintiffs believe that their class action was a struggle between right and wrong and that they were satisfied because “right” won out. It is not surprising that this sense of right versus wrong is prominent in the class action context, given the number of claimants and potential recovery involved, the high public profile of many class action defendants, and the way that plaintiffs’ attorneys inculcate in the named plaintiff the importance of looking beyond their self-interest and focusing on what is best for the entire class. The following statements underscore how many named plaintiffs see the class action as the last best hope of holding corporations accountable:

The class action suit is the consumers’ only recourse in many situations. I believe in government regulations. I do not believe that major corporations have my best interests at heart in all cases. I don’t think that corporations care about their customers except for the money that they can bring in They will treat them badly if they think they

167. Interview 30040, *supra* note 89.

168. Interview 30039, *supra* note 76.

169. Telephone Interview 30038, *supra* note 78 (class action against automobile manufacturer for defective part).

can get away with it and still make money. Part of the reason the legal system exists is to slap them when they don't.¹⁷⁰

I think the only way that citizens can even stand up to corporations is through class actions and I doubt that class actions, I mean I'm sure there are lawyers that maybe try to do class actions to make money but they wouldn't get any results if it wasn't wrong what the company or the party had done to begin with. I just think it's a good way for citizens to keep powerful organizations in check.¹⁷¹

A final noteworthy finding about the progression from goals to satisfaction was that, while four named plaintiffs said that they filed the lawsuit, in part, because they wanted to obtain information about the defendants' practices, only one stated the receipt of such information as a reason for their satisfaction with the case.¹⁷² This shift is probably due to a number of factors. First, when the named plaintiffs reflected on their reasons for being satisfied with the result in the case, they normally focus on the settlement, rather than on information about the defendant's practices which emerged during the discovery process in the midst of the lawsuit. Second, the named plaintiffs may not have been made aware of the information that emerged during the discovery process. And third, some named plaintiffs who want information about the defendant's practices are satisfied because, among other things, the case demonstrated that the defendant was wrong. This was true for one of the four named plaintiffs in this study interested in obtaining information about the defendant's practices.¹⁷³ These named plaintiffs may have felt that the information about the defendant's practices revealed that the defendant was wrong. For them, successfully achieving the goal of obtaining information was transformed into satisfaction on the grounds that the defendant was shown to be in the wrong.

2. Plaintiffs' Lawyers' Satisfaction

Given that the lawyers selected the cases on which to focus their interviews, it is not surprising that the vast majority were satisfied with the result. Most attributed their satisfaction to obtaining relief for the class in the form of monetary damages for the class, specific performance, and/or a cessation of the defendant's practice. Several also mentioned their receipt of attorneys' fees. Three pointed to making

170. Interview 1018, *supra* note 74.

171. Interview 30042, *supra* note 90.

172. Interview 30033, *supra* note 78.

173. Interview 30034, *supra* note 29.

good law through reported opinions on class certification and substantive law.¹⁷⁴ To the extent that the lawyers were dissatisfied with the result, the most common reason was that they had hoped to recover more money for the class.

3. Plaintiffs' Lawyers' Perceptions of Named Plaintiffs' Satisfaction

The interviews of lawyers included an open-ended question about whether—and why—they felt that the named plaintiff was satisfied with the result in the case. The distribution of lawyers' responses to that question suggests that most are well aware of the range of reasons for named plaintiff satisfaction.¹⁷⁵ Thus, the lawyers' speculation as to their clients' reasons for being satisfied or unsatisfied with the result of the case fell into the same two general categories that the named plaintiffs identified: self-interest and collective justice. And the latter category was divided, as it was among the named plaintiffs, into obtaining money for the entire class and other forms of collective relief such as stopping the offending practice. The lawyers were twice as likely to identify collective justice as a reason for the named plaintiffs' satisfaction as they were to identify self-interest. This accurately tracked the proportion of self-interest and collective justice reasons for satisfaction articulated by the named plaintiffs. It also contrasts with Relis' conclusion in the individual medical malpractice case context that most lawyers think that their clients are mainly interested in money.¹⁷⁶ This awareness among the class action lawyers is not surprising, given the preceding discussion about how these lawyers shape the named plaintiffs' collective justice goals. One would expect these lawyers to attribute named plaintiff satisfaction to fulfillment of the goals they helped shape.

However, while the lawyers were cognizant of the reasons for client satisfaction, they somewhat underestimated the complexity and overlapping nature of those reasons. For example, while four named plaintiffs were satisfied because the defendant had been proven wrong, none of the lawyers (including, of course, the lawyers of those particular named plaintiffs) cited that as a reason for named plaintiff satisfaction. And, while three named plaintiffs said that they were satisfied, in part, because the result had served notice on other members of the relevant

174. Interviews 1013, 1016, 30046.

175. Four of the lawyers did not cite a reason for their belief that the named plaintiff was satisfied with the result in the case.

176. See generally Relis, *It's Not About the Money!*, *supra* note 4.

industry, none of their lawyers mentioned this as a reason for their clients' satisfaction. These discrepancies suggest that many named plaintiffs, like the literature tells us is true of their counterparts in individual cases, have a broader set of expectations about the legal system than their lawyers think they do. Lawyers focus on the relief that the legal system can deliver.¹⁷⁷ In individual cases that is mostly monetary compensation, and in class actions it is class-wide monetary and injunctive relief. Most class action settlements do not, however, include any admission of wrongdoing on the part of the defendant (quite the contrary – such settlements usually explicitly state that the defendant does not admit liability) or admonitions to other members of a particular industry. These limitations do not, however, deter many named plaintiffs from believing that the class action achieved those very results.

Taken together, this study's findings about named plaintiff goals and satisfaction suggests yet another intriguing twist on dispute transformation in the class action context: while class action lawyers are very successful in shaping named plaintiffs' collective justice goals to conform to legal system realities (primarily money for the class and injunctive relief) they cannot control the way that those named plaintiffs view the result of the case. In individual cases, even where a case is nominally successful, plaintiffs' reaction to the result is sometimes negative because they did not achieve the non-monetary, justice-oriented goals they harbored throughout the litigation.¹⁷⁸ In the class action context, the effect is quite different, and leads to a more positive reaction to the litigation process: many named plaintiffs harbor collective justice goals that extend beyond legal system realities, such as affecting change throughout an industry, or a vindication of right against wrong. But unlike plaintiffs in individual cases, named plaintiffs are satisfied because they believe the class action achieved those extra-legal goals.

C. Perceptions of Process Fairness

The data gleaned from interviews in this study strongly suggest that both named plaintiffs and plaintiffs' lawyers evaluate the fairness of the consumer class action process according to the result in the case. These findings contradict much of the literature on procedural justice and process control, while supporting the distributive justice theory.

177. *Id.* at 702.

178. See Relis, *It's Not About the Money!*, *supra* note 4.

1. Named Plaintiffs' Perceptions of Fairness

Among the named plaintiffs who felt the process was fair (which constituted the overwhelming bulk of the interviewees), the most frequently cited reason was the favorable result in the case. The following responses to an open-ended question about process fairness are illustrative¹⁷⁹:

Oh yeah, I think [the process was fair]. At least we got something.¹⁸⁰

It was fair. Because I had my car fixed.¹⁸¹

I think it was as fair as it could be. [The defendant is] a limited liability corporation. I would like to have seen more . . . but . . . given that it was a limited liability organization and certain judgments could have put them [into bankruptcy], then we would have gotten nothing.¹⁸²

The other most common reason cited by named plaintiffs for the perceived fairness of the process was the competence of their attorney, though this was typically a result-oriented response. In other words, the named plaintiffs felt the process was fair because their lawyer produced a favorable result, either for the named plaintiff personally or the class as a whole:

Yes [the litigation process was fair]. My lawyer got me the things for me that I wanted to get out of the lawsuit.¹⁸³

It was fair because of the way the lawyers handled it.¹⁸⁴

Yes [the litigation process was fair]. Because the other side tried everything, but the judge saw how the public was being taken advantage of. There were a lot of appeals. But I guess our attorneys were a lot smarter.¹⁸⁵

The latter comment is instructive for two reasons besides the link between plaintiffs' attorneys and their client's perception of process

179. The interview question was as follows: "Leaving aside the actual result of the class action, do you feel that the litigation process itself was fair in your class action? Why or why not?"

180. Interview 30041, *supra* note 105.

181. Interview 30037, *supra* note 75.

182. Interview 30026 *supra* note 89 (class action against condominium developer for ordinance violations).

183. Interview 30025 (Apr. 1, 2009) (class action against automobile dealership for overcharging registration fees).

184. Interview 30033, *supra* note 78.

185. Interview 30028, *supra* note 78.

fairness. First, it illustrates the perception that fairness of process depends on the judge in the case. As we will see shortly, this view is especially prevalent among attorneys, though far less so among named plaintiffs, who rarely encounter the judge during a class action. Second, it reveals the same perception of class action as struggle between right and wrong that emerged in response to the questions about goals and satisfaction with the result in the case. In this instance, the named plaintiff perceived the process as fair, in part, because the judge understood the larger issues at stake (the defendant's exploitation of the public generally, rather than merely the other class members) and was not distracted by the defendant's diversionary tactics. According to this view, the judge is not merely an adjudicator of the dispute between the class and the defendant; rather, he or she decides more fundamental issues of collective justice in the face of corporate excess.

Even the two named plaintiffs who were dissatisfied with the result in their case (because the class was not certified) nevertheless thought the process was fair because it provided an opportunity for "the little guy" to stand up to large corporations:

Yeah, I thought the process was great and interesting. Of course, I would change how it all came out, but I thought that the process was good. I don't think anything is wrong with class actions. I think the only way that citizens can even stand up to corporations is through class actions.¹⁸⁶

[I]t seemed [that it was] as fair as it's going to be for a little schmuck I think [the court is] made for the guys that got the power and the money, [rather] than . . . the little guys [who] come in and bang their toes. I didn't feel shut out and I feel that we would have got a fair shake and we did get a fair shake as far as we went, as fair as we could expect.¹⁸⁷

These comments are intriguing for a number of reasons. Although the interview question sought the named plaintiffs' opinion as to their particular class action, both chose to discuss the U.S. legal system generally. And they both suggested (the first more obviously than the second) that the class action is the only exception to that system's bias in favor of moneyed interests over the individual. So here again, even among named plaintiffs disappointed with the result in their case, we see an appreciation—even an adulation in some cases—for the class action

186. Interview 30042, *supra* note 90.

187. Interview 30043, *supra* note 84.

as defender of the moral authority of individual interests against those of corporations.

Only two named plaintiffs referenced actual litigation procedure in response to the question about fairness of the process. One made a positive reference to “the formation of the class,”¹⁸⁸ and another complained about a change in venue adversely affecting the case.¹⁸⁹ The paucity of responses about actual procedure is not surprising, given how little contact most named plaintiffs had with the actual workings of the case. In fact, one named plaintiff cited his detachment from the case as a basis for his perception that the process was fair:

Sure [the process was fair]; I never had to go to court or anything. I guess it was settled out of court. I know I never had to go. As far as I know if they went to court it was just the lawyers and the judge, I guess. I didn’t have to do much of anything really. I just sat at home and waited for them to call me or send me something or whatever.¹⁹⁰

The named plaintiffs’ limited role in class actions presents an alternative explanation for why most named plaintiffs equate fairness of process with result: they have no other basis for evaluating fairness. Indeed, one named plaintiff never said whether she thought the process was fair. Instead, she stated that she never went to court, implying that she never saw actual court procedures and thus could not evaluate their fairness.¹⁹¹

To the extent that named plaintiffs felt the process was unfair, the most commonly stated reason was that it took too long. But any such

188. Interview 1017, *supra* note 84.

189. Interview 30040, *supra* note 89.

190. Interview 30036, *supra* note 77. The lawyers were also very aware of the limited role for named plaintiffs in most class actions, though they did not cite it as a reason for why the process was fair. The following comments are illustrative:

There are all sorts of legal issues that come out of [class actions] that really have very little to do with the main plaintiffs. So, for example is this a certifiable class? I mean some part of that involves the [named] plaintiff’s understanding but that’s like a tiny part of it. Really what most of the fight is about is whether legally the kind of claim is one that should be determined on a class basis In . . . an individual case you’re just situated in a place that’s closer to that individual. In a class action . . . you get more removed from that individual in a particular case and in fact, you’re supposed to be somewhat removed from that. I don’t see that as a deficiency. It’s just the nature of the proceeding.

Interview 1016, *supra* note 115. “The class litigation has its own timeline. It has nothing to do with the individual [named plaintiff]. For instance, the motion and memorandum in support of the class certification usually has nothing to do with the individual.” Interview 30044, *supra* note 29 (class action challenging a standard form debt collection letter).

191. Interview 30035, *supra* note 82.

negative feelings were outweighed by their satisfaction with the overall result in the case:

It took a little longer than I thought. That was the only thing I thought was unfair about it.¹⁹²

It's onerous. It's long. Overall with the result, yeah, I'm satisfied with it but it's a long drawn out process.¹⁹³

The named plaintiffs' responses to the fairness question were noticeably less overlapping and complex than their responses about goals and satisfaction. The mean number of reasons cited for fairness (or lack thereof) was 1.3 (as compared to 2.3 goals and 1.9 reasons for satisfaction) and both the median and mode for the number of those responses was 1 (as opposed to 2 for both goals and satisfaction). The more limited range of responses to the question about fairness attests to the predominance of case result as the basis for the named plaintiffs' evaluation of fairness.

On the surface then, the responses of most of the named plaintiffs were consistent with the distributive justice theory, which posits that disputants view the fairness of an adjudicative procedure in terms of the distribution of rights or resources flowing from it.¹⁹⁴ Similarly, these responses also call into question the idea posited in the procedural justice literature that participants in adjudicative processes view the fairness of that process as separate and distinct from their interest in achieving a favorable outcome. To the contrary, most of the named plaintiffs in this study view process and favorable outcome as one and the same; i.e., the process is fair *because* it leads to a favorable result.¹⁹⁵ Rather than believing that fair processes produce fair results, named plaintiff believe that successful results and fair procedures are synonymous.

The close correlation between result and perceptions of fairness revealed in this study also calls into question the applicability of the process control theory in the class action context. The central tenet of that theory holds that disputants evaluate the fairness of a given process by the extent to which it allows them to control the development and

192. Interview 30039, *supra* note 76.

193. Interview 30038, *supra* note 78.

194. See Shestowsky & Brett, *supra* note 14, at 90-91.

195. Because few named plaintiffs expressed dissatisfaction with the results of the case, it is difficult based on this study to determine the extent to which dissatisfied named plaintiffs similarly conflate fairness and result. Nevertheless, as noted above, the two named plaintiffs who expressed dissatisfaction with the result felt that the process was fair.

selection of information that will be used to resolve the dispute.¹⁹⁶ As a general matter, named plaintiffs have far less control over the information and other factors relevant to the resolution of a class action than do plaintiffs in individual cases. As we saw earlier in this article, many of the named plaintiffs, as well as many lawyers, were keenly aware of this lack of control over (and involvement in) the process. Indeed, even the manner in which some named plaintiffs characterized the positive result of the case further illustrates the detachment they felt, even though they served as class representative:

*They won a huge settlement.*¹⁹⁷

*They won. And I got more money than I'd thought.*¹⁹⁸

It is not entirely clear whether the “they” to which these named plaintiffs are referring is their lawyer or the rest of the class, but in either case the term connotes a sense of distance between the named plaintiffs and the result in the case. Thus, if many named plaintiffs feel removed from the kind of control that typically leads to satisfaction with a disputing process, why did the overwhelming number of named plaintiffs in this study nevertheless feel that the litigation process in their class action was fair? As noted above, this was no doubt due in part to the conflation of result and perceptions of fairness. Moreover, as Alan Erbsen suggests, given the choice between some control (i.e., less than they would experience as a plaintiff in an individual lawsuit) and no control whatsoever (i.e., as an absent class member), named plaintiffs are content with the former.¹⁹⁹ This contentment may be enhanced by the relatively low cost of serving as a named plaintiff, combined with the satisfaction that flows from being involved in a case that benefits a large number of persons and, perhaps, society generally.

2. Plaintiffs’ Lawyers’ Perceptions of Fairness

Most of the lawyers in this study took a similarly result-oriented view towards the notion of process fairness. A few made the connection explicitly:

Yeah, I think it was fair. We weren’t happy when the judge dismissed the case at the front end. We thought that he wasn’t making the right

196. See Thibault & Walker, *supra* note 5, at 1285-86.

197. Interview 1017, *supra* note 84 (emphasis added).

198. Interview 30038, *supra* note 78 (emphasis added).

199. See Erbsen, *supra* note 1, at 1008 n.17.

decision, which is why we appealed. Ultimately, the litigation process worked the way it should; we won on appeal. The case was resolved in a way that was favorable to our client.²⁰⁰

I thought it was fair [T]he . . . judge that was assigned to the case was very conscientious, and stayed on top of the case, and knew what it was about, and took a very active interest in the case. I suppose my view is always colored by the fact that . . . we got a decent settlement and a good result.²⁰¹

As to this case in particular, there was nothing that was unfair. To the extent that anything was actually litigated, it was handled expeditiously and turned out well.²⁰²

I thought we did well. I thought the judge was OK. We got the right rulings.²⁰³

The vast majority of lawyers answered the fairness question by referring to the judge, but it was clear that a fair judge in their eyes was one who ruled in favor of the class. As one lawyer put it, “The best facts don’t mean anything if you have a hostile judge.”²⁰⁴ Thus, the lawyers’ responses included observations that the judge liked the case, was sympathetic to the cause, was open to considering the plaintiff’s claims, wanted justice to prevail, paid attention to the case, read the papers, took the case seriously, and was knowledgeable and hard-working.

Only three lawyers discussed procedural issues in response to this question: two said that the process was fair because both sides were able to state their case or receive the discovery they desired;²⁰⁵ one complained that there was insufficient time for discovery.²⁰⁶ This lack of focus on procedure is noteworthy because, unlike the named plaintiffs who made similarly few such comments, the lawyers were engaged with the case on a regular and often intense basis. Nevertheless, nearly all of the lawyers evaluated the fairness of the process according to its outcome, rather than the procedural workings of the case.

200. Interview 30046, *supra* note 124.

201. Interview 1012, *supra* note 131.

202. Interview 1003, *supra* note 111 (class action against manufacturer of over-the-counter cold remedy).

203. Interview 30017, *supra* note 123.

204. Interview 30020, *supra* note 110.

205. Telephone Interview 30022 (Mar. 9, 2009) (class action against health insurance company for denial of claims); Interview 1009, *supra* note 138.

206. Interview 1011, *supra* note 116.

The fairness responses of the lawyers also mirrored the named plaintiffs' in that several criticized unwarranted delays, although they felt the process was nevertheless fair.²⁰⁷ Another notable way in which the lawyers' perception of fairness mirrored that of many named plaintiffs was the sense that the consumer class action is a battle between right and wrong, and that the litigation process was fair because it permitted the "right" side to prevail:

Yes [it was fair]. No one was cheated. . . . [The defendant] did what they should have done under the law. They admitted that they were in error. Their depositions all admitted the same thing. And [the case] accomplished a major, major social benefit.²⁰⁸

I think it was [fair] and I think we've made good law in the process, not only for the employees of this company but we forced a lot of the big companies to be prudent just because these cases have been settling for a lot of money.²⁰⁹

The latter comment is also noteworthy because it ties fairness into affecting the marketplace generally, not simply the conduct of the defendant in a particular class action. This view is consistent with that of several named plaintiffs who saw their case as an opportunity to change the behavior of companies throughout a particular industry. These comments also reflect a more general confidence in the class action as the only way to reign in corporate excesses. Other attorneys sounded the same theme:

I am very proud to be a class action attorney. It's a powerful tool. I know they are the only effective way to enforce the laws to protect my clients. I will make sure that it is not abused. It is a remarkably effective, efficient fair way the private bar is far more effective, when they are given the proper tools.²¹⁰

207. Interview 30017, *supra* note 123; Interview 1014, *supra* note 141; Interview 30018 (class action against health insurance company for unlawful increase in premiums) (Oct. 26, 2008); Interview 30014, *supra* note 61 (class action against insurance company for underwriting practices); Interview 1009, *supra* note 138.

208. Interview 30047, *supra* note 62 (class action against home appliance manufacturer for defective product). Interestingly, the named plaintiff in this case harbored no such altruistic visions of the case and its outcome: "I just wanted my \$100 back. I never thought about anyone else.;" Interview 30036, *supra* note 77.

209. Telephone Interview 30048 (July 30, 2009) (class action against trustees of employee benefit plan for breach of fiduciary duty).

210. Interview 30015, in Portland, Or. (Oct. 25, 2008) (class action against automobile credit company for discriminatory credit policies).

You see there are [two] types of controls for market misbehavior One is regulatory, two is supply and demand, you know that so and so is a thief if he doesn't give you what he promises so people don't go to him. But as you know, neither of them is sufficient by itself. Every one of the federal agencies that I'm aware of has said expressly in so many words and repeatedly . . . that they simply don't have enough resources to do their job completely. It is very true. So, there is a very important function in relying upon private attorneys general.²¹¹

This shared sense that a class action is a battle between forces of right and wrong is another example of the way in which, despite the lesser *quantity* of lawyer-client communication in class actions (as compared to individual cases), the *quality* of that communication may be more effective, as lawyers and clients mutually reinforce the idea that the lawsuit is about more than individual financial recovery. It also demonstrates that whereas communication between lawyers and clients in individual cases continually narrows both lawyer and client goals as time progresses, lawyer-client communication continues to emphasize broader causes.

On the other hand, at least a few attorneys are cynical about the potential of class actions—and litigation in general—to bring about any kind of meaningful social change:

The whole court system is way too slow. I think in the context of litigation I thought we did well. I thought the judge was OK. We got the right rulings. But you have to invest a lot of time and money to go after these people and in the end I'm not quite sure what you accomplish except to swat at one in an hundred thousand flies out there.²¹²

I certainly don't think much of the judicial system or the process I can't really complain because, you know, I'm making a living from it and it's interesting and I feel like we are doing stuff that's worth while but you know, it's pretty much just throwing sand against the tide.²¹³

3. Plaintiffs' Lawyers' Views of Named Plaintiffs' Perceptions of Fairness

While most of the lawyers were willing to speculate as to their client's goals and level of satisfaction with the result of the case, fewer were willing to opine about their client's view of the fairness of the class

211. Interview 30022, *supra* note 205.

212. Interview 30017, *supra* note 123.

213. Interview 1007, *supra* note 109.

action process. Many assumed that their clients thought it was fair, but offered no reason to support that assumption. Perhaps this is because it is more difficult to project an assessment of fairness onto another than it is to assume that they are satisfied with the result of a lawsuit. Nevertheless, among those willing to offer an opinion (about half of the lawyers), the majority speculated that the named plaintiffs thought it was fair because of the result in the case. Interestingly, a larger number of lawyers answered this question in a negative fashion than was the case with respect to their speculation about client satisfaction with the result. Four lawyers said that the named plaintiff felt that the case took too long.²¹⁴ One speculated that the client may have felt it was unfair because she did not receive the injunctive relief sought.²¹⁵ Two suggested that the named plaintiffs would say that at least one part of the process was unfair: their deposition.²¹⁶ As one of these lawyers, whose class action involved several named plaintiffs suing a credit card company for abusive debt collection practices, noted:

I think some of them anyway, I know, did not think that the deposition process was fair. They felt it was terrible and unfair for them to be deposed for a full day and questioned in a way that they felt was abusive . . . They thought that they were being asked questions that had nothing to do with the case. They thought that they were being asked questions that they couldn't possibly have remembered. And about things they couldn't possibly have remembered. Or questions that suggested that they weren't telling the truth. That they were at fault when they didn't feel that they were at fault.²¹⁷

In contrast, none of the named plaintiffs (including the named plaintiff represented by the lawyer who made the statement above) cited their deposition as contributing to their assessment of the fairness of the process. Although one named plaintiff did complain about her deposition, she saw that as separate from her overall evaluation of process fairness.²¹⁸

214. Interview 1005, *supra* note 143; Interview 1015, *supra* note 121; Interview 30044, *supra* note 29.

215. Interview 30023, *supra* note 115.

216. Interview 1002, *supra* note 111; Interview 30012, *supra* note 114.

217. Interview 30012, *supra* note 114.

218. Interview 1018, *supra* note 74.

VI. CONCLUSION

This study suggests that several central tenets of the dispute transformation and procedural justice literature either do not apply or should be modified in the class action context. For example, while the plaintiffs' lawyers in this study conditioned named plaintiffs on "legal system realities," the reality they projected to their clients was an expanded view of remedies, rather than the narrow, money-based vision that lawyers in individual cases typically present to their clients.²¹⁹ To the extent that the named plaintiffs were unaware of either the widespread effect of the harm they had suffered individually, or of the potential for class actions to provide large-scale non-monetary relief, the attorneys transformed their dispute, though in a very different way than lawyers in individual cases. Rather than suppressing their clients' "aims of principle," these lawyers consciously and transparently cultivated and encouraged such aims.

The lawyers' underlying motivation for this transformation is the same as in individual cases: to maximize the chances of a successful result. Named plaintiffs who lack a broad vision of what the class action can offer, or who tire of litigation delays, are more likely to be tempted by individual settlement offers that can derail an otherwise meritorious class action. Yet the effect of the transformation is very different: the named plaintiffs who undergo it exhibit a more hopeful view of the legal system than most individual plaintiffs. Thus, while Felstiner and Sarat found that many plaintiffs in materially successful individual cases are nevertheless disappointed with the legal system because their "extra-legal" goals remain unfulfilled, nearly all of the named plaintiffs in this study—including those whose cases ended unsuccessfully—expressed satisfaction with the litigation process itself.

This distinction is likely attributable to several factors. The broader relief attainable through class actions is more likely to satisfy the non-monetary goals of many named plaintiffs. Indeed, many named plaintiffs see the class action as a vehicle for attaining "extra-legal" remedies, such as changes in corporate behavior throughout a particular industry. Moreover, class actions appeal to named plaintiffs' conception of right versus wrong, allowing them to interpret a successful result as more than a monetary payout, but rather a moral victory, a triumph for "the little guy" over corporate excess. And while there were too few materially unsuccessful cases in this study to say for sure, one suspects

219. See Relis, *It's Not About the Money!*, *supra* note 4.

that even in such cases, named plaintiffs nevertheless feel a sense of pride in having taken a stand against a corporation that was, in their view, abusing many people. Further, as Garth's earlier study on class actions suggests, the role of named plaintiff itself provides a sense of importance and empowerment, transcending the material result in the case.²²⁰

In a related vein, the data collected for this study reveal no correlation between the level of named plaintiff involvement in the litigation and their sense of empowerment. While nearly all of the named plaintiffs had little engagement with, or control over, the case that bore their name, many nevertheless felt a significant level of personal satisfaction and pride with the result. Indeed, in an ironic twist, it was one of the few activist named plaintiffs, whom one would expect to be most involved in the case and thus empowered by the successful result, who stated that "*They* [i.e., not "*We*"] won a huge settlement."²²¹ In addition, one of the named plaintiffs who felt most encouraged and empowered by the result, feeling that her efforts resulted in a change in industry practices, reported that she never had to go to court, didn't have much communication with her attorney, and "the lawyers handled things."²²² Thus, at least in consumer class actions (a sub-group not covered in Garth's study) named plaintiff satisfaction and empowerment seem to have little to do with extent of involvement and control. The relief obtained, and the scope of that result, seem to be far more important contributors to these positive reactions to the experience of being a named plaintiff. In this way, many named plaintiffs in consumer class actions resemble those potential claimants who rejected payments from the 9/11 Victims Compensation Fund, to whom "litigation represents more . . . than a means to satisfying private material ends; it represents principled participation in a process that is constitutive of a community."²²³

The paramount importance of the result in the eyes of named plaintiffs also contradicts the central tenet of the process control theory, which holds that disputants evaluate a given dispute resolution procedure according to the amount of control it affords them over the development and selection of information used to resolve the dispute.²²⁴ The interviews of named plaintiffs and lawyers alike reveal that the

220. See *supra* note 2.

221. Interview 1017, *supra* note 84.

222. Interview 30035, *supra* note 82.

223. See Hadfield, *supra* note 63, at 649.

224. Shestowsky & Brett, *supra* note 14, at 68.

former have far less control over the development and selection of information used to resolve the dispute than plaintiffs in individual cases. Nevertheless, these same named plaintiffs expressed far more satisfaction with the fairness of the process than has been reported in studies of plaintiffs in individual cases.

Moreover, the findings of this study contrast with those analyzing individual cases across a variety of substantive areas that perceptions of fairness depend as much, if not more, on process characteristics than on whether disputants “won” the dispute. On the contrary, perceptions of fairness among the named plaintiffs in this study were overwhelmingly linked to the result of the case, at least when that case ended successfully. Because the number of named plaintiffs interviewed about unsuccessful cases was too small, it is impossible to speculate as to whether this pattern holds true when the plaintiffs lose.

In another departure from the findings in some of the literature on disputing behavior, the lawyers in this study were generally attuned to their clients’ complex and overlapping array of goals. They also recognized that those goals sometimes became more oriented toward collective justice as the case endured. This contrasts with, for example, Relis’ finding that plaintiffs’ lawyers in medical malpractice cases tend to view their clients’ goals as remaining consistent (and primarily centered on money) throughout the course of the lawsuit.²²⁵ Of course, this heightened awareness of named plaintiffs’ goals among class action lawyers is largely the result of the way in which the lawyers encourage and nurture those very goals.

Ultimately, this study suggests that named plaintiffs are no different from individual plaintiffs in at least one key respect: they want justice done. They want an accounting for the defendant’s behavior and see litigation as the necessary means to that end. And they are happy to allow their lawyers to seek that accounting. What distinguishes the litigation experience for most named plaintiffs, however, is that they are encouraged by their lawyers to maintain and expand these justice-seeking goals, rather than narrow them. As a result, they are likely to have a more favorable view of the litigation process, and of lawyers, than individual plaintiffs, regardless of the outcome of the case.

225. See Relis, *It’s Not About the Money!*, *supra* note 4.

APPENDIX A—QUESTIONS FOR ATTORNEYS

1. Please provide a brief overview of a class action that is now closed in which you represented a class of plaintiffs. In your answer, please include:

The name of the case;

The approximate size of the class;

The duration of the lawsuit, from filing to resolution.

2. As plaintiffs' counsel in this case, what were your goals when you filed this lawsuit?

3. On a scale of 1-10, with 1 being attorneys' fees and 10 being the desire for some kind of larger social good, where would you place your motivation for filing this lawsuit?

4. Did your goals change during the course of this lawsuit?

5. Please give a brief summary of the facts and legal claims in this lawsuit (if not already provided in response to an earlier question).

6. Please describe the nature of the relief sought in this lawsuit (if not already provided in response to an earlier question).

7. Why do you think the named plaintiff(s) filed this lawsuit?

8. Did the named plaintiff(s)' reasons for filing this lawsuit change during the course of the lawsuit? If so, why?

9. Did you ever sense that your goals in litigating this lawsuit differed from your clients' goals? And if so, what—if anything—did you do about that?

10. How frequently did you discuss this lawsuit with the named plaintiffs while the case was ongoing? In general, how would you describe the substance of those conversations?

11. What was the result of this lawsuit, and were you satisfied with that result? Why or why not?

12. Leaving aside the actual result of this lawsuit, do you feel that the litigation process itself was fair in this lawsuit? Why or why not?

13. Do you think the class representative(s) in this lawsuit were satisfied with the result of the lawsuit? Why or why not?

14. Leaving aside the actual result of this lawsuit, do you think that the named plaintiffs felt that the litigation process itself was fair in this lawsuit? Why or why not?

15. As a general matter, how do you decide whether a potential named plaintiff in a class action would be a suitable class representative?

16. As a general matter, during the course of a lawsuit, do you speak more frequently, less frequently, or the same amount with your clients in class actions or individual cases? Why do you think this is so?

17. If you could change the class action procedure in any way, what, if anything would you change?

Ask for contact information from named plaintiffs.

APPENDIX B—QUESTIONS FOR NAMED PLAINTIFFS

1. Please provide a brief overview of the class action entitled [NAME OF CLASS ACTION DISCUSSED BY THEIR ATTORNEY IN PRIOR INTERVIEW] in which you served as a named plaintiff. In your answer, please include:

The approximate size of the class;

The duration of the lawsuit, from filing to resolution.

2. What were your goals when you filed this lawsuit?

3. On a scale of 1-10, with 1 being a monetary award and 10 being the desire for some kind of larger social good, where would you place your motivation for filing this lawsuit?

4. Where would you place your lawyer on this spectrum?

5. Did your goals change during the course of this lawsuit? If so, why do you think this happened?

6. Please give a brief summary of the facts and legal claims in this lawsuit (if not already provided in response to an earlier question).

7. Please describe the nature of the relief sought in this lawsuit (if not already provided in response to an earlier question).

8. Did you ever feel that your goals in pursuing this lawsuit differed from your lawyers' goals? And if so, what—if anything—did you do about that?

9. How frequently did you discuss this lawsuit with your lawyer while this lawsuit was ongoing? In general, how would you describe the substance of those conversations?

10. What was the result of this lawsuit, and were you satisfied with that result? Why or why not?

11. Leaving aside the actual result of the lawsuit, do you feel that the litigation process itself was fair in your lawsuit? Why or why not?

12. If you could change the class action procedure in any way, what, if anything would you change?