ETHICAL CONSIDERATIONS CONCERNING THIRD PARTY FILER SERVICES IN CLASS ACTION SETTLEMENTS

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INTRODUCTION

Third party filers, sometimes also referred to as claims filing services or claims aggregators, are companies that solicit absent class members to provide services, including (i) filing settlement claims on their behalf, (ii) compiling, where necessary, documentation or information to support those claims, and (iii) communicating with the claims administrator to perfect, cure, supplement, or otherwise oversee the claims filing process through inception to distribution of funds. [1] After the provision of notice to a settlement class and the district court's order approving a settlement, a claim administrator, or special master, is usually appointed by the court to, *inter alia*, review claims and decide which claimants are entitled to participate in settlement distributions and the amount of the distribution to which they are entitled.[2] Third-party filers will solicit absent class members' business and enter into retention agreements that

[1] Compl. ¶ X, SEC v. Cammarata, et al., No. 21-cv-4845, ECF No. 1 (E.D. Pa. Nov. 11, 2021) ("As a claims aggregator, [the third-party filer] purports to assist clients engaged in securities trading, such as hedge funds, proprietary investment firms, and family offices, in collecting proceeds recovered in connection with securities class action settlements or SEC enforcement actions. . . . As part of its services, [the third-party filer] purports to identify distribution funds arising from class actions or SEC enforcement actions in which its clients may be eligible to participate, prepares and files proof of claim forms and supporting documentation with distribution fund administrators, communicates with the distribution fund administrators, and ensures that the distribution proceeds received are accurately allocated to the client's account. Claims prepared and submitted for clients often contain detail reflecting hundreds or thousands of individual trades purportedly executed during the relevant period of time, typically presented in spreadsheet format.").

[2] *Id.* (claim administrator's responsibilities include, "maintaining a website specific to the applicable [class action] settlement or SEC enforcement action, providing notice of the claims adjudication process and related deadlines, evaluating claim submissions, communicating with claimants, and mailing settlement checks . . . If the distribution fund administrator identifies any issues with a claim, they may seek additional information from the party submitting the claim, and ultimately can reject the claim, entirely or partially.")

typically compensate the third-party filers with a percentage of the absent class members recovery, akin to a contingency fee, usually amounting to a third of the recovery.[3]

Third-party filers may present various value propositions to absent class members. Third-party filers are usually staffed with former class action attorneys or employees of claims administrators. This means that they may have expertise in the claim filing process that absent class members do not have, and consequently, their expertise may assist with claims filing and accuracy in settlement processes, or at least those that are unusually complicated. They may also streamline the process of "curing" claims that the claims administrator determines are incomplete or deficient. For large businesses entitled to participate in numerous common fund class action settlements, third-party filers may essentially serve as an outsourcing function of the business's legal department. Third-party filer's solicitations to absent class members also may alert them to the existence of settlement funds of which they were either unaware or considered illegitimate, thereby increasing participation of absent class members in settlement funds.[4] And while perhaps rarer, third-party filers may successfully demonstrate a class member's right to a greater recovery than determined by a claims administrator in particularly complex litigation settings involving voluminous submissions or supporting documentation and data.[5]

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[3] *See, e.g.*, *Ridgeway v. Flagstar Corp.*, 1994 WL 564571, at *2 (N.D. Cal. Oct. 3, 1994) ("It was initially reported to Class Counsel that [the third-party filer] was charging individuals a fee for access to the toll-free number of the Claims Administrator and having individuals execute an agreement under which they agreed to pay [the third-party filer] a portion of any recovery obtained in this action. Subsequently, it was reported to Class Counsel that [the third-party filer] was charging individuals a fee for assisting them in filling out their claim forms and continuing to demand contingency agreements for 20% of the recovery obtained.")

[4] Jessica Erickson, Automating Securities Class Action Settlements, 72 Vand. L. Rev. 1817, 1828-1829 ("For smaller, retail investors, the problems are likely similar, although there is no research available on this side of the process. Retail investors may view the claim forms they receive in the mail as the legal equivalent of junk mail, and they may be skeptical that they really could receive money by going through a cumbersome claims process.").

[5] *Visa Check / Mastermoney* at X ("claim filing and fund recovery services for

However, third-party filer also present numerous practical and ethical challenges. Perhaps the most ubiquitous third-party filer practice is the imposition of contingency-fee like fee arrangements on absent class members. Notably, in such cases, the absent class member will lose two percentages of their recovery when retaining a third-party filer. First, the absent class member's recovery is calculated net of court-awarded attorneys' fees, litigation expenses, and incentive awards to the named plaintiffs. Second, the absent class member's recovery is reduced a second time by the amount of the third-party filer's contingency fee, which is typically a third of the class members' recovery.[6] Third-party filer's practices are also largely unregulated. Ethical rules are not clearly applicable to them and no federal or state law is tailored to their oversight. The lack of transparency into third-party filers has caused consternation in a number of litigation settings, with third-party filers' conduct, in some cases, amounting to outright fraud.

This text seeks to explain what it known about third-party filers, including exploring their potential benefits as well as the risks they can introduce into the settlement claims process. The

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commercial and securities class-action settlements . . . [can provide value because most] businesses have neither the technical expertise, nor the time to devote corporate personnel to obtain and sift through corporate records needed to properly support a claim for such settlements. [Third-party filers] increases participation rates by generating corporate interest in submitting claims. It does this by managing the claims filing process for the customer, which has in effect outsourced to [a third-party filer] the package of work required to submit . . . in this case, a solid challenge, if appropriate, to the estimate from the Claims Administrator. This includes compiling and analyzing transaction data for the applicable claim period, testing the data to determine the maximum claim amount, preparing the claim, filing the claim and monitoring the claim and the claims administrator through to the final payout.").

[6] *Ridgeway v. Flagstar Corp.*, 1994 WL 564571, at *2 (N.D. Cal. Oct. 3, 1994) ("The Court has established reasonable compensation for attorneys' fees in this case and the Court's decree establishes a claim fund which the Court intends to be paid to the class with no further deductions for attorney's fees. The Court has also appointed Class Counsel, who are licensed attorneys, to aid class members in filing their claims free of charge. [The third-party filer's] practice of charging class members to aid them in completing their claim forms not only taxes the class twice for attorney's fees, but is also extremely dangerous, since neither [the third-party filer's proprietors] nor any of their employees is a licensed attorney.")

text then considers various sources of potential regulatory authority for courts, claims administrators, and third-party filers that may interact with third-party filers. Following that discussion, the text explores through case studies the growing jurisprudence addressing third-party filer's practices and the regulation thereof. And finally, the text makes observations and suggestions about best practices in dealing with third-party filers.

SOURCES OF POTENTIAL ADJUDICATORY OR REGULATORY POWER

Like parties, there is no blanket prohibition on non-parties like third-party filers from communicating with absent class members.[7] However, as with parties, third-party filers' ability to communicate with class members is not without limits. District courts commonly exercise discretion to regulate third-party filers' conduct in connection with settlement funds, invoking a number of sources of adjudicatory authority in order to exercise their exclusive and continuing jurisdiction over the settlement agreement and their "ultimate control over communications among the parties, third parties, or their agents and class members on the subject matter of the litigation to ensure the integrity of the proceedings and the protection of the class."[8] These sources of authority most commonly include Federal Rule of Civil Procedure 23(d) and the All Writs Act.[9] Other potential avenues include Federal Rule of Civil Procedure 23(e) or the Rules of Professional Conduct. Finally, in some instances, third-party filers' conduct may rise to a level that it is pursued by regulators under federal law, including the federal securities fraud laws.

A. Rule 23(d)

[7] *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 2014 WL 4966072, at *31 (E.D.N.Y. Oct. 3, 2014) (citing Newberg on Class Actions (5th) Sec. 9.10 and Manual for Complex Litigation (4th) (Manual) Sec. 21.33)

[8] *Interchange*, at *31(citing Manual for Complex Litigation (4th) (Manual) Sec. 21.33).

[9] *Interchange*, at *31(citing Manual for Complex Litigation (4th) (Manual) Sec. 21.33 and 1 Litigating Tort Cases Sec. 9:16)

Rule 23(d) authorizes district courts to issue orders that: "require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of: (i) any step in the action . . . or (E) deal with similar procedural matters."[10] In *Gulf Oil Company v. Bernard*, the Supreme Court understood the potential abuses arising between parties and potential class members and in interpreting Rule 23(d) held that "a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties."[11] District courts have repeatedly ruled that Rule 23(d) gives them "broad authority" in class actions to regulate communications, including between third parties and class members.[12] The "broad authority" includes restricting "abus[ive] communications to class members" because they "pose a serious threat to the fairness of the litigation process, the adequacy of representation, and the administration of justice generally."[13] Examples include: fraudulent, deceptive, or misleading information, misrepresenting the current status of the class action, or manipulating class members to opt-out.[14] When misleading information is used by third parties, pursuant to Rule 23(d), the District Court will use curative actions (e.g., notice) to protect class members.[15]

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[10] Fed. R. Civ. P. 23(d)(1)(B)(i) and (d)(1)(E).

[11] *Gulf Oil Company v. Bernard*, 452 U.S. 89, 100 (1981).

[12] *See, e.g., Fox v. Saginaw County, Michigan*, 35 F.4th 1042, 1047 (6th Cir. 2022); *see also McWilliams v. Advanced Recovery Systems, Inc.*, 176 F. Supp. 3d 635, 640 (S.D. Miss. 2016).

[13] *Gulf Oil Company v. Bernard*, 452 U.S. 89, 100, 101-102 (1981); *Fox v. Saginaw County, Michigan*, 35 F.4th 1042, 1047 (6th Cir. 2022) (quoting *In re Sch. Asbestos Litig.*, 842 F.2d 671, 680 (3d Cir. 1988).

[14] *Fox v. Saginaw County, Michigan*, 35 F.4th 1042, 1047 (6th Cir. 2022); 3 William B. Rubenstein, Newberg on Class Actions Sections 9.3 an 9.10 (5th ed. Dec. 2021 update); *accord Gulf Oil Company v. Bernard*, 452 U.S. 89, 100 n.12 (1981); *Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 554, 561 (S.D. Fla. 2008).

[15] *Interchange*, at *31 (citing 1 Litigating Tort Cases Sec. 9:16). *See, e.g.*, *In re Lupron*

The First Amendment of the U.S. Constitution does not conflict with a district court's broad authority to limit communications if rooted in factual findings.[16] In *Kleiner v. First National Bank of Atlanta*, the Eleventh Circuit explained that, "In general, an order limiting communications regarding ongoing litigation between a class and class opponents will satisfy first amendment concerns if it is grounded in good cause and issued with a 'heightened sensitivity' for first amendment concerns."[17] Thus, before exercising its "broad authority" under Rule 23(d), "a court must weigh the need to protect class members against the restriction of a speaker's First Amendment rights."[18] And based on a clear record and specific findings that has a "carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances."[19] An order regulating speech should "sweep[] no more broadly than necessary," and considers previous restrictions.[20]

Marketing and Sales Practices Litig., 2004 WL 3049754, at *1-2 (D. Mass. 2004) ("ordering counsel for intervenors to remove website content found to be 'blatantly misleading and deliberately intended to deceive potential plaintiffs into believing that the websites are either court-sanctioned or sponsored by the MDL plaintiffs'" and to provide corrective notice); *In re McKesson HBOC, Inc. Securities Litig.*, 126 F. Supp. 2d 1239, 1246-1247 (N.D. Cal. 2000) (ordering that misleading statements made by outside attorney be remedied by curative notice to solicited class members, inclusion of court-mandated disclosures in attorney's future solicitations, and permitting rescission of solicited agreements); *Georgine v. Amchem Products*, Inc., 160 F.R.D. 478, 489 (E.D. Pa. 1995) (invalidating opt-outs and creating second opt-out period where several law firms opposed to the settlement sent misleading communications and advertisements to absent class members)

[16] *County of Santa Clara v. Astra USA, Inc.*, 2010 WL 2724512, at *5 (N.D. Cal. July 8, 2010) (holding that a party's First Amendment right to communicate with absent class members is properly "limited by considerations for protecting the putative plaintiff class"); *Impervious Paint Indus., Inc. v. Ashland Oil*, 580 F. Supp. 720, 723 (W.D. Ky. 1981) (appropriate to limit communications with absent class members, which "were made solely to protect pecuniary interests" and did not involve "advancement of political beliefs or ideas").

[17] 751 F.2d 1192, 1205 (11th Cir. 1985).

[18] *Fox v. Saginaw County, Michigan*, 35 F.4th 1042, 1045 (6th Cir. 2022).

[19] *Gulf Oil Company v. Bernard*, 452 U.S. 89, 100-101 (1981).

[20] *Pittsburgh Press Co. v. Pittsburg Comm'n on Human Relations*, 413 U.S. 376, 390

B. All Writs Act

The All Writs Act, 28 U.S.C. Sec. 1651(a) (1982), "does not itself create jurisdiction, . . . but it authorizes federal courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.'"[21] In class actions, the settlement agreement will usually provide exclusive jurisdiction to the relevant district court to issue orders when parties or third parties are engaging in wrongdoing that may hinder the settlement.[22] The Supreme Court "has repeatedly recognized" a district court's authority to issue orders under the All Writs Act "to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.'"[23] Thus, district courts "may prohibit communications with class members entirely, compel communications correcting misleading statements, and declare contracts between third parties and class members void."[24]

C. Rule 23(e)

(1973); *Retiree Support Group of Contra Costa County v. Contra Costa County*, 2016 WL 4080294, at *9 (N.D. Cal. July 29, 2016).

[21] *Stephenson v. Dow Chem. Co.*, 346 F.3d 19, 21 (2d Cir. 2003) (citing *Sygenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002).

[22] *Visa Check*, at *4 ("The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.")(citing *In re Baldwin-United Corp. (Single Premium Deferred Ammunities Ins. Litig.)*, 770 F.2d 328, 336 (2d Cir. 1985) ("the findings of the district court that the injunction was necessary to preserve its jurisdiction and protect its judgments, if sustainable, would be sufficient to justify the issuance of the injunction under the All Writs Act."); *United States v. Silva*, 140 F.3d 1098, 1104 (7th Cir. 1998) ("noting court's authority to grant injunctive relief against nonparty trade association that sent unauthorized, confusing letter to class members but instead invoking Rule 23 to order offending nonparty to send corrective notice."); *see also In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation,* 369 F.3d 292, 297 (3d Cir. 2004).

[23] *Visa Check*, at *4 (quoting *U.S. v. New York Tel. Co.*, 434 U.S. 159, 172 (1977)).

[24] *Visa Check*, at *5.

Rule 23(e) authorizes courts to approve class action settlement agreements between parties, and to consider in the calculus, *inter alia*, (a) the adequacy of the "relief provided for the class," and (b) "the effectiveness of any proposed method of distributing relief to the class, *including the method of processing class-member claims*." Since third-party filer's practices implicate the relief provided to the class, the method of proposed distribution, and the method of processing class-member claims, Rule 23(e) is another source of potential adjudicatory oversight.

D. Ethics Codes

While seldom invoked by courts in adjudicating controversies concerning third-party filers, [25] the Rules of Professional Conduct have a number of provisions that could apply to third-party filers operating in various contexts.

Rule 1.5 provides that "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."[26] Where a third-party filer is operated by lawyers, or is deemed to be engaged in the (authorized or unauthorized) practice of law, this rule has two potential implications. First, is the imposition of a second contingency fee upon the class members' recovery reasonable or excessive as a matter of course? Second, is the third-party filer providing enough of a service to the absent class member such that its imposition of a typically one-third fee against that recovery reasonable under the specific circumstances of the transaction? Consider the circumstances of a pre-populated claim form disseminated to absent class members in an antitrust case. If the third-party filer obtains for the class member the same payout they would have received under the pre-populated claim form (i.e., the same payout

[25] *Williams v. Quinn*, 2010 WL 3021576, at *3 (N.D. Ill. July 27, 2010) (Rule 4.2); *McWilliams v. Advanced Recovery System*s*,* 176 F. Supp. 3d 635 (N.D. Miss. 2016) (Rule 4.2, 7.1, and 7.4).

[26] Model Rules of Prof'l Conduct R. 1.5.

if they had not engaged with the third-party filer at all?), is the third-party filer's collection of a one-third contingency fee reasonable?

As we will see below, judicial treatment of third-party filer's conduct frequently involves allegations of misrepresentations directed at represented and unrepresented parties, bringing Rules 3.3 (candor to the tribunal),[27] Rule 4.2. (communication with represented persons),[28] Rule. 4.3 (dealing with unrepresented persons),[29] and most saliently, Rule 7.1 (communications regarding a lawyer's services) squarely into play.[30] Except in the case of pre-existing personal, business, or attorney-client relationships, solicitation issues under Rule 7.3 are also implicated.[31]

Courts have typically refrained from engaging in substantive analysis of third-party filer's practices under state ethical rules; however, at least one Court of Appeals recently remanded a case to the district court to "consider [plaintiff's] alternative argument, which [the

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[27] Model Rules of Prof'l Conduct R. 3.3 ("A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal . . . (3) offer evidence that the lawyer knows to be false.").

[28] Model Rules of Prof'l Conduct R. 4.2 ("In representing a client, a lawyer shall not communicate with a person the lawyer knows to be represented by another lawyer[.]").

[29] Model Rules of Prof'l Conduct R. 4.3 ("When the lawyer knows or reasonably should know that the *unrepresented person misunderstands the lawyer's role in the matter*, the lawyer shall make reasonable efforts to correct the misunderstanding.") (emphasis added).

[30] Model Rules of Prof'l Conduct R. 7.1 ("A lawyer shall not make or permit to be made a false, misleading, deceptive or unfair communication about the lawyer or lawyer's services. A communication violates this rule if: (a) Contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading[.]").

[31] Model Rules of Prof'l Conduct R. 7.3 ("A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain . . ."); *see also* Model Rules of Prof'l Conduct R. 7.4 ("(d) Any factual statement contained in any advertisement or written communication furnished to a prospective client under this Rule shall not: (1) Be directly or inherently false or misleading; (2) Be potentially false or misleading; (3) Fail to disclose material misinformation necessary to prevent the information supplied from being actually or potentially false or misleading; (4) Be unsubstantiated in fact; or (5) Be unfair or deceptive.").

district court] did not reach below: whether [third-party filer]'s agreements and any resulting opt-outs are invalid because [non-party] is engaged in the unauthorized practice of law" pursuant to Rule 5.5, [32] which prohibits, among other things, the practice of law by non-lawyers.[33]

Appellate Review

When district courts do exercise their judicial authority to regulate the conduct of third-party filers, interesting questions arise as to the availability and timeline for appellate review.

Recently, Courts of Appeals have opined on whether the collateral-order doctrine permit an interlocutory appeal of the Court's Rule 23 order against a third-party filer on jurisdictional grounds. In *Fox v. Saginaw County*, 35 F.4th 1042 (6th Cir. 2022), the Sixth Circuit heard an appeal from the district court granting Plaintiffs' motion to order a third-party filer to stop contacting class members to entice them to opt-out of class action litigation and permitting class members to rescind their agreements with the third-party filer.[34] The Sixth Circuit found the order effectively unreviewable if not addressed through an interlocutory appeal as the third-party filer "could suffer irreparable harm—by losing its claimed First Amendment freedom to communicate with class members—if [the appellate court] wait to review this order until final judgment."[35] Thus, the 6th Circuit ruled that they had jurisdiction over the non-party's appeal.[36]

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[32] *Fox v. Saginaw County*, 35 F.4th 1042, 1051 (6th Cir. 2022).

[33] Model Rules of Prof'l Conduct R. 5.5.

[34] *Fox v. Saginaw County, Michigan*, 35 F.4th 1042, 1045 (6th Cir. 2022). Specifically, "[i]t enjoined Ari from communicating with class members about the claims without court approval and directed Fox and the counties to submit a curative notice, which would be sent to all class members. The court ordered that the curative notice tell class members that they could rescind any agreement with ARI or the law firm that ARI retained."

[35] *Fox v. Saginaw County, Michigan*, 35 F.4th 1042, 1047 (6th Cir. 2022).

[36] *Fox v. Saginaw County, Michigan*, 35 F.4th 1042, 1047 (6th Cir. 2022).

Notably, a couple of months later, the Ninth Circuit ruled that the district court's order invalidating class members' opt-outs and corrective notice arising from a third-party law firm sending allegedly misleading statements to class members was outside appellate jurisdiction under the collateral order doctrine.[37] The Ninth Circuit distinguished its ruling from the Sixth Circuit by finding that the Sixth Circuit's order "enjoined [the third-party filer] from communicating with class members about the claims without court approval," while the order in the Ninth Circuit did not restrict the third-party law firm acting in a claims-filing capacity from communicating with class members; thus, and consequently, "no irreparable injury at stake in this case, and [third-party lawyers] can fully remedy any injury they suffered by way of the district court's orders after a final judgment is reached."[38] These decisions seen reconcilable, and since most of the cases do result in some curtailment of a third-party filer's ability to communicate with absent class members, each suggests the availability of appellate review.

Benefits and Challenges of Third-Party Filers Explored

Third-party filers can potentially provide various value propositions to both class members as well as claims administrators. First, many third-party filers are staffed, owned, or operated by former class action lawyers or claims administrator employees, whose expertise can raise the accuracy of claims filing, particularly in complex litigation settings, and streamline the claims' curative notice process, whereby claims that were initially incomplete or deficient are more readily and more fully corrected. For example, in securities fraud cases, the claim administrator will require documentation on the amount of affected shares purchased, the dates of those purchases, and the price paid by the class member during the relevant time period, data

[37] *Aguilar v. Walgreen Co.*, 47 F.4th 1115 (9th Cir. 2022).

[38] *Fox v. Saginaw County, Michigan*, 35 F.4th 1042, 1046 (6th Cir. 2022); *Aguilar v. Walgreen Co.*, 47 F.4th 1115 (9th Cir. 2022).

and documentation collection functions that a class member might outsource to a third-party filer.[39] In some instances, third-party filer's afford claimants and claims administrators a "streamlined filing process."[40] For smaller companies or individuals, they may treat claims forms in the mail as junk or be hesitant that the benefit surpasses the cost of participating (e.g., finding documentation) in the claim filing process, concerns third-party filer's may ameliorate.[41] In 2017, securities class actions saw an increase in third-party filers submitting electronic claims, which resulted in potential cost savings. [42] Thus, third-party filers can increase claim rates as well as introduce efficiencies into the claims-filing process.[43]

Unfortunately, some third-party filers' practices introduce needless challenges to the claims-filing process. Third-party filers often submit so-called "placeholder claims"—essentially

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[39] Jessica Erickson, Automating Securities Class Action Settlements, 72 Vand. L. Rev. 1817, 1820; *see also id.* ("the claims administrator cannot simply send all class members, or even claimants, the full amount of their calculated loss. The claims administrator instead needs to calculate the total value of the claims and then determine the pro rata share of the settlement fund that each class member should receive. Only after finishing these calculations can the claim administrator send claimants their share of the settlement fund.")

[40] Jessica Erickson, Automating Securities Class Action Settlements, 72 Vand. L. Rev. 1817, 1829 ("In my conversations with claims administrators, they stated that these third-party filers typically do not file traditional claim forms and supporting documentation for their clients. Instead, they send the claims administration a spreadsheet of transaction data relevant to their clients' claims, and the claims administrator conducts random audits to help ensure the accuracy of this information. The investors that use these services therefore often do not have to go through their old files to track down confirmation of their transactions unless their claims are audited, unlike class members who file claims directly.")

[41] Jessica Erickson, Automating Securities Class Action Settlements, 72 Vand. L. Rev. 1817, 1829.

[42] Alex Villanova, Current Claims Filing Trends in Securities Class Action Settlements, Epiq (May 22, 2018).

[43] Alex Villanova, Current Claims Filing Trends in Securities Class Action Settlements, Epiq (May 22, 2018) ("[T]hird-party in the position of being responsible for the claim and responsible for curing any deficiencies that may arise, as well as communicating directly with the claims administrator to correct any issues while marketing these extra services as part of package they are offering.").

blank, unpopulated claims, indicating only the identity of the class member and otherwise lacking any detail. The third-party filers then "cure" those claims during the deficiency notice process, whereby the claims administrator provides notice to class members with deficient or incomplete submissions and a brief opportunity (usually several weeks) to address any issues with their claim. Unfortunately, the wide-spread use of placeholder claims backlogs the settlement distribution process, as many calculations may have to be redone, and significant supplemental review and auding of claims and supporting materials must occur at the backend of the process that might have more efficiently been handled during the initial review processes.[44]

Third-party filers may also submit blanket claims and supporting "documentation" across numerous settlement funds but without regard to whether that documentation demonstrates class membership and an entitlement to proceeds, "thereby foisting on the claims administrator the entire burden of determining which entities in fact have valid claims and, as a corollary, saddling the class with the expenses incurred by the claims administrator in doing so."[45] Unscrupulous

[44] *See, e.g., in re Deepwater Horizon*, 641 Fed. Appx. 405 (5th Cir. 2016).

[45] *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 327 F.R.D. 483, 501 (S.D.N.Y. 2018) ("MCAG admits that it has filed numerous claims with no actual knowledge as to whether the entity on whose behalf the claim is being filed is in fact a member of the [] settlement classes. Rather, MCAG appears to have submitted claims based on its educated guesses as to which entities would have owned LIBOR-based instruments satisfying the class definition, thereby foisting on the claims administrator the entire burden of determining which entities in fact have valid claims and, as a corollary, saddling the class with the expenses incurred by the claims administrator in doing so. In addition, one would seriously question why MCAG's process has resulted in the submission of claims for some entities in only one of the two settlements, as the two settlement classes are identical except for minor differences in opt-outs. MCAG's responses have been insufficient on multiple levels[.]"); *Hillson v. Kelly Services, Inc.*, 2017 WL 3446596, *6 (E.D. Mich. 2017) ("the costs of paying the claim administrator, processing the claims, providing notice to the class, and *generally administering the settlement is typically deducted from the settlement fund*."); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D. Ga. 1993) (holding that the settlement agreement "does not contemplate that the fund would also bear the costs individual class members incur in documenting their proofs of claim.").

third-party filers may take this approach because claim administrators may not review or audit all submissions and instead will review a subset for approval or denial, meaning ineligible claims may receive settlement distributions.[46] Other times, third-party files submit claims without the authorization to do so, either to impose upon absent class members their contingency fee "cuts" of the settlements, [47] or sometimes to pocket the proceeds themselves.[48] This issue is exacerbated when the third-party filer requests that its claimed compensation be paid directly to the third-party filer and not to the class member directly.[49]

Lastly, and perhaps most commonly featured in judicial cases concerning third-party filers, they may solicit class members with false or misleading advertisements or claims to scare or confuse class members into hiring them.[50] This issue has been significantly exacerbated by the

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[46] *SEC v. Cammarata, et al.*, Case No. 2:21-cv-04845 (E.D. Pa.), Par. 80 ("Administrator 1 replied that they do not need documentation for every trade and that a few will suffice.")

[47] *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 327 F.R.D. 483, 499-500 (S.D.N.Y. 2018) ("MCAG asserts it has authority, under various arrangements with class members, to file claims and involve itself in settlements on those class members' behalf. We are dubious that MCAG in fact has such authority, and MCAG's actions taken to take does nothing to assuage our suspicions. . . . MCAG does not dispute that it has been less than fully compliant with our April 11, 2018 order directing that MCAG provide proof of authority contemporaneously with any subsequent claims . . . . Given the apparent difficulty that MCAG has had in establishing its authority to file claims thus far, and its continued reluctance to be forthcoming with such proof in the face of an order of this Court so directing, we would be hard pressed to conclude that MCAG in fact possesses the authority it asserts."); *see also In re LIBOR-Based Financial Instruments Antitrust Litigation*, MDL No. 11-2262, ECF No. 2849 (S.D.N.Y.) (ordering supplemental notices to be sent to all of MCAG's purported clients asking them to confirm or deny MCAG's authority to act on their behalf).

[48] *SEC v. Cammarata, et al.*, Case No. 2:21-cv-04845 (E.D. Pa.), Par. 80 ("Administrator 1 replied that they do not need documentation for every trade and that a few will suffice.")

[49] *Rigdeway v. Flagstar Corp.*, 1994 WL 525553, at *1 (N.D. Cal. Sept. 22, 1994) ("[Lawyer] requested [to class counsel] that should any of these individuals file a claim that is determined to be valid, that the settlement check be issued jointly in the names of the Law Offices of Melvin Belli and the claimant.")

[50] *In re Visa Check/MasterMoney Antitrust Litig.*, 2006 WL 1025588 (E.D.N.Y. Marc. 31, 2006) ("incorrect or misleading" statements included, *inter alia*, "(3) the claim administrator would become 'adversarial' with respect to the merchants . . . (4) . . . the estimated cash payment

advent of the internet, which has made is significantly less expensive for third-party filers to undertake far-reaching campaigns for the solicitation and provision of their services.[51]

Case Studies on Judicial Treatment of Third-Party Filers

Ridgeway v. Flagstar Corporation

Among the earliest, if not the earliest, reported cases involving third party claims filing services is *Ridgeway v. Flagstar Corporation*.[52] *Ridgeway* involved a class action settlement that resolved federal and state claims challenging racially discriminatory policies and practices at Denny's-branded restaurants in California. After preliminary approval of the settlement but before final approval and dissemination of the settlement proceeds to class members, class counsel alerted the district court to several alarming practices by a law firm unaffiliated with the class action or class counsel that was purporting to represent numerous class members.

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sent to class members was an 'offer' or 'partial offer.'"); *Interchange*, at *33 ("the ability to enjoin claims filing companies that have made material false or misleading statements to merchants from further action in relation to this case is a necessary tool in the effort to protect the merchants from overreaching. I find that Premier has made such statements and thus I permanently enjoin it and its principals and agents from engaging in any manner or through any entity in claims filing services related to the settlement in this case."); *see also Interchange*, at *9 ("Class Counsel, Class Administrator . . . and the Texas Attorney General's Office received numerous inquiries and complaints from class members that received communications as part of [a third-party filer's] opt-out campaign.").

[51] 1 Litigating Tort Cases Sec. 9:16 ("[T]he era of the Internet has enabled increasingly cheap and far ranging . . . campaigns to be launched, challenging the ability and will of the courts to protect the integrity of the class certification and settlement notification process by ensuring that only court authorized, complete and accurate communications reach class members.... Internet websites can be changed rapidly, enabling determined . . . campaigners to *stay one step ahead of the court and its restraining orders.* Much more damage can now be done far more quickly and far less expensively, than in the days when the only mode of . . . campaign was a limited and expensive mail campaign . . . or prohibitively expensive print media publication campaigns.").

[52] *Ridgeway v. Flagstar Corporation*, No. 93-cv-20202, 1994 WL 525553 (N.D. Cal. Sept. 22, 1994).

The complaints against the law firm acting as third-party filer can be grouped into two overarching buckets. *First*, the law firm was reportedly "charging fees to individuals for services related to the preparation and/or filing of claims." Relatedly, the law firm requested that checks to the class members it "represented" should be made payable jointly to the class member and the law firm, ultimately producing retainer agreements with 43 class members seeking to receive benefits from the settlement fund, though oddly enough, those 43 retainers included 5 claimants that had opted out of the class action settlement. *Second*, there were allegations of in person solicitations of class members at a shopping mall as well as confirmed written materials provided to interested class members that contained "several misrepresentations and could lead a class member believe that he or she needs the assistance of the [law] firm to file a claim."

Judge Ware of the Northern District of California presided over the dispute and adjudicated the controversy under the inherent "authority to issue orders to effectuate compliance" with the orders concerning the class action settlements, including "the issuance of injunctions against nonparties whose conduct interferes with or impedes implementation of those orders, citing Federal Rule of Civil Procedure 23(d). Judge Ware also invoked its authority under the "All Writs Act," which included the power to "protect its final decrees, especially when [a] non-party's actions threaten the adjudicated public rights of a party to [a] litigation." While Judge Ware did adjudicate controversies concerning the excessiveness of the law firm's fees, Judge Ware did not rely on Model Rule of Professional Conduct 1.5 or its California counterpart, which proscribe attorneys from charging excessive or unreasonable fees.

Regarding the law firm's fees to absent class members, Judge Ware concluded that the law firm's conduct amounted to "avaricious freeloading on the work of class counsel," whereby the law firm, "[u]nder the guise of a contingent fee," attempted to induce class members "to pay

money for assistance in filing a claim, a service for which Class Counsel have already been compensated and will perform without charge."[53] Judge Ware questioned whether there "is a true 'contingency' or risk worth of the high price being charged to the class" given the context of an already secured, multimillion dollar class action settlement to benefit these class members. Judge Ware had "already established reasonable compensation for attorneys' fees" in the action, such that the law firm's conduct had "the effect of taxing the class twice for attorney's fees." On its face, Judge Ware's opinion would categorically prohibit a third-party filer, at least one operated by attorneys, from charging for services that were freely available from class counsel.

Regarding the misleading written materials, Judge Ware's opinion canvased the myriad improper communications between the law firm and class members.[54] *First*, the law firm had inaccurately communicated that "'Denny's case class counsel' have no intention of paying each and every claim submitted to them." Judge Ware found two concerns with that statement; it "mislead claimants into believing that legitimate claims will not be honored" and moreover, it insinuated that "Class Counsel is allied with 'Denny's' and is not representing the interests of the class. Collectively, these statements created "unwarranted fear among the claimants that unless they retain private counsel their claims will not be properly considered." *Second*, the law firm inaccurately relayed that neither the settlement administrator nor class counsel "will file claims for you," which Judge Ware found had "the propensity to mislead claimants into believing that Class Counsel will not assist the class in filing claims and that the claims process is so complex

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[53] Judge Ware never addressed the law firm's attempt to file claims on behalf of claimants that opted out of the settlement, likely because the issue was unnecessary to the court's ultimate disposition, which barred the law firm from charging contingent fees to class members at all.

[54] Judge Ware never addressed the alleged in person solicitations, perhaps because the issue was disputed and its resolution unnecessary to the court's ultimate disposition, which barred the law firm from continuing to solicit class members much more broadly.

that the assistance of an individual lawyer is needed to file a claim." *Third*, the law firm instructed class members to use "our" claim form, which Judge Ware found was "likely to mislead the class to believe that the [law] firm ha[d] some official position in administration of claims. And finally, the law firm instructed class members to follow a claims process that differed from the court-ordered one, which Judge Ware found would "result in delay, confusion and potentially result in claims being filed too late."

Judge Ware found that the law firm's conduct "threaten[ed] the integrity and orderly implementation of the claims procedures approved by this Court thereby infringing upon the rights of all class members, potential or otherwise, in this matter." Judge Ware ordered that the law firm's fees be waived with respect to class members that had already signed contingent fee agreements with the law firm, while ordering that the law firm identify for class counsel all class members that had received, but not yet executed, such a contingent fee agreement so they could be contacted and advised of the court's rulings. Judge Ware also enjoined the law firm from continuing to disseminate misleading materials to class members and from soliciting potential claimants to enter into contingency fee agreements. Judge Ware's order permitted the law firm to continue to represent individuals that opted out of, or were otherwise not members of, the class.

Unfortunately, this was not the end of the *Ridgeway* story, which involved two additional proceedings involving two separate third-party filers, one composed of lawyers, one nonlawyers.

A month after the initial proceedings, another third-party purporting to offer claims filing services was brought to Judge Ware's attention by class counsel.[55] This time, the third-party filer was neither an attorney or a law firm. Some of the less-nefarious conduct of this third-party

[55] *Ridgeway v. Flagstar Corporation*, No. 93-cv-20202, 1994 WL 564571 (N.D. Cal. Oct. 3, 1994).

filer's included entering into contingency fee agreements with class members and charging class members "between $10-25 for access to the" claim's administrator's free-of-charge 800 number. But more egregious conduct was unearthed in a series of investigative efforts by class counsel and regulatory authorities. Initially, class counsel sent a paralegal to visit the third-party filer's offices undercover, posing as a potential class member. During two separate visitations, the paralegal was encouraged by the third-party filer's employees to provide false information concerning the date and location of the discriminatory conduct in question and to "embellish details of her discriminatory incident," which ultimately spawned an investigation by the Federal Bureau of Investigation and the Department of Justice. Similar allegations were confirmed by private investigators as well as an investigator from the District Attorney's office.

Judge Ware admonished the conduct of the filer's proprietor, "a thrice-convicted felon who is not an attorney," for "assisting the filing of fraudulent claims," jeopardizing the "integrity and fairness" of the class proceedings and "dilut[ing] the value of the claims of persons who were victims of discriminatory conduct." Judge Ware again invokes the All Writs Act and Federal Rule of Civil Procedure 23(d) as authority for the ability to order the third-party filer to cease and desist from "any activities" related to the class action and ordered disclosure to class counsel of all individuals that had signed contingency agreements with the third-party filer so that class counsel could take remedial measures. While Judge Ware found that the third-party filer's conduct to be "extremely dangerous" since neither the proprietors "nor any of their employees is a licensed attorney," Judge Ware never invoked Model Rule of Professional Conduct 5.5 or its California counterpart, prohibiting the unauthorized practice of law.

One might naturally construe this holding, invalidating contingency fee agreements between class members and a non-lawyer third-party filer, as a categorical prohibition. After all,

why would a jurist prohibit conduct by a lawyer, bound by fiduciary and ethical obligations, but tolerate the very same conduct by an unregulated non-lawyer? Despite this seemingly natural extension of Judge Ware's prior holding concerning the conduct of law firm third-party filers, it is not completely clear whether Judge Ware would have invalidated any fee agreement between a non-lawyer third-party filer and an absent class member, or if Judge Ware merely invalidated the fee agreements at issue as a consequence of the filer's other misconduct and outright fraud.

A third set of proceedings followed a month later.[56] There, two lawyers entered into retainer agreements entitling the lawyers to as much as 40% of the class members' recoveries from the class action settlement. Both lawyers refused to produce documents to class counsel in response to validly served subpoenas. Both lawyers invoked their fifth amendment rights at their depositions, refusing to answer questions from class counsel about their conduct in connection with the class action settlement. Ultimately, that proceeding was resolved by agreement of the third-party filer attorneys to provide class counsel with the contact information for all class members that had executed contingency fee agreements with the third-party filers and to disavow those agreements and any attorney client relationship with any class members. Like its prior judicial opinions on the subject, Judge Ware relied upon his authority under the All Writs Act and Federal Rule of Civil Procedure 23(d), rather than any attorney ethical rules.

In re Visa Check/Mastermoney Antitrust Litigation

In re Visa Check/Mastermoney Antitrust Litigation involved a $3 billion settlement of claims that Visa and Mastercard had illegally tied the sales of debit products to credit cards, in

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[56] *Ridgeway v. Flagstar Corporation*, No. 93-cv-20202, 1994 WL 665250 (N.D. Cal. Nov. 22, 1994).

violation of the federal antitrust laws.[57] There were an estimated 5 million merchants in the settlement class. After final approval of the class action settlement and after the close of the claim's filing deadline, but before distribution of settlement proceeds to class members—a process that would occur in periodic installments, because the defendants would fund the settlement annually "over a ten-year period"—class counsel alerted the district court to "false and misleading statements to [] class members" made by the self-described "nation's largest claim filing and fund recovery service for commercial and securities class action settlements."

The complaints against the third-party filer could be grouped into stages. *First*, there were a series of initial misleading communications between the filer and absent class members, which included (1) representations that the structured transactional database relied upon by the claims administrator was inaccurate, (2) representations that class members could expect to receive "significant" recoveries between $100,000 and $6,000,000 if their claim was properly handled, (3) that the claims administrator "would become 'adversarial' with respect to the merchants [class members] and [was] obligated to rely only on the questionable" data provided by Visa and Mastercard, and (4) that the estimated cash payment included on the claim forms class members received from the settlement administrator was an "offer" or "partial offer."

Second, in a subsequent round of misleading communication, the filer communicated to absent class members a host of misinformation about the potential outcomes of the United States Government's submission of a substantially sized claim to the settlement fund. These statements included unsupported assertions that the Government's claim was invalid, would delay distribution of the settlement proceeds, and would dilute class members' claims. These claims

[57] *In re Visa Check/Mastermoney Antitrust Litigation*, No. 96-cv-5238, 2006 WL 1025588 (E.D.N.Y. Mar. 31, 2006).

were made in connection with the third-party filer's attempts to solicit class members to sell their claims to the third-party filer for less than their present value.

Judge Gleeson of the Eastern District of New York presided over the dispute and resolved it under the authority conferred by the All Writs Act, finding that the "district court retains exclusive jurisdiction over settlement agreements and distribution of settlement funds pursuant to those agreements," and so it "may issue orders necessary to protect the settlement from threats by both parties and non-parties." Judge Gleeson made this finding over the third-party filer's objection that its contracts and the related disputes "do not affect [Judge Gleeson's] ability to administer and distribute the settlement funds." Judge Gleeson disagreed. Judge Gleeson found the All Writs Act authorized a district court to "prohibit communications with class members entirely, compel communications correcting misleading statements, and declare contracts between third parties and class members void." Judge Gleeson observed that not only did he have the authority to undertake these efforts, but further that where a jurist knows that class members are being mislead, failing to act would be an "abdication of responsibility." Judge Gleeson relied on the All Writs Act, to the exclusion of all other sources of potential authority, including Federal Rule of Civil Procedure 23(d).

When confronted with the initial round of misleading statements, Judge Gleeson limited his relief to corrective notice disseminated to all absent class members that the third-party filer had communicated with. Likely to class counsel's disappointment, Judge Gleeson ordered that those expenses were chargeable to the settlement fund, rather than to the third-party filer itself.

Judge Gleeson took a different tact with the second round of misleading settlements. While Judge Gleeson found that it is "fine for firms . . . to solicit merchants to use their claim processing or claim purchasing services"—a seeming departure from Judge Ware, which found

such services impermissibly taxed class members twice by requiring them to pay for services that class counsel had already been compensated to perform—"the class members must not be misled." Judge Gleeson went on that a "merchant reading the e-mail for its common sense meaning could conclude (erroneously) that the initial payment will be delayed and decide, on that erroneous basis, to contract with [the third-party filer] either to administer the merchant's claim or to purchase it." Judge Gleeson concluded that the third-party filer "must noe be held accountable for its carelessness," and ordered different relief than in the prior proceedings.

First, Judge Gleeson ordered corrective notice to class members already affected. *Second*, Judge Gleeson ordered the third-party filer to provide that corrective notice to any class member considering a contractual relationship with the filer, to allow a rescission option for any new contractual relationships for a period of fourteen days, and to confer with class counsel to agree upon the contents of any future disseminations of marketing materials to class members. Third, Judge Gleeson ordered that "equity requires that class members be authorized to rescind their contracts," provided "they state under oath that they entered into their contract [] in reliance on [the] false or misleading statements." *Finally*, Judge Gleeson entertained, but deferred to the Special Master, an application for class counsel's fees and costs incurred in connection with the second round of misleading statements and authorized a renewed application predicated on class counsel's fees and costs flowing from the initial round of misleading statements.[58]

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation

[58] The resolution of the fee application is not apparent on the face of the docket, and a contemporaneously filed (and then promptly dismissed) appeal filed by the third-party filer suggests that the appeal may have been withdrawn in exchange for class counsel forgoing its application for attorneys' fees and expenses in connection with the third-party filer's conduct.

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation was another federal antitrust class action against Visa and Mastercard, this time resulting in a $7.5 billion settlement (later reduced to $5.7 billion based on a settlement amount reduction triggered when a threshold number of class members opted out of the settlement class).[59] There were an estimated 12 million merchants in this settlement class. Class counsel alerted the district court to a number of misleading practices by numerous third-party filers, which Judge Gleeson of the Eastern District of New York again presided over. Judge Gleeson described the complaints as an evolution of the "phenomenon that occurred in [the] earlier related class action," which "replicated itself in this one" as a "many-headed hydra . . . involving far-ranging claims . . . and a long list of actors," thus necessitating the protection of "the small and relatively unsophisticated merchants . . . from overreaching by third-party claims filing companies." The following discussion includes: (a) an overview of the Court's adjudicatory authority, (b) the myriad complaints lodged against the third-party filers, on a filer-by-filer basis, and including Judge Gleeson's filer-specific findings, and (c) a summary of prospective remedial measures imposed by Judge Gleeson, some on a case-wide, generally applicable basis.

Adjudicatory Authority

Consistent with his findings of law in *Visa Check/Mastermoney*, Judge Gleeson exercised his procedural authority under Federal Rule of Civil Procedure 23(d) and his equitable authority under the All Writs Act. Judge Gleeson observed that Rule 23(d)'s authorizes (1) "appropriate notice" of "any step in the action" in order to "protect class members and fairly conduct the action," (2) "impose conditions on the representative parties or other intervenors"; and (3) "deal

[59] *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 05-md-1720, 2014 WL 4966072 (E.D.N.Y. Oct. 3, 2014).

with similar procedural matters." Rule 23(d) is also designed to allow the court to exercise its "responsibility to protect the class and preserve the integrity of the process." Judge Gleeson also observed his equitable powers under the All Writs Act, which permits "injunction[s], where necessary to protect the court's earlier orders," a "power [that] extends to non-parties." As Judge Gleeson recognized, "The Supreme Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued[.]"

Third Party Filer A

Third-party filer A, the first filer highlighted in Judge Gleeson's opinion, was implicated in a "barrage of direct mail communications" to class members informing them that unless they "opted out" by a deadline imposed unilaterally by the third-party filer, third-party filer A would file claims to the settlement fund on their behalf. Third-party filer A did so despite lacking any authorization from the class members to file such claims or impose such a deadline. Failure to "opt out" by third-party filer A's deadline, according to the filer, meant that the class member was then obligated to pay the filer a fee in the amount of 20% of the class member's recovery from the settlement fund as well as additional upfront "settlement administration fee[s]." In total, third-party filer A estimated that 500,000 class members received such communications, which led to numerous complaints to class counsel, the claims administrators, and attorney's general.

Class member complaints included that the communications "lacked information about the settlement and claims filing process"; that class members "did not want to be automatically bound to a service they had not themselves chosen"; that the opt-out and other deadline information were confusing; that it was unclear whether the communications "were legitimate and whether the opt-out policy was legal"; and that they wished to opt-out, but doing so through

third-party filer A's unilaterally-imposed and onerous process required the class members to disclose commercially sensitive material, including their tax identification numbers and merchant identification numbers for their credit card processing companies.

Judge Gleeson rejected third-party filer A's argument that the "auto-enrollment" was authorized by pre-existing contracts between class members and "the credit card processors"—not between class members and third-party filer A. Equally unavailing was third-party filer's shocking averment that this "is the way business is done in this industry and how we have conducted business with our customers for a long period of time." Judge Gleeson concluded that any "pre-existing contractual relationships" were "different in kind and did not come remotely close to an authorization to make claims in the class action settlement." Judge Gleeson enjoined third-party filer A's opt-out campaign and ordered the dissemination of corrective notice, although notably, Judge Gleeson did not outright bar third-party filer A from submitting claims on behalf of class members. Third-party filer A was also subjected, like all third-party filers, to the prospective case-wide relief imposed by Judge Gleeson, discussed in the following section.

Third-Party Filer B, C, and D

Judge Gleeson dealt with a series of similarly misleading communications from other third-party filers. Third-party filer B had represented to class members that "failure to enter into a contract at th[is] time would result in the loss of data critical to the claims process," which class members complained they "relied on in signing up with [third-party filer A] only to later discover that 'there was no urgent need for historical data.'" When class members sought to void their contracts with third-party filer B, the filer contested the class members' right to do so.

Third-party filer C advertised that class members could "begin the refund process now" and that they "need only 'download and fill out two forms to receive their refund" by signing up

with third-party filer C, despite the fact that the claims process had not yet begun and claim forms were not yet available. Third-party filer C's website also failed to inform class members that the settlement (at the time of the complaint) had not yet received final approval. Third-party filer C voluntarily took down their website in response to complaints from class counsel.

Third-party filer D was accused of sending direct mail solicitations that "mimicked the format of an official, Court-approved document," and instructed class members that their was "Action Required" to participate in the claims process, ostensibly, signing up with third-party filer D. The solicitation further cautioned that class members "may be at risk" without enrolling in third-party filer D's "Rate Lock Protection" plan and cautioned that claims filing was a "time-consuming and complicated one involving many steps to secure full recovery."

Judge Gleeson "reject[ed] categorically the assertions by some [third-party filers] that no reasonable merchant could have been deceived by their statements," finding all of the charged statements misleading, incomplete, or both. In particular, Judge Gleeson observed that, contrary to many third-party filer representations:

> the claims filing process will involve signing and returning a claims form pre-filled with all their relevant data, including the actual or estimated amount of their claim. It is a simple, onestep process—one that leaves merchants with their full predetermined recovery and saves them from needlessly handing over a significant portion of their claim to a third-party claims filing company.

Moreover, when pressed about claims that third-party filers would maximize class members recoveries, the record reflects only a single third-party filer's identification of any such instances, limited to two class members (out of millions) in the *Visa Check/Mastermoney* matter.

Judge Gleeson declined to permanently enjoin third-party filers B, C, and D from submitting claims on behalf of class members in the action. Judge Gleeson did, however, order those filers—indeed, Judge Gleeson ordered ***all*** third-party filers participating in the action, regardless of whether they had been subject to any specific complaints or participants at any

evidentiary hearing concerning the same—to comply with significant measures as a prerequisite to their continued ability to submit claims to settlement proceeds on behalf of class members.

First, Judge Gleeson ordered that all third-party filers that had signed up class members as of the date of the court's order would send a corrective notice, "to be approved of by Class Counsel and delivered at the companies' own expense," informing those class members that they could void their claims-filing contracts if they had been mislead by solicitations.

Second, all third-party filers were required to include the following language in any solicitations with class members: (A) a statement that claim forms were not yet available; (B) a statement that class members need not sign up for a third-party service in order to participate in any monetary relief and explaining that no-cost assistance will be available from the claims administrator and class counsel; and (C) information directing class members to the court-approved settlement website for additional information. This requirement applied, in Judge Gleeson's words, to "every single solicitation, every website, every email solicitation, every telephone communication, every solicitation imaginable." This requirement was then extended beyond solicitations and imposed "on any contracts drafted by third-party claims filing services to be signed by class members." Class counsel would be involved in crafting these statements, though the third-party filers were permitted to include language that "there might be some cases where a third-party service might serve [class members'] interest."

Third, Judge Gleeson instructed the parties that he would personally send a communication from the court (via the claims administrator) to any class member identified by the claims administrator as being represented by a third-party filer. That correspondence would instruct the class members to inform the court if they believed that they were induced to contract with a third-party filer based on false or misleading statements or representations.

Non-compliance with these provisions would result in a permanent injunction barring a third-party filer from submitting claims to the settlement on behalf of class members.[60] Through these mechanisms, which covered all third-party filers, whether implicated in alleged bad acts or not, Judge Gleeson sought to "proactively protect class members from overreaching claims filing companies by preventing confusion and deception before they can happen."

Third-Party Filer E and F

Third-party filers E and F were distinct entities that operated jointly through a referral as well as an agency relationship in connection with the *Interchange* settlement. Third-party filer E disseminated misleading communications "falsely representing to class members that signing up with [third-party filer E] was a prerequisite to recovery and that class members must sign up with [third-party filer E] right away to receive their refund." Numerous class members complained to the claims administrator, confused by the communications, which included "official-sounding voicemails from men identified as only 'Ryan' or 'Mark' . . . who told class members that they would not receive their share of the settlement unless they signed up with [third-party filer E] and further that time was running out for them to take part in the settlement," despite the fact that at that juncture the claims filing process had not even begun.[61] The voicemails did not disclose

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[60] Judge Gleeson also described in his opinion complaints about two additional third-party filers. One such filer advertised that the court-approved claims process involved "a complex 27-page document" and was likely to result in merchants receiving "50% less than what [] may be due." Those descriptors were dubious, given that at that time the claim form was not publicly available to the third-party filer or anyone else, and the claims process had not even begun. The other third-party filer claimed that "early registration" with the third-party filer was now available such early registration was "a Required Action Step," the untruthfulness of which was bolstered by the fact that, again, the claims process had not yet even opened. These filers were not the subject of evidentiary hearings and Judge Gleeson made no specific findings of fact as to them, but notably, they were bound by the same case-wide prospective relief outlined above.

[61] "This is [Ryan/Mark] over at the Merchant Claim Center calling about

third-party filer E's 35% fee, which was only first disclosed once class members responded to the voicemail and obtained third-party filer E's paperwork. Buried in "dense boilerplate language" at the end of the paperwork was disclosure language informing class members that [third-party filer E] was not affiliated with the Class Administrator and that class members did not need to sign up with [third-party filer E] to file a claim." Most of these efforts were undertaken by third-party filer F on third-party filer E's behalf, operating under a referral and agency relationship. It was disclosed that over one million class members received the misleading solicitations. Importantly, as we'll discuss later, third-party filer E directed that all such activities by third-party filer F cease shortly after class counsel's initial complaint.

Judge Gleeson found the voicemail and related communications misleading because, *inter alia*, the "Merchant Claim Center" DBA used by third-party filer E made misleading made it sound like the official claims administrator, while the substance of the communication suggested that third-party filer E "was distributing claims forms, which in fact were (and remain[ed]) not yet available." The voicemail script suggested to class members that they were required to contract with third-party filer E when they were not. Judge Gleeson also observed that additional misleading communications permeated third-party filer E's Frequently Asked Questions, which "suggested to the merchants that the claims filing process is a complicated one that requires the hand of an expert," and that "full recovery under the settlement . . . would require [third-party filer E's] assistance. As noted above, the claims process was simple, straight

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the legal notice sent to you about the money you could receive from the Visa/Mastercard class-action settlement—which ended up totaling 7.25 billion dollars. *And to date we have not received the simple form required to start your claim through our office. This is important because your settlement payment is not automatic, so you must take action to receive your part of the settlement. Now—there is no cost to file your claim, but if you don't file before the deadline—then you could lose your portion of the settlement.*" (emphasis in original).

forward, and in almost no instances required the assistance of a third-party claims filing service. The FAQ's were also ambiguous on third-party filer E's fees, in one instance referencing no "out-of-pocket costs to file a claim," then later disclosing the filer's 35% fee.

While recognizing that "the lines drawn" between third-party filer E and F "blurred very quickly," Judge Gleeson nonetheless treated them separately. Judge Gleeson found the conduct sufficiently egregious to issue a permanent injunction to third-party filer F (his first and only), barring them outright from submitting claims on behalf of any class member in the settlement. Third-party filer E's defense, in sum and substance, was that it had been unaware of the conduct of its agent, third-party filer F's conduct. Judge Gleeson was not so convinced, as discovery revealed that third-party filer E was "aware" of this conduct, including "numerous complaints made by class members."[62] Judge Gleeson found that third-party filer F's conduct on third-party filer E's behalf "was egregious," causing many class members "to needlessly cede 35% of their damages claims," and that egregious conduct "is fully chargeable to" third-party filer E. But two factors militated against issuance of a permanent injunction as to third-party filer E. First, there were evidentiary issues surrounding the admissibility of certain transcripts during the evidentiary hearing, of which third-party filer E had "the better of the admissibility arguments." Second, rather than defending its practices, third-party E promptly and voluntarily took "meaningful corrective action," including disseminating corrective notice and suspending the practices. Judge

[62] By early November, [third-party filer E] was clearly aware that [third-party filer F] was distributing the Frequently Asked Questions form, making solicitations through multiple channels—telephone representatives, automated telephone systems, voicemail blasts and email messages—and furthermore that varied but consistent complaints had been made regarding the solicitations. [Third-party filer E] was also aware of the immense volume of solicitations being made by [third-party filer F]."

Gleeson opted to "exercise the equitable powers of the Court in a manner that encourages the sort of swift remedial actions [third-party filer E] took in this case."

In re LIBOR-Based Financial Instruments Antitrust Litigation

In re LIBOR-Based Financial Instruments Antitrust Litigation involved $250 in class action settlements resolving antitrust claims with two of seventeen defendants—each of which was among the largest financial institutions in the world—that they conspired to manipulate the London Interbank Offered Rate, a key financial benchmark.[63] A third-party filer objected to the settlement on several grounds. Class counsel conducted discovery into the third-party filer's objection and conduct in connection with its claims filing services, making troubling findings.

Judge Buchwald of the Southern District of New York presided over the dispute. Perhaps because the dispute arose in the context of settlement approval under Federal Rule of Civil Procedure 23(e), Judge Buchwald never relied on any source of authority, and no party questioned Judge Buchwald's authority to entertain the dispute or order remedial measures.

First, and perhaps least troubling among the third-party filer's assorted conduct, were the deficiencies in the third-party filer's standing to object. The third-party filer admitted that it had not "transacted in qualifying LIBOR-based instruments" and "is not itself a class member." Instead, the third-party filer asserted that it had "authority, under various arrangements with class members, to file claims and involve itself in settlements on" their behalf. Judge Buchwald observed that "even if" the third-party filer had "claim-filing authority, whether it ha[d] to undertake the further-reaching act of objecting to the settlement is a separate question." To show authority to object, the third-party filer must have demonstrated (a) a valid assignment of that

[63] *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 327 F.R.D. 483 (S.D.N.Y. 2018).

authority by (b) an entity that was a settlement class member. The third-party filer had, as we will see below, failed on many occasions to even substantiate its authority to file claims on behalf of class members. On its authority to object, Judge Buchwald found the third-party filer's responses "more or less limited to naked assertions of its authority to do so." Judge Buchwald thus found the third-party filer lacked standing to object to any portion of the settlements.[64]

Second, there were serious questions about the third-party filer's authority to file claims it had submitted on behalf of absent class members. The third-party filer had submitted claims on behalf of gargantuan corporations like General Electric Corp., Morgan Stanley, and "perhaps most incredibly," Citizen's Bank, *a subsidiary of one defendants* in the *LIBOR* litigation. Judge Buchwald was "dubious that [the third-party filer] in fact has such authority." Judge Buchwald ordered the third-party filer to submit, for each claim already filed, and each claim filed in the future. Judge Buchwald also ordered notice to all entities that the third-party filer purported to represent, and offered all such entities (a) the opportunity to affirm or deny the third-party filer's authority to act on their behalf and (b) if they repudiated the third-party filer's authority, a window of thirty days to file a claim directly, without involving the third-party filer.[65]

The third-party filer's response to the request to submit its authority to act was "insufficient on multiple levels" and "less than fully compliant" with Judge Buchwald's order,

[64] On the substance, Judge Buchwald overruled the third-party filer's objections on the merits, noting that the third-party filer's objection was, "in large part, a copy-paste job from an earlier objection submitted by" an actual class member (notably, an absent class member that the third-party filer did "not purport to have a contractual relationship with").

[65] *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No 11-md-2262, ECF No. 2489 (S.D.N.Y. Apr. 11, 2018).

which saw the third-party filer instead withdraw “a substantial portion of the claims it had previously filed,” rather than provide proof of its authority to maintain them.[66]

Third, Judge Buchwald chastised the third-party filer because even as to those entities for which it had credible claims of authority to act, many of them “appear not to be class members at all.” The third-party filer “admit[t]ed that it ha[d] file numerous claims with no actual knowledge as to whether the entity on whose behalf the claim is being filed is in fact a member of the . . . settlement classes.” By inundating the claims administrator with what, at best, amounted to “educated guesses” as to class membership, the third-party filer “foist[ed] on the claims administrator the entire burden of determining which entities in fact have valid claims and, as a corollary, saddling the class with the expenses incurred by the claims administrator in so doing.” Judge Buchwald ordered class counsel and the claims administrator to “record their expenses incurred” addressing the third-party filer’s conduct, ostensibly for use in a future application to shift those costs to the third-party filer; however, no such application was ever made.

In re Fresh and Process Potatoes Antirust Litigation

In re Fresh and Process Potatoes Antirust Litigation involved class action settlements resolving allegations of horizontal price fixing of potato products.[67] A third-party filer submitted a substantial claim on behalf of a significant class member eight months after the claims deadline. The claim would account for 26% of the entire settlement fund. When the claim was rejected by the claims administrator, the third-party filer brought a dispute to the district court

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[66] Judge Buchwald further described the third-party filer’s non-compliance as such: “Given the apparent difficulty that [the third-party filer] has had in establishing its authority to file claims thus far, and its continued reluctance to be forthcoming with such proof in the face of an order of this Court so directing, we would be hard pressed to conclude that [it] in fact possesses the authority it asserts.”

[67] *In re Fresh and Process Potatoes Antirust Litigation*, No. 10-md-2186, 2017 WL 11682705 (D. Id. Dec. 21, 2017).

contending that the untimely submission should be accepted because of excusable neglect. Judge Winmill of the District of Idaho presided over the dispute. No party questioned the district court's authority to determine issues of distribution, and none was cited by the district court.

Judge Winmill noted that the untimely claim was "by far the largest claim submitted, and by far the latest claim submitted – nearly eight months late." If accepted, the untimely claim would cause "a significant reduction to all other [timely] claims." Judge Winmill noted, in evaluating the prejudice prong of the excusable neglect rubric, that whether "the opposing party here is the Defendants, the Claims Administrator, or the settlement class members, there is prejudice to all." The defendants suffered prejudice because of "there is always prejudice in lengthy delays and lack of finality." The claims administrator suffered prejudice because work to analyze the submitted claims had concluded before the third-party filer's late filed claim was submitted. And absent class members suffered prejudice because they would suffer material reductions in "their already calculated settlement amounts by 26%." Judge Winmill also noted that the untimely claim had already prejudiced the proceedings, even if rejected, because "[b]ut for the need to address [the] late-filed claim, distributions would have occurred by now."

In re Urethane Antitrust Litigation

In re Urethane Antitrust Litigation involved an over $800 million class action settlement, reached on appeal following an over $1 billion class action jury verdict in a case alleging horizontal price fixing of sales of polyurethane products.[68] After final approval of the settlement and in the context of motion practice concerning the appropriate distribution of the common fund. Specifically, a dispute arose as to whether a claimant was entitled to directly receive their

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[68] *In re Urethane Antitrust Litigation*, No. 4-md-1616, 2019 WL 480555 (D. Kan. Feb. 7, 2019).

entire claim, or whether instead a third-party filer should directly receive their claimed third of the claimant's recovery, with the remaining two-thirds distributed to the claimant directly.

The third-party filer indisputably had a valid contractual relationship with a purported class member A that was achieved without any allegations of misrepresentation or other inappropriate conduct. Instead, the dispute arose because another purported class member B claimed to have a superior interest in the claim by virtue of a 2010 asset purchase agreement and a 2013 assignment of claim. Class member B had no contractual relationship with the third-party filer; however, the third-party filer's contractual relationship with class member A predated the 2010 asset purchase agreement and 2013 assignment, having been executed in 2007. In 2018, following correspondence between class member A and class member B, class member A wrote to class counsel notifying them "that it withdrew its claim to the proceeds." Class member B requested the entirety of the claim be distributed to it directly in light of class member A's withdrawal. The third-party filer objected, requesting that the district court distribute to it directly the claimed one-third interest in class member A's (or B's) settlement proceeds. Judge Lungstrum of the District of Kansas proceeded over the dispute. No party questioned the district court's authority to determine issues of distribution, and none was cited by the district court.

Judge Lungstrum focused exclusively on which entity had the superior interest in the claim, noting that class member B's "assertion of ownership has not been disputed by any other possible owner of the claim," which "effectively ends the inquiry." The third-party filer was "not a competing claimant," and had "not shown that it has a present ownership interest in the claim" by "assignment, lien, security interest, or other means." The third-party filer's claimed "entitlement to a portion of the proceeds" created, "[a]t most," a "contractual right to collect a percentage of the proceeds as a fee," but Judge Lungstrum disagreed that the fee issue was

"properly before this Court." Judge Lungstrum was "concerned only with distribution of the settlement proceeds to the rightful owner." The third-party filer was free to pursue its claim against class member B "based on its contractual rights in a separate proceeding [] in the proper jurisdiction." Judge Lungstrum ordered distribution of the entire claim to class member B.[69]

S.E.C. v. Cammarata

S.E.C. v. Cammarata is an ongoing civil enforcement action brought by the Securities and Exchange Commission (SEC) against a third-party filer and three of its owners in the Eastern District of Pennsylvania, alleging a long-running "scheme to steal money from distribution funds established for the benefit of securities fraud victims."[70] Judge Kenney has presided over the action since its filing in 2021. In a departure from prior cases involving third-party filer misconduct, *S.E.C. v. Cammarata* was not predicated on challenges or oversight by either private plaintiffs or the federal courts overseeing a particular settlement fund. Instead, it was brought by a federal regulator under the federal securities laws—specifically Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder—and allegedly implicated the misappropriation of "$40 million from approximately 400 [different settlement] distribution funds," including funds established by private plaintiffs as well as SEC-administered funds.

The third-party filer's business operations involved submitting claims, for a fee, to distribution fund administrators "on behalf of clients, such as hedge funds and family officers,

[69] On policy grouns, the SEC has recently included provisions in their settlements that do not permit third-party filers from being the payee on any settlement check or wire transfer and prohibit payment or deduction of third-party filer's compensation directly from any settlement checks or wire transfers. Matter of Wells Fargo & Company, Corrected Plan of Distribution, at Par. 67 ("The Third-Party Filer shall not be the payee of any Distribution Payment check or electronic Distribution Payment . . . Compensation to the Third-Party Filer for its services may not be paid or deducted from the Distribution Payment.").

[70] Complaint, *S.E.C. v. Cammarata, et al.*, No 21-cv-4845, ECF No. 1 (E.D. Pa. Nov. 3, 2021).

which re alleged victims in securities class actions or SEC enforcement actions." Perhaps these purportedly legitimate aspects of the third-party filer's business served as a veil, helping to mask the defendants' alleged fraudulent behavior, which involved allegations that the defendants "submit[ed] false claims and falsified supporting documents to the distribution fund administrators" in the names of "entities that did not trade in the underlying securities, and thus were ineligible to recover" from the settlement distribution funds. More specifically, the third-party filer's and the individual defendants' deceptive acts included:

- Claiming losses for securities trades that were never made;[71]
- Fabricating brokerage records, trading records, and other securities reports to submit in support of their fraudulent claims;[72]
- Creating false personas to communicate with distribution fund administrators;[73]
- Lying to distribution fund administrators who questioned the claims and documentation; and

[71] "The transaction reports for [Sham Co. A] and [Sham Co. B] included 139 and 149 pages, respectively, of trades purportedly executed in securities issued by BP during the relevant time period. Defendants knew, or were reckless in not knowing, that [Sham Cos. A and B] had not engaged in those trades, and those transaction reports contained false information. Based on the false information and documentation submitted by Defendants, Administrator 2 approved the claims submitted in the names of [Sham Cos. A and B] for payment. Subsequently, Administrator 2 liquidated the money market fund in which the settlement proceeds had been held in escrow and made distributions."

[72] "In furtherance of Defendants' deception, [defendant C] provided, directly or indirectly, false documents to distribution fund administrators that Defendants had fabricated to appear as though the documents had been generated by certain brokers, including [Sham Company], and its predecessor[s]."

[73] "In other instances, [defendant A], using [an] alias email account, or [defendant B], using [an] alias email account, would forward an email from an administrator to [defendant C's] email account at [Sham Company]. [Defendant C], acting as the CEO of [Sham Company], would respond, and [defendant A] or [defendant B] would then forward the response on to the administrator, thereby creating the false impression that an independent broker-dealer had answered the distribution fund administrator's inquiry."

- For the individual defendants, masking their affiliation with the third-party filer and the entities in whose names false claims were submitted.

The evidence, as pleaded by the SEC, strongly indicated knowingly fraudulent behavior.[74] Indeed, unlike other instances whereby innocent class members unknowingly benefited from the third-party filer's allegedly nefarious conduct, here the ill-gotten gains were funneled into accounts for the defendants' personal expenses, including "jewelry, home renovations, watercraft, vacation homes and other real estate," as well as upkeep on a defendant's "personal Caribbean island."[75] As stated by the SEC in its civil enforcement complaint, "[i]n defrauding the distribution fund administrators, Defendants effectively stole money intended for victims of the underlying securities fraud," by transferring the funds "to accounts in the names of the Individual Defendants or entities controlled by the Individual Defendants." The SEC's complaint sought injunctive relief enjoining these illicit practices in the future, disgorgement of all ill-gotten gains with prejudgment interest, further civil penalties under the federal securities laws, as well as disqualifying one of the individual defendants from serving as an officer or a director of a public company in the future.

The SEC's complaint does not specify how the defendants' alleged fraudulent practices came to light, though the pleadings do reference an incident in October 2020 when one of the defendants' submissions to a settlement fund was randomly "selected for audit" and ultimately rejected by the claim's administrator for that fund—the only settlement claim rejection pleaded.

Because the enforcement action was brought by a regulator alleging violations of federal securities fraud laws, Judge Kenney was not required to examine whether his adjudicatory

[74] For example, one individual defendant wrote to another: "I woke up in the middle of the night thinking about JAIL, because we waited a week to hear anything from the admin."

[75] "In fact, the Sham Clients received no payments from [the distribution funds]."

authority was either implicitly or explicitly predicated on ethical cannons, the All Writs Act, Rule 23, the court's inherent powers, or any other basis. Judge Kenney issued a temporary restraining order and then a preliminary injunction order freezing all assets of the defendants. Thereafter, defendant A plead guilty, agreeing to the forfeiture and sale of a personal residence, watercraft, and automobiles,[76] and B plead guilty, agreeing to entry of a forfeiture order in the amount of $9,588,640.38, with all sums to be remitted or restored to eligible victims.[77] The enforcement action remains ongoing against the remaining defendants.

Best Practices

As discussed above, courts and practitioners have a number of tools in their toolkits to combat problematic practices by third-party filers. Best practices for practitioners that require no court order are myriad. They would involve following the Securities and Exchanges Commission's guidance, and declining to remit money directly to third-party filers, instead insisting that payments are made payable only to the named class member itself. Additionally, practitioners can propose that court-authorized notice papers as well as settlement websites and other materials contain clear and conspicuous statements that assistance with the claims filing process is available for free from class counsel and the claims administrator and that the utilization of a third-party filer is unnecessary and, in many cases, can unnecessarily dilute the class members recovery, which would be "taxed twice" before it is remitted to class members.

District courts have power to issue orders to remediate offending conduct by third-party filers, but it tends to be implemented in a reactive fashion, rather than proactive. Judge Gleeson's

[76] Stipulation and Consent Order for the Sale of Frozen Assets, *S.E.C. v. Cammarata, et al.*, No 21-cv-4845, ECF No. 195 (E.D. Pa. Nov. 3, 2021).

[77] Stipulation and Consent Order for the Sale of Frozen Assets, *S.E.C. v. Cammarata, et al.*, No 21-cv-4845, ECF No. 235 (E.D. Pa. Nov. 3, 2021).

requirement in the *Interchange* case that third-party filers include certain disclosures in their notices to class members, as well as his dissemination of a supplemental notice directly from the court to class members that the claims administrator indicates have contracted with third-party filers, is one proactive measure to combat abusive third-party filer practices.

Another way to proactively address potential third-party filer overreach and address the lack of transparency into third-party filers' practices is to order disclosure of draft solicitations to class members before they are disseminated, as a prerequisite to participating in the claims-filing process. While the authors are unaware of a court ever mandating such disclosures, requiring it as a prerequisite to participating in the claims and distribution process is firmly within the district court's authority, if not under Rule 23(d) and the All Writs Act, then under Rule 23(e), which confers in the district court to approve "the effectiveness of any proposed method of distributing relief to the class, *including the method of processing class-member claims*." Such disclosure would incentive third-party filers to be honest in their communications with class members and identify offending communications before they cause confusion and consternation.[78]

[78] To the extent the district court's powers are found not to authorize such proactive measures, an amendment to the Federal Rules of Civil Procedure expressly providing such authority may be warranted.