Injury Equity: The Rise of Future Stakes Settlements

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In a changing environment in which class action defendants are turning to aggressive strategies to contain the cost of lawsuits, including using bankruptcy proceedings to limit their liability, plaintiffs' attorneys are fighting back by seeking new ways to recover damages from illiquid and functionally judgment-proof companies. The latest development is the "future stakes settlement," unveiled in the agreement to end a privacy law class action lawsuit against the startup Clearview AI. Under this novel mechanism, a defendant grants a privately traded equity stake to the class in exchange for a release of all claims.

Future stakes settlements, though similar to existing mechanisms in class action and bankruptcy law, offer distinct benefits and costs. Through a future stakes settlement, the class may recover against a cashless defendant and receive a larger payout than would be possible through a traditional cash damages fund. But this recovery is uncertain, as the value of a future stake can fluctuate. Furthermore, by transforming injured parties into shareholders, future stakes settlements pose serious moral quandaries.

Existing guidance for settlement agreements under Federal Rule of Civil Procedure 23(e) is insufficient to handle the high degree of risk associated with future stakes settlements. This Comment recommends additional standards that courts should apply when evaluating these settlements. Through these additions, courts can prevent defendant gamesmanship, ensure future stakes settlements are fair to the class, and fulfill the dual purposes of compensation and regulation in class actions.

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INTRODUCTION

If you lived in the United States between 2017 and 2024 and posted a picture of yourself online, you may be entitled to compensation. How much will you receive? Hard to say. When will you receive payment? Probably before 2027, but that is not guaranteed. Will you get paid at all? That depends on how many law enforcement agencies buy access to a database that includes your personal photos.

That is all because, in 2016, entrepreneur Hoan Ton-That marshalled a team of engineers to develop a facial recognition application that would come to be known as Clearview AI.[1] Ton-That's team designed a program to automatically scrape billions of images from Facebook, YouTube, Instagram, Venmo, employment sites, news sites, and other publicly accessible

1 *See generally* Kashmir Hill, *The Secretive Company that Might End Privacy as We Know It*, N.Y. TIMES (Nov. 2, 2021) [hereinafter Hill, *Secretive Company*], https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html.

webpages.[2] The program allegedly used artificial intelligence algorithms to scan the collected photos and harvest unique biometric identifying information.[3] Using these biometrics, Clearview created a searchable database that allowed users to identify unknown individuals by uploading a photograph to the database for comparison.[4] Clearview sold access to federal, state, and local law enforcement, private companies, and individual users.[5] While some customers have used the powerful tool for good, the system has been vulnerable to misuse.[6]

In developing the database, however, Clearview's web-scraping software ran afoul of state laws protecting privacy rights. After the *New York Times* broke the news about Clearview in 2020, injured parties filed lawsuits across the country.[7] Many of the suits were consolidated by the Judicial Panel on Multidistrict Litigation in the Northern District of Illinois as a class action alleging violations of the Illinois Biometric Information Privacy Act[8] (BIPA), as well as violations of other laws.[9]

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2 *Id.*

3 Complaint at 1–2, *In re* Clearview AI, Inc. Consumer Priv. Litig., 585 F. Supp. 3d 1111 (N.D. Ill. 2021) (No. 1:21-CV-00135).

4 *Id.* at 2.

5 *See* Kathleen Foody, *Facial Recognition Startup Clearview AI Settles Privacy Suit*, ASSOCIATED PRESS (June 21, 2024), https://perma.cc/Z4S6-B6BH; *see also* Hill, *Secretive Company*, *supra* note 1.

6 *See ICMEC Law Enforcement Partners and Clearview AI Conduct International Victim Identification Operation*, INT'L CTR. FOR MISSING & EXPLOITED CHILD. (July 2, 2024), https://perma.cc/FQ82-NQ98 (reporting the identification of 110 child sexual abuse victims); Allison Ross, Malena Carollo & Kathryn Varn, *Florida Cops Use This Facial Recognition Tech that Could Be Pulling Your Pics*, TAMPA BAY TIMES (Feb. 11, 2020), https://perma.cc/9Y27-5TET (describing Florida police department successes using the application); *cf.* Ashley Belanger, *Cop Busted for Unauthorized Use of Clearview AI Facial Recognition Resigns*, ARS TECHNICA (June 13, 2024), https://perma.cc/XNK3-G7HC (reporting that an Evansville, Indiana, police officer was secretly using Clearview to identify social media users unconnected with criminal investigations); Kashmir Hill, *Before Clearview Became a Police Tool, It Was a Secret Plaything of the Rich*, N.Y. TIMES (Mar. 6, 2020), https://www.nytimes.com/2020/03/05/technology/clearview-investors.html (reporting that individual users deployed the application in social settings and to identify people and recall names at business gatherings).

7 Kashmir Hill, *Clearview AI Used Your Face. Now You May Get a Stake in the Company.*, N.Y. TIMES (June 13, 2024) [hereinafter Hill, *Stake in Clearview*], https://www.nytimes.com/2024/06/13/business/clearview-ai-facial-recognition-settlement.html.

8 740 ILL. COMP. STAT. 14/1 et seq. (2024).

9 *See* Hill, *Stake in Clearview*, *supra* note 7; *see also* Complaint, *supra* note 3, at 16–17 (including state classes in New York, California, and Virginia).

Because of Clearview's limited resources as a startup and the costs associated with prolonged litigation, Clearview and the plaintiffs' class counsel reached a novel settlement.[10] Clearview has granted the class a 23% settlement stake in the company, which may pay out in the future if Clearview is, among other triggers, sold or has an initial public offering.[11] This settlement structure is in sharp contrast to a traditional cash damages fund, which pays out to class members immediately.[12] By contrast, it gives the class members a stake in the future performance of the company. In other words, the *In re Clearview AI, Inc. Consumer Privacy Litigation*[13] settlement is an example of what can be called a future stakes settlement.[14]

Evaluating this new form of settlement raises questions about the very nature of class actions. Class litigation can be used as a regulatory tool or a conflict resolution mechanism.[15] Proponents of class actions as a form of regulation argue that litigation and settlement should prioritize improving future behavior, regardless of the relief awarded to class members.[16] On the other hand, conflict-resolution proponents focus on maximizing recovery for class members to right the wrong they have suffered, no matter the impact on deterring bad behavior.[17] These purposes, which may not always align,[18] evoke policy questions about the benefits and consequences of adopting future stakes settlement agreements.

On one hand, a future stakes settlement, like that in *In re Clearview AI*, seems better designed to provide relief than to deter misconduct. It is an innovative way to allow plaintiffs to recover

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10 *See generally* Class Action Settlement Agreement and Release, *In re Clearview AI*, 585 F. Supp. 3d 1111 (N.D. Ill. 2021) (No. 1:21-CV-00135) [hereinafter Settlement Agreement].

11 *See In re* Clearview AI, Inc., Consumer Priv. Litig., 2025 WL 875162, at *5–6 (N.D. Ill. Mar. 20, 2025).

12 *See, e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 824–25 (2010) (concluding that 89% of federal class action suits that settled between 2006 and 2007 provided cash relief to the class).

13 2025 WL 875162 (N.D. Ill. Mar. 20, 2025).

14 The term future stakes settlement was coined by attorney Jay Edelson. *See* Hill, *Stake in Clearview*, *supra* note 7; *see also, e.g.*, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., 2024 WL 4982986, at *20 (N.D. Cal. Dec. 4, 2024).

15 *See* David Marcus & Will Ostrander, *Class Actions, Jurisdiction, and Principle in Doctrinal Design*, 2019 BYU L. REV. 1511, 1516–20.

16 *See id.* at 1517.

17 *See id.* at 1516–20.

18 *Cf.* Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 54–61 (1975).

more substantial sums against defendants whose cash on hand may not reflect their future valuations. By granting an ownership stake, defendants can delay payout and minimize the costs of extended class litigation through faster settlement. This mechanism also provides an avenue to compensate injured class members based on the actual severity of their injury in situations where the total injury may be unknown or growing at the time of settlement.

On the other hand, addressing plaintiffs' injuries by offering them a financial investment in the company that injured them is a risky and morally complex solution. At a minimum, the value of the stake is uncertain and vulnerable to change, and there is less incentive to use the settlement to deter future misbehavior as the company's success becomes a priority for the class. Without settlement terms that protect the class's interests, a future stakes settlement is at risk of accomplishing neither compensation nor deterrence.

Just as future stakes settlements put pressure on the traditional objectives of class action litigation, they also test the limits of the existing doctrine guiding judicial approval of settlement agreements. A critical factor on which judges focus when evaluating proposed settlement agreements is the value generated for class members relative to the merits of the class's claims.[19] Already a tricky metric to calculate when assessing traditional class settlement agreements, it is even more difficult in a future stakes settlement. Because the ultimate value of the settlement can be forecasted only during the court's review and is subject to the influences of the evolving market for the company's services and subsequent company behavior, value for class members is an unstable and insufficient measure to determine whether a future stakes settlement treats class interests fairly.

The settlement mechanism at the core of *In re Clearview AI* seems likely to become more common as class counsel face off against defendants, especially startups, who threaten bankruptcy in the face of continued litigation.[20] Though venture-backed startups have not typically declared bankruptcy when facing

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19 *See, e.g.*, *2018–2019 Amendments to the Federal Rules of Civil Procedure Approved*, FED. RULES OF CIV. PROC. (June 14, 2018), https://perma.cc/4K8H-GFNF (highlighting the Advisory Committee's note to the 2018 amendments of the Federal Rules of Civil Procedure, which states that "[t]he relief that the settlement is expected to provide to class members is a central concern").

20 *See infra* notes 36–38 and accompanying text (describing defendants' strategic use of bankruptcy to limit the size of class recoveries).

company failure,[21] they are increasingly doing so when faced with significant legal issues.[22] More broadly, nonstartup defendants rely on Chapter 11 bankruptcy proceedings to cap the costs of mass tort and class action litigation.[23] Plaintiffs' attorneys are likely to look to future stakes settlements to provide defendants with an alternative to the drastic step of declaring bankruptcy in response to class litigation.

Part I reviews the *In re Clearview AI* settlement as a case study to explore the benefits and downsides to using a future stakes settlement mechanism in a class action. Part II compares the future stakes settlement to alternative class action settlement mechanisms. This survey contextualizes the future stakes settlement method, tallies its advantages and disadvantages, and identifies best practices that parties and courts should invoke when negotiating and assessing future stakes settlements. Part III assesses the current standards for evaluating class action settlement agreements and concludes that the existing standards are insufficient to protect class interests when reviewing future stakes settlement proposals. Part IV recommends four categories of additional review standards that courts should adopt to ensure future stakes settlements are used fairly and as a last resort. Courts should (1) adopt a rebuttable presumption against approving future stakes settlements, (2) scrutinize the value forecasts, (3) assess the sufficiency of value protections for the class, and (4) address the moral complexity provoked by competing interests within the agreement. By using future stakes settlements only when truly appropriate, courts can guard against gamesmanship by defendants, preserve the value of classes' stakes, and mitigate the moral complexities inherent in a remedy that leaves a continued relationship between injured parties and the defendant.

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21 Elizabeth Pollman, *Startup Failure*, 73 DUKE L.J. 327, 335 (2023).

22 *See id.* at 345–46; Ronald J. Mann, *An Empirical Investigation of Liquidation Choices of Failed High Tech Firms*, 82 WASH. U. L.Q. 1375, 1385, 1437 (2004) (finding that 22% of failed firms had filed for bankruptcy, some of which had been to resolve litigation). FTX is a notable example. *See* Andrew Scurria & Soma Biswas, *FTX Collapses into Bankruptcy System that Still Hasn't Figured Out Crypto*, WALL ST. J. (Nov. 16, 2022), https://www.wsj.com/articles/ftx-collapses-into-bankruptcy-system-that-still-hasnt-figured-out-crypto-11668550688.

23 Pamela Foohey & Christopher K. Odinet, *Silence Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1269–70 (2023).

I. FUTURE STAKES SETTLEMENTS

Under Federal Rule of Civil Procedure 23, plaintiffs can bring four types of class actions.[24] Rule 23(b)(3) suits are the typical form of class action—under this device, a class can seek monetary relief to remedy its injuries. To maintain a class action under Rule 23(b)(3), plaintiffs must meet two major requirements: predominance and superiority. Per the Rule, "questions of law or fact" that are common to members of the class must "predominate over any questions affecting only individual members."[25] In addition, a class action must be the superior method to "fairly and efficiently adjudicat[e] the controversy."[26] The Rule instructs courts evaluating superiority to consider the class members' interests in having individual control in the litigation, the state of preexisting litigation, the desirability of concentrating litigation in the selected forum, and whether it will be difficult to manage the case as a class action.[27] If plaintiffs also meet the baseline requirements for any class action, as articulated in Rule 23(a), they may be able to successfully petition for certification as a class.[28] By certifying a class, class counsel can take advantage of the efficiency of consolidation to transform lower-value individual injuries into a higher-value collective injury worth litigating.

The legal landscape for class actions is in flux. Class actions are becoming increasingly expensive. A survey of more than three hundred large U.S. companies across a variety of industries indicated that they spent $3.9 billion on class action defense in 2023, a sum that has consistently risen since 2014.[29] Although the rate of class action settlements has declined,[30] settlements continue to be a desirable outcome for parties.[31] Finally, the number of class actions is also on the rise, as 61.9% of survey respondents

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24 FED. R. CIV. P. 23(b).

25 *Id.* 23(b)(3).

26 *Id.*

27 *Id.*

28 *Id.* 23(c).

29 CARLTON FIELDS, 2024 CARLTON FIELDS CLASS ACTION SURVEY: BEST PRACTICES IN REDUCING COST AND MANAGING RISK IN CLASS ACTION LITIGATION 6–7 (2024). While reporting on the cost of litigating class actions for class counsel is limited, the defense-borne cost is presumably mirrored by significant (though lower) expense for class counsel operating on a contingency basis.

30 *Id.* at 26.

31 *Id.* at 39–40.

reported they were facing a class action in 2023, and respondents faced an average of 9.8 class action matters per company.[32]

Though the number of suits is on the rise, legal standards for class action litigation have become less plaintiff friendly, leading to tougher battles for class certification and higher bars for recovery.[33] Defendants are also changing their tactics. For example, defendants facing expensive claims from class actions and mass tort suits are increasingly turning to Chapter 11 bankruptcy to attempt to contain the impacts.[34] Through bankruptcy, defendants receive an automatic stay of any pending litigation, a requirement that creditors file claims in the bankruptcy proceeding, and a permanent injunction against the collection of debts after the case concludes except those renumerations covered by the bankruptcy plan.[35] The automatic stay, which pauses all pending litigation, can be the death knell for a putative class action. Plaintiffs' attorneys working on contingency may decide their future fee is too small to warrant continued pursuit of the claims. Defendants are also turning to more aggressive bankruptcy maneuvers to quarantine legal liability for mass torts and minimize costs. Companies are turning to the so-called Texas Two-Step to shield their assets from litigants.[36] In light of these threats to the viability of class action litigation, plaintiffs' attorneys are reaching for alternative settlement mechanisms to deter defendants from hitting the emergency bankruptcy button. And, as bankruptcy is a costly, time-consuming, and painful endeavor, many defendants

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32 *Id.* at 8, 18.

33 *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352–55 (2011) (heightening the commonality requirements for class certification); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) (requiring that class members have suffered a concrete injury to establish Article III standing, even with a statutory cause of action).

34 *See* Foohey & Odinet, *supra* note 23, at 1269–70; *see also* Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1161–64 (2022) (calling attention to the growing prevalence of solvent nondebtor companies using bankruptcy when facing mass litigation).

35 *See* Foohey & Odinet, *supra* note 23, at 1280.

36 *See* Dan Levine & Mike Spector, *How a Bankruptcy "Innovation" Halted Thousands of Lawsuits from Sick Plaintiffs*, REUTERS (June 23, 2022), https://www.reuters.com/investigates/special-report/bankruptcy-tactics-two-step/. Under this strategy, defendants undertake a "divisive merger" in Texas by splitting their businesses into two entities and then assigning all liabilities to one entity and all valuable assets to the other. *See* Lawrence Ponoroff, *Mass Tort Litigation, Chapter 11, and Good Faith: Let Not Perfect Be the Enemy of Pretty, Pretty, Good*, 74 DUKE L.J. ONLINE 1, 8–9 (2024). Then, the newly liable entity can declare Chapter 11 bankruptcy and redirect all claims against it into the Chapter 11 proceedings, leaving the entity with the assets unmarred by the legal proceedings. *See* Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, MICH. L. REV. ONLINE (June 2022), https://perma.cc/WNJ6-VPKW.

also have an incentive to negotiate with plaintiffs to avoid this outcome.

Plaintiffs' attorneys are also seeking new settlement solutions to maximize their ability to bring lawsuits against companies that have fewer liquid assets to draw on to pay out a settlement. Given the costs associated with litigating a class action, plaintiff-side firms will take on a case only if they expect to make money.[37] If the defendant lacks the financial resources to allow for a substantial judgment, or more frequently, a large settlement, firms are disincentivized from bringing an entrepreneurial suit.[38] As a result, individuals may experience injury due to a company's misbehavior but have little recourse because the company's precarious financial situation renders it functionally judgment-proof.[39] Accordingly, plaintiffs and their counsel share an interest in identifying new ways to hold defendants financially accountable.

The settlement agreement between Clearview and a class represented by the law firm Loevy & Loevy revealed such a new, creative solution: the future stakes settlement. By granting an ownership stake that can be cashed out in the future, defendants can delay payout and avoid bankruptcy, and class members can receive a potentially larger remedy for their harms. However, addressing plaintiffs' injuries by offering them a financial investment in the company that injured them is a precarious solution that entails meaningful risks, including that the stake may be valueless and that the settlement will be a poor deterrent.

A. The *In re Clearview AI* Settlement

In re Clearview AI took shape after individuals filed suit against Clearview in 2020 alleging that the company had violated state laws when it scraped billions of images of people from

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37 *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2062 (2010) [hereinafter Fitzpatrick, *Class Action Lawyers*].

38 *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 686 (1986) ("The key point is that the litigation stakes are asymmetric, with the defendant focusing on the judgment or settlement and the plaintiff's attorney focusing on the fee, which is typically a declining percentage of the recovery."). *But see* Morris Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 REV. LITIG. 757, 796 (2012) (arguing that class counsel at larger firms are motivated to invest in cases for reasons beyond just predicted fees).

39 *Cf.* Fitzpatrick, *Class Action Lawyers*, *supra* note 37, at 2062 ("Lower compensation to attorneys means they will bring fewer cost-justified actions.").

publicly accessible websites.[40] After consolidation in the Northern District of Illinois as a multidistrict litigation action, a putative class action formed. Through multiple attempts at negotiation with the support of a mediator, Clearview and the class reached a deal.[41] Both parties were incentivized to agree to a settlement because of concerns that continued litigation would force Clearview to declare bankruptcy.[42] On June 12, 2024, class counsel filed a motion for preliminary approval of the future stakes settlement agreement.[43] Judge Sharon Johnson Coleman granted preliminary approval on June 21, 2024, and ordered that notice be made to potential class members.[44] After receiving sixteen objections from eighteen objectors and an amicus brief in opposition from twenty-two states and Washington, D.C.,[45] as well as briefing from the parties,[46] Judge Coleman issued an order approving the *In re Clearview AI* settlement on March 20, 2025.[47]

For Clearview and the injured class, a future stakes settlement is a way to avoid bankruptcy while maximizing the potential recovery for the class. Because the class is so large ("virtually anyone in the United States whose face appears on the internet"), any payout would have needed to be substantial.[48] However, as a startup, Clearview had few "unencumbered assets" and could not free up the funds to offer significant relief.[49] Instead, the settlement granted a 23% future settlement stake to class members that will be managed by an appointed, independent settlement master who has a fiduciary duty to manage the stake in the best

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40 *See supra* notes 7–9 and accompanying text.

41 *See* Declaration of Hon. Wayne R. Andersen (Ret.) Regarding Preliminary Approval of Class Action Settlement at 2–4, *In re Clearview AI*, 2025 WL 875162 (N.D. Ill. Mar. 20, 2025) (No. 1:21-CV-00135) [hereinafter Hon. Wayne R. Andersen Declaration].

42 *See* Plaintiffs' *Unopposed* Motion and Memorandum in Support of Preliminary Approval of Class Action Settlement at 2, 17–18, *In re Clearview AI*, 2025 WL 875162 (N.D. Ill. Mar. 20, 2025) (No. 1:21-CV-00135) [hereinafter Plaintiffs' Motion for Settlement].

43 *See generally id.*

44 *See* Preliminary Order of Approval of Class Action Settlement, *In re Clearview AI*, No. 1:21-CV-00135, at 3–4 (N.D. Ill. June 12, 2024).

45 *See infra* notes 60–64 and accompanying text.

46 *See generally* Parties' Joint Response to Objections and Amicus Brief, *In re Clearview AI*, 2025 WL 875162 (N.D. Ill. Mar. 20, 2025) (No. 1:21-CV-00135) [hereinafter Parties' Joint Response to Objections]; Plaintiffs' Motion and Memorandum in Support of Final Approval of Class Action Settlement, *In re Clearview AI*, 2025 WL 875162 (N.D. Ill. Mar. 20, 2025) (No. 1:21-CV-00135) [hereinafter Plaintiffs' Motion for Final Approval of Settlement].

47 *See generally In re Clearview AI*, 2025 WL 875162 (N.D. Ill. Mar. 20, 2025).

48 *See* Plaintiffs' Motion for Settlement, *supra* note 42, at 2.

49 *Id.* at 6.

interests of the class.[50] This stake can be paid out following either the consummation of Clearview's underwritten initial public offering (IPO) or Clearview's sale to another buyer (or another liquidation event).[51] The settlement stake is defined as the "monetary amount equal to the value of the number of shares of Clearview common stock equal to twenty-three percent (23%) of the capitalization of Clearview as of September 6, 2023, calculated on a fully diluted basis."[52] In other words, the class's payout will be based on the size of a 23% share relative to the total holdings of Clearview's other investors at the time of settlement. To calculate on a "fully diluted basis," any convertible notes (short-term debt instruments) will be treated as having been converted into equity. Alternatively, the settlement master can sell the class's stake to a third party, subject to conditions in the settlement agreement, and the class will receive the proceeds of the sale.[53] As a final fallback, the settlement master may elect to demand a cash payment to the class of 17% of Clearview's revenue earned between final settlement approval and the date of the demand (up until September 2027) instead of waiting for a triggering event or selling to another investor.[54] This structure is unlike a traditional class action settlement because it provides an equity stake of uncertain value in a company that is not already publicly traded.[55]

Notably, the settlement does not provide any injunctive relief, and Clearview does not admit any liability nor agree to any stipulations about future uses of its application as part of the settlement.[56] Per class counsel, injunctive relief would be of no value to the Illinois subclass because of a 2022 settlement in a suit brought under BIPA in which Clearview agreed to (1) stop granting access to the database to private entities and individuals nationwide, (2) stop granting access to Illinois government agencies and contractors, (3) delete old facial vectors, (4) provide an opt-out program for Illinois residents to request that their photos

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50 *Id.* at 8–9.

51 Settlement Agreement, *supra* note 10, at 22–24.

52 *Id.* at 16.

53 *Id.* at 24.

54 *Id.* at 23.

55 David Thomas, *Legal Fee Tracker: Clearview AI's Choose-Your-Own-Adventure Privacy Settlement*, REUTERS (Sept. 12, 2024), https://www.reuters.com/legal/transactional/legal-fee-tracker-clearview-ais-choose-your-own-adventure-privacy-settlement-2024-09-12/.

56 *See* Settlement Agreement, *supra* note 10, at 50; *In re Clearview AI*, 2025 WL 875162, at *12–14.

be removed, and (5) screen out Illinois-based photographs from the database for five years.[57] However, the settlement has not slowed Clearview's national expansion. In June 2024, Clearview shared that the annual number of facial recognition searches performed by law enforcement officials had risen to two million, doubling from the past year.[58] Clearview has also added ten billion new images since November 2023, bringing the database to a total of fifty billion images.[59]

Class members registered a variety of objections to the terms of the settlement. Common themes across the objections included (1) the lack of limits placed on Clearview's future operations,[60] (2) concerns that the monetary value of the settlement was too small and uncertain and thus insufficient to remedy the harm,[61] and (3) discomfort with being forced to root for Clearview's success or be complicit in its continued operation.[62] One objector expressed a preference that Clearview be forced into bankruptcy through continued litigation.[63] In their amicus brief in opposition to the settlement, the consortium of twenty-two states and Washington, D.C., even suggested that Clearview's financials may not be so dire as claimed and that a traditional cash damages fund may be more appropriate.[64] Nonetheless, the court overruled these objections and granted final approval of the settlement agreement.[65]

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57 *See* Settlement Agreement & Release at 1–4, ACLU v. Clearview AI, Inc., No. 2020 CH 04353 (Ill. Cir. Ct. May 9, 2022).

58 *See* Chris Burt, *Clearview Facial Recognition Searches Double, Database Reaches 50B Images*, BIOMETRIC UPDATE (June 26, 2024), https://perma.cc/7X48-6WUB.

59 *Id.*

60 *See, e.g.*, Objection to the Proposed Class Action Settlement and Notice of Intent to Appear at 12–14, *In re Clearview AI*, 2025 WL 875162 (N.D. Ill. Mar. 20, 2025) (No. 1:21-CV-00135).

61 *See, e.g.*, Objections of Class Members Weissman and Claypool and Notice of Intent to Appear at 9–12, *In re Clearview AI*, 2025 WL 875162 (N.D. Ill. Mar. 20, 2025) (No. 1:21-CV-00135) [hereinafter Objections of Class Members Weissman and Claypool].

62 *Id.* at 8.

63 *See, e.g.*, Settlement Objection of Class Member Lee, *In re Clearview AI*, 2025 WL 875162 (N.D. Ill. Mar. 20, 2025) (No. 1:21-CV-00135) ("Simply put, I don't care if Clearview goes bankrupt.").

64 *See* Brief of the Attorneys General of Vt., Ariz., Cal., Colo., Conn., Del., Haw., Ind., Iowa, Kan., Me., Mass., Mich., Minn., Neb., Nev., N.J., N.Y., Or., R.I., Tenn., Wash., and D.C. as Amicus Curiae in Opposition to Class Action Settlement at 10–11, *In re Clearview AI*, 2025 WL 875162 (N.D. Ill. Mar. 20, 2025) (No. 1:21-CV-00135).

65 *See generally In re Clearview AI*, 2025 WL 875162.

B. Benefits of Future Stakes Settlements

As a new settlement mechanism, future stakes are untested. Based on qualities of the future stakes settlement, however, there appear to be some likely benefits. The agreements provide opportunities to sue typically judgement-proof defendants, collect larger payouts than a traditional cash fund provides, and scale class compensation to account for the actual harm that members suffer.

First, this structure provides an opportunity to bring class actions against defendants who might otherwise be judgment-proof. Against Clearview, class members were at risk of receiving very little or even nothing if continued litigation caused the company to declare bankruptcy.[66] This was true even if the class won, as some of Clearview's convertible noteholders possessed security interests that would take priority in bankruptcy proceedings over the class's affirmative judgment.[67] In *In re Clearview AI*, the likely threat of bankruptcy if litigation continued did not need to kill the case if parties could structure a class remedy to pay out in the future.

Thus, *In re Clearview AI* suggests that this future-oriented settlement structure could be useful as a policy tool to correct the trend towards reckless risk-taking in startup culture.[68] Because startups tend to be cash poor, they are functionally judgment-proof. Since the plaintiffs' attorney is self-funded under a contingency fee structure, a suit without a recovery offers no pay. Under the current system, a strategic, entrepreneurial plaintiffs' attorney has little incentive to target a startup that is illiquid, no matter how egregious its wrong. And, by extension, this means that the startups are not subject to the risk-regulating mechanism of class litigation.

To restore proper deterrence, there must be an incentive to sue startups when they do wrong. That is where the future stakes device proves useful. While many startups lack the current cash

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66 *See* Hon. Wayne R. Andersen Declaration, *supra* note 41, at 5.

67 *Id.*

68 *See, e.g.*, Winston Cho, *Actors Hit AI Startup with Class Action Lawsuit over Voice Theft*, HOLLYWOOD REP. (May 16, 2024), https://perma.cc/KA9B-399D (misappropriating actors' voices); Lauren Irwin, *Former Employees File Class-Action Lawsuit Against News Startup The Messenger*, THE HILL (Feb. 1, 2024), https://perma.cc/8MRE-H7NS (violating the Worker Adjustment and Retraining Notification Act); Taylor Soper, *Convoy Hit with Class Action Lawsuit Alleging Violation of WARN Act*, GEEKWIRE (Oct. 26, 2023), https://perma.cc/SF2N-F3KQ (same); Jonathan Levinson, *Portland Nuclear Power Startup NuScale Hit with Investor Lawsuit*, OR. PUB. BROAD. (Nov. 22, 2023), https://perma.cc/MC5G-RQGM (making materially false or misleading statements about a business).

to be viable targets for traditional methods of class recovery, their growth potential lends itself well to a settlement modeled after *In re Clearview AI*. A class action is worth an attorney's time and up-front investment if the resulting future stake can be expected to increase in value. However, future stakes settlements may increase risk taking by startups. While future stakes settlements offer a new avenue by which injured parties can seek recourse, the delayed payout mechanism (that may never amount to a payout at all) might incentivize continued risk-taking by startups that see the financial costs of litigation as distant and less significant than the threat of forced bankruptcy. Ultimately, the deterrent effect of suing startups may come down to how venture capitalists react to the threat of future stakes settlements. If this kind of legal arrangement diminishes investor interest in a startup, this will amplify the deterrent effect and lead startups to operate more responsibly.

When facing a defendant who is not judgment-proof but does lack sufficient liquid assets to provide a meaningful cash payout, a future stakes settlement offers the potential for a larger class award than that possible through a traditional mechanism. Traditional negotiations tend to yield settlements based on cash on hand—in other words, agreements anchor around what defendants can feasibly offer immediately. When facing the risk that a company may go out of business, a traditional payout method creates an incentive for class counsel to settle for a smaller award just to ensure the class (and counsel) receive something. By permitting future stakes, the class award can be larger, predicated on the anticipated increase in the defendant's value over time, without concern for the company's current financial distress.

Finally, in situations where the harm caused by the defendant is unknown at the time of settlement, or may continue to grow over time, a future stakes settlement can be a more effective way to fully and accurately compensate class members for their injuries. In *In re Clearview AI*, class members experienced an initial harm when Clearview scraped their photos and uploaded them into the database.[69] However, each Clearview customer that accesses the database may violate each class member's privacy again, and each sale is driven by the strength of a database built through wrongful conduct. Thus, Clearview's success will

69 Illinois class members, for example, could sue Clearview for violations of BIPA. *See* 740 ILL. COMP. STAT. 14/20.

increase the number of users and raise the odds that a class member's privacy will be violated. A cash payout right now could not account for the future harms that class members may experience based on how widespread Clearview's application becomes, but a future stakes settlement, which pays out relative to the value at which Clearview sells or IPOs, better reflects continued injury. A future stakes settlement grants class members a recovery that is proportional to the success of the company and thus proportional to the harm the class suffers.

C. Costs of Future Stakes Settlements

In opening new opportunities for a class to recover, future stakes settlements also trigger new risks and costs. In some circumstances, these disadvantages may outweigh the benefits of the settlement tool. Settling class members face an agreement that offers an uncertain value, results in a delayed payout, serves as a less effective deterrent against wrongdoing, and creates a moral quandary by bonding injured parties with their injurers.

First, more so than many other settlement mechanisms, the value of future stakes is uncertain. At its core, the settlement is a speculative grant. Though parties may forecast the likely value, that prediction is subject to change. While some degree of variability in the ultimate payout may be common in a traditional cash payout,[70] future stakes have an uncertain value both at the aggregate level (total value of the stakes) and at the individual level (payout post liquidation to each claimant). An uncertain valuation makes it harder for judges to evaluate whether the settlement is fair and for potential class members to make an educated decision about whether to opt out or object to the settlement. While most class members are disengaged and may submit a claim automatically, some potential class members may be more sophisticated or feel more acutely injured by the defendant's conduct. The forecasted value of the payout can be an important input for these attentive class members as they decide how to proceed. Injured parties cannot determine whether to preserve their right to litigate independently without knowing how much they can expect to receive as a class member.

70 For example, parties may forecast the number of claims they expect to receive from class members to estimate the total settlement payout or the size of the individual awards for class members.

The very existence of the settlement agreement could dampen the defendant's business prospects and introduce additional uncertainty into the value forecast. Issuing new shares through the settlement dilutes preexisting shares, complicating the ownership structure. This complexity may be off-putting to venture capitalists and private equity firms in future rounds of investment. If investment dries up, the defendant's company value will drop, and the class's stakes will follow suit. And in a case like *In re Clearview AI*, where the company may be fined by government regulators, the class's future stakes may fall victim to the continued ill effects of the defendant's wrongdoing.[71] If the stakes end up being worth nothing, the settlement should never have been approved at all.[72]

Second, a future stakes settlement delays payout to the class, which may be contrary to the class's interests. In Clearview's case, the company may not sell or IPO anytime soon, and there is little incentive for the settlement master to exercise the revenue clause immediately because the payout will be greater if the class waits longer. Though a future stakes settlement may give the class the opportunity to claim a bigger recovery, some class members may prefer not to wait for payout.

Third, future stakes settlements may be less effective as a deterrent. There are fewer incentives for the class to push for the defendant to make operational changes that will make the company less profitable when the class benefits directly from the company's financial success. The *In re Clearview AI* settlement, for example, does not include any limits on Clearview's continued operations.[73] Though class counsel claim additional injunctive

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71 Clearview has faced substantial fines from European authorities, and continued governmental scrutiny may deter potential investors, stymying the company's anticipated growth. *See* Stephanie Bodoni, *Clearview Gets $5.7 Million Fine over French Privacy Order*, BLOOMBERG L. (May 10, 2023), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X6G2QUQO000000; *see also* Sarah Jacob, *Clearview AI Gets Fined by Dutch Watchdog over Data Collection*, BLOOMBERG L. (Sept. 3, 2024), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/XC3Q4M4C000000.

72 *See In re* Subway Footlong Sandwich Mktg. & Sales Pracs. Litig., 869 F.3d 551, 556 (7th Cir. 2017) ("No class action settlement that yields zero benefits for the class should be approved, and a class action that seeks only worthless benefits for the class should be dismissed out of hand." (quotation marks omitted) (quoting *In re* Walgreen Co. S'holder Litig., 832 F.3d 718, 724 (7th Cir. 2016))).

73 *See* Settlement Agreement, *supra* note 10, at 50; *see also In re Clearview AI*, 2025 WL 875162, at *12–14.

relief is valueless because of the 2022 settlement,[74] that deal primarily enacted Illinois-specific limitations, without protections for the nationwide class.[75] Defendants may counter that the risk of facing future litigation and granting additional equity stakes to injured parties is sufficient to deter the behavior that led to the original litigation. For example, Clearview may refrain from scraping new images off websites to prevent further litigation on the same issue. However, this effect grants little solace to members of the original class. Clearview can continue to use its illegally harvested photos to buoy database-access sales with impunity. Even when there is no previous injunctive relief, class counsel is less likely to seek settlement requirements that might diminish the value of the company because their fee may be linked to the class's payout.

Finally, future stakes settlements convey a morally complex and mixed message about harmful and unlawful company activity. Fundamentally, a class action settlement is a payoff—class members agree to release their legal claims against the defendant in exchange for a payout. However, future stakes settlements add additional moral complexity to this exchange, as injured parties are not just paid off but brought into the continued operations of the business that harmed them. Class members, especially those who value injunctive relief or a forced bankruptcy over monetary relief, may find it both unfair and unreasonable to receive a settlement that forces them to support the company's continued business.[76]

II. ANALOGUES TO THE FUTURE STAKES SETTLEMENT

The future stakes settlement mechanism is novel but not unprecedented. Parties already turn to alternative methods to settle class actions and manage injury claims in bankruptcy, and courts have some level of experience critically evaluating these mechanisms to ensure they treat injured parties fairly. In fact, the future stakes settlement can trace its origins to these preexisting alternatives. It combines elements from each of these alternatives to create a new mechanism that can be extended to

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74 *See* Plaintiffs' Motion for Settlement, *supra* note 42, at 2.

75 *See* Objections of Class Members Weissman and Claypool, *supra* note 61, at 14. The 2022 settlement has not prevented Clearview from selling database access to law enforcement outside Illinois. *See* Peyton Spellacy, *New Mexico Law Enforcement's Use of Facial Recognition Technology Raises Concern*, KOAT ACTION 7 NEWS (Sept. 20, 2024), https://perma.cc/8VWL-2L4Z.

76 *See* Objections of Class Members Weissman and Claypool, *supra* note 61, at 7–8.

situations where the alternatives prove ineffective. This extension, however, introduces increased risk that is primarily borne by the class. Comparing the viability of the alternative mechanisms to the proposed future stakes settlement, as applied to the facts of *In re Clearview AI*, reveals both the advantages and disadvantages of the new settlement arrangement. To counteract those disadvantages and mitigate the enhanced level of risk for the class, parties and courts should strive to import the applicable best practices from each alternative into any future stakes settlement agreement.

A. Alternative Class Settlement Mechanisms

The future stakes settlement is the latest in a long line of class settlement mechanisms that take a creative, nontraditional approach to provide relief to class members. Other mechanisms, ranging from most to least like the future stakes settlement, include the creation of a new, class-owned corporation; stock grants; future revenue payouts; and coupon settlements. These alternatives, like future stakes settlements, grapple with how to balance class and defendant interests while ensuring the settlement is fair. Imagining how the alternatives could have been implemented in *In re Clearview AI* draws out the similarities and differences between each mechanism and future stakes settlements, and highlights the best practices that parties considering these settlements should employ.

1. Class-owned corporation.

The most similar preexisting alternative settlement mechanism to future stakes settlement is the class-owned corporation. Instead of granting the class an equity share in the company, the defendant creates a new company, transfers existing assets or revenue-generating technology to the company, and grants class members complete ownership of the new entity. This equity stake, much like the equity granted in a future stakes settlement, is of uncertain value. However, a future stakes settlement differs in that it grants class members a stake in the existing company and may include limitations on the decision rights and authorities of the class as a shareholder.

In *Uhl v. Thoroughbred Technology & Telecommunications, Inc.*,[77] the plaintiffs sought a class settlement certification on behalf of approximately fifty-eight thousand members who owned property along several thousand miles of railroad track on which Thoroughbred Technology and Telecommunications (T-Cubed) intended to install fiber optic cable.[78] Under the settlement, T-Cubed agreed to create a new company, Class Corridor, and provide it with resources to manage the fiber optic cable assets necessary for the project, enabling Class Corridor to operate as an independent telecommunications company.[79] Class members received 100% ownership of Class Corridor (with apportioned voting rights) and were entitled to share in the company's revenues.[80] Though the Seventh Circuit acknowledged that the future benefits that the class might receive were speculative and that Class Corridor might fail, the court affirmed the district court's conclusion that the agreement was fair given the weaknesses in the plaintiffs' individual cases.[81]

The solution in *Uhl* tracks closely to a future stakes settlement. Both mechanisms grant class members a privately traded share in the defendant. The value of that share is somewhat uncertain and depends on the future success of the company. However, there are notable differences between a class-owned corporation and an equity share. First, the class-owned corporation provides a better guarantee that the class's recovery has a minimum level of value. For example, while the success of Class Corridor was not guaranteed, the mandated asset transfer between T-Cubed and the new corporation ensured that the class's stake was immediately worth something, regardless of the business's future success.

Second, the total value potential of a class-owned corporation may be smaller than a future stakes deal, as the class members who receive ownership of a newly created corporation are likely to be ill-equipped to run the business effectively. A new company without the support of the original company's leadership team, strategy, and brand identity may be less successful. The autonomy of ownership, though, grants symbolic, nonmonetary value to the class by giving agency back to injured parties. Instead of

77 309 F.3d 978 (7th Cir. 2002).

78 *Id.* at 981.

79 *Id.* at 982.

80 *Id.*

81 *Id.* at 981–83.

being forced into the role of a passive partner, receiving indirect benefits from the continued use of ill-gotten gains, the class in *Uhl* was empowered to manage the business. In contrast, in *In re Clearview AI*, the class does not have voting rights or any influence over Clearview's business. Defendants in future stakes cases may resist agreements that give the class voting rights, as investors guard their decision-making authority. Since operational authority is a valuable tool to prevent the defendant from undertaking manipulations that devalue the class's stakes, the example of a class-owned corporation shows that if a future stakes settlement does not grant such governance authority, it should incorporate other protections against manipulation.

Though a class-owned corporation might be a realistic substitute for a future stakes settlement in some cases, it is unlikely that the parties in *In re Clearview AI* would have accepted this alternative. In *Uhl*, the defendant's business model permitted the severance of some of the company's assets. Creating the class-owned corporation was akin to setting up a regional subsidiary that operated in a connected but independent way. But there is no easy way to cleave Clearview's central assets, as the biometric database and user application are closely linked. A class-owned corporation in *In re Clearview AI* would be an all-or-nothing solution, transferring virtually the entire value of the company to the class. While some might argue this is a fair remedy for the class, there is no incentive for Clearview to agree to this settlement structure. A Chapter 11 bankruptcy would be preferable to settling, as it would permit Clearview to retain these critical assets.

Even if such a deal could be negotiated and Clearview agreed to a class-owned corporation settlement, this outcome would create new issues and challenges. Instead of offering a future stakes settlement, Clearview would have to create the new corporation, transfer exclusive ownership of the facial recognition technology and database to the new corporation, and grant 100% of the ownership shares to the class. To manage the approximately sixty-five thousand new shareholders, the class-owned corporation would need to adopt mechanisms akin to those used by large, publicly owned companies. The class would need to install a capable leadership team with expertise in operating a technology startup and navigating venture capital and private equity. Alternatively, the class might avoid the complexities of managing the business and instead sell the corporation, taking the proceeds of the sale as payout. This outcome shares similarities with the structure of the future stakes settlement, which pays out when Clearview sells or IPOs. Though the class could receive payout earlier via a class-owned corporation, and would have greater agency over when to sell, this approach denies the class the opportunity to benefit from the forecasted increase in Clearview's value. Given the size of the class and the complexity of Clearview's business, a new corporation may be an expensive, fraught, and perhaps unmanageable undertaking that would not be a realistic improvement on a future stakes settlement.

2. Stock grants.

Future stakes settlements and stock grants share a key characteristic: giving class members equity in the defendant with the hope that the value of their shares will increase. Stock grants are a common payout method in securities class action settlements, whereby the defendant issues publicly traded stock, puts, or warrants to class members in exchange for a release of claims of wrongdoing. Under this mechanism, "the class relinquishes a valuable economic claim in return for equity (stock) or an entitlement to equity (options and warrants) in the company."[82] In contrast to a future stakes settlement where a payout of uncertain value will be made to the class in the future, a stock grant provides immediate value to class members through the individualized distribution of tradable shares.

One example of a stock settlement mechanism in a class action is *In re TSO Financial Litigation*.[83] The settlement awarded $2.1 million worth of the defendant's stock to the class, in addition to a cash award of $750,000, and class members received shares in proportion to their individual losses.[84] A notable feature of this settlement was that the agreement included a "share value guarantee," which required the defendant to pay the difference between the trading value of the defendant's stock and $12 if the stock defendant's stock did not trade at or above $12 for a consecutive ten-day period in the four years following the date of settlement.[85]

Issuing stock is similar to the *In re Clearview AI* future stakes. In both situations, the grant's value is subject to fluctuations based on the company's performance. However, a key

[82] Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 LAW & CONTEMP. PROBS. 97, 104 (1997).

[83] 1989 WL 73249 (E.D. Pa. June 29, 1989).

[84] *Id.* at *1, 3.

[85] *Id.* at *4.

difference between the two is that there is market information available to assess the value of a share of a publicly traded company's stock. The stock's price is evidence to a court evaluating whether the stock award is fair compensation for the class. In contrast, gauging the value of a future stakes settlement as applied to a nonpublic company is especially difficult because external variables beyond the internal finances of the company may influence its prospects. For example, the shifting whims of venture capitalists may boost or sink a startup's fortunes as the market evolves, regardless of the company's past performance and financial forecasts. Additionally, protective measures, such as the share value guarantee in *TSO*, may not be possible in a future stakes settlement. A company like Clearview, which lacks the cash to survive even continued litigation, is unlikely to have the ability to pay the difference between the stake's ultimate value and its projected value. As a result, approval of any future stakes settlement should be conditioned on access to detailed financial information to mitigate the information asymmetry.

This mechanism is not a viable alternative for Clearview because Clearview is not publicly traded. While Clearview could IPO and grant the class stock, this approach would not be preferable for Clearview or the class. Going public is a risky undertaking, and while Clearview's aim may be to eventually IPO, rushing to go public to settle a class action is not a recipe for success. Though the value of the stock would be more certain for the class, this certainty may come at the cost of value. Clearview's starting price is likely to be influenced by the circumstances of the IPO, including the settlement agreement, and might decrease the value of the stock.

3. Future revenue payout.

Another, more dissimilar alternative to the future stakes settlement is a future revenue payout. Under a future revenue payout settlement, the defendant commits to paying a percentage of future revenue to the class. Like a future stakes settlement, the revenue payout automatically scales up or down and provides the class with an opportunity to potentially recover more than they would through an immediate cash damages payment. But unlike a future stakes settlement, a revenue payout's value can be more confidently forecasted, and the payout mechanism provides a regular cash influx to class members with less delay.

An example of a future revenue payout deal is the Tobacco Master Settlement Agreement (MSA).[86] Reached in 1998 between four major tobacco companies and forty-six state attorneys general, the MSA required the companies to redirect a portion of their future revenues into a fund for tobacco-related health costs.[87] Each company's MSA payment is determined annually based on several factors, including the volume of cigarette sales.[88] Although the MSA was not the product of a class action, it shares key features with a class action settlement. For example, the agreement provided a remedy for multiple injured parties and included a broad liability release for past behavior.[89]

Like a future stakes settlement, a revenue payout can automatically scale to reflect the defendant's subsequent success. In circumstances where the class's injury grows as a product of the defendant's success, a revenue payout keeps harms and remedies in sync. However, as demonstrated by the MSA, scalability can present a conflict between maximizing the size of the payout and deterring the defendant's bad behavior through injunctive relief. Because the annual payout depends on continued cigarette sales, states that are party to the MSA benefit from the continued success of tobacco companies.[90] And, just as in *In re Clearview AI*, states participating in the MSA became partners with the tobacco manufacturers.[91] Despite these conflicting incentives, the MSA included provisions that placed limitations on the behavior of tobacco companies, thereby achieving the deterrence aims and providing injured states with an injunctive remedy.[92] Ultimately,

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86 *See The Master Settlement Agreement*, NAT'L ASS'N OF ATT'YS GEN., https://perma.cc/ZCC5-4SZU.

87 *See id.*

88 *See* Seth M. Wood, *The Master Settlement Agreement as Class Action: An Evaluative Framework for Settlements of Publicly Initiated Litigation*, 89 VA. L. REV. 597, 638 (2003).

89 *See id.* at 637. Notably, the MSA also stretches beyond past conduct and immunizes tobacco manufacturers "for future conduct, acts[,] or omissions . . . arising out of or in any way related to, in whole or in part, the use of or exposure to [t]obacco [p]roducts manufactured in the ordinary course of business, including without limitation any future [c]laims for reimbursement of health care costs." *The Master Settlement Agreement*, *supra* note 86, at 14.

90 *See Payments to Date (as of April 18, 2024)*, NAT'L ASS'N OF ATT'YS GEN., https://perma.cc/D3YU-X3J4 (showing annual payments to participating states).

91 *See* Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J.L. & MED. 187, 197–98 (2000).

92 Permanent injunctive relief in the MSA includes limiting youth-targeted advertising tactics, prohibiting the distribution of products bearing brand names of tobacco products, banning payments for media product placement, and preventing sponsorship of events with large youth audiences. *See The Master Settlement Agreement*, *supra* note 86.

the MSA contributed to a reduction in cigarette consumption, as tobacco companies were forced to increase the price of cigarettes to meet the settlement fund requirements.[93]

The MSA is also distinct from a future stakes settlement because the value of the revenue payout was more certain. Given the strong preexisting market for tobacco, participating states could feel confident that the tobacco companies would have future revenues, even if those revenues were lower than historical precedent. The same cannot be said for Clearview. Facial recognition is a quickly growing and changing industry,[94] and Clearview's market fortunes are far from assured. The MSA demonstrates that a scalable settlement mechanism can be an effective way to compensate based on changing injury, but such a mechanism is riskier for the class if the defendant's future business success is uncertain.

The *In re Clearview AI* settlement includes a similar future revenue payout mechanism as an alternative to the 23% equity stake.[95] Instead of cashing out the stake, the settlement master may demand a payment of 17% of Clearview's earned revenue. However, unlike the MSA's annual payment structure, the *In re Clearview AI* settlement provides a onetime revenue payout covering the period between the final approval of the settlement and when the settlement master exercises the payout option (prior to September 2027).[96] An annual payment schedule would be more challenging for a large class action like *In re Clearview AI*. Settlement administration costs would increase significantly thanks to the logistical challenge of processing an annual payment for tens of thousands of class members, and the expense of an annual payout would outweigh the benefits to the class of a more frequent payout. Clearview's ability to find investors in future fundraising rounds might be negatively impacted by an annual payment requirement that could disturb returns for other investors. Of course, decreased interest in Clearview would decrease the value of the stake. Thus, the existing onetime revenue payout is likely a better fit for a class of this size.

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93 *See* Paul L. Keenan, *Death by 1000 Lawsuits: The Public Litigation in Response to the Opioid Crisis Will Mirror the Global Tobacco Settlement of the 1990s*, 52 NEW ENG. L. REV. 69, 88–89 (2017).

94 Terry Schulenburg, *5 Ways Facial Recognition Is Making Waves Across Industries*, BUILTIN (May 3, 2023), https://perma.cc/7WRQ-FKR4 (predicting that the facial recognition industry will experience a compound annual growth rate of 16.13% from 2023 to 2030).

95 *See* Settlement Agreement, *supra* note 10, at 23.

96 *Id.*

4. Coupon settlements.

The least similar alternative mechanism to a future stakes settlement is a nonpecuniary settlement, frequently called a coupon settlement. A coupon settlement is

> a settlement where the defendant creates a right for class members to obtain a discount on future purchases of the defendant's products or services. The right to receive a discount is the consideration class members receive instead of an immediate cash payment. The defendant receives a release from legal claims and the benefit of the consumers' increased incentives to purchase one of its products or services.[97]

Coupon settlements may take the form of actual coupons or vouchers but may also provide in-kind benefits, including a broader promise of favorable treatment for class members when making future purchases.[98]

Coupon settlements have been a source of great controversy because of the potential for abuse by defendants[99] and class counsel,[100] and are thus subjected to a higher level of scrutiny by courts under the Class Action Fairness Act[101] (CAFA). Despite the discord, coupon settlements can be effective.[102] They may provide greater value to the class than a cash payout would and, when transferable, allow the creation of a secondary market through

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97 Miller & Singer, *supra* note 82, at 102.

98 *See, e.g.*, Michels v. Phoenix Home Life Mut. Ins., 1997 WL 1161145, at *6–8 (N.Y. Sup. Ct. Jan. 7, 1997).

99 *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1004 (2002) ("[T]he overriding motive behind coupon settlements is that defendants can minimize any monetary payment to the class while, theoretically, in some cases actually making out better off financially than if there had been no litigation."). Defendants can claim to be offering a large settlement by calculating the value based on 100% redemption by the class, even though defendants know the redemption rate will be lower. Alternatively, defendants may offer a coupon that only partially subsidizes a purchase so that redemption requires coupon users to pay additional funds.

100 S. REP. NO. 109-14, at 14–20 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 15–20 (collecting cases where lawyers received a disproportionate fee relative to the value of the coupons granted).

101 *See* Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.); *see also infra* note 157.

102 *See, e.g.*, *In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 304–06 (N.D. Ga. 1993); *see also* Lisa M. Mezzetti & Whitney R. Case, *The Coupon Can Be the Ticket: The Use of "Coupon" and Other Non-Monetary Redress in Class Action Settlements*, 18 GEO. J. LEGAL ETHICS 1431, 1433 (2005) (noting that coupons take advantage of opposing sides placing different values on the same good and can deliver greater value than an all-cash payout).

which class members can sell their unwanted coupons, thereby transferring the settlement's benefits to people who will get the greatest utility from the coupons.[103]

Though the structure of a coupon settlement is quite different from a future stakes settlement, both mechanisms share some notable downsides. First, the actual value of coupon settlements can be very challenging to calculate ex ante. While the coupon may have a calculable value, the redemption rate can be hard to anticipate, and the total value manifested for class members is frequently much lower than parties initially predict.[104] Second, both future stakes and coupon settlements require class members to have a continued relationship with the defendant to receive compensation.[105] Given the combination of an uncertain valuation and the moral complexity of forcing a continued relationship, courts considering future stakes settlements should bring a similar skepticism to the fairness review as they would for a coupon settlement.

A coupon settlement is not viable in *In re Clearview AI*. The only product that Clearview can offer is access to its database—access that is not permitted by certain members of the class under the terms of the 2022 injunctive settlement. Furthermore, many class members have no need for this product; a coupon granting free access would be worthless to them. Establishing a secondary market for such coupons would also be fraught. In contrast to selling an unwanted coupon for a discount on an e-commerce site,[106] class members selling their Clearview coupons would be enabling access to a database that includes their personal images—thereby deepening their own injuries from Clearview's violation. As a result, the coupons would be of little or no value to

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103 Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 194–95 (2009) [hereinafter Macey & Miller, *Judicial Review*].

104 *See, e.g.*, Briseño v. Henderson, 998 F.3d 1014, 1020–21 (9th Cir. 2021).

105 *See* DEBORAH R. HENSLER, NICHOLAS M. PACE, BONITA DOMBEY-MOORE, BETH GIDDENS, JENNIFER GROSS & ERIK K. MOLLER, CLASS ACTION DILEMMAS 27, 33 (2000) ("The primary problem with coupon settlements is that [they fly] in the face of the sound precepts upon which our capitalist economy is based. Rather than punishing a wrongdoer for its wrongful actions, it instead rewards that wrongdoer with additional business from the very persons it caused harm." (quotation marks omitted) (quoting Stephen Gardner, Att'y, Comment Letter on Proposal to Amend Federal Rule of Civil Procedure 23 (Dec. 16, 1996), *reprinted in* 4 LEONIDAS RALPH MECHAM, ADMIN. OFF. OF THE U.S. CTS., WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RIGHTS ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 63, 79 (1997)).

106 *See, e.g.*, Knapp v. Art.com, Inc., 283 F. Supp. 3d 823, 837 (N.D. Cal. 2017).

the class, and the court could not conscionably approve the settlement.

B. Asbestos Trusts in Bankruptcy

Looking beyond class action litigation, future stakes settlements also share common characteristics with asbestos bankruptcy trusts. Mass tort bankruptcies share common characteristics with class actions. For example, in both cases, a large group of plaintiffs sues the same defendant based on a similar injury, and parties seek adjudicative efficiency by consolidating individual claims into a group action. While there are notable differences between mass tort bankruptcies and class action litigation (such as concerns about individualized injuries and future potential claims[107]), the features of mass tort resolutions in bankruptcy, as exemplified by the asbestos trusts, are instructive for future stakes settlements. Both mechanisms provide a solution to address unknown injuries (though the asbestos trust is intended for parties whose injuries have yet to manifest, rather than parties whose total level of injury is yet unknown) and rely on independent management to protect the rights of injured parties.

The creation of the asbestos bankruptcy trust was set in motion when the Johns-Manville Corporation filed a petition for reorganization under Chapter 11 of the Bankruptcy Code because it faced an overwhelming number of tort liability claims.[108] The bankruptcy reorganization created the Manville Trust in 1988 to resolve all current and future personal injury claims from exposure to asbestos.[109] Subsequent revisions to 11 U.S.C. § 524(g) of the Bankruptcy Code codified the mechanism to create a trust that will assume liability for asbestos-related tort claims and manage future payouts to claimants. Asbestos bankruptcy trusts have since become a common solution for other manufacturers,[110] and companies facing mass tort claims of other varieties have set

107 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624–25 (1997) (highlighting that the complex, individualized questions in a mass tort asbestos class action failed the predominance requirement for class certification under Rule 23(b)(3)).

108 Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1444 (2004).

109 *History*, MANVILLE TRUST, https://perma.cc/6SCX-C7YJ.

110 U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 14–15 (2011) (reporting that sixty companies have invoked § 524(g) in response to asbestos-related liabilities).

up similar trusts under the general equitable authority granted to bankruptcy courts in 11 U.S.C. § 105.[111]

After a plaintiff has provided sufficient evidence to demonstrate that they were exposed to asbestos products produced by the trust's predecessor company, the trust will pay out the claim.[112] Per § 524(g), a court may issue an injunction against independent legal action and direct plaintiffs to seek a remedy through the trust provided that the following conditions have been satisfied[113]: (1) future victims have an appointed representative to speak on their behalf,[114] (2) a commitment that the trust will pay current and future victims similarly,[115] (3) a judicial finding that this solution is fair and equitable in light of the company's financing of the trust,[116] and (4) at least 75% of current plaintiffs have approved the plan.[117]

Asbestos trusts, as exemplified by the Manville Trust, share some similarities with a future stakes settlement. First, the creation of a trust poses similar concerns regarding sufficient representation. For asbestos trusts, future claimants have an appointed representative to serve as a fiduciary for their interests in the bankruptcy negotiations. However, this representation, and other reorganization requirements, are frequently inadequate to sufficiently protect the interests of future claimants.[118] Future trust claimants do not themselves participate in the creation of the trust, just as members of a class action are absent during precertification settlement negotiations, and both groups depend on the protection of legal representatives they did not personally select. Second, the trusts have independent management, though they are usually overseen by a cohort rather than an individual settlement master,[119] and the trust management takes on responsibilities that

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111 *See* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 980–81 (2023). However, the future of this practice is less certain in light of the Supreme Court's decision in *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024), which limited the use of nondebtor releases to asbestos-related bankruptcies, *id.* at 2085.

112 S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 WIDENER L.J. 299, 312–13 (2013).

113 *Id.* at 313–14.

114 11 U.S.C. § 524(g)(4)(B)(i).

115 *Id.* § 524(g)(2)(B)(ii)(V).

116 *Id.* § 524(g)(4)(B)(ii).

117 *Id.* § 524(g)(2)(B)(ii)(IV)(bb).

118 Listokin & Ayotte, *supra* note 108, at 1443.

119 Brown, *supra* note 112, at 315. Typically, the management group includes trustees, a future claimants' legal representative, private claim reviewers, and a Trust Advisory Committee composed of plaintiffs' lawyers.

remain with the class action defendant rather than the settlement master. For example, the trust management "seek[s] to preserve and grow the limited funds . . . for the benefit of creditors" and reports on the trust's financials to the bankruptcy court.[120] Given the importance of effective management of the class's future stakes, parties should follow the example set by asbestos trusts and imbue the settlement master with sufficient authority to act on the class's behalf.

One notable difference between asbestos trusts and future stakes settlements is the participation of future claimants. The Manville Trust, and other peer trusts, were designed to handle claims from individuals whose harms had not yet manifested when the bankruptcy petition was filed. In contrast, a class action is composed of individuals who have already suffered the requisite injury to opt into the litigation or settlement and settlement cannot bind future parties. As a result, while an asbestos trust can be managed to overcome the competing interests between current and future claimants to ensure all parties receive some form of payout, a future stakes settlement can set up conflicts of interest between existing class members and potential future plaintiffs. The value of the existing class's future stakes may be diluted if another class action against the defendant ends in a future stakes settlement or may be devalued if future litigation requires the defendant to pay out large sums. Accordingly, injunctive relief to prevent further wrongdoing may be especially important in a future stakes settlement to address this conflict between existing and future plaintiffs.

III. LIMITATIONS OF CURRENT STANDARDS FOR EVALUATING SETTLEMENT AGREEMENTS

Although future stakes settlements share similarities with existing settlement mechanisms that courts have encountered before, there is no perfect analogue. All alternative settlement mechanisms entail a more complex analysis for reviewing courts than that required for ordinary damages, as it may be less readily apparent whether the nontraditional approach is fair to the class. However, future stakes settlements pose a particularly acute and novel challenge. As future stakes settlements present higher levels of uncertainty and risk than class-owned corporations, stock grants, revenue payouts, and coupons, future stakes

[120] *Id.*

settlement reviews place greater pressure on the legal standards for approving a class action settlement.

The existing legal standards are insufficient to meet the challenge of a future stakes settlement. While litigation is usually an adversarial process, settlement agreements bring both sides together and give them a common aim—in fact, many settlement agreements include terms that preclude the parties from opposing the proposal.[121] As the court can no longer rely on the adversarial process between the plaintiffs and the defendant to illuminate issues with class settlement, the responsibility of protecting the interests of the class primarily falls to the court. The court's protective role is especially critical in large-scale, small-claim litigation like *In re Clearview AI*. In this kind of case, plaintiffs' attorneys function like entrepreneurs who bear the risk that the litigation will fail.[122] The class counsel self-funds the suit on contingency and, as a result, is highly attuned to their own recovery[123]—sometimes at the expense of the class's.[124] However, because the class is typically dispersed and disorganized, the class cannot monitor counsel in the way a typical client would.[125] While class representatives are better positioned to provide oversight, they are frequently selected by the class counsel and thus lack the independence to provide meaningful scrutiny.[126] And because such a settlement will bind absent class members,

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121 BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 12 (2010).

122 Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 12, 78 (1991) [hereinafter Macey & Miller, *Economic Analysis and Recommendations*].

123 *Id.* at 22–27.

124 *See In re* Mercury Interactive Corp. Sec. Litig., 618 F.3d 988, 994–95 (9th Cir. 2010) (describing that at the fee-setting stage, "plaintiffs' counsel's understandable interest in getting paid the most for its work representing the class [is] at odds with the class'[s] interest in securing the largest possible recovery for its members").

125 John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 884 (1987).

126 Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 181 (1990) ("The class attorney may use a 'professional' class representative; he may find the 'client' through an informal 'underground railroad' network of referrals among class action attorneys; he may engage in nationwide advertising to solicit a class representative."); Macey & Miller, *Economic Analysis and Recommendations*, *supra* note 122, at 75, 83, 93 (describing the named plaintiff as a "figurehead" and ill-equipped to monitor plaintiffs' counsel).

represented (likely unknowingly) by the class representatives,[127] some circuits have suggested that the judge must serve as a fiduciary representing the class's interests.[128] To assist with this responsibility, courts primarily look to the Federal Rules of Civil Procedure (FRCP) and other related resources. These resources are not enough. Future stakes settlements have an especially uncertain value and are more vulnerable to postsettlement manipulation. These characteristics stretch beyond the typical concerns about settlements that are addressed in the current standards.

A. The Rule 23(e) Standard

The FRCP, in particular Rule 23(e), regulate class action settlements.[129] A case involving a certified class or a settlement class certification proposal cannot be settled without the judge's approval. After parties reach a settlement agreement, the parties must first give the court the information necessary to determine whether to preliminarily approve the settlement and issue notice to class members.[130] While the Rule does not specify what the preliminary submission must include, parties typically provide information such as the proposed settlement agreement, declarations from counsel and mediators as to the fairness of the negotiations and the settlement, proposed notice to the class, proposed claim and opt-out forms, and recommendations for claims administrators and settlement masters.[131] Per Rule 23(e)(1)(B), notice is appropriate if the court will likely be able to grant final approval of the proposal under Rule 23(e)(2) and certify the class.[132] After the

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[127] Macey & Miller, *Economic Analysis and Recommendations*, *supra* note 122, at 20 (noting that class members cannot monitor class actions as they are often unaware of the litigation until settlement is reached).

[128] *See, e.g.*, Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1253 (11th Cir. 2020); Stewart v. Gen. Motors Corp., 756 F.2d 1285, 1293 (7th Cir. 1985); *In re* Cendant Corp. Litig., 264 F.3d 201, 231 (3d Cir. 2001); Grant v. Bethlehem Steel Corp., 823 F.2d 20, 22 (2d Cir. 1987).

[129] *See* FED. R. CIV. P. 23.

[130] *Id.* 23(e)(1).

[131] *Practical Guidance, Litigation, Overview—Seeking Preliminary Approval of Settlement: Class Actions*, BLOOMBERG L., https://www.bloomberglaw.com/document/X8HLS1UG000000.

[132] FED. R. CIV. P. 23(e)(1)(B). Historically, preliminary approval was a formality, as it was rare for a court to deny a request for initial approval and certification of a settlement class. *See* Dan Donovan, Ragan Naresh & Carrie Bodner, *Class Action Settlement Approval in an Era of Heightened Judicial Scrutiny*, N.Y.L.J. (Feb. 28, 2019), https://www.law.com/newyorklawjournal/2019/02/27/class-action-settlement-approval-in-an-era-of-heightened-judicial-scrutiny/. However, since the 2018 amendment to the

court grants preliminary approval and orders notice, class members may file objections with the court under Rule 23(e)(5). While these objections give judges a better understanding of the class's reaction to the settlement proposal, objections are vulnerable to abuse[133] and may come too late in the process to serve as an effective balance against the risk of collusion between class counsel and defendants.[134]

Rule 23(e) scrutiny culminates when the court conducts a final fairness hearing to evaluate the agreement before reaching an ultimate decision on the proposal. The hearing provides an opportunity for class counsel, the defendant, and serious objectors to argue for or against approval of the settlement.[135] After the hearing, the court issues a ruling to approve or reject the settlement agreement. Parties to the case, including objectors, may appeal the final ruling.[136]

Under Rule 23(e)(2), the court may approve a settlement agreement only if it is "fair, reasonable, and adequate."[137] The proposal must be fair to class members, appropriate relative to the merits of the class's claims, and of an adequate value to remedy the alleged injuries. Rule 23(e)(2) specifically directs courts to consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;

FRCP that clarified Rule 23 requirements, including expectations for preliminary approval and class notification, *see Recent Amendments to the Federal Rules of Practice and Procedure*, FED. JUD. CTR., https://perma.cc/968A-UTHJ, some courts have placed greater scrutiny on preliminary settlement agreement proposals, *see, e.g.*, Lusk v. Five Guys Enters., 2022 WL 209560, at *5–6 (E.D. Cal. Jan. 24, 2022).

133 In some cases, so-called professional objectors may file "canned objections . . . to simply extract a fee by lodging generic, unhelpful protests." O'Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003) (quotation marks omitted) (quoting Shaw v. Toshiba Am. Info. Sys., 91 F. Supp. 2d 942, 973 (S.D. Tex. 2000)). Because of this threat, and to prevent class counsel and defendants from conspiring to buy off genuine objectors, Rule 23(e)(5)(B) requires the court to approve any payment made in exchange for withdrawing an objection.

134 ROTHSTEIN & WILLGING, *supra* note 121, at 11–12.

135 *See, e.g.*, Transcript of Fairness Hearing of the 3M Settlement in the Case of the City of Camden v. 3M at 3–4, *In re* Aqueous Film-Forming Foams Prods. Liab. Litig., (J.P.M.L. 2024) (No. 2:18-MN-2873).

136 FED. R. CIV. P. 23(f).

137 *Id.* 23(e)(2).

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.[138]

The Rule 23(e)(2) criteria were introduced in December 2018, when amendments to the FRCP took effect.[139] Rule 23 underwent significant change, primarily to address issues related to settlement. Relevantly, the revisions to Rule 23(e)(2) were made in response to the various lists of factors that circuits had developed to evaluate the fairness of a proposed settlement. Some of these lists had gone largely unchanged for thirty or forty years.[140] The amending committee noted that "a lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process."[141] The goal of the amendment was to refocus on the "core concerns of procedure and substance."[142]

Despite the committee's efforts to standardize, circuits continue to interpret Rule 23(e) differently.[143] For example, the Fourth Circuit continues to rely on the legal standards that it had in place prior to the amendments,[144] and the Second Circuit has similarly held that "the revised Rule 23(e)(2) does not displace [the] traditional [ ] factors" it has used for over fifty years.[145] The Ninth Circuit, on the other hand, requires courts to apply the Rule 23(e) standards[146] instead of the ones it established in the

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138 *Id.*

139 *2018–2019 Amendments to the Federal Rules of Civil Procedure Approved*, *supra* note 19.

140 *Id.*

141 *Id.*

142 *Id.*

143 *See* Matt Veldman, *A Rule Change Is, After All, a Rule Change: Rule 23 Settlement Approval and the Problems of Consensus Rulemaking*, 112 CALIF. L. REV. 159, 186 (2024).

144 *Id.* at 187; *see In re* Jiffy Lube Sec. Litig., 927 F.2d 155, 159 (4th Cir. 1991) (listing the factors the court considers to assess fairness and adequacy).

145 *See* Moses v. New York Times Co., 79 F.4th 235, 243 (2d Cir. 2023); *see also* City of Detroit v. Grinnell Corp., 495 F.2d 448, 462–63 (2d Cir. 1974) (establishing the Second Circuit's nine traditional factors for evaluating settlements under Rule 23(e)), *abrogated on other grounds by* Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000).

146 Veldman, *supra* note 143, at 192–93.

late 1990s.[147] Overall, however, most circuits consider some iteration of circumstances that include the value and structure of the proposed settlement, the strength of the plaintiffs' claims, and the downsides of continued litigation.[148]

In addition to past precedent, judges may also turn to external resources to guide their Rule 23(e)(2) evaluations of settlement proposals. The *Manual for Complex Litigation* (MCL), published prior to the latest amendments to Rule 23(e), recommends a list of potential factors for a judge to consider when assessing a settlement proposal, including the advantages of the settlement versus the probable trial outcome, the probability that the class claims could be maintained through a trial, the extent of participation in settlement negotiations by class members or a special master or judge, and the number and force of objections.[149] These general factors provide little additional guidance to help judges assess fairness when faced with a risky agreement like a future stakes settlement, as they provide no benchmark for what is and is not reasonable. The MCL lacks the necessary detail to help judges assess future stakes settlements. For example, while the manual does address other potential resources available to judges, including appointing a claims administrator or special master to assist with managing and administering the settlement agreement, the manual provides vague guidance on how to select the right settlement master or determine the necessary qualifications for the role.[150]

Another Federal Judicial Center resource, *Managing Class Action Litigation: A Pocket Guide for Judges*, provides more specific guidance. The guide encourages judges to obtain information on a variety of aspects of the litigation, including the merits of the class claims, likely number of claimants, and the actual settlement value likely to be distributed.[151] It states that a judge's appraisal of the proposed settlement "should focus on the value

147 *See* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998).

148 In addition to the Second, Fourth, and Ninth Circuits, other circuits have also considered how to reconcile the revised Rule 23(e) with their preexisting legal standards. *See, e.g.*, Williams v. Reckitt Benckiser LLC, 65 F.4th 1243, 1261 (11th Cir. 2023) (instructing district courts to "consider the impact of Congress' 2018 amendments" to Rule 23(e)); Garcia v. Matson, 2022 WL 6935303, at *3 (5th Cir. Oct. 12, 2022) (invoking the Rule 23(e)(2) standards and the Fifth Circuit's preexisting six factors from *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983)).

149 MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.62 (2004).

150 *Id.* § 21.661.

151 ROTHSTEIN & WILLGING, *supra* note 121, at 13.

actually distributed to the class—based on the number and percentage of class members who have filed a claim."[152] The guide directs judges to consider whether they need to consult an expert to appraise the value of the settlement.[153] Notably, the guide flags that some settlements include provisions, termed "hot button indicators," that suggest the agreement is likely unfair.[154] However, this section provides little useful assistance to a judge reviewing a future stakes settlement, as the guide states that "[h]ot button indicators include any remedy to which you *cannot confidently assign a cash value*."[155] If a judge followed this guidance exactly, most future stakes settlements would automatically fail because of the intentional design around an uncertain payout value. But this outcome would frustrate the potential for class members to recover against defendants who would be otherwise judgment-proof.[156] Thus, courts must adapt in the face of future stakes settlements that challenge the traditional notion that a settlement should not be approved without stable and clear value.[157]

B. Issues with the Existing Standards of Review

At its core, Rule 23 seems ill-equipped to guide judges as they assess whether a proposed future stakes settlement is fair. Rule 23(e) directs judges to focus primarily on procedural fairness (the negotiations process) and substantive fairness (the relief provided to class members).[158] Courts examine the work of class counsel and class representatives to determine whether the class was adequately represented, review the settlement terms to

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152 *Id.* at 16.

153 *Id.*

154 *Id.* at 17.

155 *Id.* at 17 (emphasis added).

156 *See In re Clearview AI*, 2025 WL 875162, at *14–15 (acknowledging that the value of the equity stake may change but concluding the forecasted value is sufficient to merit approval).

157 Aside from Rule 23, CAFA, which was passed to mitigate perceived abuses of the class action system, is another tool for assessing class actions. CAFA expanded federal jurisdiction over class actions, instituted requirements to provide notice of settlement to relevant government officials, and changed the rules for evaluating coupon settlements. *See* Standard Fire Ins. v. Knowles, 568 U.S. 588, 592 (2013) (interpreting CAFA to provide federal district courts with jurisdiction if the class has more than one hundred members, the parties are minimally diverse, and the matter in controversy exceeds $5 million); *see also* 28 U.S.C. §§ 1712, 1715(a)–(b). However, CAFA's provisions provide little assistance to aid a judge evaluating a future stakes settlement. Rule 23(e) is the main provision with the power to influence outcomes.

158 *See 2018–2019 Amendments to the Federal Rules of Civil Procedure Approved*, *supra* note 19.

ensure that they were reached after arm's-length negotiations and treat all class members equitably, and ensure that side deals did not unduly influence the settlement outcome.[159] Provided the procedure was fair, the "relief that the settlement is expected to provide to class members is a central concern."[160] Circuits tend to consider whether the value of the settlement is sufficient consideration to justify the release of all legal claims held by class members, given the costs and risks associated with continued litigation.[161] To make this evaluation, courts calculate the value of the proposed settlement and compare it to possible alternative outcomes.[162] But calculating the value of the settlement is easier said than done when assessing a future stakes settlement. Rule 23(e)(2) and existing judicial resources are not sufficient to meet this challenge.

An uncertain settlement value impedes the court's ability to discern the appropriateness and adequacy of a future stakes settlement. Unlike a traditional damages fund, a future stakes settlement is predicated on a forecast of the defendant's business prospects. Courts have less information on which to judge the accuracy of these forecasts than with alternative settlement mechanisms (such as stock grants, where the court knows the market value). Even if the future stakes defendant is forthcoming about their financials,[163] the winds of success can shift suddenly. Previous valuations may not portend future success, especially for a company that may be the target of government regulatory action for its alleged legal violations and could face investor blowback because of the settlement. There is no guarantee that the company will avoid bankruptcy after escaping this fate in litigation. This is especially true for a company whose margins are so thin that a traditional cash payout would bankrupt it. Even if a company's financial aspirations hold, without sufficient

159 *See* FED. R. CIV. P. 23(e)(2)(A)–(D); *id.* 23(e)(3).

160 *See 2018–2019 Amendments to the Federal Rules of Civil Procedure Approved*, *supra* note 19.

161 *See, e.g.*, Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 283–84 (7th Cir. 2002) (rejecting a settlement agreement in which the class released potentially substantial claims against a defendant without an exchange of any additional consideration for the class).

162 While courts cannot precisely forecast the value of continued litigation, one method endorsed by the Seventh Circuit is to estimate possible outcomes at four different levels ("high, medium, low, and zero") and assess the likelihood of each outcome manifesting. *See id.* at 285.

163 For example, as part of the settlement agreement, Clearview has offered to share confidential financial information with the court in camera. *See* Plaintiffs' Motion for Settlement, *supra* note 42, at 3 n.3.

protections in place to limit the defendant's behavior, manipulations of the class's stake relative to broader investor holdings through dilution may decrease its value.

Rule 23(e)(2) does not equip courts to handle so much volatility in the settlement's potential value. A court reviewing a future stakes settlement is likely to be able to assess the merits of the class claims and extrapolate the likely minimum and maximum recovery the class might hope to win litigating its claims—this analysis is not different for a future stakes settlement than any other settlement type, as it is divorced from the particulars of the proposal. However, it will be much more difficult for the court to compare these findings to the uncertain value of the settlement. Though parties may present previously approved settlement agreements to provide a benchmark against which to judge the future stakes forecast,[164] a volatile forecasted value cannot be fairly compared against even the relatively higher certainty provided by alternative mechanisms, like stock grants or revenue payouts. Benchmarks against traditional cash payouts offer even less value for courts because comparing a higher but speculative value against a lower but certain value is akin to comparing apples and oranges. Supplementary resources like the MCL and the litigation pocket guide provide little guidance on how courts should assess a settlement whose ultimate value could be insignificant, substantial, or somewhere in between. Some courts may be inclined to automatically reject future stakes settlements because of this uncertainty, but this approach would be detrimental to class members. In cases where continued litigation will push the defendant to bankruptcy and guarantee that the class will not recover, even the uncertain remedy offered by the future stakes may be preferable. Rule 23(e) and other existing resources are not enough to aid courts as they make this kind of assessment.

IV. PROPOSED SOLUTIONS TO SAFEGUARD FAIR USE

Future stakes settlements are a creative solution to provide a remedy to class members in situations where the alternative may be no recovery at all. When used effectively, a future stakes settlement can better compensate a class whose injuries may grow proportionally to the success of the defendant company. The

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164 *See, e.g.*, *id.* at 20–21 (comparing the *In re Clearview AI* settlement proposal to previous settlements under BIPA).

mechanism may give class members a larger financial recovery when continued litigation is a sure path to the defendant's bankruptcy. However, the opportunity for a higher future payout is accompanied by increased uncertainty. The class bears significant risk in accepting a settlement whose ultimate value is not guaranteed and could potentially be valueless. As a fiduciary of the class,[165] courts must carefully review future stakes settlement proposals to evaluate whether the trade-off is appropriate.

A few principles should guide the court's review process. First, the core demands of Rule 23(e)(2) review still apply to future stakes settlements, even though the Rule's guidance is insufficient. Courts must determine whether the settlement agreement is "fair, reasonable, and adequate."[166] Second, the settlement should seek both to compensate the class for its injuries and deter the defendant from future wrongful conduct.[167] Though these purposes may press in opposite directions, the court should push parties to reach an agreement that provides a meaningful remedy for class members and a consequential correction to the defendant's behavior. Finally, courts should evaluate the settlement proposal in the context of the alternatives. Traditionally, courts look to the expected outcome of continued litigation to determine whether the settlement is fair.[168] In the case of future stakes settlements, however, consideration of alternatives should stretch beyond continued litigation to include alternative settlement mechanisms as well.

To address insufficiencies in the current legal standards for settlement approval and effectuate the guiding principles articulated above, courts should adopt four categories of additional review standards. First, courts should presume that a future stakes settlement is not appropriate unless the parties show that the mechanism is truly the best option for the class. Second, before approving, courts should closely review the forecasted value to determine its accuracy and weigh the risks and rewards of the remedy. Third, the settlement agreement should institute guardrails to protect the stake's value for the class as much as possible. Fourth, courts should push for terms that reckon with

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165 *See supra* note 128 and accompanying text.

166 FED. R. CIV. P. 23(e)(2).

167 *See supra* notes 15–18 and accompanying text.

168 FED. R. CIV. P. 23(e)(2)(C)(i) (requiring the court to consider "the costs, risks, and delay of trial and appeal" when deciding whether the relief is adequate).

the morally complex relationship between the defendant and the class in the settlement.

A. Adopt a Rebuttable Presumption Against Approval

Future stakes settlements are high-risk solutions that should serve as a last resort for plaintiffs. Courts should adopt a default rule against approving a future stakes settlement, unless class counsel and the defendant can prove that the mechanism is the superior choice for the class. If parties successfully rebut the presumption against approval, the court should closely evaluate the details of the proposal, applying the criteria in Rule 23(e)(2) and the other review standards articulated below.[169] If the parties fail to rebut the presumption, the court should reject the settlement proposal, as an agreement that does not meet these minimum criteria will not be fair, reasonable, and adequate.[170] To overcome the default rule, parties should show *each* of the following: (1) the defendant faces an imminent risk of bankruptcy, (2) the future stakes are likely to be worth more than a recovery through bankruptcy proceedings, and (3) the alternative settlement mechanisms will not be effective.

First, defendants should be facing a real and imminent risk of bankruptcy if litigation continues. To achieve a deterrent effect, the settlement must inflict a serious cost on the defendant, one that is sufficient to inspire behavioral change. For some defendants, a future stakes settlement does not provide enough bite. Because a future stakes settlement delays payout, it is like extending a line of credit to the defendant. Defendants, especially cash-strapped startups, might prefer to take their chances on an increased class payout in the future in exchange for the freedom to invest that "loan" in the immediate term. Defendants should not be able to negotiate a future stakes settlement as an investment strategy. To avoid this kind of gamesmanship, courts should require parties to prove that continued litigation expenses will force the defendant to declare bankruptcy. To ensure the threat of bankruptcy is a genuine one, the court should review the defendant's filing through the lens of bankruptcy's "good faith" requirement.[171] If a defendant's claim of the threat of bankruptcy

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169 *See infra* Part IV.B–D.

170 FED. R. CIV. P. 23(e)(2).

171 *See In re* Integrated Telecom Express, Inc., 384 F.3d 108, 118 (3d Cir. 2004) ("Chapter 11 bankruptcy petitions are subject to dismissal under 11 U.S.C. § 1112(b) unless filed in good faith."). Circuits apply varied tests to determine a good faith showing. *See* Jane

is in good faith, this supports a conclusion that the parties have selected the future stakes mechanism out of necessity.

Second, the future stakes awarded to the class should reasonably be expected to be worth more than the class would recover if the defendant filed for bankruptcy and the class's claims were adjudicated through bankruptcy proceedings. Precisely calculating the class's recovery through bankruptcy would be a complex undertaking and likely beyond the capacity of a court reviewing a future stakes settlement.[172] Nonetheless, parties should provide whatever evidence they can to support their claims that settlement is a better outcome for the class than asserting a class claim in bankruptcy, including offering benchmarks of recovery for similar classes in other bankruptcy proceedings.

Third, parties should show that alternative settlement mechanisms are not suitable. In addition to substantiating their argument that the proposed settlement is superior to continued litigation, they should also show that alternative settlement options, including traditional cash damage funds, future revenue payouts, the creation of a class-owned corporation, stock grants, and coupons, would leave the class worse off. Courts should require parties to provide evidence supporting their contention that alternatives are not viable, including turning over financial analyses to support the claim that the defendant lacks the funds to make a traditional payout. These alternatives either pose less uncertainty or better manage uncertainty about the value of the class's recovery relative to future stakes settlements. Reviewing courts can more confidently assess whether one of these settlement mechanisms is fair, reasonable, and adequate, and they should push parties to use the higher-certainty mechanisms whenever workable. Experimentation with settlement form, at

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Kim, *Good Faith: What Recent Mass Tort Bankruptcy Decisions Tell Us*, AM. BANKR. INST. J. (Mar. 12, 2024), https://perma.cc/A6GT-WMLD. The Third Circuit's rigorous test, which requires that a debtor have a "valid bankruptcy purpose" (i.e., is in financial distress) and that the petition was not filed to "obtain a tactical litigation advantage," is best suited to prevent opportunistic defendants from threatening bankruptcy as a tactic. *See In re* LTL Mgmt., 64 F.4th 84, 100–01 (3d Cir. 2023).

172 Such a forecast, in the case of a Chapter 11 bankruptcy, would require the court to predict the form that a payment plan might take, compare that payment plan to the hypothetical liquidation value of the defendant's assets in a best-interest-of-creditors test, and determine the class's share of that payment plan. *Cf. generally* Gregory G. Hesse & Cameron W. Kinvig, *"Best Interest of Creditors" Test: Why Those Math Classes Weren't a Total Waste After All*, AM. BANKR. INST. J., Mar. 2008, at 32 (summarizing the process of asset valuation and plan evaluation in a Chapter 11 bankruptcy).

the expense of additional risk for the class, should be undertaken only when the alternatives are worse.

Though not a required condition, courts should look more favorably on future stakes settlement proposals in cases where the class's injury is scalable and will increase in proportion to the defendant's success. This type of harm is better suited to be remedied by a future stakes settlement because tying the future payout to the defendant's growth as a company calibrates the remedy to the actual harm suffered, rather than compensating based on a forecasted or assumed harm through a traditional cash payout. But as a future stakes settlement could be the best option for a class whose alleged injuries are static, it would be overly constricting to limit the use of the mechanism to only parties who can prove a scalable injury. Instead, courts should give additional weight to parties' arguments rebutting the presumption when they can demonstrate that the structure of the future stakes settlement matches the structure of the harm.

If courts are unwilling to take the strong step of establishing a presumption against future stakes settlements, courts should, at a minimum, require parties to provide a well-reasoned rationale for why a future stakes settlement is the best option for the class. While courts applying Rule 23(e) tend to focus on the proposed settlement versus the likely outcome of continued litigation, assessment of a future stakes settlement should also compare the future stakes mechanism to bankruptcy and other settlement options to ensure the higher risk to the class's recovery is worth it. Though the future stakes will ultimately pay out as a form of pecuniary relief, the court should treat the settlement proposal in a similar manner to a proposal for nonpecuniary remedies (e.g., a coupon settlement). Academics have proposed a variety of justification tests for nonpecuniary settlements, including a cash equivalency test,[173] an intermediate level of scrutiny,[174] and a bona fide rationale requirement.[175] Any of these could serve as a starting

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173 Professor Geoffrey P. Miller and attorney Lori S. Singer suggested that courts performing a fairness review should ask: "[I]s the settlement under consideration as good or better, within a range of reasonable error, for the members of the class than what realistically could be expected in a cash settlement?" *See* Miller & Singer, *supra* note 82, at 124.

174 Macey & Miller, *Judicial Review*, *supra* note 103, at 195–96 (suggesting that the nonpecuniary-relief justification should demonstrate that the relief is designed to provide "genuine value" to the class and "is at least as beneficial as the best available cash settlement").

175 J. Brendan Day, in his student comment about the inadequacies of CAFA, proposed a two-pronged test to address its shortcomings. Under the test, parties must provide

point for courts evaluating future stakes settlement proposals to ensure the mechanism has been selected for the class's benefit, not just the benefit of the class's attorneys and the defendants.

B. Scrutinize Value Forecasts Closely

Scrutinizing the value of a settlement is a complex task under the best of circumstances and is made even harder in the case of future stakes, where there is less information, greater uncertainty, and a shorter market history than, for example, a grant of publicly traded stock. Both the class counsel and the defendant will urge the court to adopt the settlement proposal and are incentivized to sell it as a fair, reasonable, and adequate remedy for the class. However, the court should undertake its own investigation of the likely value of the future stakes because parties may be advocating for the settlement to benefit their own personal interests, rather than those of the class.[176] To determine whether the forecasts that parties provide are realistic, the court should consult special masters with experience in venture capital or private equity, evaluate nonpublic financial information from the defendant, consider the influence of market conditions, and review the value signal provided by class counsel's behavior.

Courts should not hesitate to call on outside, independent special masters or experts to assist in reviewing settlement proposals and forecasting the value of the stakes. A lack of experience or expertise is a challenge for judges when reviewing class settlements.[177] Most judges are used to relying on the adversarial nature of the legal system to determine issues, but class action settlements subvert this norm.[178] Some courts already consult independent experts to assist with class settlement

a bona fide rationale for using a coupon settlement structure and show that the settlement agreement does not exclude or otherwise reduce the award for absent class members. *See* J. Brendan Day, Comment, *My Lawyer Went to Court and All I Got Was This Lousy Coupon! The Class Action Fairness Act's Inadequate Provision for Judicial Scrutiny over Proposed Settlements*, 38 SETON HALL L. REV. 1085, 1121–27 (2008).

176 *See infra* notes 181–82 and accompanying text (summarizing the agency problem in class action representation).

177 Macey & Miller, *Judicial Review*, *supra* note 103, at 180 ("Judges also lack competence in analyzing the value of the release being provided to the defendant.").

178 ROTHSTEIN & WILLGING, *supra* note 121, at 2 ("The high stakes of the litigation heighten your responsibility, and what's more, you cannot rely on the adversaries to shape the issues that you must resolve in the class context.").

fairness review[179]—a best practice that should continue—but additional care for the selection of the right experts is necessary when dealing with future stakes settlements. The future stakes have more in common with a venture capital investment than a typical class payout. Accordingly, judges should turn to experts with backgrounds in venture capital and private equity to provide independent analyses of the settlement proposals, even if these characteristics come at the expense of less expertise in class action litigation or settlement administration.

Courts, with the help of outside experts, should closely examine the value forecasts provided by the parties to independently determine if the class is likely to receive a sufficient payout to justify releasing its legal claims. Defendants should be required to provide nonpublic financial information—such as current valuations, existing investor holdings, and financial forecasts—to aid in this review. The more uncertain the defendant's prospects, the greater the scrutiny that the court should apply. A future stakes settlement with a defendant whose future market success seems more assured (à la sale of tobacco and the MSA) poses fewer risks to the class, even if the forecasted value of the settlement proves wrong. In contrast, in a more tumultuous industry with a defendant whose future is less certain, as in the case of Clearview, courts should dedicate additional time to conducting an independent assessment of the quoted value.

Courts should also rely on experts to look beyond the defendant's financial forecasts to consider the broader market conditions. As parties are more likely to turn to the future stakes mechanism when the defendant is a privately owned company with limited current resources but high growth potential, startups are the most likely defendant candidate. However, the market for startups is vulnerable to boom-and-bust cycles that create short-term valuation bubbles.[180] Thus, courts should

179 *See, e.g.*, Georgine v. Amchem Prod., Inc., 157 F.R.D. 246, 307–08 (E.D. Pa. 1994), *vacated on other grounds*, 83 F.3d 610 (3d Cir. 1996) (describing the appointment of a special master to analyze the value of inventory settlements); *In re* Holocaust Victim Assets Litig., 302 F. Supp. 2d 89, 91–92 (E.D.N.Y. 2004), *aff'd*, 424 F.3d 132 (2d Cir. 2005) (summarizing the court's adoption of recommendations from a special master).

180 For example, scholars and financial analysts have expressed concern that the enthusiasm for generative artificial intelligence has created a bubble that may burst or has already begun to deflate. *See, e.g.*, Jennifer Sor, *Why Top Tech Analyst Gene Munster Says Investors Have 2 Years Before the Tech Bubble Bursts*, BUS. INSIDER (Jan. 12, 2025), https://perma.cc/5MGQ-8H7D; David Gray Widder & Mar Hicks, *Watching the Generative AI Hype Bubble Deflate*, HARV. KENNEDY SCH. ASH CTR. FOR DEMOCRATIC GOVERNANCE & INNOVATION (Nov. 20, 2024) https://perma.cc/6PLM-94NV.

consider the defendant's financial projections in the context of broader market conditions. If the defendant works in a heavily hyped space that may show signs of overvaluation, the court should discount the reliability of the defendant's forecasts accordingly.

Finally, courts should account for nonfinancial signals of the perceived value of the future stakes by reviewing the class counsel's proposed fee structure. There is an agency problem at the center of all class action suits: class counsel and defendants both have an incentive to optimize a settlement for their interests, even if it is to the detriment of the class.[181] In a future stakes settlement, as with other nonpecuniary settlements, class counsel has an incentive to reach a settlement that maximizes its fees, even if it is not the optimal outcome for the class. The defendant has little reason to challenge the self-motivated counsel because the payout split between the counsel and the class has no impact on the defendant's bottom line. This conflict is one of the reasons why nonpecuniary settlement mechanisms receive so much scrutiny, as counsel may architect a deal that gives them a generous payout relative to a virtually valueless coupon scheme.[182]

Courts should be extremely skeptical of any future stakes settlement that handles class counsel fees separately from the future stakes, as it suggests that class counsel are not confident enough in the value of the settlement to take on the same risk that is asked of the class. Instead, to align the interests of class counsel and class members, courts should push parties to adopt a common fund approach, whereby class counsel would receive a percentage of the ultimate class recovery when the future stakes are paid out. In this way, class counsel and class members both bear the risk that the payout may not match the forecast at settlement. Class counsel will be incentivized to negotiate strongly for settlement terms that will improve the class's recovery, as that will determine their ultimate fee. If a future stakes mechanism is truly the best and most valuable option, class counsel should be willing to be compensated in the same manner as the class.

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[181] Bruce L. Hay, *The Theory of Fee Regulation in Class Action Settlements*, 46 AM. U. L. REV. 1429, 1436 (1997).

[182] *See, e.g.*, Redman v. RadioShack Corp., 768 F.3d 622, 624, 630–31 (7th Cir. 2014) (rejecting a class counsel fee that was more than 55% of the value of the settlement to the class).

C. Require Value Protections for the Class's Stake

The class's equity share in a future stakes settlement is vulnerable, both because of the uncertainty about the ultimate value of the payout and because the defendant's future conduct to the class is unknown. As the defendant will continue to control the company, and by extension, the class's share, courts should be attentive when reviewing the terms of the future stakes proposal to ensure that there are protections in place to guard the stake's value for the class and prevent manipulation. This is especially necessary if the terms of the settlement grant the class a nonvoting share, leaving the class powerless to influence the company and defend its own interests. In such situations, the protections available to class members are only those secured through the settlement agreement.

Defendants may act to undermine the class's recovery, because the ultimate payout value can be influenced by the company's behavior after the settlement agreement. For example, the company may issue additional rounds of equity, creating new shares for other investors. Without protections, this action will dilute the value of the class's share, as their stakes become smaller relative to the number of shares owned by others. Dilution may also be an unintentional coincidence of a company's efforts to grow, as it is standard practice for a startup to go through multiple capital rounds.[183]

Given a future stake's value is already vulnerable, agreements should include mechanisms that prevent the defendant from intentionally or unintentionally altering the class's share. Courts should encourage parties to include more robust antidilution regulations to protect the class's stake if the defendant sells future shares at a lower price per share. Typically, startups offer previous shareholders a new conversion price that allows them to convert their original, higher-priced shares into the new, lower priced shares.[184] While any issuance of new shares decreases the size of an existing ownership stake (e.g., from 20% to 12.5%), enabling conversion at the new price limits the size of the decrease (e.g., from 20% to 15%

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[183] The parties in *In re Clearview AI* recognized that Clearview was likely to seek additional investment. The mediator stated that the parties agreed on a 23% stake because "[t]oo large a percentage ran the risk of preventing Clearview from attracting additional, future investors." *See* Hon. Wayne R. Andersen Declaration, *supra* note 41, at 6.

[184] Will Kenton, *Anti-Dilution Provision: Definition, How It Works, Types, and Formula*, INVESTOPEDIA (Aug. 6, 2024), https://perma.cc/U9ND-VCLE.

instead).[185] Instead of offering the opportunity to convert the class's share for a cost, the defendant should be required to perform this conversion automatically, at no cost to the class, to minimize the devaluation of the stake. Alternatively, the future stakes agreement could set even harsher antidilution restrictions, such as requiring the defendant to scale the class's shares to maintain the exact same ownership stake despite new financing rounds (e.g., issuing additional shares to *In re Clearview AI* class members to maintain a 23% stake) or placing limits on the number of new shares that the defendant can issue at all.

Other antidilution measures may be more minimalistic and provide less protection for the class. For example, in the *In re Clearview AI* agreement, the class's settlement stakes must be treated "no less favorabl[y] than the treatment of the shares then owned by [founders] Hoan Ton-That and Richard Schwartz."[186] This protection, at least in theory, may disincentivize Clearview from issuing new classes of equity to investors with greater payout priority or value than the class's stakes. However, it may not be enough. Many startup investors demand preferred stock with liquidation prioritization over even the founders' shares.[187] Thus, if Clearview needs to raise capital, it may issue additional preferred stock in future financing rounds and dilute the relative size of the class's stakes. So, in addition to encouraging the inclusion of antidilution protections, the court should also consider whether any mechanisms included to protect the class will be effective.

In light of the risk that future stakes may not grow in value as the parties hope they will, courts should also require parties to include alternative payout methods in future stakes settlements. In Clearview's case, the settlement includes two such alternatives: the 17% revenue payout and the opportunity to sell the equity stake to another investor.[188] Both options protect the class against the risk that a qualifying payout event, such as a sale or IPO, may not happen for years to come. Courts should look for these types of protections in all future stakes settlement proposals.

Courts should also set stricter requirements for settlement masters overseeing the future stakes and push for agreements that empower settlement masters to make significant decisions

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185 *What Is Anti-Dilution Protection?*, ANGELLIST, https://perma.cc/6XL3-5QV4.

186 *See* Settlement Agreement, *supra* note 10, at 23.

187 *What Startup Founders Should Know About Preferred Stock*, SILICON VALLEY BANK, https://perma.cc/M8ZQ-H74H.

188 Settlement Agreement, *supra* note 10, at 23–24.

for the class. While prior experience as a judge or managing other class actions is beneficial, the experience the settlement master most needs is with venture capital or private equity. Settlement masters will be charged with making complex decisions, such as whether to sell the class's settlement stakes to another investor or to activate a revenue payout clause instead of waiting for the company to sell or IPO.[189] They will also provide crucial oversight of the defendant's activity, and thus need to be equipped to recognize warning signs of share dilution, company value manipulation, or other forms of wrongdoing. Most former judges lack the financial and industry expertise to make these decisions and supervise the defendant, even if they possess substantial experience with class actions. Courts can look to the composition of asbestos trust management groups for inspiration and may even consider requiring the appointment of a team to manage the stakes, rather than resting all authority with a single master.[190]

D. Account for Moral Complexity of Future Stakes

Future stakes settlements pose special moral complexity because they enable a company that has caused harm to avoid bankruptcy and grow bigger and more profitable, all while transforming victims into shareholders. These agreements represent an acceptance of that trade-off and a recognition that, in limited circumstances, securing a financial remedy for the class is more important than a symbolic rejection of the wrongful conduct. To attempt to address the moral complexity of turning class members into co-owners as much as possible, courts should push for meaningful injunctive relief to curb wrongdoing directly, provide an intraclass market to sell and buy shares so that class members can be bought out, and continue to view the settlement mechanism as the last resort.

Despite the competing impulses regarding injunctive relief,[191] courts should expect settlements to include some form of limitation on the defendant's future operating procedures. Though calculating the value of injunctive relief is challenging, deterring the defendant's bad behavior yields some minimum level of value to the class, even if the future stakes turn out to be worthless. Injunctive relief ensures that the defendant will be

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189 *See id.*

190 *See supra* notes 119–20 and accompanying text.

191 *See supra* Part I.C.

compelled to change its behavior, even if the equity grant fails to achieve a deterrent effect on its own. If parties propose a settlement agreement that does not include any injunctive terms to constrain the defendant's future behavior, the court should withhold approval until the proposal includes such relief. If the proposal includes injunctive provisions from the start, the court should evaluate the terms to assess what kinds of behavior are covered, determine the likely effects of the limitations, and conclude whether the terms are sufficient considering previous wrongdoing. To further the aims of deterrence in class action litigation, courts should vary the intensity of required injunctive provisions based on factors such as whether the harmful conduct was intentional. In cases where the defendant has allegedly engaged in purposeful wrongdoing, stronger injunctive relief is necessary to deter the defendant from repeating this apparently lucrative conduct. If parties point to injunctive relief outside the terms of the settlement, as in *In re Clearview AI*, courts should carefully consider whether the preexisting injunctive relief covers and meaningfully benefits the members of the current class.

Courts should encourage parties to include postsettlement mechanisms that allow class members to sell their shares to others within the class to alleviate intraclass conflict. Individual class members are likely to have different appetites for risk. In addition, some class members might be particularly disturbed by the prospect of maintaining a continued relationship with the defendant that has harmed them and may want to expedite payout to sever ties. However, permitting class members to make individual decisions about how to cash out their shares is impractical and would be detrimental to the overall value of the equity stake. An intraclass market, through which class members can sell their portion of the future stakes settlement to another member, is a better solution. This would permit class members with low risk tolerance or moral queasiness to exit more quickly without undermining the collective value of the future stakes. Parties can look to similar requirements in coupon settlements to permit a secondary market for inspiration.

Eventually, the terms of future stakes settlements may be expanded to permit the creation of an external market for shares, allowing class members to sell their portion of the settlement to individuals who were not party to the settlement agreement. Until the actual consequences and effects of future stakes settlements become clear, courts should be especially risk averse in assessing agreement provisions. Though permitting an external market would increase the number of interested buyers and likely increase the going rate for a class member's share, introducing outside investors into the settlement poses uncertain risks. For example, through the purchase and accumulation of a concentration of shares, a more sophisticated outside investor might seek to use their holding to place pressure on the settlement master to make decisions for the class with the purpose of benefitting the outside investor. These decisions could be detrimental to the remaining class members who choose not to sell their shares of the settlement. In the longer term, an external market might create incentives for investors to manipulate the system and push for class action litigation against startups to secure an investment in the companies.

While injunctive relief and an intraclass market attempt to address the moral quandary posed by turning injured parties into co-owners, it is impossible to fully account for the complex message transmitted by forcing an alignment of interests between class members and the defendant. The court should continue to acknowledge this challenge by treating the future stakes settlement as a last resort. Even if the value of the settlement is expected to be high, courts should encourage the use of alternative settlement mechanisms if available. Future stakes settlements can, under the right circumstances, provide much-needed relief to the class. As this relief comes with a moral trade-off, courts should take their responsibility seriously and invoke the standards described in this Comment as a complement to the existing Rule 23(e)(2) requirements.

E. Applying the Solutions to the *In re Clearview AI* Settlement

There were good reasons for the court to approve the *In re Clearview AI* settlement. Because class members' injuries will scale up based on expanded use of the application, the automatically scaling structure of a future stakes settlement is well suited to the harms alleged. Clearview expects to continue growing,[192] and the future stakes would follow suit. As the court noted, "Indicia of trustworthiness . . . permeate the prior litigation and the settlement agreement."[193] However, the *In re Clearview AI* settlement agreement fails to provide sufficient value protections and

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[192] *See In re Clearview AI*, 2025 WL 875162, at *15.

[193] *See id.* at *12.

acknowledgement of the moral complexities of the deal, despite following a fair procedure and engaging in good-faith, arm's-length negotiations. In its current form, the *In re Clearview AI* settlement does not pass the additional standards articulated in this Comment and should not have been approved without revisions.

Class counsel have rebutted (or probably could rebut) the presumption against future stakes settlements. Though assessing the strength of the class counsel's showing is difficult without access to financial reporting, I will assume that Clearview's financial documentation substantiates the concern that continued litigation will force the company to declare bankruptcy.[194] Given this expectation and that class recovery tends to be more limited in bankruptcy, I assume that proceeding through bankruptcy is a worse option for the class.[195] Though the future stakes proposal incorporates elements of alternative settlement mechanisms (e.g., the one-time revenue payout as an alternative to Clearview's sale or IPO), the analysis in Part II supports a conclusion that the alternatives would not be an improvement.[196] Finally, the use of a future stakes settlement is more appropriate in this case because the class's injury will scale alongside the defendant's success.[197] Taken together, these factors rebut the presumption and support further consideration of the proposal's fairness, reasonableness, and adequacy.

While it is challenging to scrutinize the value forecasts without access to detailed financial reporting and the support of experts, I assume that class counsel's claims hold up. Biometric recognition is an active and highly competitive market, and Clearview's public records suggest that it is maintaining a successful business.[198] Clearview does face several challenges, including probes by government regulators and the recent resignation of its chief executive officer, which could imperil its future market value.[199] Nonetheless, reports of its continued growth lend confidence to counsel's claims. In addition, Loevy & Loevy has requested that its counsel fees be paid out as a

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194 *See supra* notes 36, 42, and accompanying text. The court concluded that the risk of bankruptcy was genuine. *See In re Clearview AI*, 2025 WL 875162, at *16.

195 *See supra* notes 36–38 and accompanying text.

196 *See supra* Part II.

197 *See supra* Part II.A.3.

198 *See supra* notes 58–59 and accompanying text.

199 *See* Charles Rollet, *CEO of Clearview AI, a Controversial Facial Recognition Startup, Has Resigned*, TECHCRUNCH (Feb. 20, 2025), https://perma.cc/XJ2E-FTMX.

percentage of the class's recovery.[200] The firm's preference for a percentage fee from the common fund suggests it has faith in the value forecasts.

Though the *In re Clearview AI* proposal seems to be founded on a fair value forecast, it does not include sufficient protections to prevent manipulation. Besides calculating the class's share on a fully diluted basis, the agreement does not include any further limitations on Clearview's ability to issue additional equity to the detriment of the class. There are no guards against dilution. The class's stake gets some protection thanks to the alternative payout options, but these provisions place substantial pressure on the settlement master to correctly determine when or whether to exercise these options. The settlement master, Judge Sidney Schenkier, has extensive experience as a magistrate judge and as an arbitrator and mediator. However, his background appears to be more generalist, and he may not have in-depth knowledge of the vagaries of private equity, venture capital, or startup valuation.[201] Because there are not enough protections in place to ensure that what appears to be a good deal for the class remains one, the proposed settlement is not fair, reasonable, and adequate.

The *In re Clearview AI* settlement also fails to account for the moral complexity inherent to a future stakes agreement. Clearview has already demonstrated a willingness to engage in wrongdoing to advance its business, and its continued pace of frantic growth[202] raises red flags about whether Clearview will self-police in the future. Even accepting the court's conclusion that injunctive relief would not be valuable,[203] the failure to provide for the creation of a secondary market on which class members can sell their shares fails to reckon with the intimacy of the harm that class members have suffered. Clearview's photo scraping was a violation of class members' privacy. By denying class members the ability to remedy their harms without having to be a co-owner and proponent of the business, *In re Clearview AI* reprises the violations of individual autonomy that spurred the suit in the first place. Approving this settlement, which does not attempt to address the moral ickiness of forcing injured parties to root for their continued exposure in

200 *See* Plaintiffs' Fee Petition at 9–11, *In re Clearview AI*, 2025 WL 875162 (N.D. Ill. Mar. 20, 2025) (No. 1:21-CV-00135).

201 *See Hon. Sidney I. Schenkier (Ret.)*, JAMS, https://perma.cc/3FMR-H8WB.

202 *See supra* notes 58–59 and accompanying text.

203 *See In re Clearview AI*, 2025 WL 875162, at *12–14.

biometric recognition searches, sends the wrong message to Clearview and to other potential privacy violators.

The settlement, as it currently stands, does not satisfy the factors articulated here and thus is not fair, reasonable, and adequate as required by Rule 23(e)(2). The court should not have approved the settlement in its current condition. However, this is not to say that no future stakes settlement could have been approved in this case. Class counsel and Clearview should have gone back to the drawing board to negotiate additional terms to better protect the interests of the class and individual class members.

CONCLUSION

Complex problems require creative solutions. And creative solutions require carefully crafted guardrails. Granting an equity stake to the class permits injured parties to recover from a defendant who might otherwise declare bankruptcy and allows damages to scale proportionally to the success, and thus proportionally to the harm that a class suffers. But a future stakes settlement also poses risks. Its value is uncertain, it is vulnerable to manipulation, and it provokes moral quandaries about whether it is appropriate to force injured parties to further engage with the company that caused them harm. Existing standards for class settlement fairness review are insufficient to address the complex benefits and risks of future stakes settlements. This Comment advocates for courts to adopt additional standards when evaluating future stakes settlements to ensure they are used fairly.

Future stakes settlements are the next innovation in a line of alternative class action settlement mechanisms. If courts can responsibly and reasonably manage the use of future stakes settlements, this mechanism may become very popular. Initially, a future stakes settlement may be best suited to litigation between a large class bringing many small claims against a startup. The startup's limited liquid resources make it vulnerable to bankruptcy, but its expected increase in value in the future suggests improving financial fortunes such that future stakes might be desirable. However, if this mechanism becomes normalized in class actions against startups, other defendants may follow this example. For defendants who are not facing the threat of insolvency through continued litigation, a future stakes settlement may be a strategic investment tactic. Defendants may calculate that their internal rate of return of continuing to invest their existing funds into the business outweighs the increased cost of paying out a larger value in the future. As a result, even defendants who are not facing the imminent threat of bankruptcy may advocate for a future stakes settlement that allows them to continue investing and growing in the short term in exchange for providing a larger payout in the longer term. Given the diversity of potential use cases, it is especially critical that courts lay the groundwork now to critically evaluate proposed future stakes settlements and challenge parties to negotiate terms that compensate class members and deter bad behavior.