



# Suing Subway: When Does a Class Action Settlement Benefit Only the Lawyers?

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In 2013, an Australian teenager measured a sandwich he purchased from a Subway restaurant and discovered that his “footlong” sandwich was [missing an inch](#). After the teen posted his discovery on social media, his post [went viral](#), and a group of consumers commenced [a class action lawsuit](#) against the restaurant chain alleging that its sandwiches were shorter than advertised.

The parties ultimately agreed to settle their dispute on the condition that Subway (1) [inspect and measure](#) its baked rolls to ensure that its sandwiches were at least 12 inches in length; and (2) pay plaintiffs’ counsel over half a million dollars in [attorney fees](#).

[In a recent decision](#), however, the U.S. Court of Appeals for the Seventh Circuit [rejected](#) this proposed settlement. The Court ruled that the settlement violated the [Federal Rules of Civil Procedure’s](#) requirement that class action settlements be “[fair, reasonable, and adequate](#)” because the settlement [did not meaningfully benefit Subway’s customers](#), but instead [solely benefited plaintiffs’ counsel](#).

The *Subway* decision reflects a [growing](#) (but [not universal](#)) trend of courts [increasingly](#) scrutinizing class action settlements to evaluate whether they provide meaningful benefits to class members or instead serve predominantly to [enrich class counsel](#). This Sidebar explores the *Subway* ruling and its broader significance to class action litigation, tort reform, and consumer rights.

## **Class Actions and the Underlying Debate**

As background, a [class action](#) is a mechanism by which a class of persons affected by a defendant’s allegedly unlawful practice challenges that practice in a single lawsuit, rather than through numerous, separate suits initiated by individual plaintiffs. A proposed “class representative” may sue on behalf of many other similarly situated persons – including persons who are not named parties to the lawsuit – as

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long as the proposed class action satisfies prerequisites established by the [Federal Rules of Civil Procedure](#).

Class actions have been the subject of much debate. As one court [has explained](#), “the class action is a worthwhile supplement to conventional litigation procedure ... but it is controversial and embattled ... in part because it is frequently abused.”

On the one hand, proponents defend class action litigation as a method for individual plaintiffs to [hold defendants accountable](#) for unlawful practices that inflict comparatively [small injuries to a large number](#) of people. As the [Supreme Court has noted](#),

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.

So, for instance, a customer who buys a 12-inch sandwich for \$6.00 but receives an 11-inch sandwich will likely not pay an attorney to recover the fifty cents for the missing inch. Few (if any) attorneys would be willing to file suit for such a “paltry” sum. However, if that single customer can instead represent a class of *one million* customers, every one of whom has allegedly paid fifty cents for an inch of sandwich she never received, then the total potential damages for that entire class of consumers would equal \$500,000. If the class is ultimately victorious, a large portion of that \$500,000 damages award could be [divided](#) among class counsel and the class representative to compensate them for their efforts in challenging the defendant’s allegedly unlawful actions, while the remainder could be split amongst the other class members. Proponents of class actions therefore contend that class action litigation provides plaintiffs an incentive to challenge unlawful behavior that [might otherwise go unpunished](#).

On the other hand, critics argue that class actions are [subject to abuse](#). Because class certification allows the plaintiff to [aggregate](#) the damages suffered by a large number of people, a defendant who opts to defend rather than settle a class action may face, in the words of the advisory notes to the Federal Rules of Civil Procedure, “[potentially ruinous liability](#).” Thus, as a 2012 [Seventh Circuit opinion](#) noted, “even if a class’s claim is weak, the sheer number of class members and the potential payout that could be required if all members prove liability might force a defendant to settle a meritless claim in order to avoid breaking the company.” Critics therefore maintain that class actions encourage the filing of meritless lawsuits in the hopes of securing a settlement.

### **Judicial Scrutiny of Class Action Settlements and the *Subway* Case**

In this vein, because a class representative purports to represent class members who are not named parties to the lawsuit (and therefore “have [no control](#) over class counsel”), [some courts](#) have expressed concern that a class representative and her counsel may negotiate a settlement that is not in the class’s best interests. In the words of one [Seventh Circuit opinion](#), class counsel’s “incentive to negotiate settlements that enrich themselves but give scant reward to class members,” coupled with the defendants’ “burden of responding to class plaintiffs’ discovery demands,” creates “an incentive” for both parties “to agree to an early settlement that may treat the class action lawyers better than the class.”

To reduce the risk that the parties will negotiate a settlement that disfavors absent class members, the [Federal Rules of Civil Procedure](#) require “[court approval](#) of all class action settlements, which may be granted only after a fairness hearing and a determination that the settlement taken as a whole is fair, reasonable, and adequate” to the class members. [Courts weigh a variety of factors](#) to evaluate whether a proposed settlement is “fair, reasonable, and adequate,” including:

- The strength of the plaintiff’s case;

- The risk, expense, complexity, and likely duration of further litigation;
- The amount offered in settlement;
- Whether the proposed settlement was fairly and honestly negotiated;
- The parties' judgment that the settlement is fair and reasonable; and
- The reaction of the class members to the proposed settlement.

The Seventh Circuit ruled that the proposed settlement in *Subway* failed this test. As noted above, Subway had agreed as a condition of settlement to [inspect and measure](#) its bread rolls to ensure that its sandwiches were at least 12 inches in length. However, the Seventh Circuit concluded that these inspection procedures would not affect the amount of food customers would receive because, among other things, “all loaves are baked from the same quantity of dough” and any “sandwich roll that fails to bake to a full 12 inches actually contains no less bread than any other.” Having determined that a Subway customer would receive the exact “[same amount of food](#)” for her money with or without the settlement agreement, the Seventh Circuit held that the proposed settlement “provided [no meaningful benefits](#) to the class.”

The proposed settlement did, however, provide plaintiffs' counsel with over half a million dollars in [attorney fees](#). Opining that “a class settlement that results in fees for class counsel but yields no meaningful relief for the class ‘is [no better than a racket](#),’” the Seventh Circuit [held](#) that the lower court “should not have . . . approved” the settlement.

### Key Takeaways

The *Subway* case is one of several recent cases rejecting proposed class action settlements because of their lack of value to class members. The [Seventh Circuit](#) has been [particularly aggressive](#) in [overseeing](#) proposed class action settlements, and the [Sixth](#) and [Ninth](#) Circuits have also invalidated settlements that, in the view of those courts, afforded substantially greater benefits to class counsel than to class members.

That is not to say, however, that judges reject the majority of proposed class action settlements that come across their desks, as several federal [courts](#) have [approved proposed class action settlements](#) and [attorney fee awards](#) within the past few months alone.

Moreover, not all courts appear equally skeptical of settlement agreements that provide only modest benefits to class members. The Tenth Circuit, for instance, recently approved a settlement that awarded “millions of dollars in [attorney's fees](#)” to class counsel yet provided only [non-economic “informational” benefits](#) to class members. In that same case, the Tenth Circuit also [explicitly refused](#) to adopt the Seventh Circuit's rule that any attorney fees award that exceeds “a third . . . of the total amount of money going to class members and their counsel” is presumptively unreasonable.

The aforementioned cases take place against the backdrop of broader legislative debates regarding whether class actions confer meaningful benefits to the public or if they instead primarily benefit the class action bar. These debates have resulted in proposed legislation in the 115th Congress, such as the [Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017](#) (H.R. 985), which, among other things:

- Limits attorney fee awards to a “reasonable percentage” of any payments provided to the class;
- Prohibits attorney fee awards that “exceed the total amount of money directly distributed to and received by all class members;” and
- Prohibits the payment of attorney fees until the completion of the “distribution of any monetary recovery to class members” and an “accounting of the disbursement of all funds paid . . . pursuant to the settlement.”

The House passed H.R. 985 on March 9, 2017, and, as of the date of publication, the bill is [pending](#) before the Senate's Judiciary Committee. If ultimately enacted, this statute could alter the availability of attorney fees in class action litigation, and, by extension, implicate the willingness of courts to approve class action settlements.

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