Class Actions in Chile

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ABSTRACT

This study provides an empirical description of how class actions have worked in Chile under the procedure enacted in 2004. The study is the first comprehensive empirical description of consumer class action cases in the country since they were implemented. This study begins with a description of the consumer class action procedure and explains how the consensus regarding the undesirable effects of private enforcement, steered by plaintiffs' attorneys, led to a defendant-friendly procedure that gave little incentive for plaintiffs to litigate them. The study also explains the theoretical barriers in the procedure that prevent settlements, which are a common outcome of class action litigation in other jurisdictions. The second part of the article describes the universe of class action cases, and provides some interpretations on the aggregated data. The latter confirms that the class action procedure has effectively prevented sophisticated plaintiffs' counsels from engaging in class action litigation, has rendered few settlements, and ultimately has been used for political purposes or to draw the attention of the regulatory authorities.

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Our concern is that Europe's revulsion at accepting the reality of legal enforcement [of class actions] as an entrepreneurial activity may leave the incipient reforms without the necessary agents of implementation.

Samuel Issacharoff & Geoffrey P. Miller

INTRODUCTION

In 2009, Professors Samuel Issacharoff and Geoffrey Miller wrote an essay analyzing how Europe was experimenting with aggregate litigation in light of the American experience.1 Their main concern was that European countries, having reached consensus that the American model dominated by plaintiffs' attorneys was not desirable, might introduce aggregated litigation without the necessary agents of implementation.2 Chile introduced consumer class actions in 2004, and having reached the same conclusion as Europe, adopted several innovations that sought to avoid the creation of a “litigation industry” fueled by empowered plaintiffs’ attorneys. Yet, problems arose because this consensus was reached while Congress was discussing the draft that became the class action procedure, and thus the innovations were introduced over an existing project without much consideration of whether they were coherent with the whole and with other provisions of Chilean civil procedures.

Regarding the economics of the litigation, this “on the fly” consensus led to a procedure that allowed private litigation but banned all the shortcuts and all the evident incentives for private plaintiffs to invest in it. The problem was that in doing so, legislators also removed all the sanctions and all the punitive aspects that, according to the theory, could prevent extended litigation and deter future abuses. Regarding the procedural aspects of the litigation, the abrupt consensus led to a patchwork statute that abused open-ended formulas. These formulas included, for example, giving civil law judges control over critical aspects of the litigation without giving them the necessary rules to address them. It also involved giving the existing consumer agency a prominent role in the litigation, something that was done without increasing the agency’s budget or staff.

2. Id.
The conjunction of these two dimensions, in addition to other particular rules, created a difficult scenario for Chilean plaintiffs for several reasons. First, by altering the remedies usually provided for consumer abuses, the class action procedure eliminated the opportunity to claim moral damages. These damages were essential in the attorney’s contingency fees in non-class action procedures and were not replaced with a comparable substitute. Second, the open-ended norms required substantial interpretative work, which led to considerable back-and-forth between higher and lower courts. This increased the cost of the litigation, which gave defendants an advantage. Third, because the procedure did not impose significant sanctions to defendants for their attempts to delay the trials, they extended the litigation on formalistic interpretations of the class action statute for years at little or no cost.

Perhaps the only aspect that encouraged some early sophisticated litigation in class actions were fines that were defined for the individual procedures that existed before the introduction of the class actions. If these fines were to be applied to each case in the class, they could have turned into excellent incentives for defendants to try to settle cases and pay plaintiffs’ counsels. Nevertheless, courts quickly rejected this empowering interpretation. As a result, today’s class actions are often litigated by unsophisticated plaintiffs’ attorneys and by a resource-constrained consumer agency. These agents have used class actions to exert political pressure on the defendants or to draw the attention of the regulatory authorities rather than to compensate consumers and deter abuses.

To present the argument and the empirical data that sustains it, this study is organized as follows. Part I describes the Chilean class action procedure from a normative and theoretical standpoint. It identifies the main features of the procedure and pinpoints the main structural issues that shaped the litigation, in particular the framework of incentives for plaintiffs, which form part of Issacharoff and Miller’s concern. Part II provides a descriptive analysis of the universe of class action cases in Chile, as well as some occasional assessments of the class action procedure in relation to the existing cases. It also provides consistency checks in order to assure that the empirical data aligns with what is expected under the procedural rules described in Part I. Part III concludes with a summary of the findings, stressing the fact that the rejection of entrepreneurial activity of plaintiffs’ attorneys left the country with inefficient class actions that only serve in some cases to induce regulation.

3. Moral damages, or daños morales, are a judicial construction based on a provision of the Chilean Civil Code that says: “[E]very damage that arises from a negligent or tortious behavior from a third party must be compensated by the later.” Código Civil [COD. Civ] art. 2329 (Chile). Even though the category is comprehensive and includes all damages that are non-pecuniary, for the purposes of this study they can be considered “mental anguish,” “mental suffering,” “humiliation” or “emotional distress.” See Saul Litvinoff, Moral Damages, 38 LA. L. Rev. 1, 37 (1977); see also Enrique Barros Bourie, Tratado de Responsabilidad Extrakontractual 287 (2006).
I. THE CHILEAN CLASS ACTION PROCEDURE

I begin by detailing the sources I used to draft this Part. I then briefly explain the history of the Chilean class action procedure, trying to unveil some of the policy choices behind the consensus. After, I give a detailed description of the main features of the procedure, followed by an account of the theoretical incentives that exist to litigate class actions. In that central section, I also describe other structural problems that in theory prevent settlements in Chilean class actions. In the last section, I provide general conclusions about the procedure that serve as an introduction to the cases described in Part II.

A. SOURCES

The sources for the information presented in this Part are interviews with two drafters of the Chilean class action procedure; records of congressional debates of the relevant laws; records from fifty-seven class action cases; academic papers regarding class actions in Chile; interviews with eighteen stakeholders in several class actions; and 137 news media articles covering the political developments surrounding the introduction of class actions and the class action cases. Most of the concepts used in this chapter come from the American literature over class actions that helped fill the gaps in the almost inexistent Chilean literature on the topic. That said, for the concepts that could not be described using comparative literature, I provided footnotes and references to the Chilean literature or statutes that address them.

B. BACKGROUND OF THE CLASS ACTION PROCEDURE

In the mid-1970s, the Chilean retail industry began to thrive on consumer credit with little regulation. By the beginning of the 21st century, the consumer credit practices of the retail industry were generating more

4. The statute governing Chilean consumer class actions is Ley No. 19496 ESTABLECE NORMAS SOBRE PROTECCIÓN DE LOS DERECHOS DE LOS CONSUMIDORES, usually referred to as the “Consumer Law,” which incorporated the class procedure after a reform enacted by Law No. 19955 on July 14, 2004. See Law No. 19496, Marzo 7, 1997, Diario Oficial [D.O.] (incorporating the changes made by Law No. 19955 unless expressed otherwise).

5. See Historia de la Ley No. 19955, Modifica la Ley No. 19496, Sobre Protección de los Derechos de los Consumidores 2004 (Chile); Historia Fidedigna de la Ley No. 19496 (1997) (Chile).

6. For the construction of the database, see infra Part II.A.

7. Most of them conducted in Santiago, Chile, in January 2011.


consumer claims than any other industry in the country.\textsuperscript{10} Since its creation after the return to democracy in 1990, Servicio Nacional del Consumidor (SERNAC), the Chilean consumer protection agency, tried to foster self-regulation in the retail industry and in other industries, first by providing information to consumers, and then, after 1997, by intervening in existing individual procedures that had no counsel to claim for fines or to represent the general interest of consumers.\textsuperscript{11} These efforts achieved modest results curtailing the abusive practices of the industry, and this provided the economic argument for SERNAC's project to introduce consumer class actions in the country.\textsuperscript{12} The class action procedure was drafted by SERNAC between the years 2000 and 2001. The agency devised the procedure as part of the Consumer Protection Statute and with the same scope of protection. Accordingly, the procedure was included in an extensive package intended to improve the Consumer Law presented to Congress.\textsuperscript{13} The government bill's preamble posited that class actions were needed because small or negative value claims (where the cost of the claim exceeds the benefits of

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\textsuperscript{11} See Law No. 19496, art. 54 (replaced by Law No. 19955, art. 58(g)).

\textsuperscript{12} Interestingly, the idea of having class actions in Chile was proposed by SERNAC's former Director, Alberto Undurraga, an economist with graduate studies at the University of Michigan, under the advice of José de Gregorio, the former Minister of Economy, a Ph.D. in Economics from MIT. In an interview held January 2011, the former Mayor Undurraga, told me:

The idea did not come from the world of lawyers . . . and it was resisted by them because it changed the relative effects of judgments . . . . The idea came up in conversations with Eduardo Engel [professor in the Yale Department of Economics]. We wanted to correct market asymmetries . . . and present SERNAC as a pro-market advocate. [By 1999] we had, in SERNAC, accumulated frustration . . . the teams inside [the agency] had the feeling that the reforms of 1997 were bad and insufficient. [SERNAC's lawyers] had a stock of "issues" that needed to be incorporated in the Consumer Law . . . answers to problems observed on the way.

Interview with Alberto Undurraga, former Director, SERNAC (Jan. 2011); see also \textit{HISTORIA DE LA LEY} No. 19955, supra note 5, at 38 (quoting Alberto Undurraga's transcribed formal interventions in Congress). The congressional debate over class actions is full of references to SERNAC's role in monitoring corporate misbehavior in the retail industry. See id. at 138, 152, 158, 465, 473, 477, 487, 494, 497-98, 552, 564, 566, 573.

\textsuperscript{13} Other related bills, like the Chilean Ombudsman introduced in 2003, were devised to protect "supra-individual" interests outside the Consumer Law, after the fashion of what Professor Francisco Fernández Fredes, former Director of SERNAC, advocated for Chile several years before the class action reform. These projects were rejected by the legislature because the right-wing parties believed that there were already enough checks and balances in the Chilean administrative system. See \textit{MENSAJE DE S.E. EL PRESIDENTE DE LA REPÚBLICA CON EL QUE SE INICIA UN PROYECTO DE REFORMA CONSTITUCIONAL QUE CREA EL DEFENSOR CIUDADANO} 214-350 (Nov. 17, 2003) rejected in the \textit{CÁMARA DE DIPUTADOS LEGISLATURA 356, SESIÓN 100}, at 41 (Nov. 12, 2008), both available in Tramitación de Proyectos, Librería del Congreso, http://sil.senado.cl (access through a menu on the left side introducing 3429-07 Boletín number).
claiming) had no viable enforcement mechanisms, and because they were needed to curtail the abusive practices of the industries.

The class action procedure, as envisioned by SERNAC and sponsored by the Minister of Economy, was a written civil procedure, like the one existing for individual consumer claims, that involved a two-stage mechanical process. It started with a declaratory stage, where an authorized entity filed a claim and tried to prove general causation between consumer abuse and the alleged damages in the court that had jurisdiction for the individual claims of the same nature with erga omnes effects. The judgment that ended the declaratory stage could impose fines and declare the defendant liable for its abuse, but could not assess damages. The determination of damages was reserved exclusively to the compensatory stage. Once in the compensatory stage, each consumer could go

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14. The preamble of the bill said that one of its main goals was to:

[A]llow the adequate resolution of current and future consumer problems through legal remedies and self-regulation. The project has been careful to respect certain areas of regulation of institutions taking into consideration that the approach can be developed through self-regulation . . . On the consumer side, this reform will allow us to solve problems of massive consumption, for which, for various reasons (cost of the claims are higher than their benefits, there are difficulties in the process, and difficulties in finding out about infractions, among others), there is currently no proper protection. From the market offer side, a mechanism like the one proposed, with collective redress, deters possible massive infractions, where it is a fact that only a few consumers claim, and therefore, even with fines and possible individual compensations, the infraccional behavior may remain profitable. (translated by the author).


16. This original procedure did have some resemblance to the decoupled model of class actions proposed by Rosenberg for the United States for mass torts in the sense that it separated the liability question from the damages assessment for each member of the class. Nevertheless, the Chilean version lacked the most fundamental deterrent elements to prevent future abuses: the assessment of the global damages, the treble of those damages, and the creation of a compensation or insurance fund, which are essential to Rosenberg's model. See David Rosenberg, Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions
and claim her damages in the same court that reviewed the declaratory stage or in any parallel court in the country according to the general rules, using the declaratory judgment as undeniable proof of the abuse. Under this envisioned procedure, class members could recover both pecuniary and moral damages using the declaratory judgment obtained in the collective procedure. Also, this envisioned procedure did not have any kind of certification to allow the cases to proceed as a class.\(^\text{17}\) In the project, giving standing to entities that were deemed representative and adequate and sanctioning temerarious or reckless lawsuits, were supposed to prevent the misuse of the class action device. Among the entities that had standing to file class actions in the project were SERNAC, consumer associations, fifty or more consumers acting together, and any administrative agency in the country.\(^\text{18}\)

The congressional debate changed most of the original procedure under the arguments that class actions, as proposed by SERNAC, would engender a "litigation industry" like those in other countries.\(^\text{19}\) The most important changes introduced to SERNAC's proposal were the introduction of a new separate stage, called admissibility, similar to the class certification existing in the United States, and the explicit prohibition of using class actions to seek moral damages. The resulting product was a cumbersome written civil procedure that could only be used to pursue pecuniary damages arising from consumer contractual relationships.\(^\text{20}\)

C. THE CHILEAN CLASS ACTION PROCEDURE\(^\text{21}\)

Using comparative class action terminology,\(^\text{22}\) Chilean class action is a
procedure that can be described as: (a) a three-stage (admissibility, declaratory, compensatory), (b) agency-and judge-overviewed, (c) limited transubstantive, (d) opt-out procedure in the declaratory stage and opt-in procedure in the compensatory stage as a general rule, (e) with limited standing, (f) *erga omnes res judicata* declaratory effects in the affirmative but no binding effect in the negative, and (g) with a variety of alternatives for injunctive relief and/or reparation of contractual damages but limited to pecuniary damages.

The definitions for these core concepts are as follows:

a. **Three-stage** means that the procedure is designed as a logical construction of three subsequent stages. The first phase is the admissibility stage. This stage was recently reformed and no case has been tried under the new rules, so the changes, when relevant, are explained in footnotes.\(^2\) The admissibility stage is discussed before the same civil judge who will later oversee the other two stages of the procedure. In this stage, the civil judge has to determine, using “sound evaluation” as the standard of proof,\(^2\) whether: (a) the case was filed by one of the authorized plaintiffs who have standing according to the law; (b) the prosecuted conduct *affects* the diffuse- or collective-interest of consumers as defined in the law;\(^2\) (c) the complaint identified the *matters of fact* that affect the diffuse- or collective-interests of consumers; and (d) the potential number of involved consumers justified, in terms of *costs and benefits*, a procedural or economic necessity to use the class action procedure to effectively protect their rights.\(^2\) The admissibility stage ends with an admissibility

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2. See *Law No. 20543, Octubre 21, 2011, DIARIO OFICIAL* [D.O.] (Chile) (Relativo al Procedimiento Aplicable para la Protección del Interés Colectivo o Difuso de los Consumidores) [In relation to the procedure applicable to protect the Collective or Diffuse Interest of Consumers].

23. These rules have not been applied in any case yet and do not address any of the problems of incentives described in sections I.D and I.E of this study. Nevertheless, footnotes are provided when relevant to explain how Congress reacted to the problem of lengthy trials. See *Law No. 20543, Octubre 21, 2011, DIARIO OFICIAL* [D.O.] (Chile) (Relativo al Procedimiento Aplicable para la Protección del Interés Colectivo o Difuso de los Consumidores) [In relation to the procedure applicable to protect the Collective or Diffuse Interest of Consumers].

24. The original Spanish of the required standard of proof is *sana crítica*, which translates to the equally obscure *reasonable judgment* or *good judgment*. The *sana crítica* standard gives the judge freedom to admit any kind of evidence, but imposes on her the obligation to evaluate the evidence using deduction and experience to achieve a result without apparent contradictions, thereby exercising a “sound evaluation” of the evidence. See Jaime Laso Cordero, *Lógica y Sana Crítica*, 36 REV. CHIL. DERECHO 143, 144 (2009). The latest reforms removed this reference because the new admissibility stage does not consider an evidentiary period. See *infra* note 27.

25. The Consumer Law defines *collective-interest* class actions as the ones that claim the rights of a determined or determinable group of consumers, related to a provider by a contractual relationship, and *diffuse-interest* class actions as the ones that claim consumer violations of an indeterminate group of consumers. See *Law No. 19496, art. 50*.

26. These rules were a good example of Congress’ open-ended norms that civil law judges could not manage. This call produced huge delays in most of the cases because defendants claimed that the non-aggregated administrative procedures (enacted as competing mechanisms by regulatory agencies while Congress discussed class actions) were swifter and cheaper. It also delayed trials because, when
judgment where the judge must declare whether the complaint fulfilled the requisites to proceed as a class action. If it did, the judgment defined the class and ordered to serve notice of the procedure to consumers via news media, warning them of their right to opt out of the class if they so wish.27

The second phase of the class action procedure is the declaratory stage, which is the trial through which general causation between the abuse and the damages must be proven. Before the recent reform, this stage had to follow the rules of the Procedimiento Sumario as a whole. Now it only follows the evidentiary rules of that procedure, which are almost entirely transcribed in the class action procedure.28 The compensatory stage ends with a declaratory judgment, where the judge declares whether the collective interest or the diffuse interest of consumers was affected or not; set the class counsel's fees; and if compensation proceeds, invites the consumer not redressed in expedited ways in the judgment itself to come forward to obtain redress by the news media.

The last phase of the procedure is the compensatory stage, where individual consumers, not compensated by expedited methods in the declaratory judgment because they were unknown or had undetermined damages, may come forward and prove their individual damages.29 The compensatory stage starts with a period of ninety days immediately following the last notice of the declaratory judgment. This period is established for consumers to come forward and claim their damages. After that period, consumers that did not appear by themselves or represented by a lawyer lose their chance to obtain redress on the same facts. The procedure also allows consumers to opt-out during the same period, permitting them to try their cases in individual procedures using the declaratory

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27. The recent reforms changed the mechanics of the admissibility stage. Now the judge must rule on admissibility using solely the class action complaint, but defendants can challenge this decision in front of the same judge and also appeal to the court of appeals of the same jurisdiction where the case was filed. In theory, the admissibility stage now ends with a judgment that rejects the appeal and orders the defendant to publish the notice calling for opters-out. See id.

28. Literally “Summary Procedure.” See Código de Procedimiento Civil (CóD. Proc. Civ.) [Civil Procedure Code] Libro III, tit. XI, Aug. 30, 1902 (Chile). The latest reforms eliminated the reference to Procedimiento Sumario as a way to simplify the integration with the class action procedure. The reforms provided new rules for the evidentiary period that now lasts twenty days instead of the eight days of the evidentiary period of the Procedimiento Sumario, and also formalized a mandatory conciliation, which was established for several other civil procedures, but was not properly implemented on class actions. See Law No. 20543, art. 1(1).

29. See Martín Gubbins & Carla López, Chile, in The Globalization of Class Actions 71 (Deborah R. Hensler et al. eds., 2009).
tory judgments as undeniable proof.\textsuperscript{30} After those ninety days, the procedure gives the defendants the chance to challenge the named class members and their damages. Then comes a discussion, and finally, the judge sets the global amount of compensation for the opters-in and orders the defendant to deposit that amount in the court's account. The court then distributes the appropriate amount to each consumer. This ends this stage and the class action procedure.

b. \textit{Agency- and Judge-overviewed} means that, in this procedure, both SERNAC and the judge have special powers. The agency has to be notified of the existence of each case and the existence of potential settlements and has the right to join or to continue the cases started by other plaintiffs, even if those plaintiffs wish to settle them.\textsuperscript{31} The judge has the power to remove the class counsel, approve or reject settlements, and fix attorneys' fees. These features are unique to class action procedure in Chile.\textsuperscript{32}

c. \textit{Limited transubstantivity} means that the procedure can also be applied to protect consumer rights described outside the Consumer Law, such as the ones described in the governing statutes of education and health or the ones that follow antitrust suits, but are limited to "consumer relations" as the Consumer Law defines them.\textsuperscript{33}

d. \textit{Opt-out} procedure in the declaratory stage means that the results of the declaratory judgment will bind all consumers that fit the definition of the class unless they opted out of it right after the notice of the admissibility judgment. Nevertheless, this feature does not address consumer compensations in cases where consumers or their individual damages are unknown. In said cases, consumers will need to opt-in during the compensatory stage and to come forward to obtain redress.\textsuperscript{34}

\textsuperscript{30} In messy wording, the rule requires consumers to expressly opt-in to receive compensation, but also allows consumers to explicitly opt-out in order to allow them to use declaratory judgment as undeniable proof in an individual procedure. Without positive action in ninety days, consumers who do not make one of these two choices will lose their chance to obtain compensation. Law No. 19496, art. 54(c).

\textsuperscript{31} Contrary to Brazil's class actions, the purpose of notice to the authority represented by SERNAC is not to invite the agency as a \textit{custos legis} or viewer, but as a full party. \textit{See Gidi, supra} note 22, at 339. This has several implications for private plaintiffs. \textit{See infra} note 52.

\textsuperscript{32} \textit{See Law No. 19496, art. 51(7), 53B.} The procedure mandates that if there are disputes among several counsels, the judge can appoint a "common procurator," a position equivalent to that of class counsel.

\textsuperscript{33} \textit{Limited transubstantivity} means that legislators designed the procedure to be used whenever it involved consumers' collective- or diffuse-interest, without taking into account whether the infractions were described in the Consumer Law or not. For example, education, health, construction, and other special industries have provisions and infractions described in their own governing statutes but these infractions can be prosecuted using consumer class action procedure. For a description of the term of art, \textit{see Mark C. Weber, The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases, 14 Rev. Litig.} 113, 120 (1995).

\textsuperscript{34} The term \textit{opt-out} comes from the fact that consumers who do not want to be represented in the class have to explicitly say so. Conversely, the term \textit{opt-in} means that consumers need to explicitly say they want to join the cases. Describing the Chi-
e. **Limited standing** means that only three authorized entities are allowed to file a class action representing consumers. The three entities are: SERNAC; a consumer association formed at least six months prior to the filing; and a group of fifty or more consumers with direct representation.35

f. **Erga omnes effect** is the natural consequence of an opt-out procedure and means that the judgment that declares the responsibility of the defendant in the declaratory stage will bind anybody that fits the description of the class unless they opted out while in the procedure.36

g. Finally, **injunctive relief** and/or **contractual damages** are the remedies that the procedure grants. **Diffuse-interest** class actions can only grant injunctive relief when an on-going situation violates consumer rights. **Collective-interest** class actions can seek injunctive relief and contractual damages. Nevertheless, regarding the latter, Chilean class actions were shaped very conservatively, limiting the damages to pecuniary contractual damages, therefore banning plaintiffs from claiming moral damages that could also rise from contractual violations. This is a substantial difference with all other civil procedures that could serve the same purpose on an individual basis, where plaintiffs can always claim moral damages.37

ean class action procedure, Gubbins and López claim that: “Only those [consumers] who join may receive whatever relief, reimbursements or compensation is granted in the case.” Gubbins & López, supra note 29, at 72. This may lead readers of their work to consider Chilean class actions as opt-in procedures because there is no prior reference to help understand their assessment. In fact, Chilean class actions are opt-out, because the effects of the declaratory judgment in the affirmative are erga omnes. In any case, Gubbins and López’s claim is incorrect, because a judge can order expedited ways to compensate consumers, if possible, without asking them to come forward. See Law No. 19496, art. 53(f), 53C(e), 54C. Gubbins and López’s claim is valid only in the case where class members remain unknown or their damages are uncertain in the compensatory stage, so they need to opt-in to be compensated.

35. The regulatory agencies were discarded as entities with standing to file class actions without expression of cause in the Commission. Instead, the Commission proposed a mandatory notice to SERNAC when the case was started by a private entity with standing. This mandatory notice gives SERNAC the opportunity to join the private plaintiffs’ cases. There is no formal debate on record as to why the Commission removed standing from the administrative agencies. Nevertheless, to my knowledge no agency has ever decried the lack of that power. This had several implications in the relations of SERNAC and the existing regulatory agencies. See infra note 122; see also Law No. 19496, art. 52.


37. In Chile it is rare to find procedural rules that set limitations on what normally would be considered substantive law matters, such as damages. The reason for this limitation was that the Commission, mindful that judges were using moral damages to punish defendants in consumer cases, included a provision that explicitly banned the possibility of using class actions to claim moral damages. See the tex-
The class action procedure, as all other Chilean civil procedures, does not contemplate punitive damages. As said, the only punitive sanctions in Chilean consumer class action were the result of a mistake of the drafters who forgot to modify the fines existing for the individual procedure of the Consumer Law before the introduction of class actions. These fines, which remained in the statute, are defined per abuse so they could have been applied to each case inside the class or for the class as whole. Nevertheless, these fines are too high to be considered applicable to each individual case by the conservative Chilean judiciary.

D. DIRECT INCENTIVES TO LITIGATE OR TO AVOID LITIGATION IN CHILEAN CLASS ACTIONS

Because incentives, in particular incentives to the plaintiffs’ attorneys, which are Miller and Issacharoff’s agents of implementation, are a key factor that shapes the class action litigation, I devote this section to explaining thoroughly the differences between the rules that apply for the general case and the rules that Congress, rejecting the American experience, elaborated for the Chilean class actions.

The general rule in Chilean civil procedures is that each party pays its own attorneys’ fees and that cuota litis (contingency fees) agreements are permitted. Due to the fact that Chile does not have punitive damages,
and contractual pecuniary damages, which include the actual damage and loss of income, are delimited by stricter rules, moral damages serve in most of the procedures to increase the contractual damages and to punish defendants when judges decide to do so. These moral damages are usually included in the calculus of the plaintiffs' attorneys' 
*cuota litis* in all sorts of civil litigation.

The only exception to the previous cost allocation rules are the *costas*, which are monetary sanctions against frivolous litigation that are shifted from the condemned party to the party that suffers from it. For the judge to condemn a party in *costas*, the defendant must be fully condemned or the plaintiff must lose on all its allegations, and the judge must rule their claims or defenses as frivolous. In any other case, judges will consider the litigation justified because the parties had "plausible reason to litigate." To maintain the coherence of the cost allocation rules, the Code of Civil Procedure mandates that the *costas* belong to the party and not to her attorney. So, if attorneys want the *costas*, they have to bargain for them in advance with their clients as part of their fee arrangement. In any case, *costas* – which are the only fee that the Chilean judges had ever shifted – are volatile and historically have been extremely low. Thus, they are not considered an important source of an attorney's fees.

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42. According to Barros: The problems arising from [implementing] punitive damages are more intense when referred to moral damages, because, on the contrary to the pecuniary damages, these cannot be calculated in reference to an objective sum that express the damages suffered [by the plaintiff]. Therefore the tension in our jurisprudence is understandable, and, despite the justified doctrinal apprehensions, it is not easy to eliminate the retributive elements from the assessment of moral damage. (translated by the author).

Barros, *supra* note 3, at 310. For examples of judgments that contain references to punitive expressions, see *id.* at 309, n.304-05.

43. *Costas* translates to "expenses," and are monetary sanctions eventually imposed on a losing party who instituted a frivolous issue requiring a formal ruling from the judge. See CÓD. PROC. CIV., art. 144.

44. Mery has qualified the Chilean cost allocation rules as something in the middle of the English Rule and the American Rule, because *costas* require 'absolutes' in order to work and, in any case, they almost never cover the full costs of the party that receives them. See Rafael Mery, *Una Aproximación Teórica y Empírica a la Litigación Civil en Chile*, SELECTED WORKS RAFAEL MERY 25 (2006), http://works.bepress.com/rafael_mery/1.

45. The same feature can be found in some of the American procedures that have fee-shifting provisions. See Charles Silver, *Unloading the Lodestar Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 872-74 (1991).

46. There is an important qualification of this assessment. Since 2007, the Court of Appeals of Santiago has seen an explosion of litigation against health insurance companies. This movement was encouraged by a late reform of the statute that governed those companies and provided the legal framework under which these claims arose. There, lawyers have found a sustainable way of living out of the *costas* granted by the Court. According to a report made by Centro de Investigación Periodística (CIPER-Chile), the Court awarded *costas* for an average of approximately $1,000 per each *Recurso de Protección* (constitutional emergency actions which are very expedited), and several lawyers have specialized in this kind
In the consumer class action context, the previous scheme differs in four critical aspects. First, under the class action procedure, the entity authorized to file class actions only becomes a class representative, and its attorney, the class counsel, after the admissibility judgment is advertised by newspapers calling for the opters-out. This issue, perhaps desirable from the standpoint of individual justice because it gives consumers “feet,” and also desirable from the standpoint of collective justice, because it gives consumers a voice through their own lawyers,

47. This newspaper-notice provides the factual landmark in which the law creates the legal fiction, unchallengeable by collateral attacks based in inadequate representation, that all potential class members are being directly represented by the class counsel and therefore bound to the results of the case. This is a key element of the due process that makes Chilean class actions compatible with a Civil Law tradition that is reluctant to allow legal representation of absent parties.

48. In Chilean class actions, “feet” serve little to consumers because in most cases it will be economically impracticable to opt-out in order to file an individual complaint and it is prohibited to create a parallel class. As Issacharoff explains for the United States:

One of the prime reasons for the development of the class action is the insufficiency of resources of individual litigants facing a common course of conduct by a repeat actor. In such cases, the “negative value” of any individual claim defeats the prospect for meaningful individual enforcement of even well-established, meritorious claims... As a result, an individual litigant who is unlikely to sue outside an aggregate action is similarly unlikely to exercise a right to opt out into the domain of unviiable individual claims.


49. The procedure allows each authorized entity and each individual consumer who desires to be represented with a voice in the declaratory stage to grant powers of attorney to her own lawyer. This voice, considered a valuable control mechanism for class action litigation in other jurisdictions, does not add much value to consumers here. Unless the claim has decidedly differentiated and high enough pecuniary damages that it could be tried separately, the inclusion of an additional lawyer to exercise voice may reduce payments to the class. In a similar fashion, Coffee notes for the United States that aggregating lawyers to defend subclasses in small value claim class actions would reduce the total payouts of the class. According to Coffee:

"Whether the consequence of adding additional counsel to bargain over this margin is to increase or narrow it, everyone is worse off if the additional transaction costs exceed the gain to the side whose position is improved. Such an outcome is Pareto inferior, and no rational policy should impose it on the class." Coffee, supra note 48, at 43; see also Law No. 19496, art. 51(3).
becomes a structural problem that prevents authorized entities other than SERNAC to invest in having their class actions admitted. This happens because neither the entity that files the complaint nor their attorneys are going to invest in a case they may not control afterwards. An additional important factor is that the Chilean class action procedure does not consider declaring the admissibility for the purposes of a class settlement. Therefore, the notice of the admissibility judgment is an unconditional invitation, not only for consumers to opt-out, but also for other lawyers with as few as one client to become parties and free-ride on the investments made by the party who got the case admitted. The most uncomfortable of these invitees for private plaintiffs can be SERNAC, the public agency that can join or decline joining the case, and dispute the control over it to the existing counsel to become the common procurator.

A second difference with the individual litigation is that under the class actions mechanism there is no chance to set a cuota litis agreement with unknown class members. To solve this, the procedure bluntly mandates that the judge will have to set reasonable fees for the “common procura-

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50. To avoid the problem of unmanageability in cases with several lawyers, a judge may ask the plaintiffs to select a common procurator or, in case of disagreement, select herself. Agreed to or not, in theory, only the common procurator will be entitled to receive the attorney’s fees. In practice, the only entity forced to start cases despite this problem is SERNAC, because it is politically liable if it does not. See Law No. 19496, art. 52(3), 51(6), 51(7).

51. Because most consumer class actions for pecuniary damages will be “negative-value” claims, there is a fair presumption that a lawyer who does not have enough named clients from the admissibility stage will join after the notice to opt-out of the declaratory stage only if she has the chance to free-ride or to dispute the control of the case to the class counsel. The rule that allows consumers to become parties is contradictory with the essence of the opt-out feature, because instead of creating an innocent and useless right to opt-in in the opt-out procedure, it created the right to join as a party with unlimited rights even if the case is in the declaratory stage that undermines class cohesion. See supra note 49. There is no evidence in the history of the class action procedure that this door to fragmentation of class cohesion was intentional. It seems that, because in the original procedure the declaratory stage only served to prove general causality and to impose fines, drafters saw no harm in allowing everybody who wanted to opt-in as a party in that stage.

52. This creates uncertainty for potential entities with standing to file because if the agency joins the case, it has the power to take control of the litigation. But if it does not join the case, its absence is interpreted by defendants (and sometime by the courts) as an approval of the companies’ behavior and weakens the plaintiff’s case. To prevent the latter, private entities sometime file class actions and invite SERNAC to join their case. The agency has accepted few invitations, claiming budget constraints, and has not played an active role in the litigation of the cases it did not start. On the other hand, SERNAC has taken over meritorious cases initiated by private entities. See infra note 122.

53. Attorneys could agree on a contingent fee with the class representative, that is, the consumer association that acted as the entity with standing. Nevertheless, that agreement would only bind the association itself and not its members and would only be feasible if the cases reach settlement, and defendants agree to pay a premium to the class representative. In any other case, a contingent fee agreement will be worthless because the bounty for the consumer association will be as large as the individual compensation of all its members. The same argument can be made if fifty organized consumers start the case. This was foreseen by many of the initial plaintiffs’ counsels who started their cases with an aim to obtain their fees
tor” in the declaratory judgment (second stage of the procedure), taking into account the amount of value of the trial and the economic power of the “plaintiffs.” This rule is over-simplistic and problematic in four aspects: first, it does not establish how to remunerate the attorneys that litigated the admissibility stage and may automatically lose their clients to the judge-appointed common procurator if the judge decides to name one; second, it does not provide how the common procurator’s fees should be deducted from the individual compensations or shifted to the defendant; third, the rule completely ignores the fact that judges have to fix the counsel’s fees in class actions because it is impossible to agree on them with absent consumers, therefore the economic power of those consumers, if it could be assessed, should not matter; and fourth, it does not consider the case where consumers remain unknown by the time of the declaratory judgment, and thus are irrelevant for the purposes of setting the counsel’s fees.

54. The rule to fix attorneys’ fees in class actions is another good example of an open-ended norm that turned out to be vague and incongruent. The norm says: “The judge will prudentially set the fees of the main counsel after his proposal, taking into account the economic power of the plaintiff and the value of the trial.” (translated by the author). See Law No. 19496, art. 51(6).

55. On one hand, this provision gives bargaining power to opportunistic attorneys that may join the class action after the class is declared admissible, because it allows them to dissent with leading counsel and bargain peace. On the other hand, the provision may be used to expropriate clients of attorneys that litigated the case and did not become the class counsels. In practice, in small value cases with a lot of dispersion, it is likely that lawyers will lose their clients to the class counsel because, even if they have cuota litis agreements with their clients, they will not be able to pursue those agreements outside the class device. See id.

56. In Chile, the general rule is that each party bears its litigation costs and the class action procedure has not explicitly changed that. Therefore, if judges do not deduct the attorneys’ fees from awards, defendants may have a good case against the fees in the higher courts. Problematically, judges can only deduct fees from the consumers’ compensation in cases where consumers and their damages are known and can be redressed directly by the company. In any other case, judges will have neither the number of consumers nor the amount of compensation needed to decide the class counsel compensation. In these cases the amount of attorneys’ fees ultimately depends upon how many consumers opt-in.

57. The norm that allows a judge to fix the attorneys’ fees seems to be, in part, reinforcing the general cost allocation rules. Otherwise, the reference to the economic power of the plaintiffs to fix their attorneys’ fees would be inexplicable. Nevertheless, when the rule orders the judge to take into account the value of the trial it could mean either that a valuable case deserves a higher compensation for the counsel, or that there is no need to set a high fee for the class counsel when the case is valuable because she will receive her fees from her clients. Only this last interpretation is consistent with considering the economic power of the plaintiffs to set the attorneys’ fees. See infra Part II.C.3, 4.

58. Unlike other jurisdictions, the Chilean class action procedure does not consider the figure of a compensation fund, or recognize any kind of cy pres or fluid recovery, which could compensate the class counsel based on an estimation of affected consumers. In the United States, this feature is almost always found in small value cases. Even those who favor individual justice over deterrence, have ironically recognized its utility: “[I]ndeed, in many class actions it is solely the use of cy pres that assures distribution of a class settlement or award fund sufficiently large to guarantee substantial attorneys’ fees and to make the entire class proceeding
A third important difference with other civil procedures is that class actions comprise fines and other sanctions that do not exist in other civil procedures. For example, in class actions each authorized entity that acts as a plaintiff can be punished for reckless complaints with a fine of up to 200 UTM (approximately USD 16,000). In contrast, as said above, defendants can be fined with 50 UTM (approximately USD 4,000) per class action. These fines were set in place as a mechanism to prevent abusive lawsuits, but show a clear imbalance in favor of defendants.

The last difference in terms of incentives, as said above, is that the class action procedure—modifying the general remedies provided for contractual violations—only allows plaintiffs to seek contractual pecuniary damages and expressly bans the recovery of moral damages. This becomes a critical issue, because without sufficient fines and without the menace of potential moral damages, Chilean class actions pose little or no financial threat to the defendants.

seemingly worthwhile." Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 621 (2010). Previously, Nyal D. Deems, *The Cy Pres Solution to the Damage Distribution Problems of Mass Class Actions*, 9 GA. L. REV. 893 (1974). One possible explanation for this omission in Chile is that in the original project of SERNAC, the aggregated part of the procedure only served to prove general causality and to impose fines, and was decoupled from the compensatory stage. See supra note 16. As the procedure evolved into an integrated opt-in procedure, where judges could order the defendant to compensate consumers directly in cases where they were known, it became clear for the detractors of the opt-out system that the pocket-to-pocket compensation system would become their best defense for the rest of the cases. As an expression of how conscious the Congress was of this decision, Senators did include a provision that set a period of ninety days for consumers to come forward after the declaratory judgment to claim redress. After that period consumers lose the chance to be redressed under the class action procedure and under any other procedure if they did not opt-out in the declaratory stage. See supra note 30 and Law No. 19496, arts. 53 C(d), 54 C and 54 F.

59. Private entities can bear additional sanctions for reckless complaints, like mandatory dissolution of the consumer association that filed the complaint, and disciplinary sanctions for the attorney who represented the fifty or more consumers, among others. See Law No. 19496, art. 50 E.

60. See supra note 40.

61. The menace of 'potential retributive elements,' paraphrasing Barros, supra note 3, at 310, was eliminated in the Commission by eliminating the moral damages that could contain them. Perhaps the best description of the Senate's belief about the deterring power of moral damages and the policy choices about SERNAC as an enforcement actor can be found in an intervention of socialist Senator Viera-Gallo in the congressional debate:

I want to notice the concerns expressed by the Chamber of Commerce – that I endorse – regarding the collective and diffuse interests. I understand this is an advance, but depends on how it is used and the culture in which this device is going to work in plenitude . . . by the means of the collective and diffuse interests and, on top, the use of moral damages and an active governmental agency – that may act with wisdom some times, but sometimes not (this is not for granted) – is possible to create a substantive conflict, harmful to the economic activity (translated by the author).

See HISTORIA DE LA LEY No. 19955, supra note 5, at 244.

wrongdoers will prefer to extend the litigation until it reaches judgment, as in fact they have done.  

E. OTHER FACTORS THAT AFFECT LITIGATION STRATEGIES AND POTENTIAL SETTLEMENTS

In theory, besides the lack of incentives for plaintiffs to invest in litigation and for defendants to avoid it, the Chilean class action procedure has an additional structural problem: even if plaintiffs are willing to settle the cases from their weak position, the chances of obtaining class settlements are low. This happens because the best time for plaintiffs to settle the cases would be before the admissibility judgment, when they control the litigation, there is no freeriding over their investments in the case, and they can obtain their fees from the defendants. On the other hand, the best time for defendants to settle a case is after the notice of the admissibility judgment, when they can get the preclusive effects of a class settlement with *erga omnes* effects that will prevent successive litigation over the same facts.

Given this misalignment, the theory predicts that only a few particular situations will have the chance to lead to a settlement. First, as it happens with individual cases in countries where each party pays its litigation costs, some class actions could be settled for their nuisance value before they are declared admissible. Another possibility that can increase the chances of settlement is when most of the members of the potential class
are known or the potential class is relatively small. In these cases it is unlikely that another lawyer will dispute the control of the litigation to the attorney that started the case, and also it is unlikely that the case is going to be tried again after the settlement, even if this comes before the notice of the admissibility that gives settlements *erga omnes* effects. A third factor that could increase the chances of settlement is when the potential damages arising from the abuse are variable and therefore create a risk that defendants may want to avoid by settling the case. In all other cases, given the incentives and the timing mismatch, the class actions should continue until they arrive at a definitive judgment.

An additional problem that plaintiffs, other than SERNAC, face to settle their cases, even when the agency does not join the case in the admissibility stage, is that the procedure requires SERNAC to be notified of any attempt of the plaintiffs to withdraw the complaint, which is the natural consequence of a settlement outside the courtroom. In practice, this provision gives SERNAC gate-keeping power, because the agency can continue the cases even if the plaintiffs who started the litigation want to settle them. This makes settlements extremely difficult, because the alternative, which is settling in front of the judge, requires that the proposed settlements be made public before the judge approves them.

This first Part described the sources for this research, the background for the introduction of class actions, the main features of the procedure, the framework of incentives behind it, and the problems that plaintiffs and defendants may face if they want to settle their cases. In theory, the Chilean class action procedure poses too many barriers for plaintiffs: it does not provide the right incentives for plaintiffs to invest in the cases and for defendants to avoid the litigation and it does not set the right conditions to arrive at settlements before judgment. It seems like, in rejection of the idea of the entrepreneurial plaintiffs’ attorney of the American class action, as Professors Issacharoff and Miller posited, the Chilean Congress avoided all the required incentives for private plaintiffs to litigate class actions and also ignored all the instances that could have

66. Nevertheless, in these cases, using a joinder with the individual procedure of the Consumer Law that allows claiming moral damages would be a much more sensible choice. For a comparison of the results of joinder and class actions under the same facts and the same defendant, see infra note 131.

67. Normally, without significant fines and without moral damages, pecuniary damages in consumer class actions should be predictable. Nevertheless, if the potential damages are variable enough (e.g., because the market value of promised goods that were not delivered is variable or may have produced extensive loss of income to the plaintiffs) defendants may decide to push for an agreement to avoid the risk of being forced to pay an expensive judgment.

68. The procedure says:

   All transactions or settlement must be approved by the judge, who can reject them if she estimates that they are against the law or openly discriminatory. In case the plaintiff decides to withdraw the complaint, the court shall notify [SERNAC], who can become the plaintiff in a period of 5 days after the notice. (translated by the author).

   See Law No. 19496, art. 53.

69. See Issacharoff & Miller, supra note 1.
shortened the process, leaving lengthy trials that favor defendants in the long-run as the only option.

Despite this unfavorable scenario, between 2004 and 2010, Chilean plaintiffs, including SERNAC, filed fifty-seven class actions complaints. Only a few of these cases have been settled, and even fewer have provided compensation to consumers. The next Part is an empirical assessment of these cases.

II. AN EMPIRICAL ASSESSMENT OF CHILEAN CLASS ACTIONS

This Part provides a descriptive analysis of Chilean class actions, including an overview of when the cases started, which industries have been targeted, who the plaintiffs are and some interpretations in connection with the previous Part. Part II is divided into four sections. The next section describes the construction of the database of cases and the methodological approach used to analyze it. The second section describes, in general, when the cases started, where they started, and which industries plaintiffs targeted. The third section analyzes the plaintiffs in Chilean class actions and their strategies. Each plaintiff is described through their cases, analyzing who makes the decision to file the class action, their budget, which fights they choose, their effectiveness at keeping their cases alive or settling them, and finally, whether they are behaving as expected given the theoretical framework described. The last section concludes with a summary of findings for the plaintiffs in Chilean class actions.

A. SOURCES AND METHODOLOGY

The class action cases analyzed in this Part come from the official record that SERNAC must keep by mandate of the Consumer Law. A total of fifty-seven class action cases were analyzed. I complemented the official information with media reports, and crosschecked this information with the law firms that have participated in these class actions in

70. Law No. 19496, art. 51(9) (mandating that every class action complaint filed should be reported to SERNAC); see also art. 58 (commanding SERNAC to keep a registry with all the judgments and interlocutory judgments pronounced by the civil courts and local police courts that have jurisdiction in the procedures of the Consumer Law); see also SERNAC, Más y mejor información para consumidores: Se creará un registro de sentencias sobre casos de consumo [More and Better Information for Consumers: A Registry of Judgments of Consumer Cases will be Created], SERNAC (Apr. 4, 2006), http://www.sernac.cl/sernac2011/noticias/detalle.php?id=693. There is no way to check if all the courts are complying and sending their cases to SERNAC, thus there may be some class actions that have been filed but not reported to the database. Nevertheless, because of the public nature of the class actions and the fact that superior courts have vacated at least one procedure where SERNAC was not properly notified, the chance of class actions "off the record" and not considered in this work is remote. The database is accessible at: http://www.sernac.cl/sernac2011/leyes/juicios.php (last visited Apr. 5, 2011).
order to find out if they have received threats of further lawsuits or are defending class actions that have not been reported to SERNAC.

One of the most important components of SERNAC's record is the docket number of each case, which in Spanish is called the rol de la causa. I used these numbers to perform a second crosscheck of the cases in the database of the Judicial Branch, where most of the courts keep an online record of their decisions.\(^7^1\)

SERNAC's record of cases was fairly complete. The other sources showed only four instances of class action litigation that were not considered by SERNAC: two class action cases mentioned by a defense firm;\(^7^2\) one re-litigation of a case that never saw the light of day informed by a consumer association;\(^7^3\) one case filed in the Región de la Araucanía (Temuco) late in 2010; and several cases of a new kind of class action that share a name with consumer class action but deal with the quality of construction and were enacted after the Chilean earthquake of February 2010. I incorporated the first three in the database. I decided not to include the fourth instance because the “class actions for the quality of construction” are not representative actions, but rather opt-in procedures that are more like a joinder with some minor features of the consumer class actions.\(^7^4\)

The fifty-seven cases included in the analysis were categorized according to their year, jurisdiction where the case was tried, type of entity filing the claim, type of industry of the defendant company, and main type of

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\(^7^1\) With the rol de la causa, each case is tractable in the courts or in the Judicial Archives. Almost 70 percent of the cases had an online record, which facilitated further research on the issues tried in those cases. Especially important in this research effort were the intermediate holdings of the courts, which shed light on the issues discussed and many other facts not included in SERNAC's records. Nevertheless, for some cases, especially the ones tried in courts outside the city of Santiago, the dockets were not online, and the information used for those cases comes from news media coverage available on the Internet.

\(^7^2\) I was informed about these cases by one of the specialized defense firms in the country. They were filed by consumers against Farmacias Ahumada (FASA), because of abusive prices in a cartel case followed by the Fiscalía Nacional Económica (FNE) [National Economic Prosecution Office]. See Tribunal de Defensa de la Libre Competencia [T.D.L.C] [Antitrust Court], “Requerimiento de la FNE c. Farmacias Ahumada S.A. y Otros,” Rol de la causa: C-184-08; Fasa califica demandas colectivas en su contra como “temerarias,” [FASA Considers Class Actions Against it as Reckless], El Mercurio (June 1, 2009), http://diario.elmercurio.cl/detalle/index.asp?id{98cc46e3-8044-4e2a-81bc-69d5ebac3218} (registration required).

\(^7^3\) This case was filed for the purpose of settlement and was never declared admissible as a class. See 13vo Juzgado Civil de Santiago [J. Civ. Stgo] [13th Civil Court of Santiago], “ODECU c. Metro de Santiago,” Rol de la causa: 16480-2008.

\(^7^4\) These are not properly class actions in the sense they do not involve any of the important features of the procedure. They do not include the admissibility process, they are opt-in, they include compensations for moral damages, and they are limited to construction failures. See Juan Eduardo Figueroa, Analizan demandas colectivas en juicios por daños en la calidad de las construcciones [Analysis of Class Actions for Damages in Construction Quality], El Mercurio (Dec. 31, 2010), http://diario.elmercurio.cl/detalle/index.asp?id{78fc8472-6580-454d-9181-a8e504516c1}.
abuse claimed. I also coded the cases for efficacy of the plaintiffs in keeping class actions alive\(^\text{75}\) and for the frequency of the practice denounced in the complaint.\(^\text{76}\)

After processing this information, I did a second round of coding, accounting for potential size of the putative class, nationality of the defendant company, and other features particular to each case. The result of the previous coding left some questions, for which I did not have a clear hypothesis. To answer these questions I presented provisional results of the coding to the same lawyers and officers behind the cases who I had interviewed before.\(^\text{77}\) Their answers are described in the text as provided by “reporters” or by SERNAC, in abstract, to protect the confidentiality of those who agreed to be interviewed under this condition.

**B. General Overview**

1. General Distribution of Cases over Time

Contrary to general expectations, in Chile there was not an escalation of class actions or a dramatic explosion of a litigation industry after the introduction of the class action procedure in 2004.\(^\text{78}\) Figure 1 shows that the number of class action suits was low at the beginning, reached its peak in 2007, and has decreased since.\(^\text{79}\)

The first case started in 2004, a few months after the approval of the class action procedure. In this notable case, a consumer association filed a complaint against the only Chilean commercial public bank, originating *CONADECUS con Banco Estado*, a case that after seven years has still not obtained definitive results, but is slowly moving to the compensatory stage.\(^\text{80}\) The data from 2005 and 2006 show an apparently substantial increase in the amount of class actions presented, but a close look at the

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75. The coding simplifies a complex scenario based on intermediate resolutions, and divides the cases between those cases that are on-going or settled, the cases declared inadmissible, and the cases with unknown status.

76. *See infra* note 85.

77. These reporters are the same stakeholders who provide some of the information described in Part I. I conducted the interviews personally in January 2011, and held interviews by phone between January 2011 and March 2011. For an example where I re-contacted the reporters showing preliminary results, *see infra* Part II.c.2.d.

78. The expectation of the escalation was based on an inappropriate perception of the future “litigation industry” that dominated the arguments against class actions in the country. *See* Magdalena Engel, *Preocupación entre Abogados por prácticas que producirían Escalada de Juicios* [Concern Among Lawyers Regarding Practices that May Produce an Escalation of Trials], *La Segunda*, Aug. 4, 2003.

79. In terms of their distribution, the data shows that 79 percent of cases have been filed in the Santiago Court of Appeals’ jurisdiction, where most of the population resides, and the rest of the cases are spread across the country.

80. In *CONADECUS c. Banco Estado*, CONADECUS claimed that Banco Estado charged a maintenance fee that was not contemplated in the savers’ contracts. As of January 2012, *CONADECUS c. Banco Estado* is on cassation to the Supreme Court. *See* Justicia Condena al Banco Estado a Millonaria Devolución de Dinero por Infracción a la Ley del Consumidor [Justice Condemns Banco Estado to Return Millions for Infractions to Consumer Law], *ElMostrador.cl* (Sept. 29, 2010), http://www.elmostrador.cl/noticias/negocios/2010/09/29/justicia-condena-al-
cases in those years reveals two sets of class actions aimed at practices of a single industry. In these sets of cases, several defendants faced the same complaint with minor alterations. The two main sets of class action suits are: the Department Stores Saga, a group of seven cases filed by SERNAC in 2005 against some of the biggest Department Stores and their financial branches, claiming abusive clauses and effective interest rates that superseded the maximum conventional rate applicable in the country; and the Commercial Banks Saga, a set of class actions filed by a consumer association in 2006, against seven commercial banks, for overpricing intermediary fees in mortgage lending. Including the previous sets as two class actions with several defendants, the recount of cases per year shows four class actions in 2005 and nine in 2006, making the year 2007 the peak in terms of diversity of plaintiffs, defendants, and issues discussed.

The years 2008, 2009, and 2010 are characterized by fewer class actions against permanent practices and more cases in reaction to one-time episodes. Examples include: a flooding and interruption of service by a public utility company, errors in pricing of a computer offered online, three class actions following a two-month price-fixing cartel case, several class actions because of failures of the transportation system of Santi-
ago and the toll highways in their trial run, and SERNAC’s new or repeated class actions against Department Stores and small impact cases of consumer fraud.

The amount of cases per year and the frequency of the abuse denounced on the complaint demonstrate two aspects of the class action litigation: first, that class actions were not seen as an attractive undertaking for authorized entities or entrepreneurial lawyers despite the thousands of cases litigated individually based on the same abuses, and second, that class actions started to be abandoned after 2007 as way to curtail and deter permanent abusive practices and became more reactive to one-time episodes. These preliminary observations are consistent with

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90. See “SERNAC c. DIN,” supra note 82.
the unbalanced design of Chilean class action procedure, and reflect in particular the lack of incentives affecting litigation and pushing plaintiffs to select cases where the causality is more obvious or where they can attract public attention to reach a fast solution to the problem, either from the State or from the defendants.91

2. Defendants Targeted by Chilean Class Actions

Regarding the industries that have been sued on behalf of consumers, most of them are massive industries and mostly related to services.92 Data shows that the leading industry sued by class action is the retail industry, including department stores, supermarkets, and pharmacies. In these cases, the complaints have invariably addressed problems with the financial services associated with their operations, with the sole exception of the class actions derived from price-fixing in the pharmacies cartel.93

The industry with the second most cases is the banking industry, dominated by the Commercial Banks Saga.94 In third place is the transportation industry, where the numbers are increased by the disastrous effects of the Transantiago Transportation Program, a massive reform to the country's capital transportation system implemented in 2007, and by claims against the toll urban highways that were inaugurated the same year.95

After the transportation industry is the education industry, where SERNAC and groups of students claimed that universities have falsely promised job opportunities for which the academic programs were not qualified by law.96 The fifth industry in the list is telecommunications, where consumers have claimed poor coverage and excessive fees.97 Closing the list of industries sued in class actions is the real estate industry with four cases. Here the issue has been either the quality of low-income

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91. For examples of the later hypothesis, see infra note 149.
92. The classification does not adjust for the fact that some industries are more regulated than others, because the issue does not seem to matter to plaintiffs.
93. See supra note 70.
94. See supra note 83.
96. See infra note 104.
As can be noted, most of the Chilean class action suits targeted services. Only the class actions against real estate companies could be considered product liability cases. This may be due to the fact that the latter cases are more difficult to prove or because they potentially involve enough moral damages to be attractive to be pursued on an individual basis.

98. In the real estate industry, only four class actions have been filed since 2004. The former Director of SERNAC, José Roa Ramírez, claims that moral damages should be authorized for this industry, as they are for the construction class action cases after the earthquake. See José Roa Ramírez, Servicio Nacional del Consumidor Gestión 2005-2010 y Perspectivas de Futuro 31 (2010), available at www.sernac.cl/acercade/Cuenta%20de%20gesti6n%202005-2010.pdf.

99. See UPI, Sernac presentará demanda colectiva contra inmobiliaria de edificios colapsados en Maipú [SERNAC Will File Class Actions Against Real Estate Developer of the Buildings that Collapsed in Maipú], El Mostrador (Chile) (Apr. 8, 2010), http://www.elmostrador.cl/noticias/pais/2010/04/08/sernac-presentara-demanda-colectiva-contra-inmobiliaria-de-edificios-colapsados-en-maipu/. These cases were filed before the construction class action procedure was enacted. See supra note 74.

100. The incidence of moral damages in the choice of the legal vehicle to address the claims is high and becomes critical in product liability cases. For example, a few days after the procedure was approved in 2004, a local newspaper published a recipe for churros that exploded when cooked. Many people speculated that this case could become the first class action in the country, but it did not and was tried as joinder instead. Regarding this case, the Supreme Court confirmed the judgment awarding substantial moral damages to the plaintiffs. See ¿La primera class action? [The First Class Action?], NACION.CI. (Chile) (Aug. 8, 2004), http://www.lanacion.cl/noticias/site/artic/20040807/pags/20040807222157.html; Millonaria indemnización a personas quemadas con “churros explosivos” [Millionaire Compensation for People Who Were Burned with Explosive Churros], EMOL.COM (Dec. 26, 2011), http://www.emol.com/noticias/nacional/2011/12/26/518739/ordenan-millonaria-indemnizacion-a-personas-que-resultaron-quemadas-por-receta-de-cocina.html.
3. Abuses Targeted by Chilean Class Actions

The Consumer Law provides for several types of abuses that can be contract-based or generic consumer violations. Because Chilean class actions only provide pecuniary damages under contractual consumer relationships, most of the class actions' primary claim is that defendants have violated contracts, leaving as a secondary claim that defendants have committed non-contractual infractions to the Consumer Law. Building on the classification used previously to analyze consumer class actions in the United States by Hensler et al., and focusing on the central claim of the complaint, I categorized Chilean class actions as fee cases, fraud cases, price-fixing cases, "poor quality" cases, and other cases. In a fee case, the claim is that the provider overcharged consumers with a fee that was illegal. In a fraud case, the claim is that the provider committed fraud, inducing consumers to buy a product or a service that they would not have bought or would have bought under different conditions if they had known about the fraud. Price-fixing cases usually piggyback on antitrust lawsuits filed by the Fiscalía Nacional Económica (FNE) [National Economic Prosecutor], an antitrust enforcer agency, or other private antitrust lawsuits, and their objective is to recover damages for consumers. In a poor quality case, the claim is that the provider did not perform as expected.

As can be observed in Figure 4, the cases with the most abuses claimed are the fee cases. After the fee cases come the fraud cases, where eight out of the eleven fraud cases are against educational institutions. A common kind of these cases are the ones against several universities that offered the forensic expert degree that the universities claimed was required by the State in the new criminal procedure but was never con-

101. Contract-based violations would be, for example, charging a price over the one offered, delivering a product or service with lower quality than the one offered, unilaterally changing the contract, imposing absurd or unfair burdens on the consumer, reversing the burden of proof by contract, etc. See Law No. 19496, art. 16(a)-(d), 18, 25. Non contract-based violations could be incomplete promises and offers, deceptive practices that did not end in a contract, etc. See Law No. 19496, art. 16 (f), 35-36.

102. Collective-interest class actions are preferred to diffuse-interest class actions, which may only seek injunctive relief. In practice, at least for the purposes of framing the complaint, the distinction is not important. Plaintiffs will frame the class actions as collective-interest class actions in the primary petition and as diffuse-interest class actions in a subsidiary petition, in case they cannot prove the contractual relationship between consumers and the offender in the trial and to increase their bargaining power in a potential settlement. See Law No. 19496, art. 50(a).

103. The typical complaint will include several claims and alleged abuses; thus, the classification is focused on the main claim. The only difference in this classification from Hensler et al. is the "poor quality" cases, which could also fit in the category of "fraud cases" because they are the other side of the same coin (something promised and not delivered with the promised quality). The difference is justified because in Chile the "objective" publicity, as defined in the Consumer Law, is considered to be part of the contract. Thus, the poor quality cases emphasize the lack of performance. See Deborah Hensler et al., Class Actions Dilemmas: Pursuing Public Goals for Private Gain 54-55 (2000).
templated by it.\textsuperscript{104} The list continues with the “poor quality” cases, which are divided among real estate (low-income housing), public utilities, and telecommunications companies. At the end of the list of cases per type of abuse are the three price-fixing cases that follow an antitrust suit filed by the FNE against the pharmacies cartel in 2009.\textsuperscript{105}

**FIGURE 4: CLASS ACTIONS PER TYPE OF ABUSE (%)**

<table>
<thead>
<tr>
<th>Type of Abuse</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Price Fixing Cases</td>
<td>3</td>
<td>5.3%</td>
</tr>
<tr>
<td>Fee Cases (31)</td>
<td></td>
<td>54.4%</td>
</tr>
<tr>
<td>Poor Quality Cases</td>
<td>10</td>
<td>17.5%</td>
</tr>
<tr>
<td>Fraud Cases (12)</td>
<td></td>
<td>21.1%</td>
</tr>
<tr>
<td>Other Cases (1)</td>
<td></td>
<td>1.8%</td>
</tr>
</tbody>
</table>

The observed distribution of cases across all years reflects at least two aspects of the Chilean class action procedure, as depicted in Part I. First, as in U.S. state courts, fee cases dominate the Chilean class action scene.\textsuperscript{106} This suggests that plaintiffs may be cherry-picking fee cases because these cases may be easier to detect or to prove and require less investment. Second, because Chilean class actions only provide pecuniary damages originated in consumer contractual relationships, the fee cases are the less unsuitable to be claimed by a class action. The reason is simple: in fee cases, naturally, there will be less or no moral damages in


\textsuperscript{105} See supra note 72.

\textsuperscript{106} Hensler et al. found that in U.S. federal courts there are more fraud cases than fee cases, but this result is inverted in the class actions filed in state courts, where fee cases predominate. See HENSLER ET AL., supra note 103, at 57.
comparison with other type of abuses, like fraud or poor quality cases. Nevertheless, these conclusions should be attenuated in one aspect: fee cases have decreased over time, suggesting that class actions are used less and less to curtail the classical intentional abuse behind a fee case (See Figure 5).

FIGURE 5: FEE CLASS ACTION CASES PER YEAR

C. PLAINTIFFS IN CHILEAN CLASS ACTIONS

In Chilean class actions the identity of the plaintiff is critical because the class action statute, trying to avoid the growth of a “litigation industry,” limits the standing to file class actions to three entities of a different nature that were deemed adequate to represent consumers’ interests, each governed by separate rules and with different incentives. As expected, their class action litigation is also different. Thus, I devoted this section to analyzing the data of their cases and their behavior as plaintiffs.

107. Fee cases have the additional advantage that usually the excessive fee matches the contractual damage, thus the compensatory stage is easier and can, at least in paper, be omitted, giving the lawyers more control of the litigation. The Consumer Law allows the judge to provide direct remedy in the declaratory judgment in cases where abuses consist in improper collection of money and consumers can be easily identified. See Law No. 19496, art. 53 C(d).

108. Going further in the argument, two fee cases of 2007 are SERNAC’s re-litigation of cases of the Department Store Saga that started in 2005, see 29o Juzgado Civil de Santiago [29 J. Civ. Stgo] [29th Civil Court of Santiago], “Sernac c. ABC,” Rol de la causa: 14.581-2007; 28vo Juzgado Civil de Santiago [28 J. Civ. Stgo] [28th Civil Court of Santiago], “Sernac c. DIN (COFISA),” Rol de la causa: 14.581-2007. The other two fee cases in 2007, and the two of 2008, are political cases against “Transantiago” that were not litigated. See infra note 162. The only fee case in 2010 was a case against a company that migrated its software system to SAP ERP system, billing consumers twice in one month in the process, and the case sought to involve SERNAC in the litigation, so it was never litigated after the filing of the lawsuit. For a description of this case, which is also the last case filed by a consumer association, see infra note 149.
1. Distribution of Cases Among Plaintiffs

As mandated by the Consumer Law, the only authorized entities that have standing to file a class action in Chile are SERNAC, consumer associations formed six months or more before the filing of the complaint, and groups of fifty or more consumers with direct representation.109

Figure 6 shows the number of class actions initiated by each of these entities:110

As can be observed, the distribution of the fifty-seven cases among the authorized entities is similar. This was surprising, given the fact that SERNAC is a public agency with public funding that claims to receive more than 500,000 consumer claims each year through its web-based platform called SERNAC-Facilita (SERNAC-Facilitates).111

2. SERNAC as a Plaintiff

a. Description

SERNAC is the only public agency allowed to file class actions in

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109. See supra note 35.
110. In general, the Chilean civil procedures allow co-plaintiffs to enter the trial after the complaint is filed. In the class action context, this may trigger the problem of disagreement among counsels and the rule that allows the judge to choose the class counsel among them. See supra note 50. For purposes of showing who took the decision to file the claim, and assuming there are no incentives for authorized entities to coordinate a common strike, and that anybody can join the case once it is started (so it is less meaningful if somebody does), the classification presented is based on who started the case.
Chile. Its director decides which cases the agency will pursue. Other than SERNAC's vague mission statement, the director has no other rules constraining his decisions.

b. SERNAC's Specific Incentives and Litigation Budget

SERNAC, as an entity with standing, or its officers, as attorneys, do not have specific incentives to litigate class actions other than fulfilling their duty as public servants. This happens because, even if the attorneys' fees fixed by judges for class action cases turn out to be high, neither the agency nor its officers may benefit from the expected results of the litigation. The only indirect benefit of a successful litigation for SERNAC would be to use it as a way to bargain larger budgets with the central government and Congress in the future, or to capitalize on the success as a political trampoline for the director of the agency.

SERNAC's budget to file and litigate class actions is constant, but very limited and subject to several legal restrictions. These limitations can be observed in two aspects of SERNAC's class action cases: (a) evidence presented in court supporting SERNAC's class action claims usually comes from its own studies and reports, which are made for general consumer education purposes and not tailored for litigation purposes, or from publicly available sources (usually scandals covered by the news media or studies performed by other public agencies), and (b) SERNAC's counsel on class action trials are almost always SERNAC's officers and in-house lawyers. To confirm this observation, I asked SERNAC officers about the agency's budget to litigate class actions and their speciali-
zation, and they confirmed to me that the agency does not have a cost center, specialists, or a specialized budget for class action litigation.\(^\text{118}\)

c. SERNAC’s Litigation Focus

Given these constraints, I analyzed SERNAC’s twenty-one cases to find out in which industries the agency focuses its litigation. So far, SERNAC’s main targets have been the department stores and other retailers that base their operation in consumer credit. Eleven out of the twenty-one class actions filed by SERNAC are against commercial practices of the department stores and retailers with financial products like credit cards (Figure 7). These choices are consistent with the history of the Consumer Law and some of the policy objectives of the directors of the agency while they served in office.\(^\text{119}\)

![Figure 7: SERNAC’s Cases per Industry (%)](image)

The other defendants in the class actions filed by SERNAC do not show any kind of pattern in terms of the number of potentially harmed consumers, amount of potential harm to each of them, type of industry, kinds of abuses, nationality of the defendants, or news media exposure.

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\(^\text{118}\) SERNAC reporters suggested that the calculus would require multiplying the hours invested in the cases by the cost of the hours officers devoted to the cases, but SERNAC does not keep track of the hours invested in the class action cases either. I repeated this question to the new administration, and since 2011, SERNAC is sending its lawyers to any seminar or course that is available about class actions. Nevertheless, they still do not consider class actions as a priority, and they do not have an independent budget for class action litigation.

\(^\text{119}\) Even though the directors of SERNAC are appointed, the position has a lot of publicity and was a stepping-stone for Alberto Undurraga, a member of the Christian Democratic Party, former mayor for the municipality of Maipú. See supra note 12; see also Press Release, Servicio Nacional del Consumidor, Tasas de Interés: Sernac presentará juicio colectivo [Interest Rates: Sernac Will File a Class Action] (July 13, 2005), http://www.sernac.cl/sernac2011/noticias/detalle.php?id=601 (citing interventions of José Roa Ramírez).
and as said, they were fewer than expected, given the hundreds of thousands of claims the agency handles each year.120

As pointed out by the president of a consumer organization, “[i]t is obvious that a public service cannot go against a public company.”121 This is indicative of perhaps the only pattern in SERNAC’s class actions: SERNAC does not file class actions against heavily regulated industries or industries in which the State interest may be involved indirectly.122 In

120. I classified SERNAC’s class actions in terms of the potential size of the class, showing comparable amounts of large cases, small cases, and cases with an indefinite class (four cases were small, eleven cases were large, and six cases had an indefinite potential class members). The variability in potential individual damages was also wide, ranging from the value of airplane tickets to a four dollar sticker album. See Sernac presentó una demanda colectiva contra Air Madrid [Sernac Filed a Class Action Against Air Madrid], COOPERATIVA.CL (Dec. 19, 2006), http://www.cooperativa.cl/sernac-presento-una-demanda-colectiva-contre-air-madrid_notic-ruto_2006-12-19201132.html; Sernac presenta una demanda colectiva contra Panini por álbum Sudafírica 2010 [Sernac Files a Class Actions Against Panini for South Africa World Cup Sticker Album], TERRA (May 20, 2010), http://economia.terra.cl/noticias/noticia.aspx?idNoticia=201005201940_INV_79001522. The test of the nationality of the defendants, defining foreign companies as ones controlled by foreign shareholders according to Bloomberg, BusinessWeek, and local business media, showed that SERNAC has sued eighteen Chilean companies and only three foreign companies. Even though 2005 and 2009 were years of public elections and are the years with more class actions filed by SERNAC, the test for SERNAC’s own media coverage of class actions shows that the agency did not give press releases or conferences in several of them, which is inconsistent with a clear political usage of the device. The data for 2009 shows that four out of five cases filed that year were not publicized by SERNAC directly in Agenda Noticiosa, and received little attention in the press. The only case that was publicized was the one that followed the cartel case in the pharmacies industry. See SERNAC, JUICIOS COLECTIVOS CERRADOS, [National Consumer Service, Collective Judgments Close], available at http://www.sernac.cl/leyes/JUICIOS%20COLECTIVOS%20CERRADOS.pdf (last visited July 18, 2012); SERNAC, JUICIOS COLECTIVOS NOTIFICADOS AL SERNAC [National Consumer Service, Collective Judgments reported to SERNAC] (2007), available at http://www.sernac.cl/leyes/notificados.php (last visited July 18, 2012); PAGINA PRINCIPAL DE BUSQUEDA [Search Home], SERNAC, http://buscador.sernac.cl (search “juicios colectivos”).

121. See Bernardita Bascuñán, Evaluación al Sernac: Pese a avances aún hay consumidores que quedan fuera [Evaluations of SERNAC: Despite some improvements some consumers are still left behind], EL MERCURIO (Chile) (May 19, 2007), http://diario.elmercurio.cl/detalle/index.asp?id=957e511d-b63f-4814-a114-2b156ab9de9b.

122. In Chile, it is forbidden for a public agency to file a lawsuit against another public agency or a public company, but they can sue regulated private companies. SERNAC reporters acknowledge that when they tried to sue regulated industries it created huge controversies inside the government with regulatory agencies of said industries. Those issues were never disclosed to the public but are emerging now that the political coalition that ruled the government since 1990 lost power in 2010. A good example of this tension is the relation between SERNAC and the Subsecretaría de Telecomunicaciones (SUBTEL), the telecommunication agency. In 2003, in the middle of the class action debate, SERNAC was forced to give away all the claims against telecommunication companies that the agency was handling and transfer them without assessment to SUBTEL. The agreement says: “The officers that attend the public shall transfer to SUBTEL all the cases that are defined as part of its exclusive competence . . . The procedure for consumer claims, is the following . . .” (emphasis added, translated by the author). This agreement effectively prevented SERNAC from filing class actions or even supporting private
those cases, SERNAC limited itself to small reactions, like filing individual lawsuits claiming general abuses, and asked the regulatory agencies to proceed against the offenders to obtain deterrence through the application of fines.\textsuperscript{123} This is consistent with SERNAC being a dependent agency inside the Chilean government that coordinates its efforts with other agencies, but, as I pointed elsewhere, is inconsistent with the agency's arguments that class actions were needed to foster self-regulation and the agency's argument in some of its first cases.\textsuperscript{124}

d. SERNAC's Collective Mediations

Presented with the results of the previous section, SERNAC reported that there was political resistance inside the government to file class actions against heavily regulated industries that may expose deficient regulatory practices, and that SERNAC's few and erratic class actions were "half of the picture." According to SERNAC officers, the other half of the picture that explained the erratic selection of defendants was failed collective mediations. As described by former officers of SERNAC, a collective mediation is a procedure where SERNAC's Director decides to turn down the possibility of filing a class action against a company if the company agrees to redress consumers in a way that satisfies him.\textsuperscript{125} SERNAC reporters claim that collective mediations were applied every time the agency had the chance to bargain to avoid litigation, and this is why defendants are self-selected. Analyzing the collective mediations that are reported on the news media, I found anecdotal evidence that

\begin{itemize}
  \item parties who were suing telecommunications companies. \textit{See} Acuerdo de Integra-
  ci6n de Atenci6n de Usuarios entre el Servicio Nacional del Consumidor y la Sub-
  secretarfa de Telecomunicaciones (SERNAC-SUBTEL) [Agreement for the
  Integration of the Attention of Users between the National Consumer Service and
  the Undersecretary of Telecommunications] art. 2.2 (unpublished agreement) (on
  file with the author) (obtained through transparency laws); Press Release, Sub-
  secretarfa de Telecomunicaciones, Campafia SERNAC-SUBTEL: Yo Corto
  Cuando Quiero [SERNAC-SUBTEL Campaign: I Hang When I Want] (Nov. 13,
  081113145149.html. Reaffirming this claim, at the end of his tenure, the former
  director of SERNAC claimed that regulatory agencies like the SUBTEL should
  have standing to file class actions. \textit{See} RAMirez, \textit{supra} note 98, at 23.

123. See Sernac llega a tribunales por el agua [Sernac goes to court for the water], \textit{El
  Diario de Atacama}, June 7, 2008.

124. For early interpretations of the transsubstantive character of the procedure in
SERNAC's litigation, see Agustin Barroilhet, \textit{Interest Rate in the Retail Industry:
SERNAC con Distribuidora de Industrias Nacionales y otro 3} (Jan. 22, 2011) (un-
published manuscript) (on file with author).

125. A failed collective mediation may be the result of companies' disagreements with
SERNAC's claims, or of non-compliance with the agreement afterwards. SERNAC has favored collective mediations over class actions, arguing that "there is evidence on an international level, that class actions have less favorable results than extra-judicial agreements . . . ." \textit{See} JOS\'{E} ROA RAMirez, \textit{Acciones Colec-
tivas en el Sistema de Protecci6n al Consumidor: Participaci6n Ciudadana, rol de la
Empresa y del SERNAC} [Class actions in the System of Consumer Protection: Citizen Involvement, the Role of the Companies and
contradicts SERNAC's assessment; some failed collective mediations never became class actions and some class actions never passed through a collective mediation.126

The collective mediation mechanism places SERNAC as a quasi-regulatory agency,127 but with almost no powers of enforcement because, given its budget constraints, it is not credible that it will pursue all the companies with whom its collective mediation fails. The law does not contemplate the collective mediation procedure, so this is a truly law-in-action feature.128 SERNAC's use of collective mediations has raised claims from consumer associations and other actors that consider that mediations may be protecting companies instead of curtailing their abusive practices.129

126. There is no record of collective mediations and their outcomes during the period 2004-2010. The new administration keeps a database of collective mediations since September 2010. An assessment of that database is provided, infra note 171. As anecdotal information from the period 2004-2010, there are news media describing cases in which collective mediations turned into class actions. For example, see Press Release, SERNAC, Sernac presentó demanda colectiva contra Cencosud [SERNAC filed a class action against Cencosud] (Dec. 1, 2006), available at http://www.sernac.cl/sernac2011/noticias/detalle.php?id=782. For a case in which the failed collective mediation did not turn into a class action, see Campaña SERNAC-SUBTEL: Yo Corto Cuando Quiero, supra note 122.

127. The Consumer Law only empowers SERNAC to promote an individual "voluntary understanding" between a consumer represented by SERNAC and the offender company. The results of this sui generis procedure can end in an agreement sanctioned with res judicata effect only if its stipulations are fulfilled, a situation that may be discussed ex-post on trial. The redundancy of this solution depends upon which compromises the company makes before SERNAC, and on how SERNAC monitors compliance of those compromises. In practice, because the procedure requires substantive individual efforts, SERNAC has computerized the process under SERNAC-Facilita platform and invited the biggest providers of goods and services in the country to couple their customers' service with it. This makes the claims made in SERNAC-Facilita available to the provider immediately. According to SERNAC, when the providers do not answer consumers' complaints, or when SERNAC-Facilita becomes aware of a substantial number of claims by consumers of unsubscribed providers, SERNAC launches its collective mediation process. The collective mediations were only formalized in 2008, under an internal document called Procedimiento de Mediaciones Colectivas. This document claims, "[i]t is important to take into account that the law does not limit mediations only to individual processes, therefore, evidently it can be used to pursue collective solutions." (emphasis added) (translated by the author). If the collective mediation fails, then the agency claims that it files a class action. See Law No. 19496, art. 58(f); Servicio Nacional del Consumidor, Procedimiento de Mediaciones Colectivas v.0.0 [Procedure for Collective Mediations] (June 2008) (unpublished manuscript) (on file with the author).

128. See id.; RAMÍREZ, supra note 98, at 10.

e. SERNAC's Effectiveness as a Plaintiff

To end this brief description of SERNAC as a plaintiff, I review the status of all SERNAC's cases that had an online docket and coded them to see the efficacy of the agency in the courtroom. The results of this exercise showed that SERNAC is effective in keeping its class actions alive; they do not move fast, but they do not lose much either. The agency has only settled seven cases since the procedure was introduced, and these cases were settled under coupons with no real impact.

f. Is SERNAC's Litigation Reflecting the Problems in Procedure?

Initially I had expected SERNAC to have more class actions cases and be less effective in keeping them alive. Yet, the process of collective mediations distorts the results, and even though it does not explain all of SERNAC's targets, it acts as a filter of bad cases as well (the ones that are mediated but not litigated or the ones that are passed on to the regulatory agencies under the claim of no power to address them). An additional factor explaining SERNAC's efficacy is that the officers' wages do not depend on their courtroom success, but they could face administrative sanctions if they lose a case because of negligence. As Chilean class actions are discussed in terms of law and are not intense fact-based litigation, SERNAC's budget disadvantage becomes less relevant and its paid officers become more important. Considering these two facts, SERNAC, with its innovations, is behaving as expected under the incentives of the class action procedure.

130. See supra note 75.
131. I classified the cases pending or settled as “positive” for efficacy, the cases the agency lost as “negative,” and the cases without an online docket, as “not applicable.” The results were nineteen positive cases, one negative case, and one case not applicable. This is a temporary categorization, as the status of these cases will change, but it is useful to explain SERNAC's timing on class actions and its behavior under unclear incentives. (The results are accurate as of March 2011). If I had to assess these cases in comparison with other means to obtain the same results (i.e., using a joinder with the individual procedure of the Consumer Law) the class actions are totally ineffective. For example, the students of a university that were victims of the forensic expert nonexistent career and decided to wait for SERNAC's class action recently saw their case move to the declaratory stage (it was declared admissible Nov. 30, 2011). On the contrary, the students that used a joinder and the individual procedure of the Consumer Law to claim against the same university under the same facts, obtained full condemnation, including pecuniary damages, moral damages, and fines, confirmed by the Supreme Court. See 2o Juzgado Civil de Santiago [2 J. Civ. Stgo] [2nd Civil Court of Santiago], 22 noviembre 2011, “SERNAC c. UCINF,” Rol de la causa: 21489-2009; Suprema condena a universidad por publicidad engañosa en carrera de perito forense [Supreme Court Condemns University Because of Misleading Advertising About the Career of Forensic Expert], EMOL.COM (Apr. 12, 2011), http://www.emol.com/noticias/nacional/detalle/detallenoticias.asp?idnoticia=475574.
132. All these cases belong to the Department Stores Saga that I strongly criticize in Barroilhet, supra note 124, at 16.
133. See id. at 14 (providing a detailed description of the settlements that ended the Department Stores Saga cases).
3. Consumer Associations as Plaintiffs

a. Description

The consumer associations (CAs) are non-governmental organizations (NGOs) devoted to educate and protect consumers by filing individual or collective class actions on behalf of them.\(^{134}\) CAs are ruled by a few provisions of the Consumer Law. The provisions are not clear about many issues regarding the CAs, but specify that the assembly of the CAs has to make “an informed decision” to file a class action.\(^{135}\) The main CAs in Chile are Corporación de Consumidores y Usuarios (CONADECUS) and Organización de Consumidores y Usuarios (ODECU).\(^{136}\) Several other CAs exist in the country, but only five of them have filed a class action, and it seems that their activity as plaintiffs is decreasing.\(^{137}\) This may change in the future, but several entrepreneurial lawyers reported that, in their view, groups of fifty or more consumers face fewer problems in getting their class actions admitted, and thus they preferred using them for their class actions.\(^{138}\)

b. Consumer Associations’ Specific Incentives and Litigation Budget

The CAs’ regular funds come from either educational activities, i.e.

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134. The list of the existing CAs can be found at: http://www.sernac.clvinculos/chile_organizaciones.php (permanent link). CAs already existed when the class action procedure was introduced, but there were only six of them when the procedure was approved. Now, because of SERNAC’s public funds distributed every year, there are more than seventy CAs. See Law No. 19496, art. 5.

135. The president of the CAs represents it in litigation and bears personal responsibility for filing class actions without the consent of the assembly. These kinds of personal sanctions for bringing litigation on behalf of an entity are almost unique in Chile’s legal system. See Law No. 19496, art.11.

136. Among CONADECUS’s cases is the first class action case in the country. See CONADECUS c. Banco Estado, supra note 80.

137. See Fernández, supra note 36, at 9. Several aspects that allow CAs as plaintiffs explain why CAs are decreasing their activity as plaintiffs. First, in an early ruling, the Court of Appeals of Santiago held that, for CAs, “proper authorization” meant that all the members of the assembly authorizing the complaint had to have a high level of information to give informed consent to the complaint. This is difficult to achieve because CAs’ assemblies are not a sophisticated audience. Second, in another early decision, courts upheld that CAs with industry-specific orientation could not sue companies from different industries. See Corte Suprema de Justicia [C.S.J.] [Supreme Court], 15 diciembre 2006, “ANADEUS c. VTR,” Rol de la causa: 3542-2006, ¶ 4. Third, in another early case, a civil court posited that even though CAs were not required to name or show the consumers on whose behalf they are acting, they had to present individual cases among their active members to be able to claim a collective interest class action. See Law No. 19496, art. 51(4), 52 (b)-(c).

138. Since 2007, groups of fifty or more consumers have filed fourteen out of the eighteen class actions filed by plaintiffs other than SERNAC. With the information up to 2008, Fernández has observed that the activity of the CAs as plaintiffs was decreasing in favor of the representative groups and that the latter had less weight and resources. With more data, his observations seem wrong, because groups of fifty or more consumers became preferred plaintiffs, and they are as strong as their lawyer or their cohesion permits them to be. See Fernández, supra note 36, at 9.
training in the Consumer Law and consumer rights, or from public funds assigned by SERNAC, which cannot be used to file class actions. Their associates only collaborate with a nominal value and the number of associates is small. This leaves the CAs in an uncomfortable position when it comes to financing their cases. Their regular funding is not enough to pay for the operations of the CAs and to finance the litigation. As a result, in the cases that are driven by the CAs, they have promised the costas they could get as parties in the cases to outside counsel, as well as the recoveries that they can bargain with the members of the CAs if they are part of the class. In the cases where lawyers are using CAs to litigate, the formers fund the litigation.

c. Consumer Associations’ Litigation Focus

Of the sixteen CAs’ cases, they have targeted mainly banks, led by the Commercial Banks Saga. The rest of their targeted defendants do not follow such a distinctive pattern. This is not surprising, considering the number of CAs and their distribution across the country. Nevertheless, CAs’ cases do have something in common: almost all of the cases are

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139. CAs cannot perform any kind of profitable activities, except ones related to education. See Law No. 19496, art. 8(a)-(c), (f), 9. For example, ODECU, a member of Consumers International, is listed as one of the corporate social responsibility partners to the Centro de Información de Comportamiento Empresarial (CICE), a part of a governmental program, and has a special unit called “Erga Omnes” specially devoted to train employees of other companies. Registro Nacional Público De Organismos Técnicos De Capacitación [Public National Register of Technical Training Organizations], MINISTERIO DEL TRABAJO Y PROVISIÓN SOCIAL, http://otec.sence.cl/reg_tec.html?consultar=ysemidt&rut=76819750-4 (last visited Mar. 13, 2011).

140. The Consumer Law provides competitive public funds to CAs to finance special projects that cannot include the collective or individual representation of consumers in trial. This provision was the result of debate in the Senate where right-wing senators claimed that public funds should not be used to promote a “litigation industry.” See HISTORIA DE LA LEY No. 19955, supra note 5, at 411-13. Even though the law does not forbid CAs from using the studies financed with public funds as a foundation to file a class action, no CA has done this because they all think this may affect them the next time the public funds are assigned by SERNAC. See Law No. 19496, art. 11 bis.

141. Both CONADECUS and ODECU reported that SERNAC’s public funds were their main source of income. They do have some international funding from European CAs, particularly Spanish ones, but those funds only aid the CAs in their regular operations.

142. The only cases in which lawyers have obtained fees for representing CAs are the cases in the Department Stores Saga, where CONADECUS’ lawyers, invited to SERNAC’s settlements, obtained fees from the defendants, and the re-litigation of Cavada y otros con Metro, where ODECU’s lawyers got fees when the case settled, but those are exceptional cases. Interviews with four lawyers and with ODECU and CONADECUS after this analysis revealed that in all cases lawyers were working under the expectation of recovering attorney’s fees in a settlement. When some expenses other than lawyers’ work were needed, the CAs financed part and the lawyers covered the rest. In time, this situation changed, and now lawyers are financing only their hours. It is important to note that lawyers of well-established firms are in a similar situation to that of SERNAC’s officers; they will not drop the cases but do not invest much in them either.

143. See supra notes 43-46.
against industries where there is an agency or sectorial regulator in place or against public companies.\textsuperscript{144} This suggests that CAs are taking the initiative in cases that SERNAC is not pursuing or that they are leaving the cases that SERNAC can pursue to the agency and taking these by default. Whatever the reason, the mere existence of these cases, which are no doubt started by private initiative, reveals that CAs perceive the regulated industries as the more abusive ones.\textsuperscript{145}

\textbf{FIGURE 8: CAS’ CASES PER INDUSTRY (\%)}

- Transportation (1) 6.3%
- Education (1) 6.3%
- Telecomunications (2) 12.5%
- Banking (8) 50.0%
- Public Utility (4) 25.0%

\textbf{d. Consumer Associations’ Effectiveness as Plaintiffs}

I performed the same tests as I did for SERNAC to assess how effective CAs were under the incentives in the Consumer Law.\textsuperscript{146} The results were that CAs are less effective than SERNAC, but still have fifty percent positive cases. The results in this case were eight positive cases, four

\begin{itemize}
  \item The only exceptions are the cases against educational institutions, where SERNAC and the CAs have both represented students in the litigation. The cases against public companies are “ODECU c. Metro de Santiago” and “CONADECUS c. Banco Estado.” See supra note 122. This spontaneous arrangement of private and public enforcement was not considered in the design of the class action procedure, but reflects one of the caveats of SERNAC as plaintiffs.
  \item In theory the classical justification for regulation is market imperfections in industries with high impact on consumers. The fact that most of the CAs’ cases are against regulated industries may reflect those imperfections and their impact. Looking at these cases and the number of claims against regulated industries in SERNAC-Facilita, José Roa Ramírez has suggested that regulatory agencies should be given standing to file class actions. See Ramírez, supra note 98, at 23. I disagree with his suggestion because, despite recognizing that giving standing to file class actions to regulatory agencies may help to force them to act where they now can claim they do not have the power, the fact that they have issued a regulation that goes against consumers in the past makes me think they may reshape their regulation in the short term to avoid the litigation or claim lack of funds to pursue their cases.
  \item To compare with SERNAC analysis, see supra note 131.
\end{itemize}
negative cases, and four cases not applicable. The CAs have only settled one case, *ODECU con Metro*, which was the re-litigation of a previous case dismissed on formal grounds. This case is peculiar for several reasons: first, in this case, according to reporters, the judge signaled the parties to file the complaint again; second, reporters informed me that the case was settled for less money than the cost for Metro to hire the same law firm that won *Cavada y otros con Metro*; third, the case was settled before it was declared admissible and was not made known to SERNAC or any other potential claimant. After *ODECU con Metro*, CAs did not file any case in 2009, and the only case they filed in 2010 aimed to involve SERNAC in the litigation and was not pursued actively by the CA that filed the complaint.

e. Are Consumer Associations Performing as Expected by the Theory?

The results for the CAs’ efficacy were better than I expected, given their budget constraints and their dependence on SERNAC’s public funds. This finding required further research into the cases. For the cases that had a court file, I extracted the contact information of the lawyers and law firms behind the positive and negative cases and asked the lawyers about their financial arrangements with the CAs and how they handled the cases. For the most part the lawyers and the firms behind the cases confirmed that they were working in the cases under *cuota litis* arrangements over the attorneys’ fees that the judge may fix or what defendants agree to pay on a settlement. When questioned about their expectations if the cases arrive at judgment, they reported that they do not rely heavily on the attorneys’ fees they have to share with the CAs, but that they feel their cases are meritorious and are willing to keep them active while they can, waiting for a change in the circumstances.

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147. For an explanation of these categories, see *supra* note 75.
148. “ODECU c. Metro de Santiago” is the re-litigation of “Cavada y otros c. Metro.” See *supra* note 73.
149. This case is “Asociación de consumidores y usuarios del SUR c. CGE.” The case is interesting because it came after a SERNAC’s collective mediation that left a group of consumers dissatisfied. Those consumers filed a class action complaint that was not followed and was quickly dismissed by the judge. Nevertheless, the case garnered much attention, thus SERNAC granted an audience and after a few months the agency filed its class action. See in this order: for collective mediation, *SERNAC exige a CGE y CONAFE compensar el costo de cada reclamo tras los problemas de sus clientes* [SERNAC Demands from CGE and CONAFE a Compensation for Each Claim After Problems with their Consumers], *AGENDA NOTICIOSA* (July 9, 2010), http://www.sernac.cl/sernac2011/noticias/detalle.php?id=1855; for the CAs’ class action complaint and the invitation to SERNAC, see Garrido, *supra* note 129. For SERNAC’s class action, see *Sernac presenta demanda colectiva en contra de eléctricas CGE y Conafe* [SERNAC Files a Class Actions Against Electric Utilities, CGE and Conafe], EMOL.COM (Apr. 25, 2011), http://www.emol.com/noticias/economia/detalle/detallenoticias.asp?idnoticia=477874.
150. As an exception, one lawyer who handled two cases confessed to me that she had lost hope in her cases because she had discovered that the companies directly re-dressed consumers’ harms after the complaint. These cases’ future litigation will
tenacious work of the lawyers who refuse to leave CA cases they accepted in the first years of the existence of the procedure explains why CAs are more effective than the theoretical framework suggests they should be.

Two other observations confirm what was expected under the framework of incentives described in Part I regarding CAs' settlements and political use of the cases. First, the only case CAs settled, ODECU con Metro, was settled for its nuisance value before the case was declared admissible.151 Second, the only CAs' case in the last three years was used to pressure SERNAC to get involved in the case.152

4. Groups of Fifty or More Consumers as a Plaintiff

a. Description

Allowing a “group of 50 or more consumers” (the representative group) as an authorized plaintiff was an expression of democratic access, devised in the initial draft of the project. The representative group, unlike SERNAC and the CAs, is the only plaintiff not governed by any kind statute or any kind of organic deliberation.153 This may explain why their behavior as plaintiffs is difficult to assess.

The number of class actions filed by representative groups has been stable over the years, except for 2007, when most of the cases involving “consumer fraud” against education entities offering careers with no job market and cases about the transportation problems were filed. In the representative group, as expected, the decision to file a class action is made by whoever organizes the group.154

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151. See supra note 65.
152. See supra note 149.
153. The law does not prescribe how the fifty consumers should become part of the trial. The original bill did not say anything about the issue, and in the Senate, the right-wing senators added the phrase “properly individualized” to the following provision: “Art. 51 (1). [The class action] shall begin with a complaint presented by: [. . .] c) a group of consumers affected in a same interest, in a number not less than fifty persons, properly individualized.” (translated by the author). This text is confusing and the issue caused some class actions to be rejected. The practice has worked around the issue in two ways: lawyers with a class with unknown members negotiate in advance the notaries’ fees and ask consumers to give them powers of attorney in front of the notaries, with fees reported at an average of four dollars per person (this protects the lawyer from side-agreements that defendants may try with members of the representative group, because it makes it harder to retract the power of attorney); the other way reported by one lawyer is to forgo notarization when he personally knew almost all the members of the representative group. See Law No. 19496, art. 51(1)(c). For general rules to give powers of attorney, see CÓDIGO DE PROCEDIMIENTO CIVIL [COD. PROC. CIV] art. 6(1), (3).
154. In the interviews, the lawyers of some of these cases reported that they were acquainted with some of the class members and this is the way they arrived at litigation. Three lawyers reported that they created their class actions and gathered the consumers required to file the cases.
b. An Assessment of the Representative Groups’ Cases

As a way to assess the litigation of the representative group, I created a code, taking into account several facts of each case that could explain why they were filed in the first place. The first clear separation was the cases that were filed but not litigated and championed by a politician in the news media. I classified these cases as ‘political.’ For the remaining cases, I classified the cases that were financed directly by consumers as “cohesive group” cases, and those that were financed by the lawyer as “lawyer-driven” cases. Finally, using the information provided by one of the CAs regarding their litigation strategy, I classified two “lawyer-driven” class actions as “Replacing CA” cases. In these cases the representative group replaced the CA that wanted to avoid appearing as the main plaintiff.

c. Representative Groups’ Litigation Funding

The interviews with some of the lawyers that appear as main counsel in the court docket revealed different methods to fund the representative groups’ class actions. The cases that were never litigated did not require funding. Of the cases that were litigated, there are three kinds: the ones with cohesive groups, such as students of the same institution, which were financed with small sums paid to the lawyer on a monthly basis; the lawyer-driven cases were financed by the lawyers themselves; and the lawyer-driven cases were financed by the lawyers themselves; and the

155. It is important to note that, because the public profile of some class actions, they may be supported by politicians but nevertheless be lawyer-driven. To avoid this problem, I only classified those cases as political that fulfill another prerequisite: the counsel was not a sophisticated lawyer or law firm.

156. The best example of a cohesive group case is “Bascuñán y otros c. DELL Chile.” In this case, students of the University of Chile’s Engineering School formed the majority of the potential class, because they were some of the only people awake at 3:00 AM when the DELL website sold computers for twenty percent of their usual price. See Chilenos demandan a Dell por no respetar precio de notebooks [Chileans Sue DELL for Ignoring its Offers Regarding Notebooks’ Prices], El Mercurio (Aug. 20, 2008), http://www.emol.com/noticias/nacional/detalle/detalle-noticias.asp?idnoticia=318364.

157. See “ODECU c. Metro de Santiago,” supra note 73; 3er Juzgado Civil de Temuco [3 J. Civ. Temuco] [3rd Civil Court of Temuco], “Fariña y otros c. SERVIU,” Rol de la causa: 3578-2005. In these cases, ODECU was behind the consumers and later became a plaintiff. These two cases were part of the strategy of a CA to protect itself from the potential sanctions of reckless class actions, which are particularly strong against CAs but not as strong in the case of the representative group. This strategy was successful because, in one case, it allowed ODECU to retry the case against the defendant. See “Odecu c. Metro de Santiago,” supra note 73.

158. The best examples are “Crisostomo y otros c. UTEM” and “Bascuñán y otros c. DELL,” both involving university students who gathered to make decisions about the cases and hired lawyers who were known to someone in the class. Crisostomo y otros c. UTEM, supra note 104; “Bascuñán y otros c. DELL,” supra note 87.

159. For the best examples see 18vo Juzgado Civil de Santiago [18 J. Civ. Stgo] [18th Civil Court of Santiago], “Mullet y otros c. Movistar,” Rol de la causa: 12001-2006; 8o Juzgado Civil de Santiago [8 J. Civ. Stgo] [8th Civil Court of Santiago], “Madrid y otros c. Costanera Norte,” Rol de la causa: 16140-2009.
d. Representative Groups’ Litigation Focus

The industries sued by the representative groups, like their funding and litigation approaches, are diverse. The industry more targeted with complaints is the transportation industry, where politicians concerned about Transantiago and the toll highways artificially increased the numbers. Next was the education industry, where most of the plaintiffs were students of the defendant universities, followed by the retail and telecommunications industries.

e. Representative Groups’ Effectiveness as Plaintiffs

The data for the representative groups show that these entities are the most ineffective plaintiffs in Chilean class actions, with the highest number of cases declared inadmissible or archived without any movement by any of the other authorized plaintiffs. Of the representative groups’ cases, eight were positive, eleven were negative, and one was “not applicable.” But, given that the representative groups are so diverse, they should not be treated as a unified group. When broken down by type, I found that the cases that were never litigated (e.g., cases presented by politicians for the cameras) were almost immediately dismissed. Dis-
carding these cases, and considering only the cohesive group cases, the lawyer-driven cases, and the Replacing CA cases, the representative group has eight positive cases and seven negative cases. This makes the representative group as effective as the CAs, but they have had more cases in the last three years. Particularly effective are the cohesive group cases, where three out of the five cases are still on trial and one was settled. The settled case was *Fuentes y otros con Inmobiliaria Víña Occidente*, a case that involved misleading advertising that affected a group of consumers that bought houses without the security system promised by the real estate developer. This is the only class action settled after the admissibility judgment, but the judgment was on review by the Court of Appeals when the parties reached an agreement, thus there was no invitation to opters-out in this case either.

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Civ. Stgo] [22nd Civil Court of Santiago], “Hasbún c. Autopistas,” Rol de la causa: 25425-2008 (These last two cases were instigated by Gustavo Hasbún, the Major of Estación Central); 16o Juzgado Civil de Santiago [16 J. Civ. Stgo] [16th Civil Court of Santiago], “Villarroel y otros c. Vespucio Sur y otros,” Rol de la causa: 1435-2007 (instigated by the staff of Senator Naranjo). Other politicians tried to get SERNAC involved in the cases, with no success, because toll highways were an important part of the program of the Ministry of Public Infrastructure. See *Arremetida contra pago de nuevo TAG* [Swoop Against Prices for the New TAG], *Publimetro* (Sept. 30, 2008, 1:34 AM), http://www.publimetro.cl/nota/arremetida-contra-pago-de-nuevo-tag/bNQhiD!288039/. SERNAC’s cynical approach to *Godoy y otros con Ministerio de Obras Públicas, Transportes y Telecomunicaciones* can be found in Radio Cooperativa, *Sernac: Fallas en el sistema de autopistas sirven para mejorar el servicio* [Sernac: Failures in the System of Highways Help to Improve Service], *Cooperativa.cl* (Jan. 8, 2007), http://www.cooperativa.cl/sernac-fallas-en-el-sistema-de-autopistas-sirven-para-mejorar-el-servicio/prontus_nots/2007-01-08/100448.html.

163. Since 2007, representative groups have filed fourteen out of the eighteen class actions filed by plaintiffs other than SERNAC. *See supra* note 138 (comparing CAs as plaintiffs).
f. Are Representative Groups Performing as Expected by the Theory?

A closer look into the cases shows different scenarios that need to be evaluated separately. The political cases that were not litigated should not be considered in this analysis because they were not intended to be class actions. Nevertheless, because of the novelty of the class action device in the country and the lack of sanctions for filing without serving notice, they can be expected. The remaining cases confirm that the procedure is unbalanced in several ways. The fact that the CAs used representative groups to protect them is already an indication that the procedure was harsh for plaintiffs. Perhaps the only distinctive aspect of these cases is that the cohesive group cases are more effective because they have small but regular funding and the members of the group exert pressure over the class counsel.

In regards to the only existing settlement of the representative group, the security system case is consistent with the theoretical framework. First, the differences of the price of the security systems for houses available in the market were huge. Hence, there was an incentive for defendants to settle the case before declaratory judgment. Second, in the settled case, the group of potentially affected consumers was small and limited to the homeowners of the condominium sold by the defendant. This allowed for a comprehensive settlement for all the cases.

As explained before, this type of plaintiff, who more closely resembles an American "private attorney general," does not experience the same distorted incentives that SERNAC or the CAs may experience. Their behavior is consistent with the framework described in Part I, and contradicts previous research that presented this type of plaintiff as the more unsuccessful one.

5. Summary of Findings for Plaintiffs

Summing up what was said for each plaintiff, they all reflect in their litigation the unbalanced procedure that sought to avoid the growth of a "litigation industry." This is reflected in low levels of investment, low levels of settlements, and the choices of cases. Analyzed separately, SERNAC is the most active plaintiff, but its choice of cases has been erratic, with the exception of the cases against department stores. SERNAC’s explanation of its erratic choices and the use of collective me-

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164. This is where some of the benefits of the rigid civil procedure arise. Plaintiffs in a class action that will not be served to the defendant can safely call the cameras and present the complaint without being afraid of a "reckless" class action ruling. According to the procedure, this ruling requires two parties and a completely revised admissibility stage.


166. See Fernández, supra note 36, at 8.
Collective mediations reveal several questions that require further studies. For example, what are the motives behind the agency’s collective mediations? How effective are they at obtaining compensations? Are they an effective regulatory tool? What are the standards imposed on the abusive companies in collective mediations? Is the agency following up on the results of the mediations or is it just waiting until consumers claim again? Also, the effects of collective mediations on other plaintiffs’ litigation requires additional research; so far, in the existing cases, the blessing of the agency or the lack thereof seem to have an effect on how judges are interpreting the motivation of other plaintiffs. Regarding its effectiveness, the data shows that SERNAC is maintaining its pace. It does not put much effort in its class action cases, but does not lose them either. This is consistent with public servants litigating with no monetary incentives.

The CAs are the weakest plaintiffs in Chilean class actions. The admissibility requisites for CAs’ class actions are higher than for other authorized plaintiffs and their chances to obtain funding for their cases are limited by the law. A detailed look into the CAs’ cases show that they are surviving because their lawyers will continue litigating the cases they took prior to 2007. But unless a sudden change prompts defendants to settle, their litigation is going to move slowly.

The representative groups are the most heterogeneous of the plaintiffs, and as such, their class actions are difficult to characterize. Representative groups’ cases reflect widely differing situations and cannot be treated as a single category to classify the representative groups as weak or strong plaintiffs; some class actions of the representative group are political, others are the result of cohesive groups, and some of them are the result of entrepreneurial-lawyers that are trying to get defendants into settlements.

Regarding the few existing settlements, other than the settlements of the Department Stores Saga involving coupon-settlements delivered by the governmental agency, there were two other cases: one from a small, cohesive group of buyers of a real estate condominium, and the other, a re-litigation of the case against Santiago’s subway company; the latter settled for its nuisance value. These settlements are consistent with the incentives behind the class action procedure and its disincentives for settlements described in Part I, E.

167. Collective mediations are SERNAC’s solution to its budget constraint and a method to avoid the cumbersome class action procedure, but the agency has not trained personnel or experts in mediation and it is unclear about how some industries should be regulated. See supra note 118.

168. In “ANADEUS c. VTR,” SERNAC’s statement praising the company’s good will and commitment was crucial for the case to be rejected. In two procedures of the Commercial Banks Saga, in which I personally participated, the defendants tried to prove there was not a collective-interest to be protected behind the class action complaint using SERNAC’s lack of involvement as an argument. See “ANADEUS c. VTR,” supra note 137.
III. CONCLUSIONS

The article has presented an overview of the Chilean class action procedure and the cases filed since its introduction. This procedure was the result of a consensus that rejected the plaintiffs' attorneys as the major agent of implementing the class action device. This consensus was manifested in the abuse of open-ended norms, giving preeminence to a resource constrained agency, and the suppression of the moral damages that were usually used to increase both the attorneys' fees and to punish guilty defendants in other civil procedures. As a result of these features, the class action procedure is, on paper, cumbersome and defendant friendly because it creates plenty of opportunities for the defendants to challenge the interpretation of the law, and bear no cost for doing so.

The class actions filed since 2004, described in Part II, are consistent with the description presented in Part I. In terms of the number of cases, the industries sued, and the type of abuse denounced in Chilean class actions, the data reveals a procedure that sets unclear incentives to fund and litigate the cases. It is important to note that this is not a problem of ex ante funding; after all, the Chilean class action cases are inexpensive in comparison with the American ones and they are not fact intensive, but because there are no gains at the end of the road for plaintiffs it makes no sense for them to invest in the cases. In fact, the number of class actions has not increased and the role of the entrepreneurial attorney is decreasing in favor of SERNAC.

Regarding each of the three authorized plaintiffs to file class actions, data shows that SERNAC is trying to work around the problems of class actions by trying collective mediations. These collective mediations show that the agency is trying to address the problems that affect consumers on one side, but also reflect the power of defendants that have little fear of the class action device. In some of the cases where this practice has failed, SERNAC has filed class actions and has found that defendants are litigating the cases until they reached judgment. As argued above, this will continue because, once the cases are made public, it is in the defendants' financial interest to delay the cases. Also, the descriptive data shows special features in the cases of the CAs and the representative groups reflecting that they are not investing heavily in their cases, consistent with a procedure that gives little incentive for them to do so. As Issacharoff and Miller posited, the rejection of the entrepreneurial litigation is leaving the latest Chilean class actions with unsophisticated plaintiffs' attorneys and a resource-constrained consumer agency as the only real agents for their implementation.

ADDITIONAL INFORMATION

Two important developments for the purpose of this study have occurred since I initially drafted this article. First, the governing coalition changed for the first time in twenty years in March 2010. The new administration of SERNAC took a different approach to the device, and be-
came extremely active filing class actions. These numbers, which confirm the preeminence of the agency in the litigation, are not surprising. They reflect a more honest approach to the failures of collective mediations and a more frontal strategy from the government that is led by a well-known businessman, who is constantly questioned precisely because of previous ties to the business world. But, what is surprising is that SERNAC, in coordination with some regulatory agencies, has started mediations and filed class actions against regulated industries under the new administration. This does not mean SERNAC has become independent in its decision-making, but now class actions have emerged as an “official” response from the administration. The modus operandi is that regulatory agencies come first, announcing enforcement actions and administrative fines against the future defendant, followed by SERNAC with its collective mediations, and eventually class actions, seeking damages for the affected consumers.

The second development is a major class action case that shook the Chilean consumer landscape in June 2011. The case was filed by SERNAC against a listed retail company called “La Polar.” SERNAC claimed that the company unilaterally renegotiated most of its delinquent

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170. As a commentator recently put it: “. . . if Freud was right, the anti-business attitude that encourages the President is something like a reaction formation.” See Carlos Peña, El Presidente y los Matte [The President and the Matte Family], El Mercurio (June 3, 2012), http://blogs.elmercurio.com/reportajes/2012/06/03/el-presidente-y-los-matte.asp.

171. There is no database of collective mediations prior to 2010. The administration that took over the agency in 2010 created a database of mediations. It includes eighty-three cases for the period September 2010 to December 2011. Several of them are cases against public utilities. Curiously there are no collective mediations against commercial banks, suggesting that SERNAC has not found a way to sit those companies down to mediate the claims the agency does have, according to its own public statements. See SERNAC, Ranking de reclamos del mercado financiero [Ranking of Claims of the Financial Markets], SERNAC.CL, http://www.sernac.cl/sernac2011/noticias/detalle.php?id=1887; Mediaciones Colectivas [Collective Mediations] available at http://www.sernac.cl/sernac2011/leyes/Mediaciones_colectivas.php.

172. SERNAC has shown more coordination with the regulatory agencies of public utilities than with other industries like banking or telecommunications. For example, in a coordinated announcement of the results of a collective mediation the superintendent of electricity said: “Despite the fines that we can apply, our interest as SEC is that electricity companies implement all the necessary measures to reestablish the service when this is cut to the weather’s inclemency.” See SERNAC, Sernac cierra mediación logrando compensaciones por casi mil millones de pesos [SERNAC Closes Mediation Obtaining Compensations for Almost One Thousand Millions of Pesos (Approx. $2,000,000)], SERNAC.CL (May 16, 2011), http://www.sernac.cl/sernac2011/noticias/detalle.php?id=2148 (last visited Oct. 8, 2011). For other examples, see Valencia, supra note 169.

consumers’ credits for several years.\textsuperscript{174} The case became a scandal because the company did not disclose this information to their shareholders and reported the delinquent credits as healthy. After the case was made public, the shares of the company plummeted, affecting many Chilean retirement funds and becoming the largest financial scandal in the last twenty years in the country.\textsuperscript{175}

Despite the failures of the financial regulation and the corporate governance, the case showed many weaknesses of the Chilean class action procedure. First, critics have claimed that SERNAC was negligent because the agency tried a collective mediation one year before the scandal, without disclosing it to the public as it should have. Detractors claim that if SERNAC had filed the case before, millions of dollars of retirement funds would have been saved and the abuses would have stopped earlier.\textsuperscript{176} These claims forced SERNAC to justify its collective mediation as a natural step before a class action and as an ongoing practice started by the previous administration.\textsuperscript{177} But the agency has not been able to explain to the public why collective mediations with La Polar were not disclosed earlier in the process. The reason can be found in the weakness of class actions; the companies that agree to start a collective mediation with SERNAC usually impose that the collective mediation has to be kept discrete and out of the headlines.\textsuperscript{178} If a case hits the news, most of the potential damage for the abusive company would be realized, reducing SERNAC’s bargaining power and its chances to obtain benefits for consumers.\textsuperscript{179} Second, detractors have claimed that SERNAC proposed gift-
cards in its collective mediation with La Polar as the previous administration did in the Department Stores Saga, when it should have been monetary compensations. SERNAC did not address this claim because the Minister of Interior became involved in the case a few days after the accusation, claiming that La Polar should return money to its clients. This involvement gave SERNAC enough ground to push for compensations in cash that La Polar agreed to pay. Soon after La Polar started giving redress to consumers, SERNAC found out that less than five percent of the potentially affected consumers came forward, and several of them were so uneducated that they could not deal with the companies' executives and ended up renegotiating. This was denounced by SERNAC and became part of the class action's court file.

In the meantime, what was expectable because of the value of the moral damages involved in the individual claims and the opportunities to free ride that the class action procedure gives, happened: an entrepreneurial lawyer joined the case with only one case and started a pub-

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Richard F. Dole, Jr., *Consumer Class Actions under the Uniform Deceptive Trade Practices Act*, 1968 Duke L.J. 1101, 1103 (1968). According to an internal document of SERNAC called *Procedimiento de Mediaciones Colectivas* [Collective Mediations Procedure], which was used in La Polar, SERNAC emphasizes that the results of collective mediations should be “communicable.” This means that “[t]he solution must be communicated to the public through any of the approved formats . . . The solution has not only to be communicable but also it must ‘make sense to the average consumer.’ ” Nevertheless, as noted above, the document says nothing about disclosing the existence of the collective mediation before it ends. Reaffirming this assertion, the document says, “the provider cannot impose any restriction about the notice of the reached solution. The solution must be aimed to consumers and this information must be suitable to make adequate choices.” *See Procedimiento de Mediaciones Colectivas* [Collective Mediations Procedure] (unpublished manuscript) (on file with the author) (translation by author) (obtained through transparency laws).


lic campaign to collect claims through a foundation.\textsuperscript{185} The same week the case was declared admissible, the entrepreneurial lawyer, who represented more than 1,000 individual clients that registered in his webpage and granted him powers of attorney and several CAs that joined the case as individual plaintiffs, challenged the control of the case to SERNAC and won, becoming the “common procurator.”\textsuperscript{186} The agency was outraged with the issue and declined several meetings with the entrepreneurial lawyer and his foundation.\textsuperscript{187} The entrepreneur strategy was straightforward: he allowed the agency to litigate the class action, because he knew the agency had to, while he focused on individual trials that included moral damages, trying to obtain some injunctive measures against La Polar to use as leverage to obtain a global settlement. To implement his strategy, the entrepreneur continued collecting individual claims, and gave them away to lawyers that wanted to try them for a contingent fee using the individual procedure of the Consumer Law. According to his strategy, these cases could serve as “bellwether” trials for the whole case. Because La Polar reported several unilaterally renegotiated credits to credits rating agencies, according to the entrepreneurial lawyer, judges would award substantial moral damages in each case. In fact they did. Several judgments from a court were handed down where substantial damages were rewarded to the plaintiffs because of the psychological harm produced by La Polar renegotiations.\textsuperscript{188} At the same time, he tried several motions to prevent La Polar from doing any kind of

\begin{itemize}
\item \textsuperscript{185} The name of the lawyer is Tomás Fabres, and I had the opportunity to interview him in December 2011 in Santiago de Chile. The foundation’s webpage is http://chileciudadano.cl/ (last visited Oct. 20, 2011).
\item \textsuperscript{186} For the implications of the “common procurator” and the attorneys’ fees, see supra notes 49-52 and accompanying text. In its resolution to name the common procurator, the judge said: “The representation of the common procurator appointed in this case reaches every person and association that has become or will become parties in the case, with the sole exception of SERNAC.” (translated by the author). See “Inversiones SCG S.A., Corpolar S.A. y Empresas La Polar S.A.,” Res. 22, 22 septiembre 2011; supra note 174. For the admissibility judgment see Primer juzgado civil de Santiago declara admisible demanda colectiva del Sernac contra La Polar [First Civil Court of Santiago Declares the Class Action of SERNAC Against La Polar Admissible], \textit{LA TERCERA} (Sept. 23, 2011), http://www.latercera.com/noticia/negocios/2011/09/655-394691-9-primer-juzgado-civil-de-santiago-declara-admisible-demanda-colectiva-del-sernac.shtml.
\item \textsuperscript{187} Sernac suspende reunión con Fundación Chile Ciudadano por caso La Polar [SERNAC Suspends Meeting About La Polar case with Foundation Chile Ciudadano], \textit{EL MOSTRADOR} (June 28, 2011), http://www.elmostrador.cl/noticias/pais/2011/06/28/sernac-suspende-reunion-con-fundacion-chile-ciudadano-por-caso-la-polar-2.
\item \textsuperscript{188} See e.g., Juzgado de Policía Local de Huechuraba [J.P.L.H] [Huechuraba Local Police Court], 21 octubre 2011, “Pedro Muñoz Rubio con Inversiones SCG S.A. y Corpolar S.A.,” Rol de la causa: 269.525-G; Juzgado de Policía Local de Huechuraba [J.P.L.H] [Huechuraba Local Police Court], 16 septiembre 2011, “Pablo Carrasco Paez con Inversiones SCG S.A. y Corpolar S.A.,” Rol de la causa: 271.141-G; Juzgado de Policía Local de Huechuraba [J.P.L.H] [Huechuraba Local Police Court], 8 noviembre 2011, “Ximena Bazaes Reyes con Inversiones SCG S.A. y Corpolar S.A.,” Rol de la causa: 269.538-G. (Plaintiff owed La Polar approximately $1,000 and paid 2/5 of the amount before falling behind on her payments. La Polar renegotiated her credit several times and she kept paying but still
\end{itemize}
transactions with its credits portfolio, including using them as collaterals to finance its day-to-day operation.

The entrepreneur’s litigation strategy has been partially successful; pressed by the failure in the individual cases and the motions to prevent it to use its entire portfolio to obtain funds, La Polar recently offered to settle the case. Yet, this offer was received differently by the two litigants, SERNAC and the entrepreneur, leading to two incompatible settlements. Basically, both the entrepreneur and SERNAC agree on how much consumers should receive as compensation, however, the entrepreneur is claiming 1.8 million dollars as attorneys’ fees in its settlement, while SERNAC—also claiming representation of the absent members of the class—aims to distribute the 1.8 million dollar fee to the class members. SERNAC and the entrepreneur have not reached an agreement regarding these incompatible settlements yet. But, the judge already rejected the entrepreneur’s settlement with La Polar reasoning that both SERNAC and the common procurator have to concur to the same agreement. This raises the problem of the agency’s gate-keeping powers and its ability to continue the cases despite the fact that the common procurator may want to settle them.

There is no clarity regarding whether SERNAC and the entrepreneur will agree on the attorneys’ fees to settle the case. Nevertheless, the class action procedure provides the entrepreneur an obvious fallback plan. If he is unsuccessful in obtaining a settlement during the declaratory stage, in which he could obtain consumer redress and his fees, once La Polar is found liable on SERNAC’s efforts, he can opt-out with his thousand plus clients in the compensatory stage to seek individual damages according to the general rules. With his opters-out, and the powers of attorney he has, he can try the cases individually or in several joinders using the individual procedure of the Consumer Law, where his clients can obtain moral damages and he can obtain substantial contingency fees.

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189. According to SERNAC, the common procurator only represents current or future parties and the absent members of the class are not considered parties, therefore they represent their interest. See supra note 186.

190. One the desired effects of giving public agencies preeminence over private enforcers in class actions is to allow them to monitor sellouts by the class counsel. However, as this case demonstrates, agencies can be less than welcoming of competing private enforcement and, in fact, they can intervene, with a short-term view, discouraging the kind of private enforcement that proved valuable in La Polar case. See supra note 52.